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The Changing Face of Justice in a New Century

The Challenges It Poses to State Courts and Court Management

Remarks to the National Association of Court Managers (NACM)
Of Chief Justice John T. Broderick Jr., Portland, Oregon
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It's a genuine pleasure to be with all of you this morning and an honor to address you. I have great respect for what you do. I know how difficult your jobs are. And I also know this: without your talent, dedication, and long-term commitment the state courts in America couldn't do their invaluable work. Quite simply, you all have tough and important jobs. All of us are working for a common purpose larger than ourselves.

The topic of my remarks this morning is the changing face of justice in a new century and the challenges it presents for all of us. These are sobering times. We are all here this morning in the most perilous economic time in my memory. The economy has become the elephant in almost every room in America during the last year.

No one has money — even banks and private investment houses seem cash poor. Virtually every state is managing a difficult budget and hoping for bailout dollars. Sadly, it's everyone's current reality, as hard as it is to accept. But state courts are traditionally underfunded — even in good times — so we probably have a shorter distance to fall. That may be the only “good news,” as bad as it sounds.

As author and columnist Thomas Friedman would say, we all inhabit a flat world. Our new reality is moving at the speed of light.

Simply stated, we have become a nation of multitaskers, more anonymous yet more integrated and interdependent. Efficiency, speed, and transparency have become the watchwords of our time. Technology is developing and changing more rapidly than we can often master and sometimes afford. Whether we choose to acknowledge it or not, the torch has already been passed to a younger generation of millennials, who were born after 1980. My young grandchildren will integrate technology

into their lives as effortlessly as my generation of baby boomers integrated television into theirs. In this new age, impatience is up, immediacy is king, and interconnection is essential.

Innovation is no longer just a good idea. It is a prerequisite to survival. As Thomas Friedman has said, “Just coasting along and doing the same old thing is not an option any longer.” As they say in Texas, “If all you ever do is all you've ever done, then all you'll ever get is all you ever got.” Although Friedman was using Texas wisdom to address the challenges confronting the United States on green energy, his words apply with equal force to all of us who toil in the state justice system across America.

Some years ago there was a very popular movie starring Ernest Borgnine and Shelly Winters entitled “The Poseidon Adventure.” In the film, a large cruise ship was flipped over by a tidal wave, and the passengers who survived had to decide how to ensure their rescue. Most elected to stay put under the water line in the hope that they would be found and saved. A much smaller number set out on a difficult journey to find the bottom of the hull, which was now above water. Only those brave souls survived.

The economy has been a tidal wave for the state courts, and I respectfully suggest we can't just wait to be rescued. We need to begin our climb out in search of a route to the 21st century — or at least begin the difficult planning necessary to join the new century. As someone once said, “A crisis is a terrible thing to waste.” With that caveat in mind, this is a very opportune time to discuss what the changing face of justice should look like in this new era because whether we like it or not, yesterday is not tomorrow's answer. And no one is coming to rescue us. We need to take the first step.

How can it be that in this new world, which is literally and exponentially remaking itself with alarming speed through science, technology, emerging markets, and global interdependence, that the American justice system can remain the only institution in American life that need not adapt, that need not adjust to current day realities? Quite simply, it can't. It just can't. The American justice system cannot sit idly by and expect to remain relevant and respected indefinitely. In time, public trust and confidence in the state courts will erode if we do not take Friedman's challenge seriously. As important as green energy is, it is not guaranteed by the state and federal constitutions. What all of us do and try to ensure each day is at the very heart of our Republic. It is at the core of the American experience and is the cornerstone of America's promise.

In my view, it is imperative that we redouble our efforts, judges and court managers alike, to sustain and creatively adapt our state justice system to meet the real world needs of the 21st century. Change will come even if we do nothing, but it will not be the change we want. Time and current economic realities do not make our task easier, but they certainly provide powerful incentives for change. Change we create and manage. It is that needed change that I would like to discuss with all of you this morning. Failure is not an option because too many people are counting on us. Incremental change will not suffice.

If all of us in this room today were asked to design a court system for the first half of the 21st century, with full knowledge of the problems outside the windows of our courthouses and a strong sense that the pace of change in the world around us was not likely to abate, it would be highly improbable that we would design the exact same

system with the same paperwork that exists today. The population using our courts has changed. The problems we deal with in the courts have become more complex and often more nuanced; time is a more compelling factor than ever before; the cost of our services has increased and gone beyond the reach of many. A private justice system is flourishing and is now entrenched as our competition, while at the same time we are not keeping pace with the advancements in technology. Bill Gates would not likely buy stock in the state courts as they currently exist.

