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WHEN THE COURT SPEAKS: EFFECTIVE COMMUNICATION AS A PART OF JUDGING

Honorable Daniel E. Wathen

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WHEN THE COURT SPEAKS: EFFECTIVE COMMUNICATION AS A PART OF JUDGING

*Honorable Daniel E. Wathen**

I. INTRODUCTION

ODE TO MY ROBE

When life was real and bright and gay –
And youth's high lights were shining –
I would not wear a rig like this –
E'en when unwisely dining.

But age draws near. The time has come
When life's sun settles slowly down;
I choose then for my robe-de-nuit.
The judge's corded, silken gown.

It symbolizes days of ease
And coming of the thoughtful hour.
It marks the end of daily strife
And speaks of dignity and power.

I don it when I hear the sound
Of loudly ringing Court House bell.
And rather like to wear it then
Although I know it looks like hell.

Judge William R. Pattangall¹

* Retired Chief Justice of the Maine Supreme Judicial Court. Currently of Counsel with the firm of Pierce Atwood LLP.

1. Unpublished poem attributed to William R. Pattangall, Chief Justice of the Maine Supreme Judicial Court from 1930 to 1935.

One of my early judicial role models, Justice James L. Reid² of the Maine Superior Court, was sentencing a defendant for a murder committed within the confines of the Maine State Prison. The defendant was already serving a life sentence for another murder at the time the offense was committed. Because Maine has no parole or capital punishment, the sentencing options were limited and ultimately meaningless. As Jim imposed a life sentence consecutive to the existing life sentence, the defendant rose in his manacles and uttered an early Anglo-Saxon version of “screw you.” Jim, rising from the bench and moving unhurriedly in the direction of his chambers, responded calmly, “Motion denied.” Now that is effective judicial communication at its best—clearly and concisely resolving what could have become a thorny situation.

Having worked four years on the trial bench and twenty years on the Maine Supreme Judicial Court, I finished my judicial career with deep appreciation of the critical role of judicial communication. Whether I was imposing a sentence, ruling on a motion, writing an appellate opinion, or asking the Maine Legislature to provide adequate funding for the courts, success often depended not only on what I did but how well I explained what I did. The major aspects of judicial performance depend on effective communications. If justice must not only be done, but be seen to be done, much of what is seen depends on the communicative skills of the judge. The judge must speak and write clearly and effectively, and in addition be mindful of the role the media will play in conveying the message to an audience beyond the immediate parties and their counsel. My experience, good or bad, as one cog in the wheels of justice in Maine for twenty-four years, may provide a vantage point from which to consider some of the elements of effective judicial communication.

II. THE TRIAL BENCH

I am the son of a natural-born storyteller and it came as no surprise to my father that storytelling and speaking in public inevitably became a part of my duties no matter where I was. He used to joke with me—at least I thought he was joking—“If you didn’t talk so much, people wouldn’t know you are foolish.” Despite this fatherly admonition, throughout my school career I “talked” a lot in plays, public speaking, debate, and, eventually, moot court and writing for the Maine Law Review. As a trial lawyer, my favorite tasks, in descending order, were final arguments, cross-examining witnesses, and, when I had the time, writing briefs. I enjoyed thinking on my feet, speaking on the spur of the moment, and trying to move the fact finder with both logic and emotion. Thus, I was somewhat chagrined to discover that, as a justice of the Superior Court at the tender age of thirty-seven, my principal function was to listen attentively and impassively. The trial judge interacts infrequently, never with emotion, and rarely with humor. Why? Humor and emotion from the bench just do not work. It is difficult for impartiality to survive an emotional outburst or an attempt at being funny, particularly at the expense of someone else in the courtroom.

2. James L. Reid, late of Augusta, served the State of Maine as a Justice of the Maine Superior Court from 1963 to 1975, and then served as the first active retired justice from 1975 to 1982. Before becoming a judge, he had been a prominent trial lawyer, a county attorney, and a member of the Legislature. He was known, far and wide, for his wit, his intelligence, and his ability to articulate simple and practical solutions for complex problems.

