

Enduring Values and Changing Times
The Marden Lecture
Association of the Bar of the City of New York
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When I chose the title "Enduring Values and Changing Times" several months ago, I had two thoughts. First, the words enduring values bring to mind Orison Marden, one of the great leaders of the New York City, New York State and American Bar, whose very name stands for the highest and best of our profession. It is surely no accident that the subject of this lecture fluctuates between ethics and pro bono--two bedrock values of the legal profession, two pillars of Orison Marden's own life.

Second, having absolutely no idea of what I would speak about this evening, I thought that title left me a fair amount of flexibility. You don't want to peak too early. "Enduring Values and Changing Times" is an all-purpose, inexhaustible subject--sort of like "A View from the Bench."

Never did I dream back then that the events of September 11 would give my title such special significance. Never could I have imagined that our times, our world, would change so dramatically, so completely, so permanently. Never did I dream back then that our values would be so tested by other nations, or

that in America we would see such an outpouring of patriotism, humanitarianism, professionalism.

September 11 and the Courts

None of us, of course, will ever forget Tuesday, September 11, 2001, or where we were that day. I was in Albany for the second week of the September Session of the Court of Appeals. In fact, many of our court administrators were in Albany that day as well, for a two-day conference on the vital subject of Access to Justice--a conference that had attracted a few hundred legal services providers, public interest lawyers, judges, court personnel and others from New York and elsewhere.

Our first thoughts after 8:46 a.m. were to touch base back home in Manhattan, but then very quickly we turned to critical questions concerning the courts. Immediately--almost instinctively--Chief Administrative Judge Jonathan Lippman and I decided that the New York courts, including the trial courts in lower Manhattan, should continue their operations as best they could. This was, after all, an attack on American values, including the rule of law, and it was important that we not capitulate to terrorists by closing the courts. The Access to Justice Conference in Albany, by the way, also went forward that day--a powerful statement of the participants' commitment to equal justice under law.

As you might imagine, it was one thing for Judge Lippman and me to decide that the courts should remain open, and quite another for the judges, court personnel, lawyers and jurors to implement that decision. The challenges, particularly in lower Manhattan, were incredible, starting with widespread personal dislocation and devastation--three of our own court officers missing in the rescue effort, sixty or more of our court family missing loved ones. No telephone service, no public transportation, our buildings being tested for structural soundness, a rash of bomb scares, the smoke and smell of Ground Zero hovering in the air. Thousands were feared dead at the World Trade Center. Close to 17,000 lawyers had their offices in the Frozen Zone, 1400 in the World Trade Center alone, their records and offices destroyed or inaccessible.

But they did it, they did it. They were absolutely magnificent in meeting the extraordinary challenges of those extraordinary times. This, I believe, has been a shining hour for the New York courts and lawyers, barely missing a beat in their service to the public, showing the world the high value we place on our system of justice.

September 11 and the Bar

I read in the *New York Times* a week or so ago that the term "9/11" has become a permanent part of our vocabulary, and is

being written into dictionaries. I am eager to see how it will be defined. Pro bono is already a permanent part of our profession's lexicon, and that term for me is forever defined by the shining hour of the New York Bar.

I offer two examples--first, Bar Associations and second, volunteer lawyers individually, admittedly only a small part of the picture, the part I personally experienced. There are so many other lawyer stories to be told--not only within the courts and Bar Associations but also among legal service providers (I mention particularly the Legal Aid Society's remarkable response), government attorneys, civil rights lawyers, law firm pro bono coordinators, paralegals, law schools. I hope that someone will collect these stories. Regrettably, an errant lawyer or judge is a guaranteed headline, our profession's abundant good works little noticed. But that's a subject for another day.