There is no doubt that we cannot retool the state courts on our own. We will need the help and input of the bar, the business community, our fellow citizens, our state legislators and governors, and also the federal government. But, in the first instance, we cannot delay and fall prey to making the perfect the enemy of the good. It's always easier waiting for someone else to act or vision for us, but it would be a mistake for us to wait. Who knows better the problems and challenges than we do? The burden falls to us to craft a vision in sync with the times in which we live. If we fail, change will be largely anecdotal and inadequate. But as we all know, change is hard.

But all of us need to embrace change and, more importantly, identify what change is most needed and design for it. Real change, in my experience, never happens in the shadow of a small idea, nor does it occur by perfecting yesterday's practices. The train for this new century is leaving, and we best be on it — even if we run to catch it. Soon it may be too late.

In my opinion, there are four fundamental challenges we must successfully confront if we are to ensure accessible, affordable, and understandable justice in state courts across this country. I offer them in no



Chief Justice John T. Broderick Jr.

particular order of importance because all are critical and all are interrelated. While my list is not exhaustive, I think it is a good beginning.

The four great challenges I see relate to our “customer” base; our technology; the cost of justice; and, finally, ensuring proper staff and management in the years ahead. Undergirding all of these is the need for adequate resources and less bureaucratic management. State courts, I suggest, need to reinvent themselves for maximum efficiency. No one is or should be exempt from that challenge.

Let me turn first to our changing customer base and the new demands it places on judges, staff, and court administrators. Not only are the users of the state courts speaking more languages than ever before, more and more enter our courthouses without lawyers. Many have little or no understanding of the rules, limits, or processes which have become second nature to all of us. Increasingly, many of those without counsel are middle-class and small businesses. The poor now have company.

The self-represented are real people, not statistics or abstractions. They live in our communities. They have real needs and real-world

problems. In my state, in 70 percent of all divorce cases, one or both sides is without counsel. Seventy percent. The state court system was ingeniously designed for parties with counsel who had enough money and enough time to let the process work as it always has. Increasingly, the users of the courts are without adequate resources and have too little time. It's not their fault they can't afford a lawyer, but it becomes our responsibility to deal with it. After all, we're the American justice system. Merely wishing we didn't have this challenge is not the same as meeting it.

The ever-rising tide of self-represented litigants is a national phenomenon, a growing national crisis for state courts, which can be measurably addressed only by candid discussion, openness to change, painful truths, awkward moments, national consensus, and coordinated action. In addressing this new challenge, we not only need to adjust course, but we also need to change attitudes and perceptions. Candidly, some of those attitudes and perceptions may be our own. The fundamental promise of America's justice system, and the reason it has been admired worldwide, is that it guarantees meaningful access to the courts in a timeframe and at a cost affordable by our citizens. If that bargain ceases to exist, everyone loses.

The promise of equal justice is inscribed above the threshold of our nation's highest court and concludes our pledge of allegiance. The promise of equal justice is integral to America's unique identity and is fundamental to our core beliefs as Americans. The gap between those who can afford to navigate the American justice system and those who can't is widening. Time and circumstance are not on our side, and the gap will not narrow by itself. It will never close if we remain silent. It will only get worse. Change is needed.

A few weeks ago I was in the Phoenix airport to catch a flight home. I was uncharacteristically early, so I actually had time for a late lunch. When I got off the escalator, I began looking around the expansive mezzanine for the best fast food I could find. As I was deciding which unhealthy food I could eat without conscience, I heard a woman's voice ask, "Can I help you?" It startled me. She had an official looking pin on her lapel and told me she worked for the airport and that her job was to assist travelers. Meeting her made me think we should have pleasant, knowledgeable, reassuring people just like her in all of our courthouse lobbies. They could help direct traffic and lower stress. The airport understood her value. When airports are ahead of us in "customer relations," it makes me wonder how far behind we really are.

Can you imagine how frightened you'd be to walk into a courthouse representing yourself in your own divorce where you could lose custody of your children or have your visitation rights restricted if you did not understand the first thing about the process — or even understand where to go when you arrive? I'll bet the woman I met in customer service at the Phoenix airport would understand. The old assumptions do not apply to our new and expanding customer base. If we can't find a lawyer for everyone who needs one, we have an obligation to

infuse our judicial system with user-friendly options. We will never have enough lawyers for the self-represented nor will we ever have enough money to hire enough staff to meet their needs. Assuming more and more of the burden by expanding programs and creating new positions is not the way to go. We cannot expect our legislatures to increase our budgets by five percent each year in perpetuity. We need to find ways to empower the self-represented to assist themselves.