Beyond the routine housekeeping tasks involved in conducting a hearing, a trial judge speaks rarely and carefully, and usually with great effect on the parties and the litigation. The occasions that presented the greatest opportunity and challenge for me were sentencing proceedings, dispositive rulings from the bench, and formal written decisions. In each instance, the crucial task was to ensure that the reasons I expressed for the ruling accurately reflected my inner reasoning and motivation. For example, sentencing in Maine is largely a matter of wide judicial discretion within broad statutory categories.³ Sentencing decisions are often described as among the most difficult that a judge faces. I found that if I mulled the matter over in my mind for a time and then clearly articulated for the defendant and the community the actual factors that led me to arrive at a particular sentence, I had very few second thoughts or misgivings, even in light of later, unforeseen events. Reflection, clarity, and finality are as important for the judge as they are for the litigants and the community.

There are a variety of factors that can induce a judge to substitute formulaic statements for thoughtful decision making and forthright expression. A number of years ago, I catalogued my own shortcomings as a judge in the context of describing similar shortcomings in the common law method of making law:

I confess, I am resistant to change, and I do exhibit a decided preference for the familiar. In my work I value the appearance of rationality, at times even to the point of pretense. Although I rely on nonrational factors, I tend to obscure that fact whenever possible. I sometimes attempt a detailed analysis without first grasping the fundamentals. I am at my best and my worst when dealing in abstractions. Finally, in attempting to make a common law of sentencing I have learned that both my method and my language are severely limited, and I must continuously struggle to unite the outer and inner decision.⁴

In sentencing, there is an element of risk in speaking candidly. Often the judge wishes to connect with the defendant and encourage change, but expressions of understanding and hope, even accompanied by expressions of condemnation, can be misunderstood by the victims of crime and by the media. One judge whom I admired described his task in sentencing as measuring the defendant's capacity for decency. It is far easier, however, to rely on the absence of any capacity for decency than it is to openly take a step that might be seen as favoring a defendant who possesses it. Judges are rarely criticized publicly for imposing a harsh sentence, and it takes real courage to impose a sentence that might be seen by some as lenient. Plea bargaining is subtly attractive because it diffuses responsibility and public accountability for the bargained sentence. Sentencing guidelines similarly obscure the answers to the questions: what did the judge actually think about the nature of this offense, the nature of this offender, and the need to protect the public? These are not easy inquiries but they should be answered and those answers should be articulated honestly by the judge if the criminal justice system is to maintain the public's trust and confidence. It is the judge's responsibility to balance the competing interests of the victim, the public, and the defendant within the context of a correctional system that will always be far less than perfect. Criminal

3. See Daniel E. Wathen, *Disparity and the Need for Sentencing Guidelines in Maine: A Proposal for Enhanced Appellate Review*, 40 ME. L. REV. 1, 1 (1988).

4. Daniel E. Wathen, *Making Law The Old Fashioned Way—One Case at a Time*, 52 OHIO ST. L.J. 611, 623 (1991).

sentencing presents a real challenge to judicial communication and most judges I know work hard to clearly express the basis for their action.

Dispositive oral rulings from the bench present similar challenges. The judge wants to demonstrate a grasp of the facts and law, and state clearly the basis for the court's action. It is always tempting, but often wrong, when you are sitting behind the bench, ready to rule and looking the litigants in the eye, to take the matter under advisement and issue a written ruling later. Unless the judge needs time to reach a decision, it is often best to rule from the bench. Toward the end of my career, I worked periodically in the Maine District Court. I found that I enjoyed handling small claims cases, particularly when I was able to rule from the bench and articulate a rationale that, at least, satisfied me. Small claims cases are scheduled in great numbers and the parties are afforded a mediation session just before the hearing. In the cases I observed, when mediation failed, even the side who lost at the hearing seemed to appreciate the expeditious handling of their case and respected a prompt, reasoned decision. One of Maine's most respected federal judges, Edward T. Gignoux, was fond of saying that there were three attributes of trial judges—they must be courteous, expeditious, and wrong. You can do without the last one but the first two are absolutely essential.

