

Speech given before
NH Association for Justice
June 26, 2008
Bedford Village Inn, Bedford, NH

Good evening. I last spoke to you in this very room a week before Christmas in 2002. I had just become a grandfather. It's nice to be back and I genuinely appreciated the invitation to join you. Much has changed in my life since then and I will soon be a grandfather for the third time. Since I last saw you, you've changed, too. Even your name is different. But I know your commitment to justice remains the same. And I know you will never change that.

Trial lawyers are among my favorite people and I miss your company. I know the demands of your job and its joys, as well. I, too, experienced its mountaintops and its valleys during my twenty-two years of practice. I know the adrenalin rush and I know the disappointments. I thoroughly enjoyed the trial courtroom and revered its power. I knew, even then, what an honor it was to be a creative player in the American justice system. All too often trial lawyers are maligned in the public arena but rarely by the people who sought them out during difficult times. Rarely by the people they helped. I encourage you to stay the course and I am confident you will.

Despite the change that surrounds us, trial courtrooms remain special places in American life, unique places really. It's in those rooms, those extraordinary rooms, where our Constitutions, state and federal, are road tested every day. It's where trial lawyers seek to guide judges and juries in tough decisions and through their craft and persistence nurture the common law, help to expand constitutional safeguards and ensure accountability throughout our society. No one escapes your watchful eyes and I hope they never do. You have often taken on the unpopular and demanded reform to root out unfairness and you have shined a bright light on injustice and inequality. While you are not always successful, you are always steadfast.

All of you in this room tonight give life to the fundamental promises of the American experience. Vigorous and talented advocacy for one person's rights, however unpopular, however controversial, advances and assures the rights of all. John Adams understood that when he bravely represented British soldiers charged in the Boston Massacre and a new generation of lawyers assumed this sometimes inconvenient and uncomfortable burden at Guantanamo Bay. Such is the continuing obligation of good trial lawyers. Rights unprotected atrophy over time. Rights unguarded cease to be rights. Thanks for standing watch.

In just a few months I will begin my fourteenth year on the Court. It's hard to believe that much time has passed and that I've been away that long. Being here tonight, embraced by your hospitality, feels like coming home and almost makes me believe I never left. Although my responsibilities are different now than when I sat among you—different still than when I last spoke to you—

my respect for what you do and for your invaluable role in the administration of justice has not changed. Nor will it. Nor will my need for your counsel, your friendship and your assistance to address the new realities confronting the courts and the practice of law.

In the early years of this new century the challenges confronting the profession of law are moving and evolving more quickly than we would like. Often, faster than we can accommodate or even anticipate. The maturing internet age and the marketplace demands it generates and often fosters will require lawyers to adapt to new time and economic pressures, to new competition and to new business methods.

This new era, with its increasing anonymity and impatience, will also unwittingly threaten the core culture of New Hampshire lawyering. Candor, handshakes, civility, trust and informality have nurtured all of us and they will need to be defended and protected. It is our collective obligation to try to keep faith with the generations of lawyers to follow. It will not be easy but it is important.

In my view the future of the trial bar and the future of the state courts are inextricably linked. That's one of the reasons I welcomed the chance to speak to you tonight. For the state courts to remain vital and vibrant in a rapidly changing and expectant world, they will need a strategic and competitive mindset embraced and informed by the bar, the public, the courts themselves and the other co-equal branches of state government. They will need public support, resources, judges, masters and staff of the highest quality and technology befitting a global economy moving at the speed of light. Time is not our friend and we have a ways to go.

The customer base in our courts is changing, the time demands on litigants is often more pressing than in times past and the stresses on those working in the judicial branch are at an all-time high. The competitive and economic stresses on lawyers, I suspect, are greater, too. Probably much greater.

This new and disquieting reality continues to escalate at the very same time that many people, other than the poor, struggle to afford lawyers and a private justice system is quietly being constructed in America for those who can more readily afford counsel. This new system offers options the courts often cannot match. The state courts, despite the efforts of many good people, may not be fulfilling their constitutional obligation to deliver affordable and timely justice and we do not have a monopoly on dispute resolution. Many who can afford to go elsewhere are doing so.

To reverse or at least halt this trend, I remain convinced that state courts can and must compete to fulfill our constitutional obligation and to be certain that the rules of engagement governing personal and business conduct in our state are defined and enforced by the public—either directly through juries or less directly through judges. Every citizen in New Hampshire will be well served if the state courts remain relevant to the bulk of our population and ill-served if they do not.

Law applied in private, without a public record or public scrutiny, if allowed to become the norm, is not in our long-term best interest as a free people. Public justice is the glue that cements our democracy. It's that reality that has driven strategic planning and change in the judicial branch these last several years. It's that challenge and my need for your assistance and practical wisdom that brought me here this evening.