First, the Bar Associations. As we all discovered, it was impossible to know on Day One what all the special needs would be. Day by day, they emerged. Sensibly, Bar leaders quickly came together to coordinate and thereby maximize the response. They convened regularly in this period, and divided up the tasks as they appeared--for example, the County Lawyers Association, displaced from its own offices on Vesey Street, undertaking to

represent families of uniformed officers and Port Authority employees; the Trial Lawyers Association forming "TLC" (Trial Lawyers Care) to counsel claimants to the federal victims' compensation fund; City Bar developing the Facilitator Program to train volunteers so they could provide holistic services--like the family doctor--including counseling in areas such as estates law, social security, immigration and housing, as well as establishing small business walk-in clinics to help affected street vendors, shoeshiners, shopkeepers, restaurateurs.

The State Bar Association coordinated offers of assistance from Bar groups around the world, and also established a program for lawyers and clients where law offices were decimated or inaccessible. The Women's Bar Association took on the task of special services to families and small businesses that were victims of the attack. Countless local Bar Associations pitched in as well, with a list of contributions that would keep us here all night.

Emergency legal needs, as they were identified, were promptly met with training, resources and volunteers. Comprehensive handbooks, resource guides and Internet materials were produced virtually overnight by the Bar Associations and law firms. Probono.net September 11 Practice Area--an Internet portal for communicating information and needs--registered more

than 2700 attorneys. What an astounding display of cooperation, communication, leadership.

Second, lawyers themselves responded generously, many volunteering for the first time. To give one illustration, the court system, in cooperation with the City of New York, established an expedited procedure for securing death certificates from the Medical Examiner so that victims' families could access bank accounts, insurance proceeds and the like. A call went out one day for lawyer volunteers to be trained in interviewing victims' families and completing the necessary submissions. Within hours, hundreds responded, filling the Meeting Room here, the stairway and the entire lobby out to the street. Fortunately, I was at the House of the Association that day, and was called out of a meeting with the Bar leaders to speak to the assembled crowd. The sight of all those terrific people--hundreds and hundreds of them crammed into this building, eager to do their part--is indelibly engraved in my mind. Owing to all the combined efforts, nearly 2500 orders for death certificates were issued within hours of filing--instead of the year or more that the procedure can take in ordinary circumstances.

Day after day for weeks and months, the unprecedented response from volunteer lawyers continued at what became the

Family Assistance Center on 54th Street and the Hudson River. One entire side of that block-long building was labeled "Legal"--teddy bears sent by Oklahoma City lining the wall--and members of the Bar showed up in droves to counsel victims and families. Many times I visited the Center, and I was proud to see New York's lawyers there, patiently and sensitively offering comfort and help--often themselves taking a moment or two to find a private corner and shed a tear. Talk of the Family Assistance Center--what a thing to behold! Federal, State, City, private agencies, legal service providers, religious counselors, and on and on, all came together as never before. Families there could get a meal, emergency cash, a copy of a World War II military record, anything they needed, in any language. Similar centers were established in lower Manhattan.

What an example of patriotism--of being a part of America, defending America, standing up for America in a time of crisis. What an example of humanitarianism--the very best of humanity responding to the barbarous acts of the very worst of humanity. What an example of professionalism--lawyers licensed in a public calling responding to a cry for help, fulfilling their time-honored responsibility to render pro bono service.

Now nearly six months have passed since September 11. Still the press reports fresh challenges engendered by that fateful day--new environmental studies; new clashes about the distribution of funds and redevelopment of the World Trade Center site; new security, budget and economic worries. While our concept of "normality" is forever changed, it is fair to say that we have returned to, or are approximating, normality. Despite lingering fears, we are back in the subways, the skyscrapers and the skies.

And what of the New York Bar? What remains of our shining hour?

Pro Bono Generally

I think of the first segment of this talk as a Primer of Pride, and the next as a Chronicle of Frustration. So I'll try to keep this part short.

I do believe, however, that it is important to fill out the canvas a bit on the subject of pro bono--meaning, of course, our professional responsibility to assure access to justice for those financially unable to afford a lawyer. I see this as a two-fold responsibility: both to assure adequate funding, public and private, for institutional providers, and to provide direct services to needy people. By the way, Orison Marden saw it that way too--he was both a founder in the 1930's of the Legal Aid

Society's annual associates' fund-raising campaign, and a weekly volunteer at the Civil Division's Harlem Neighborhood Office until his death in 1975.