The written decisions of a trial judge bear some resemblance to an appellate opinion and the discussion in that context applies, but obviously a greater emphasis on fact-finding is required. The erudite explication of the law that one expects in appellate opinions and law review articles is less useful in a trial court's written decision than a clear statement of the factual findings and a crisp statement of the reason for the court's ruling. In twenty years of reading trial court opinions, I grew to value the trial judge who actually revealed the critical basis for her decision rather than obscuring it by a lengthy and scholarly exegesis of the law. Because of the standards of review, hiding the worm may provide a degree of comfort on appeal, but trial judges should be unimpressed by the possibility of reversal. As a trial judge, my motto was "I would rather be right than be affirmed." Or to put it another way, I never thought I was right just because I was affirmed.

III. THE APPELLATE BENCH

During my tenure on the Maine Supreme Judicial Court, I participated in thousands of appeals and authored more than one thousand opinions for the Law Court. In addition, I wrote sixty dissents as well as sixteen separate concurrences. For sheer pleasure there is nothing like writing a dissent. Nothing spoils a good dissent quicker than three votes—it is not easy to transform a biting dissent into a carefully worded majority opinion. At the time of my retirement, by virtue of a long career during a period of a growing caseload, I had written more opinions than any single individual in the history of the Maine judiciary. The obvious question is: "So what, are any of the opinions good?" I cannot answer that question on the basis of results. The winning side usually agrees with the opinion and the losing side usually disagrees. On such a basis, no judge could ever please more than fifty percent of the audience.

Separate and apart, however, from the question of whether one agrees with the result in an appellate opinion is the more elusive question of what constitutes a "good opinion." Candor, clarity, and conciseness are the overall goals but there is

another element—providing “guideposts for human conduct.”⁵

At some point in my appellate career, my colleagues and I met with a group of appellate advocates at a bench-bar conference. We invited their comments on the quality of our opinions and after some polite remarks they spoke freely. For me, the most serious criticism was phrased in terms of the Law Court being too “result-oriented.” At first, this remark, repeated by several of the lawyers, bewildered me because I had never sensed any partisanship in my colleagues nor had I ever heard any of them argue for a particular result on the basis of anything other than the application of neutral principles. It seemed we could more readily be criticized for getting wrapped up in legal principles, to the point of becoming oblivious to the end result. Further discussion with the lawyers, however, revealed that they were not suggesting that the Law Court favored one group of litigants over another, but rather that the opinions were sometimes too narrowly focused. The lawyers were suggesting that although we provided a result in a case, we failed to provide a useful matrix for a discussion that could carry over into the next related case that might come along. Perhaps these lawyers had a point: A good opinion not only carries meaning over from a prior text to decide the present case, it also provides new meaning for future application.

Professor James Boyd White has usefully compared the law and opinion writing to the act of translation, i.e., “‘carrying something over’ from one place to another.”⁶ He poses the question of what makes a good appellate opinion in the following terms:

[T]here is often something to admire in an opinion with the result of which we disagree (in the simple sense that we would have voted the other way) and often something to deplore in opinions that “come out” the way we would vote if we had the responsibility of judging. There is for all of us, that is, a standard of judicial excellence that is different from the standard by which we determine how we would have voted on the question of affirmance or reversal. My question is, What is that standard of judicial excellence? What should it be?⁷

Having thus framed the question, he offers the following method of analysis:

In every opinion a court not only resolves a particular dispute one way or another, it validates or authorizes one form of life—one kind of reasoning, one kind of response to argument, one way of looking at the world and at its own authority—or another. Whether or not the process is conscious, the judge seeks to persuade her reader not only to the rightness of the result reached and the propriety of the analysis used, but to her understanding of what the judge—and the law, the lawyer, and the citizen—are and should be, in short, to her conception of the kind of conversation that does and should constitute us. . . .

....

When we turn to a judicial opinion, then, we can ask not only how we evaluate its “result” but, more importantly, how and what it makes that result mean, not only for the parties in that case, and for the contemporary public, but for the future: for each case is an invitation to lawyers and judges to talk one way rather

5. Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 ME. L. REV. 47, 52 (2002) (quoting Lon L. Fuller, *An Afterward: Science and the Judicial Process*, 79 HARV. L. REV. 1604, 1619 (1966)).

6. JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 233 (1990).

7. *Id.* at 93.

than another, to constitute themselves in language one way rather than another, to give one kind of meaning rather than another to what they do, and this invitation can itself be analyzed and judged. Is this an invitation to a conversation in which democracy begins (or flourishes)? Or to one in which it ends?⁸

The reader will be relieved to learn that I do not intend to analyze all one thousand of my opinions. Judging my opinions, by any standard, is a task I will leave to posterity. I can, however, point to a couple of my opinions to illustrate White's method of analysis. Without regard to the result in either case, I would argue that in the first I successfully crafted an opinion for the court that decides the case and, in addition, frames and energizes the conversation for the next case that may come along. The second case provides a clear result but a less meaningful basis for future conversation.

In 1986, the court decided *Maine Human Rights Commission v. City of South Portland*.⁹ In a four-to-three decision, the court upheld a ruling by the trial court that the city discriminated against handicapped persons in violation of the Maine Human Rights Act by purchasing buses inaccessible to persons using wheelchairs.¹⁰ The trial court had found as a matter of fact that at the time of the purchase, technology was available to accommodate the physically handicapped "at a cost not significantly greater than the cost of inaccessible buses and without significant disruptions to bus route operations."¹¹ We reviewed the relevant statutory provisions, the positions of the parties, and the unique types of discrimination confronting persons with handicaps, namely physical barriers.¹² We concluded that the creation of a physical barrier, when it can be avoided without financial or administrative burden, is an illegal act of discrimination.¹³ The portion of the opinion that, in my view, frames a useful conversation for the next case reads as follows:

The tension between the legislative statement of policy and the substantive prohibition mandates an application of the doctrine of reasonable accommodation to claims of discrimination in public transportation based on physical handicap. Only in this manner is it possible to distinguish between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons. The requirement of reasonable accommodation is both rational and meaningful. The obligation of the proprietor of a place of public accommodation with regard to physical barriers, is limited to that which can reasonably be accomplished without undue financial or administrative burden. The rights of the handicapped are advanced as technological change removes the justification for the erection or maintenance of barriers. When activated by a process of continuous review, as envisioned by the Legislature, the statutory prohibition is designed to insure that human dignity keeps pace with technological advancement and opportunity.¹⁴

In 1997, I wrote an opinion for the court in *Swanson v. Roman Catholic Bishop of Portland*.¹⁵ The court divided four-two and concluded that it could not constitutionally "impose and enforce a duty of employee supervision derived from secu-

8. *Id.* at 101-02.

9. 508 A.2d 948 (Me. 1986).

10. *Id.* at 950, 957.

11. *Id.* at 955 (citation omitted).

12. *Id.* at 952-56.

13. *Id.* at 955-56.

14. *Id.* at 955.

15. 1997 ME 63, 692 A.2d 441.

lar agency principles against a religious organization” in a case involving a consensual sexual relationship between an adult parishioner and a priest.¹⁶ The central point of the opinion was clearly stated as follows:

To import agency principles wholesale into church governance and to impose liability for any deviation from the secular standard is to impair the free exercise of religion and to control denominational governance. Pastoral supervision is an ecclesiastical prerogative.¹⁷

We concluded that certain civil rights in secular settings are not sufficiently compelling to overcome certain religious interests.¹⁸ Obviously, in light of later developments, one could look at this case and wonder what the result might be in a case involving the sexual abuse of a child. The opinion, however, provides very little to guide the conversation in the next case. It ends simply as follows:

We conclude that, *on the facts of this case*, imposing a secular duty of supervision on the church and enforcing that duty through civil liability would restrict its freedom to interact with its clergy in the manner deemed proper by ecclesiastical authorities and would not serve a societal interest sufficient to overcome the religious freedoms inhibited.¹⁹

With the advantage of hindsight, it is now apparent to me that appellate opinions like *Swanson* could be improved by considering, after they are in final draft, the nature and quality of the conversation they will generate in future cases. In *South Portland*, the future conversation is apparent to me, while in *Swanson* it would have been useful to flesh out the balancing test somewhat more fully. I am not suggesting that judges should yield to the attorneys’ desire and decide cases that are not before the court. It is not a question of determining the result in that future case, but rather of framing a conversation that will convey meaning to that case. Such an opinion would not be “result oriented” and would provide a guidepost for lawyers and clients to plan and act prudently in advance of the court’s next ruling.

