Reflections on Public Lawyering

By Stephen H. Sachs



(Editor's Note:This talk was delivered by Stephen Sachs as the keynote address at IMLA's Baltimore Conference, September 12, 2014).

This will be a very personal talk. I begin with an episode from my own public law days:

Early in my tenure as AG I visited a very large room in one of our state's mental hospitals. I was there to investigate a complaint by the Mental Health Association. The room was choked with scores of men and women ... half- clothed in filthy, ragged white gowns ... wandering about aimlessly ... often colliding, one with another. The place stank from urine and feces To the extent the inhabitants spoke, I heard only guttural moans.

These folks were developmentally disabled. They were **not** mentally ill. But the state had illegally warehoused them—some for many years—in a mental institution ~ where they received none of the care ...or the training ... to which they were legally entitled.

We convinced the responsible state agency to comply with the law. Each of the inhabitants of that Bedlam was evaluated by experienced medical professionals. The most severely disabled were moved to state facilities where they received appropriate care. Many of the others began to receive the training that they deserved ... and to which they responded.

Some eventually were able to live in group homes where they did household chores ... shopped for groceries ... went to the movies ... and, in a few cases, held a job. One man who had not spoken for decades—*not spoken!*—now spoke ... and sang.

On the wall of my study at home is a photograph of that room taken about a year after my visit. Sunlight streams through large windows onto the floor of a room now vacant. That photograph means a lot It is a symbol of the triumph of the rule of law.

That episode can serve as prologue to what I'm going to share with you today.

My talk has two parts. First, I'm going to preach seven of my public-lawyering homilies (you won't like some of them) ~ and I'll describe a few more vindications of the rule of law ~ and then I'll recount one massive failure.

And in Part II I'm going to tell you how our country fails to redeem its promise of justice for all, and challenge you to enlist in a growing national effort to right that wrong.

But first—as an old time Maryland politician used to put it—" I want to say a few words before I start speakin':"

In my inaugural speech as Attorney General many years ago I said: " My heroes are those lawyers, some famous, many anonymous, who through time have practiced law in the public interest."

That's you guys. I meant it then ... and I mean it now.

My decade and a half as one of you were the most rewarding years ~ I'm not talking dollars here—of my life at the Bar.

Even the novices among you probably have more autonomy and responsibility than young partners in a large law firm. It is you, the public lawyer, who—in the exercise of your judgment about zoning ... eminent domain ... mortgage foreclosure ... police misconduct ... procurement ... pensions ... retirement—about each of the issues you confront every day ... it is the public lawyer ... who has far greater impact on the lives of our fellow citizens than do the occasional decisions of our courts.

It is you who write the rules of the road. It is you who give voice every day to the commands of the law. Your client, in the final analysis, is the rule of

law itself. That is a very high privilege.

And with it comes an obligation. Not only prosecutors, but **every** government lawyer, is ... in the words of the Supreme Court ... "the representative of a sovereignty whose obligation to govern fairly ... is as great as its obligation to govern at all."

Judge Charles Fahy, solicitor general of the United States during the New Deal, and later judge on the United States Court of Appeals for the D. C. Circuit, (where I was lucky enough to clerk), once put it this way: " where the client is the government itself he who represents this vague entity often becomes its conscience ..."

That's the spirit that the following homilies reflect:

Homily One: Call 'em as you see 'em. Your agency client may wish for different advice and ~~ if there is genuine ambiguity in the applicable law—you might well accommodate it. But if there is not, it is your obligation to say so, and it is the agency's obligation to suck it up. You will not only have served the law. You may well have saved your agency from an expensive, losing lawsuit.

In any case, the oath of office you took was to the people ... and to the law ... not to your boss.

Homily Two: Admit the mistakes you will inevitably make. Research is imperfect. Precedents change. New statutes emerge. Perhaps you—or your predecessors—didn't get it right the first time. Say so.

Unlike your brothers and sisters in the private bar, your motto isn't "my client, right or wrong". You owe the court, the public, the profession ~~ and yourselves ~~ total candor. Maryland's Simon Sobeloff, a former Solicitor General of the United States, and note well, a former City Solicitor of Baltimore City, chief judge of both the Court of Appeals of Maryland and the Fourth Circuit, once told me that the confession of error was the highest form of advocacy because it confers priceless credibility.

Homily Three: Never engage in "smash-mouth" litigation tactics. That tough guy stuff is for the private bar. Trust me. I know ...and have the scars to prove it.

Years ago, opposing counsel in a deposition attempted, day after day, to rudely abuse my client. Provoked beyond endurance ~~ and proving the old Chinese proverb that in fighting your enemy you become like him ~~ I finally told my opponent that he was "the most obnoxious human being I have ever met." My outburst was on the record, and my words found their way into *The American Lawyer* magazine. I was terribly embarrassed. My opponent, on the other hand, boasts of his performance....the bastard!

Unlike your brothers and sisters in the private bar, your motto isn't "my client, right or wrong." You owe the court, the public, the profession and yourselves— total candor.

Don't get me wrong. You should be strong advocates for your client . But you must, as the Supreme Court has put it, strike fair blows not foul ones. The lawyer for the sovereign never stoops to conquer. Is there a double standard? Sure there is.