Let's start with needs. In the 1980s, a State Bar Association study established that, owing to lack of access to counsel, less than 14 percent of the civil legal needs of the poor in New York were being addressed. In 1992, the Committee to Improve the Availability of Legal Services--known as the Marrero Committee--recommended that pro bono service be mandated for every member of the Bar. The decision was made at that time to defer such a requirement and work instead on stimulating voluntary efforts. I keep that report at my fingertips.

In 1998, the Legal Services Project--a blue-ribbon panel of Bar and community leaders chaired by this Association's former president, Michael Cooper--reported that the poor in New York encounter millions of legal problems each year without counsel, and the problems most often involve a necessity of life. An astounding ninety percent of tenants do not have counsel in summary eviction proceedings, often the last stop before homelessness. According to a study conducted by the New York University "Capstone" team in the Spring of 2001, due to limited resources the Legal Aid Society turns away six applicants for every one it accepts.

Several studies have confirmed that more than half the members of the New York Bar do no pro bono work at all. And in 2001, the *American Lawyer's* national survey of law firms reported "record increases in revenue accompanied by a per capita decline in pro bono commitment."

Suffice it to say that the subject has been studied to death, and that the unanimous, unassailable conclusions are that the need for pro bono is both huge and unmet.

Do lawyers make a difference? That's been studied too. The Pro Bono Project Against Homelessness provided volunteer lawyers to a randomly selected group of low-income tenants in Manhattan Housing Court. And guess what? The represented tenants had significantly better outcomes than the unrepresented tenants--far fewer eviction judgments against them and far more stipulations requiring rent abatements or repairs--which the researchers attributed to the presence of counsel. Another unsurprising conclusion: having a lawyer matters.

My final conclusion on the enormity of the unmet need is again an obvious one. However dismal the statistics were on September 11, they are infinitely worse today. Since September 11, 2001, tens of thousands of jobs have been lost in New York City, many of them by low-income workers; money is tight; and interim financial measures like unemployment benefits, emergency

grants and Disaster Relief Medicaid are drawing to an end, as the City welfare rolls grow.

I would not want you to think that, as a court system, we have over the years simply conducted studies and surveys, and wrung our hands in despair. Quite the contrary.

Noting the declines in public funding for legal service providers, we asked the Legal Services Project--the Cooper Commission--to identify new, permanent funding streams. And they did indeed come up with an excellent suggestion, calling on the Legislature to allow the transfer of funds from the Abandoned Property Fund to an Access to Justice Fund administered by the IOLA Trustees. As we all know, that was not done.

By the same token, the court system has labored mightily--and vainly--for an increase in 18-b rates, a woeful \$40 an hour for in-court time, \$25 an hour for out-of-court time. Instead of the desperately needed increases, we have watched helplessly as the assigned panels dwindle to a point of catastrophe. A lawyer recently told me of a morning he spent in Family Court with a Columbia Journalism student, who observed that all of the cases at intake were in fact assigned. So where's the problem? "Did you notice," the lawyer asked, "that all of the cases were assigned to the same attorney?" I have myself seen judges send emissaries, floor by floor, through the courthouse corridors to

find attorneys to represent parents in Family Court, and then adjourn cases before them because the quest was fruitless. Is this America? Is this how we honor our promise of a right to counsel? Plainly this situation cannot continue. The rates must be raised now.

Then too, consider the rippling effects of the 18-b disaster. The demoralized 18-b attorneys now--once again-- threaten to take no new cases, with unimaginable impact on needy litigants and already overcrowded court dockets. Lawsuits around the State challenge both payments above statutory rates and administrative efforts to review awards above statutory rates. A federal District Court, calling our appointed counsel system "largely a sham," has found that current 18-b rates were constitutionally harming indigent defendants, and ordered them increased for certain cases. I repeat--this cannot continue. City and State leaders simply must think outside the box and resolve this issue. They can no longer stand by as people are hurt and the court system stalls.