My favorite opinion, one of my earliest efforts, is *Bruck v. Town of Georgetown*.²⁰ The trial judge had inappropriately referred an administrative review matter to a referee.²¹ I can now reveal that the gratuitous criticism directed at the trial judge in that case was heartfelt.²² Not only did I write the appellate opinion, but I was also the unnamed trial judge who signed the order. Self-criticism is good for the soul.

IV. THE BULLY PULPIT OF THE CHIEF JUSTICE

My role as a communicator took on new dimensions when I was appointed to serve as the Chief Justice of Maine’s court system in 1992. The first clue that communication skills were increasingly important occurred during the confirmation process. Having been confirmed uneventfully for judicial office on three prior

16. *Id.* ¶¶ 1-2, 692 A.2d at 442.

17. *Id.* ¶ 12, 692 A.2d at 445.

18. *Id.* ¶ 13, 692 A.2d at 445.

19. *Id.* (emphasis added).

20. 436 A.2d 894 (Me. 1981).

21. *Id.* at 896 (“point[ing] out for the Bench and Bar that the use of a referee in this case was inappropriate”).

22. *Id.* at 896-97.

occasions, I was somewhat surprised to find that I was now suspect, in the minds of some of my fellow Mainers, on ideological grounds. My appointment took place at a time when it was unclear whether the United States Supreme Court might retreat from *Roe v. Wade* and leave the issue of abortion for state courts. Several years before, I had appeared on a panel sponsored by the Maine State Bar Association entitled "The Sovereign Self" that discussed hypothetical questions about medical decision making, including the question of whether to abort. The panel was interrogated by a Harvard Law Professor and broadcast on public television. Although I faithfully applied controlling federal law in my hypothetical rulings, I acknowledged that I personally disagreed with a rabbi on the panel who took what I considered the extreme position that abortion could occur at any time before the head of the fetus appeared in the cervix. The program was good entertainment, and probably educational, but I had definitely stepped into the political realm. During the confirmation hearing, I explained that my remarks on that occasion, as well as in a dissenting opinion in a case involving a claim for a prenatal injury to a viable fetus,²³ did not mean that I was a fundamentalist ideologue out to overrule *Roe v. Wade*. I was successful and the opposition disappeared, but I learned an important lesson: A Chief Justice is more than a judge—I was now a public figure and the head of a branch of Maine government. The confirmation process functioned as an abbreviated political campaign in that it exposed me to public debate on a number of issues of public policy. I had to walk a narrow line to stay out of the political process, but communications, both internal and external to the court system, were now a major part of my job.

My tenure as Chief Justice began at a time when state revenue throughout the nation took a drastic turn for the worse. The Maine court budget was reduced from approximately \$32 million to \$27.5 million in my first six months. The National Center for State Courts later reported that the Maine court system was the hardest hit of all the court systems in the United States,²⁴ experiencing layoffs, furloughs, curtailment of court schedules, judicial vacancies, and delayed payment of obligations. Thus, the immediate goal was to encourage the Legislature to restore and improve the judicial budget. Historically, legislative-judicial relations had been problematic, and they were not improved during my first year when the court issued an advisory opinion upholding term limits on legislative offices proposed for voter referendum,²⁵ and when the court was required to adopt a legislative reapportionment plan after the Legislature failed to do so.²⁶ It is difficult to imagine a less promising beginning for improving the working relations between the three branches of Maine government.

We began by focusing on internal communications, and adopting a participatory management plan, performance improvement teams, a training program, annual meetings of employees, a newsletter, an employee recognition program, and visits to all court locations by the Chief Justice and the State Court Administrator. Eventually, I worked for at least one day as the presiding judge at all fifty of the court locations in Maine and sent out an email report of my visits. For many court

23. *Milton v. Cary Med. Ctr.*, 538 A.2d 252, 256-58 (Me. 1988) (Wathen, J., dissenting).

24. ROBERT W. TOBIN & KENNETH G. PANKEY, JR., *MANAGING BUDGET CUTBACKS 12* (Nat'l Ctr. for State Courts 1994).

25. *See* Opinion of the Justices, 623 A.2d 1258 (Me. 1993).

26. *In re* 1993 Apportionment, No. SJC-93-229 (Me. June 29, 1993).

employees, these simple reports served to link us as a single organization, rather than a collection of separate fiefdoms.