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Homily Four: Don't rush to take advantage of an adversary's missteps, especially if that adversary is innocently mistaken, or a novice, or, indeed, if the party is unrepresented. "Never give a sucker an even break" is not your watchword. I always preferred the old Will Rogers line that he would rather be the guy who bought the Brooklyn Bridge than the guy who sold it.

Homily Five: Don't be stingy in complying with discovery requests. After over a half - century in and around courtrooms, I believe the consequences of discovery squabbles are miniscule. I rank the efficiency of depositions at about 15% and of interrogatories near 0. Requests for Admissions ?.... Maybe.

I'll go further: in my view, you, the public lawyer, have an obligation to disclose, voluntarily, any information in your possession that substantially favors your adversary~~ a sort of municipal *Brady* rule. This is perhaps not as radical as it sounds. Your opponent is likely to acquire the stuff in discovery anyhow. Part of that 15%

Homily Six: The attorney-client privilege should not be available to the public lawyer. The public is entitled to know how the lawyer for the government ~~ *its* lawyer ~~ views the law.

There may be less to this homily than meets the eye, however. Public policy requires that there be an **executive or deliberative privilege** that promotes freedom of internal debate in the executive branch. It also mandates a **work product privilege** that legitimately serves the adversary process.

(I have a confession to make here. In our AG's office we had gradations of opinions, not all of which we regarded as public property. Some opinions were formal, while others were informal. Many were written, but many others were oral...and a select few were what one wag in my office used to refer to as "extremely oral").

Homily Seven: Finally, the most important homily of all:

An overarching principle guided my public career. I saw my primary task as seeing to it that the State itself obeyed the law. My mantra was the well-known dictum of Justice Brandeis: " Our government is the potent, the omnipresent teacher. For good or ill it teaches the whole people by its example....If the

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Stephen Sachs served as Assistant US Attorney (Maryland) for three years before being appointed US Attorney for Maryland. He was subsequently elected Maryland's 40th Attorney General, serving two terms. He sought the nomination for Governor of Maryland in 1986 and thereafter served as a partner in Wilmer, Cutler, Pickering, Hale and Dorr (today, WilmerHale) for 13 years. In 2008, he was appointed by Maryland Governor Martin O'Malley to head an independent review of Maryland State Police intelligence gathering activities. He is a graduate of Haverford College, where he won a Fulbright Scholarship to Oxford University. He received his LLB from Yale Law School.

government becomes a lawbreaker, it breeds contempt for the law..." We believed this stuff-- I believed this stuff...George Nilson believed this stuff...Dennis Sweeney believed this stuff... And we did our best to put it into practice.

Earlier, with respect to those developmentally disabled folks, I recounted one of our successes at self-policing. Here are a couple of others:

It came to the attention of our anti-trust lawyers that many of the State's occupational boards were in violation of antitrust laws because their regulations unreasonably restricted entry into the regulated trades. The plumbers board, for example, required that you had to be an American citizen to be a Maryland plumber, (When your toilet is overflowing do you really give a damn whether the guy who can fix it fastest only has a "green card"?).

And the barbers! It required so much time and training to become a master barber that we used to say you could become a *brain surgeon* more quickly.

Anyhow, our "anti-trust audit" of the occupational boards and commissions insulated them from anti-trust liability. Alas... not all of our clients welcomed our advice. Some of them let me know it years later when I ran -- and lost -- for governor.

One more success: Across the Chesapeake Bay lies Maryland's Eastern Shore. The Shore did not come gently into the modern era. There are many fine people on the Shore. But old ways die hard. The Shore remained deeply racially segregated, with occasional racial conflict, well into the second half of the twentieth century.

One of the artifacts of the old ways was the maintenance of county-wide election districts, which had the effect of diluting the votes of blacks, whose homes, as the result of historic segregation, were typically clustered in discrete areas of the county.

Such dilution of the black vote was in pretty clear violation of federal law. Black activists were prepared to sue. We met often with local officials in an effort to convince them that, unless they reconfigured their voting districts, they were in danger of having the districts redrawn by federal judges. For the most part, county officials, albeit reluctantly , complied with our advice, which in a number of cases meant the defeat of some of those incumbent, white, officials at the next election.

Lawyers make a difference. That's why folks who can afford them, hire them. But there is a shameful "justice gap" in this country. The civil legal needs of over seventy percent of the poor—mortgage foreclosures, domestic violence, child custody, to name a few—are unmet.

Our massive failure: In 1985 the wave of state insured savings and loan failures that began in Ohio swept across Maryland. Many of Maryland's S&L's had engaged in risky enterprises and self-dealing with their depositors' funds. The state agency charged with regulation of these entities was wholly ineffective. The state - created insurance company that was supposed to insure deposits was grossly undercapitalized ... and manipulated by its "insureds"

Strictly speaking, I suppose, this was not a case of the state's failure to obey its legal obligations. It was a case of the state's inadequate discharge of those obligations. Arguably, it is not the business of agency counsel to monitor the effectiveness of the client. But the agency failure here was massive. We should have caught it ... sought to intervene ... and, if unsuccessful, blown the whistle. But we did nothing .... Until the tsunami struck.