When I assumed my new duties in 2004, I said then, and believe even more firmly today, that the judicial system needs to ensure that it remains accessible, affordable and understandable. Not just for the poor but for everyone. Anything less will diminish the greatest justice system in the world. Anything less will not retain public trust and confidence over the long term. Regrettably, when I have called for change in the face of new challenges, some have heard my words to suggest that lawyers could or should be marginalized in a more user-friendly court system. Nothing could be more contrary to my beliefs and at odds with my deeply held view that lawyers always add value. We need more lawyers in our courthouses, not fewer.

A year ago I spoke with a former president of the American College of Trial Lawyers. He told me that since 1950 when the College began, no one was eligible for membership unless they had 25 jury trials to their credit. In 2005, he told me that requirement was eliminated. Civil jury trials are disappearing in more and more places across the United States. That change is like a canary in a mineshaft. We ignore it at our peril.

Trial lawyers are indispensable to the American justice system. All of us, the courts included, need to work together to make sure your services are more affordable to more and more of our fellow citizens. I challenge the bar to move away from its near exclusive reliance on the billable hour in non-contingency cases. Over time the cost of your services to individual clients might be reduced, but you may also be able to represent more people who could afford you. On balance, your earnings will not suffer. I believe the billable hour is not your friend and that client trust and confidence would be enhanced if its use were optional. I respectfully ask that you consider it.

In this new era, courts need to continually re-examine process, protocols, and paperwork from the front door to the judge's bench. We must adjust to the demands and realities of the world outside the courthouse windows and to be continually aware of the cost of our services to the people and businesses who need them. We need to streamline and simplify our procedures and be certain they are uniform across the court system. We need to eliminate process that is not due and ensure that our decisions, orders and opinions are timely.

We will need to sift our criminal and civil cases more finely in some areas. We should explore the use of specialized dockets which, if successful, will save time, enhance expertise and cut costs. Today, in New Hampshire, we have juvenile drug courts, adult drug courts and three mental health courts. More are planned. We have a family division which is now in eight counties and should be in all counties within two years. We have infused all courts with ADR and for the first time we have a Judicial Branch Office of Mediation and

Arbitration under the exceptional leadership of Karen Borgstrom to ensure quality and uniformity. The bar has stepped forward to offer its help for which I am grateful. The early results from mediation are impressive.

We expect to have adopted uniform, consistent and codified rules of civil and criminal procedure within the next year. Justice Dalianis and her colleagues on the Rules Advisory Committee have been working tirelessly and closely with the state Bar to ensure a quality product. Attorneys Slawsky and Guerriero, along with their subcommittees, have been especially helpful to our progress.

Thanks in no small part to Senators Foster and Burling and with the full and valued support of Governor Lynch, we have now joined eighteen other states with a business court docket. I am hopeful the Governor will appoint its first presiding justice this fall. The business community is very supportive.

We now have an active and ongoing Access to Justice Commission co-chaired by Justice Duggan and Chief Judge McAuliffe to continually and systemically examine the needs of the poor in our courts. New Hampshire is one of the leaders in the United States in allowing lawyers to deliver unbundled legal services. We have created and constantly improved our self-help website and now have several service centers in our courts. But we need to do more and I am confident we will.

We should not be afraid to examine whether every dispute, in the first instance, needs to be automatically tracked for the adversary process and whether some of the work we all do might be handled less contentiously, at least at the outset. We need to ensure that the courts assist counsel to minimize time and non-productive billing without sacrificing quality. Perhaps every hearing and every motion does not need an in-person appearance at the courthouse. Telephones, if used wisely, can help chip away at cost and delays.

The courts need to upgrade their technology to match that in most law firms and private businesses. We need to work towards a paperless court. When the new Odyssey case management system is fully deployed across the court system over the next few years, electronic filing will not be far behind.

Judges need training in dealing with self-represented litigants. “Neutral engagement” by the judge with self-represented parties will provide more predictability and greater control of the litigation process—to the benefit of the self-represented and represented alike. If the rules of judicial conduct need to be clarified or amended to provide judges with the necessary comfort to neutrally engage litigants, then the rules should be adjusted.

At the end of the day if we do not challenge ourselves to change and adapt, I am fearful that the critical role of the state courts will be undermined. If we let that happen, funding may not keep pace with needs and talented lawyers may not step forward to serve as judges and masters and skilled staff may be more difficult to attract and retain.

The courts need your counsel and support if they are to improve the delivery and efficiency of their critical services without undermining quality. In our efforts to improve, we need to be vigilant not to change or compromise what

we are doing well but we need to be bold enough and open enough to constantly examine what we do, how we do it, and how we could improve it, so that justice is accessible, affordable and understandable to all who need it. Quality and efficiency are not mutually exclusive goals. Personal pride and public trust require that we do all we can to make the constitutional promise of access to justice a meaningful reality for those we serve. I need your help. The courts are at a critical crossroads but if we work together, I am optimistic that we can rise to the occasion. Thanks for having me and thanks for listening.