Looking beyond the immediate court system, I met with all of the other constituencies—police, municipalities, businesses, community support organizations, child protection organizations, state agencies, domestic violence, and sexual assault groups—and tried to learn how the courts' difficulties were affecting their performance. I did not defend the status quo. When appropriate, I acknowledged that the court system was doing a poor job, related that to the prevailing funding difficulties, and found that people were willing to help. I was always impressed by the fact that in these meetings, we were able to discuss court performance and reform without getting into the details of specific cases. In short, people were very respectful of the need for judges to remain impartial with respect to individual cases. Judges can become involved in the community without compromising their ability to sit in judgment. As drug courts in Maine have demonstrated, judges can be part of the solution.²⁷

As I look back on it, one of the single most important things I did in reaching out to the rest of state government and the public was to meet with the editorial boards of Maine newspapers. Because the court system had no press representative, I solicited some advice from a seasoned media veteran who had served two governors in that capacity. He suggested that we call on the editorial boards and leave behind a short written report on the condition of the courts and their needs. Nothing of any importance came out of the meetings immediately, but the two-page report we left behind flavored helpful editorials from one end of the state to the other for the next ten years. Once it goes in their file, it tends to get used.

My press consultant also helped me use public speaking opportunities as part of an overall strategy to restore the courts' position. Previously, my primary objective in making a speech was to be interesting and entertaining. My performance was always enhanced by fresh material. Advocacy in the public arena, however, involves repetition. It may be an exaggeration, but I was told that people have to hear or see something thirty or forty times before they believe that it is true. Thus, I was introduced to the speech with the disposable middle. Each speech that you make is tailored in part for that particular audience, but you always return to the themes of the day. I always prepared my own speeches, but my consultant took care of press advisories and packets of background material and followed up with the media to facilitate the preparation of effective coverage. As Chief Justice, you can make one hundred speeches a year in near total obscurity or make the same speeches and reach the entire state. The difference is a modest understanding of how the media functions. A speech at noon to a service organization, in my experience, often became an important event in achieving a legislative goal, such as the creation of a family court.

With respect to dealing with the Legislature, I needed a bit of schooling. I had little prior experience with legislators and I first had to learn that logic and reason

27. In her annual State of the Judiciary address presented on February 1, 2005, Chief Justice Saufley, stated: "The establishment of drug courts, coupled with judicial leadership, constitutes one of the most monumental changes in social justice in this country' in the past 60 years. For most participants who graduate from the programs, drug use is eliminated altogether." ME. JUDICIAL BRANCH, THE STATE OF THE JUDICIARY, *The Promise of Justice* 4 (Feb. 1, 2005) (quoting General Barry McCaffrey, the former director of the Office of National Drug Control Policy).

are not always your strongest allies when you are in the State House halls. The biblical admonition to seek justice, love kindness, and walk humbly is particularly useful in this environment, although difficult to practice. Today's opponent is tomorrow's supporter. Fortunately, we had a strong State Court Administrator and legislative liaison. Some of my colleagues provided valuable counsel from their own experience. Lesson number one—quietly and without fanfare, attend all the retirement parties for department heads and legislative leaders in state government. It is a visible sign of respect that makes the court system seem less aloof and more a part of state government. One of the governors that I served with advised me wisely to try to maintain a presence without being present. In other words, be approachable and involved, but do not hang around. Focus your attention on the major appearances you will make in the legislature each year. Ranked in terms of importance, they are as follows: State of the Judiciary address; budget preparation meetings with the governor's staff; visit to legislative leadership; formal budget hearing before the Appropriations Committee; and work sessions before other committees on particular pieces of legislation. One final piece of advice, never refer to the separation of powers directly in a legislative hearing. It is sort of like waving a red flag at a bull.

If someone asked me what single task I enjoyed most about being a young trial lawyer, I would have said "the final argument." As Chief Justice my answer would have been "the annual State of the Judiciary address." That is the crucible in which it is possible to make the changes needed to insure that justice in Maine is prompt and affordable. It is a huge and unending challenge but well worth the effort.

In my first State of the Judiciary address, I set forth my vision of the challenges and tasks that we faced:

Let me offer you a brief sketch of what I see before us: first we must reaffirm the status of the judiciary as a co-equal branch of government, with constitutional responsibilities to Maine's citizens separate from the responsibilities of the Executive and the Legislative branches.