Yes, we helped the Governor and the Legislature, create a plan -- at taxpayer's expense -- that made depositors whole. And, yes, our office successfully prosecuted and sent to prison many of the malefactors who caused the scandal. But we should have done more.

Some commentators liken the public lawyer to the Old Testament prophets whose duties were "to warn the people of transgressions." We should have been able to sound that trumpet. That we did not still disturbs my sleep from time to time.

(With respect to those malefactors I spoke of: Maryland. Alas, is no stranger to white collar crime and public corruption. Our checkered history is well captured by a New Yorker cartoon two guys in a jail cell regard with disgust the mush they have been served for dinner. "You know," one of them says, " the food was a lot better around here when **you** were governor !").

PART II

Lawyers make a difference. That's why folks who can afford them, hire them. But there is a shameful "justice gap" in this country.

The civil legal needs of over seventy percent of the poor -- mortgage foreclosures, domestic violence, child custody, to name a few -- are unmet.

In our nation's capital less than 10% of the poor get the legal assistance they need. Here in Maryland, a government study reported that only about 20% of the poor can address their legal issues with the help of a lawyer.

These facts are replicated across the U.S.A. Compared to most of Western Europe , to India, Japan, South Africa, Zambia, the Ukraine-- and to our good neighbors to the north -- we are a Third World country

There is a growing national movement to narrow that justice gap. It seeks a "civil *Gideon.*" The name, of course, refers to the iconic case of *Gideon v. Wainwright,* in which the

Supreme Court held that criminal defendants required "the guiding hand of counsel" and that lawyers "are necessities, not luxuries."

Unfortunately, the Supreme Court refused to extend the right to counsel to poor **civil** litigants.

After several decades of despondency, however, the American Bar woke up. Legislative and constitutional solutions are being sought in at least two dozen states. In 2006 the American Bar Association's House of Delegates weighed in ... unanimously.

My hope is that you -- who have the special cachet of being lawyers for the people -- will join this march to equal justice.

Here's how I signed up:

Over a decade ago I represented Deborah Frase in the Court of Appeals of Maryland. She was appealing severe restrictions that had been placed on her custody of her two year old son.

In the proceedings below -- before a court master and trial judge over in Caroline County on the Eastern Shore -- third- party neighbors sought custody of the child. They were represented by counsel. Deb couldn't afford a lawyer and couldn't get one from overburdened, and underfinanced, legal aid offices. Her requests for court appointed counsel were routinely denied.

But she soldiered on, clumsily attempting research in the courthouse library, scouring for witnesses. She fought the system. All alone. She was my Karen Silkwood ... my Norma Rae.

The hearing before the master had been a parody of the adversary process. Deb didn't know about pre-trial discovery. She didn't know how to introduce evidence. She didn't know what an expert witness was. She frequently expressed bewilderment . Her cross-examination of her mother -- a hostile witness -- was only an exchange of accusations.

Hearsay was rampant. Her direct testimony was mainly brief responses to cursory questions from the master. In short, she was never able to achieve -- as any trained advocate would have -- a coherent presentation of how she had been able to overcome an admittedly troubled past.

Counsel almost certainly would have prevented the master and the judge -- whose distaste for Deb was evident on the record -- from imposing conditions on the grant of custody.

Deb Frase won her case in the Court of Appeals. The court relied on a Supreme Court decision that held that a fit parent knows best what's in a child's best interest. (Deb had located several witnesses who testified to her current fitness as a parent.) The court struck the conditions on custody -- but it didn't reach our argument that her requests for counsel should have been granted.

Three concurring judges would have reached the right to counsel issue and held that Deb had a right to court appointed counsel. On behalf of the three, Judge Dale Cathell wrote these words:

"We should all try to imagine," he wrote, " how it must feel to be utterly poor and to receive a summons from the hands of a sheriff informing us that we are required to appear in court because... some third party is attempting to terminate our parental rights ... and we don't have any money with which to hire a lawyer. The poor face fears without the security of money that many others have. And it can be terrifying to realize how helpless you are when others are attempting to take your children away from you."

I can't state my effort to enlist you in this cause more movingly.

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At the end of the oral argument, a newspaper reporter asked Deb Frase if she had any comment. "No," I heard her say, "Mr. Sachs spoke for me today."

She didn't intend it as a compliment and I don't take it as such. It was simply a statement of fact.

But how very much it said. She finally had an advocate. She finally had a voice. And it had made a difference That's what the fight for "civil *Gideon*" is all about.

The public must learn about it...legislative bodies must fund it ...our profession -- which witnesses the crying need in courthouses every day -- in housing court, in family court, to name only two -- our profession must take the lead. And you who serve the public can be the strongest, the clearest, the purest voices of all.

And when this movement succeeds -- and succeed it will--we will finally -- belatedly -- have redeemed the promise --carved in Vermont marble on the Corinthian columns that are portals to our Supreme Court -- the promise of "Equal Justice Under Law." ML

IMLA's 80th Annual Conference

Las Vegas, Nevada

October 4 -7, 2015