To do that, we will need more and better technology for public kiosks in our courthouses. We need convenient self-help centers on- and off-site with user-friendly technology. We need world-class self-help Web sites, and we need hardware and software in our local libraries to assist those involved with the courts. We need to retool and simplify forms and process wherever possible, and we need to infuse the system with alternative dispute resolution and rethink whether every dispute should go to court in the first instance.

If we, all of us, do not move aggressively and more publicly to address the challenges of the self-represented to the fair, timely, and impartial administration of justice in America's courthouses, be assured there will be unintended collateral consequences. None are helpful, but none are inevitable if we choose to act. If we opt for more of the same, I am

concerned that within a decade state courts will be largely for the poor and others without lawyers and for those charged with a crime.

If that occurs, some legislators might wonder if we need the money we used to receive when our users were more diverse. Many in the business community, who advocate for us now, may no longer come to our front doors but rather flee in increasing numbers to America's flourishing private justice system.

If change does not happen, I wonder whether we will attract the best and brightest lawyers to preside in our courts or the best and brightest managers and administrators to tackle the difficult challenges of running and managing a state court system.

We also need to be more attentive and responsive to clients with counsel. Often they feel squeezed to one side by the influx of the self-represented and the near heroic efforts staff and judges make to accommodate them. More and more of those who can afford it are leaving the state courts for the private justice system. This is particularly true of businesses. If the state courts become largely irrelevant to the marketplace, then the rules of the road will be fashioned behind conference room doors without a public record and with no public input.

In my state, with the full support of the legislature and the governor, we have created a business court docket

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and are awaiting the appointment of its first presiding judge. I am hopeful it will be as successful as it has been in 19 other, states. I also believe if we bring business disputes back inside our courthouses, their respected voices will advocate for court needs. Once we lose the attention and support of the broader business community, we are at greater risk that our needs will not be adequately funded.

Perhaps, in time, we should consider licensing specialized paralegals, under the supervision of a lawyer, to give legal advice in discrete areas where they are highly knowledgeable. Landlord/tenant and social security come to mind. Perhaps an even smaller number of paralegals could be licensed to advocate for clients in court as paralegal practitioners. Many people might be able to afford \$60 an hour for a paralegal, who could not afford \$150 or more per hour for a lawyer. In the world of medicine, there are physician's assistants to deal with a subset of patients who need help but may not need to wait in the long line to see a doctor. If medicine can adapt, so can the legal professional.

The second significant challenge we face is technology. We are all making strides but much too slowly. Many small law firms have better technology than the state courts they work in. We cannot long expect the "speed of light" world of commerce to bring its problems to the paper world of state courts. In my view, the larger the gap between the technology in the marketplace and the technology in our courthouses, the less acceptable we become.

A few months ago I was speaking at a bar association gathering at the

Hanover Inn, just off the Dartmouth Green. I was joined by the deputy clerk of our federal district court. He had a high-tech laptop presentation and was demonstrating the use of "hyperlinks" in the federal system. Needless to say, I was a bit jealous and a bit despondent we were so far behind. When it was my turn to speak I said, "Hearing the deputy clerk discuss hyperlinks tonight has given me hypertension." Electronic 24/7 filings are now commonplace in our federal courts but years away in the state system. We recently installed a drop box for after-hour filings at our supreme court. While my colleagues and I were pleased to offer this service, its mere presence is a constant reminder



of how much further we need to go. Certainly the 21st century will demand more than a drop box.

For the first time in my state we have a Web master in the judicial branch. He is helping to make a real difference. But our capacity to retrieve and analyze meaningful data across the court system, to train staff remotely, to e-notice litigants, to allow electronic filing and offer interactive forms is still several years away. In the information age, several years is a long, long time. Our courthouses have few public terminals and paper is still king. We

need more high-tech courtrooms with real-time reporting. We have a strategic plan for technology but few state funds available to make it a reality. Our Odyssey case management system, currently being installed in all our trial courts, will provide a platform for our broader vision, but I fear that when it is finally installed a new, better, and faster system will be on the market. Remember the first digital watch and the first bulky car phone? Without proper technology, meaningful change across the system will be nearly impossible.

Our third big challenge is the cost of justice for those who have counsel.