Nor have our efforts been limited to advocating adequate funding for institutional providers, vital as that is. We have also taken significant steps to stimulate direct pro bono activity, urging attorneys both to provide 20 hours or more of legal services a year to the poor and to support organizations that provide such services. And we most recently adopted a

policy allowing continuing legal education credit for pro bono work. As I mentioned earlier, fully one-half of New York's attorneys do no pro bono work at all.

Perhaps the most promising step the court system has taken in this regard--and I'm ending my Chronicle of Frustration right here--is the creation of the post of Deputy Chief Administrative Judge for Justice Initiatives, a position at the highest level of court administration for a skilled, dedicated individual to focus like a laser beam on access to justice issues. And indeed, Deputy Chief Administrative Judge Juanita Bing Newton has more than fulfilled the promise of that idea.

Judge Newton has spearheaded so many initiatives--like clinics and Resource Centers for the increasing ranks of self-represented litigants; satellite offices, night courts, mobile self-help offices to bring the courts closer to working litigants; and expanded alternative dispute resolution options. Under her aegis, we will soon be opening our Access to Justice Center, bringing together the best thinking from all disciplines on the subject, sharing experiences and stimulating innovations.

I am thrilled tonight to announce the appointment of Dianne E. Dixon, as Executive Director of the Access to Justice Center. A graduate of the New York University Law School, Ms. Dixon has twenty years' experience in government, academia and legal services, most recently with the Attorney General's excellent

office. What a wonderful coincidence that she began her legal career at the Harlem Neighborhood Office, where Orison Marden had once been a weekly regular! Through the combined efforts of the Access to Justice Center and Judge Newton's office, we will sponsor four Convocations on Pro Bono Service, the first this June in Manhattan. We hope to bring the issue of pro bono services from the margins to the very center of society's consciousness, and I am confident that we will succeed in this.

The Next Chapter

I closed my Chronicle of Frustration with the court system's new access to justice initiatives, and I open this final segment of my talk with the words of City Bar President Evan Davis. He asked, can our profession perhaps gain something positive and lasting from the events of September 11? And he answered:

"Adversity almost always has a counterpoint. From scandal comes reform; from disease comes medical advance. . . . The tragedy with which we are coping has revealed the Bar's deepest character, and that character is admirable."

I agree with Evan that in the rubble and ashes, the heartbreak and tragedy, of September 11, there may well be important lessons for us in stimulating pro bono. I am encouraged in this insight by the fact that others just now have it too, and especially welcome a group of Fordham Law School students here this evening who have this as their project. I think that we're all on to something important!

Obviously, much of the work begun for victims of the World Trade Center disaster necessarily continues to this day, which itself helps to keep the shining hour alive. But in the September 11 experience, we hopefully can also find factors that evoked the Bar's phenomenal response, and we can build on them. Of course, I recognize that the attack on America was the transcendent mobilizing force--and would never hope for repetition of anything like that. But other factors can, and should, be replicated.

One thing we know for certain is that legal services for the needy are absolutely essential to the recovery effort. More and more New Yorkers without access to counsel will otherwise needlessly become destitute and homeless. It cannot be that, as a profession, we would offer our services to keep a September 11 victim from homelessness or deportation, and deny that same assistance to a needy person who was not a 9/11 victim, when the impact on the person, and on society, is the very same.

What would top anyone's list, looking for the lessons of September 11, is the level of coordination, communication and cooperation within the legal community--united as never before. That joint effort maximized the Bar's ability to assure that needs were accurately identified and efficiently met--lawyers matched with clients--with sensible allocation of available resources and little duplication of effort.

Second, twenty-first century technology was intrinsic to that effort--like probono.net, and Bar Association Website links for lawyers and clients to seek out opportunities and information. In short, clients knew where to find help and volunteers knew where to find clients, training and excellent backup assistance.

Third, the facilitator, gatekeeper, family doctor model unquestionably was a big plus--lawyers able to connect with clients personally, assess the range of needs and serve as a gatekeeper to other resources. The sort of "one-stop shopping" that was available at the Family Assistance Center and other emergency centers--one telephone call to a hotline, one visit to a Website, one trip to an office--is clearly the best model for the client. September 11 proved that even beyond legal services, bringing together all necessary resources for a needy population is plainly the most effective way to reduce adversarialism and solve problems. It also most engaged the volunteer lawyers.