Next, judges, as one commentator remarked, must understand that like the rest of government they are accountable to the people. They must become comfortable with technology, appreciate the benefits of negotiation, and be willing to spend time and effort in planning.

Courts must be accessible to every individual and particularly to those who are without the means to be represented. Our civil procedure must adapt to those who represent themselves. Proceedings must be marked by respect, efficiency, fairness, and equality of consideration.

The internal structure and management of the court system must reflect the same values. The administrative structure must be clear, democratic, and participative. Communications, both internal and external must be open and frank. We must achieve and maintain competence in the use of available technology. In all of our efforts we must focus on gathering the actual needs of the public, stating those needs effectively, as I am attempting to do here today, and meeting them. In broad strokes, that is my personal view of the future.²⁸

28. Chief Justice Daniel Wathen, *The State of the Judiciary, Address at Joint Convention of the 116th Maine Legislature* (Feb. 18, 1993) (transcript available at the University of Maine School of Law Donald L. Garbrecht Law Library).

Over the course of ten years and nine annual addresses, I strove always to be open and frank about the needs of the court system. I learned that in an environment where an anecdote is often more effective than a carefully reasoned argument, the needs of the courts must be translated into the needs of the people that courts serve. For example, rather than talking about funds for court-appointed counsel, I should talk about the need for legal services for people who cannot afford an attorney. Better yet, I could provide a story about a person who was seriously disadvantaged because they were unrepresented. Someone had told me it is easy for legislators to view the courts as "an elite serving the interests of lawyers." Nothing could be further from the truth, but a commitment to serving the real needs of people must be continuously emphasized. It is important to confront the Bar openly in those rare instances when their interests clash with the needs of the general public.

Finally, it is a rare privilege to have the attention of the entire Legislature, the Governor, and the media of Maine all in one joint session. I discovered it is best to be clear and concise, never talk for more than eighteen minutes, and break it up with a bit of understated humor. Ask and you shall receive, particularly if you know what to ask for and how to pave the way beforehand. Having established my long-term plans early on, in the last several years I learned to focus on three specific requests annually. I was usually successful and that reinforced the sense that, together, we were indeed making progress.

V. COURTS AND THE MEDIA

No matter what position you hold in the judiciary, you must remember that whatever you communicate from the bench will be filtered through the mass media, at least with respect to the broader public audience beyond the litigants, their counsel, and the courtroom audience. This is significant because the relationship between the courts and the media is marked by a mutual lack of understanding, ineffective mechanisms for exchanging information, and very different objectives. Often, except for the names, you might not recognize the trial or the opinion you issued from the news account of it. There are those who argue that unrestricted television coverage of court proceedings is the remedy for the lack of understanding on the part of the media and the broader public. The argument has some merit, but after a two-year experiment that permitted camera coverage in trial courts in Bangor and Portland, we confirmed that camera coverage indeed has a negative effect, particularly on lay witnesses.

Nationally, the perils of linking trials to the entertainment industry and tabloid journalism began to surface. In 1994, by administrative order and rule, we resolved the delicate balance between the integrity of the court system and enhanced public access.²⁹ We authorized camera coverage, if allowed by the trial judge, in all civil matters and in arraignments, sentencing, and other non-testimonial criminal proceedings. Noticeably absent from the list are criminal trials—the forum in which witness intimidation is most likely. At this point, the rule has withstood the

29. Administrative Order—Cameras in the Courtroom, Docket no. SIC-228 (July 11, 1994).

test of time and seems to work well.³⁰ But there is more to the relationship between courts and the media than television coverage.

Shortly after the O. J. Simpson trial, I attended a conference at the National Judicial College on "Courts and the Media." The conference included participants, both court and press, from high-visibility trials involving, in addition to Simpson, Manuel Noriega, Mike Tyson, and Susan Smith (the young mother who drowned her children by driving her car into a lake). Each of these cases involved a major trial, some televised and some not, that became an international media event. The results, from the point of view of both the courts and the media, were mixed. One of the hallmarks of those cases that were handled well was a daily conference between the presiding judge and the press. The conference was usually scheduled late afternoon, but before the media deadline, and was "off the record" and confined to scheduling and procedural issues. This improved exchange of information seemed to make a significant difference in allowing informed coverage with a minimum of interference with the trial. I was struck by the fact that such conferences mirrored my early experience as a trial judge when each local newspaper had a seasoned courthouse reporter who was a trusted part of the courthouse crew. Both the courts and the media have changed radically since those good old days but the need for mutual understanding and effective mechanisms for exchanging information is evident.