In this new century, we need to responsibly explore re-designing the courts from the front door to the judge's bench while adhering to core principles of due process. I fear, however, that we provide much process that is not due and that we have needlessly driven up the cost of adjudicating disputes. Needed change should not be anecdotal or incremental. I believe that more aggressive systemic change will be needed.

Clearance rates in some of our busiest courts are slowing. The process of civil litigation has become too protracted and much too expensive. There's too much defensive lawyering and too much needless discovery. Trial judges need individual dockets where they don't exist, and all trial judges need to be more hands-on. We need to track cases so that discovery is more proportionate to the size of a dispute. We also need to infuse our system with alternative dispute resolution, most often mediation, so that litigants can have choices. Lawyers also have to come to terms with the

billable hour. I don't think the 21st century will tolerate it.

The American Bar Association and the American College of Trial Lawyers speak out more frequently about the decline — if not the imminent death — of the civil jury trial across our country. As an old trial lawyer myself, I share their concerns. The decline in civil jury trials is national in scope. Since 1950 and until 2005, the American College of Trial Lawyers, the premier invitation-only trial lawyer organization in America, required those eligible for membership to have tried at least 25 jury cases. Since 2005 the jury trial minimum standard has been scrapped. That's a canary in the mine, and we ignore it at our peril.

Trial by jury in the civil arena is increasingly being replaced by trial by attrition. Cases tried with banker boxes filled with indexed files and computer chips overflowing with bytes of information bringing laptops to life used to be tried not all that many years ago from a single expansion folder. And some really great trial lawyers did just fine — and justice was well served. The bar needs to be more disciplined, and the courts need to be more timely.

Unless civil jury trials return in great numbers, we will, over time, lose the stamp of public approval. If you reflect upon it, much of the justice dispensed in our trial courthouses is dispensed by citizens who sit as jurors. When the public's voice is not heard in our courtrooms or is heard much less frequently, that is not good news for any of us.

The days have long since passed where if you wanted a dispute resolved you had to go to court. Mediation and arbitration are written into more contracts than you can imagine, and when they're not, more and more parties, especially businesses, opt to take their disputes

to mediation or arbitration behind closed doors. Disputes, which arise in our communities, should be resolved whenever possible in public courtrooms. The community needs to be engaged in dispensing justice, either directly through juries or indirectly through judges. In that way, everyone knows the rules of the road and has a hand in applying them.

When alternatives are needed, and they often are, I would like to see the state courts offering them. For the first time in my state's history, we established an Office of Mediation and Arbitration under the umbrella of the judicial branch. It has been well-received and should go a long way in helping us compete with the private market place. Competition needs to be our mindset in this new age.

We need to find new ways to drain expense and delay from the services we offer. If we don't, I fear that a decade from now the state courts will not be recognizable.

The last great challenge before us is to attract and retain able, agile, and committed managers and administrators and to find and retain first-rate staff. Far easier to say than to do. When I became chief justice, I logged a lot of miles so I could visit every courthouse in New Hampshire and get a few minutes to speak privately to every staff member and every clerk of court or register of deeds. It was exhausting to do but far more valuable than I could have imagined. The people who work behind our counters are bright and committed. Many have worked for the courts for 20 to 25 years, and many are getting ready to retire. But most made a deal when they began their state service. They would make less money than their friends in the private sector, but they would have job security, excellent health benefits, and an honorable retirement. Every year that passes, that deal seems

less solid than it once did. We will need even more talented managers and staff in the years ahead. I grow concerned that we will have difficulty attracting them from the private sector. We can't offer what we used to.

The challenges we all confront to make justice accessible, affordable, and understandable are many, and none are easy. We need to remain steadfast, inventive, and adaptive, and we need to persuade all the necessary players to join us. Sometimes it is easy to get discouraged by the sheer magnitude of it all. In that regard, let me close with an apocryphal story.

One summer morning after a strong ocean storm, a small child was walking the beach tossing starfish back into the receding tide. An elderly man was walking toward him and was taken aback by the child's optimism. "Young man," he said in his wisdom, "There are hundreds of starfish that have been washed ashore. The day's heat will likely kill them before you get to them all. I think you're wasting your time. You really can't make a difference." The young boy looked up, smiled politely, and reached down for another starfish, which he cast gently into the ocean. "I made a difference for that one," he said as he continued down the beach.

Like that child, the choice is ours. Both public trust and personal pride demand that all of us do more. Impatience is our best friend, honesty our best weapon, and success our obligation. We have no time to waste. Thank you for listening and for all you do to fulfill the promise of the American justice system.