Fourth, engaging as it may be for a lawyer to offer clients a full range of legal services--the medical equivalent of bunions to brain surgery--volunteers inexperienced in general legal practice are understandably fearful of harming rather than helping people in need. Wisely, the volunteers were provided with comprehensive training as well as written materials about legal issues likely to arise, detailed how-to's, and contact

information for a host of helpful people, agencies and other resources. Perhaps most important, back-up mentors--most often, and most helpfully, experts from the legal services community--were available to them.

I know from personal experience how terrifying it can be to deal with clients and subjects outside your usual field of practice. I imagine that even Orison Marden had some trepidation--especially at the start--when he left his White & Case offices every week for the Legal Aid Society's Neighborhood Office to face a new clientele and new fields of law. When I was a commercial litigation partner at a midtown law firm, I joined the assigned counsel panel in the Eastern District and was appointed to represent a defendant in a criminal case, and I am forever grateful to Tom Concannon of Legal Aid's Federal Defender Unit for showing me the ropes. Ultimately, I managed to devise a winning argument, but it could be used only once: "Your Honor, if this case was really serious, they never would have assigned it to me." I should add that, several years later, the client called, asking me to represent him again--the ultimate compliment. When I explained that I had become a Judge, he said, "That's OK--this won't take much of your time."

One-stop shopping supported by training, and readily accessible materials, resources and mentors: that's a good model for the future. I agree with Evan Davis that the Bar's deepest

character is admirable--we want to help people in need. The September 11 pro bono effort succeeded so well because the Bar leaders made it both simple and meaningful for the volunteers to help people in need. The September 11 effort countered all of the top reasons lawyers give for avoiding pro bono work--yes, we've surveyed those too: I don't have the time; I don't have the expertise; I don't have the office support; I'm not interested in the type of projects available; I can't afford it. Well, now we all know you do, you are and you can.

That brings me to a couple of final thoughts about the success of the 9/11 pro bono initiative. I have spoken about the importance of satisfying the unmet legal needs of clients, but lawyer needs are also satisfied through pro bono work.

A couple of years ago, a corporate associate took a five-month paid leave sponsored by his large Manhattan law firm, and joined the staff of a legal services organization. Describing his experience in a recent article, he said that on "a personal level, it was one of the most gratifying experiences of my life. And from a professional point of view, the five months I spent . . . representing the city's poor and elderly did more for me as a corporate lawyer than I ever expected." Noting that corporate lawyering calls for "a thorough understanding of the issues, quick but precise thinking, and a pro-active, win-win mentality," he tells us that his assignment was "a perfect place to master

these techniques, all while helping those who need it most." That place--believe it or not--was New York City Housing Court. What's more, and I quote, "the practice of landlord-tenant law is perfectly suited to corporate training because it's about six parts negotiation, three parts creativity and one part law."

Finally, I am well aware of the pervasive discontent within our ranks, especially among new lawyers--complaints about the loss of ideals that brought them to the law, limited hands-on experience, no client contact, little opportunity to do something meaningful. The September 11 pro bono model is good for needy clients, and the need is more compelling than ever. It's also good for lawyers--an opportunity to help people while polishing essential skills. And it lifts up our profession, returning us to our roots as a public calling in a day when too many among us feel overtaken by the race to the bottom line.

I conclude with a tip of the hat to two Orison Mardens. To the first Orison Marden--a doctor, lawyer and prolific author on the subject of how to achieve success--my thanks for many inspirational lines, like this one: "Most of our obstacles would melt away if, instead of cowering before them, we should make up our minds to walk boldly through them." And to the second Orison Marden, his highly successful lawyer-son, who clearly practiced as his father preached, my thanks for your example and, by this lecture, for taking me down this path of reflection on a timeless

professional value in a new world. I now propose that all of us together walk boldly through the obstacles and keep the luster on that shining hour of the New York Bar.