In Maine, acting in concert with other state court systems, we made a modest start at improving the relationship with the media by creating a standing Advisory Committee on Courts and the Media. I introduced the subject to the Legislature in my annual address in the following terms:

One of our daily newspapers recently observed in an editorial that the jury in the Terry Nichols bombing case seemed to decide the case on "everything but the evidence presented in the courtroom." That conclusion was based upon the remarks of the jury forewoman in a televised interview. People are legitimately concerned that courts and the media are sometimes at odds in their efforts to serve the public. We are wired for 24-hour-a-day drama and entertainment, and we are challenged to deliver justice and protect the public. I am not attacking the press or attempting to diminish its [importance]. I am suggesting, however, that we in the courts can no longer ignore the critical role that the media plays in shaping the public's perception of our system of justice.

Recently, I wrote a letter to many of the media outlets in Maine inviting them to explore with the courts opportunities for improving our relationship. Efforts could include such things as interdisciplinary conferences, local bench-media committees, joint education sessions, and court visits . . .

30. In 1986, the Maine Legislature enacted P.L. 1985, Ch. 515, and directed the Maine Supreme Judicial Court to promulgate rules allowing photographic and electronic media coverage in the trial courts. By means of a direct letter of address, the court informed the Executive and Legislative branches that the mandate violated the separation of powers provisions of the Maine Constitution and was ineffective. Direct Letter of Address: *In re* Chapter 515, Public Laws of 1985, 1986 ME CXXVI, (April 25, 1986.) The direct letter of address was unprecedented in Maine history but had been used by other courts when the separation of powers doctrine prevented the execution of a legislative mandate. *See, e.g., In re* PA. C. S. § 1703, 394 A.2d 444 (Pa. 1978). The letter was an effective means of communication. Even though many people, including trial judges, supported television coverage, there was near unanimous support for the conclusion set forth in the letter. Even the media grew to accept the fact that trial coverage was the prerogative of the courts.

Maine courts and the Maine media are not rivals for the truth. Today we serve the public and provide information and news without diminishing the protection afforded by the law. In this era, however, our relationship is far too important to be left to chance. We need to work [on it], and we will.³¹

The National Judicial College followed up on its conference by creating, in concert with the University of Nevada School of Journalism, the National Center for Courts and Media, an Institute for Courts and the Media.³² Both of these projects mark an important beginning in an area that deserves considerable attention in the future.

VI. CONCLUSION

When I donned my robe in 1977, I did not appreciate the role that communication would play in my judicial career. For me, the robe did not mark the end of daily strife. Dignity and power seemed linked directly to demonstrated competence and effective communication rather than my wardrobe. Judges, however, still have a protected and favored position in our society, for within the carefully crafted contours of their jurisdiction, they are appointed to speak the truth. This is a rare privilege in public life. Much public discourse seems devoted to avoidance, spin, and partisanship. An East German friend of mine accounted for the downfall of the East German government on the basis that "they had a disturbed relationship with the truth." In part, our judiciary exists to ensure that government does not develop a disturbed relationship with the truth. I thank the people of Maine for the opportunity that I was given for twenty-four years to attempt to do the right thing and speak the truth, as I saw it. The rule of law, the linchpin of our existence as a nation, depends on a strong and independent judiciary. The Maine judiciary will maintain its strength and independence, however, only if it continues to earn the respect of the citizens on a daily basis by communicating its actions clearly, concisely, and effectively on all levels.

31. Chief Justice Daniel Wathen, *The State of the Judiciary*, Address at a Joint Convention of the 118th Maine Legislature (Feb. 10, 1998) (transcript available at the University of Maine School of Law Donald L. Garbrecht Law Library).

32. *The Reynolds National Center for Courts and Media*, at <http://www.judges.org/courtsmedia> (last visited Feb. 18, 2005); *National Center for Courts and Media*, at <http://www.judges.org/nccm> (last visited Feb. 18, 2005).