

Law Day Luncheon, Sangamon County Bar Association
May 1, 2015 – Sangamo Club, Springfield, IL
The Moving Balance Between Tradition & Progress

Good afternoon. It is such a pleasure to be here among fellow members of the Sangamon County Bar Association, and our colleagues from the Central Illinois Bar Association, the Government Bar Association, the ISBA, and the Lincoln-Douglas Inn of Court.

I want to thank Shirley Wilgenbusch for her gracious invitation and for all of her hard work in organizing this event.

The theme of this year's law day is "Magna Carta: Icon of Liberty."

I want to begin with an anecdote that amply demonstrates our enduring connection to the Magna Carta. Our British cousins displayed the document in their pavilion at the 1939 New York world's fair. Afterwards, it was displayed in Washington, D.C. It was still there in September 1939, when England declared war on Germany. The British ambassador placed the document in the care of the Library of Congress for safekeeping during the war. After Pearl Harbor, when we entered the war, the Library sent it to Fort Knox, Kentucky. It returned to England in 1946.

Thus, in a sense, the United States has not only preserved and advanced the ideals and traditions codified in the document, it preserved the document itself.

2015 marks the 800th anniversary of the signing of the Magna Carta. Looking back, I guess it also marks about the 60th anniversary of my first learning about it in grade school. Do you recall those history lessons?

King John, always portrayed as hapless and somewhat dim in Robin Hood movies, capitulated to his nobles and signed the "great charter," which came to be known as the Magna Carta.

John had been at war with France for over a decade when he returned to England in 1214 and found his barons in open rebellion against him. After they captured the city of London, John had no option but to negotiate.

The Magna Carta was intended to be the peace treaty that ended the rebellion. It didn't work because neither side actually complied with its terms. Civil war broke out, and France, not surprisingly, supported the barons.

John died in 1216 and his 9-year-old son, Henry III, succeeded him. A revised version of the Magna Carta was issued in his name, again to buy peace with the barons. He issued yet another version when he reached the age of 18. Thereafter, the promise of the Magna Carta was renewed by succeeding monarchs.

So why, then, is the Magna Carta one of the most famous documents in the world? And why do American lawyers celebrate its history?

While it was not successful as a peace treaty, it did provide an entirely new framework for the relationship between the king and his nobles.

The original document contained 63 clauses, many of which have become obsolete. For example, clause 23 provided that “no village or individual shall be compelled to make bridges at river banks, except those who from of old were legally bound to do so.”

But several clauses of the 1225 version remain in effect in England today. Clause 39, for example, stated that “no freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”

That is, any free man who was accused of a crime was to be granted a fair trial. A century later, parliament read this provision as a guarantee of trial by jury. It was enshrined in our own Bill of Rights as the guarantee of due process.

Similarly, clause 40 promised: “to no one will we sell, to no one will we refuse or delay, right or justice.” This clause promises equal justice under the law.

The Magna Carta also provided that no taxes could be imposed without the “general consent of the realm,” meaning, of course, the leading barons and churchmen. Our own patriots would rephrase this as a demand for no taxation without representation.

Specifics aside, the Magna Carta has become a symbol of resistance to the arbitrary use of power by the state or sovereign.

Most importantly, this document established, for the first time, the principle that everyone, including the king, was subject to the law. Before he capitulated to his nobles and signed the Magna Carta, King John was an absolute sovereign. He held all power, even the power of life and death. He could create new nobles or destroy them. He could dictate who married whom, as a way of controlling the consolidation of wealth and power. On that field in Runnymede in 1215, a king was forced to relinquish some of this power to his nobles, thus sharing power among wealthy, landed men.

While not envisioned by either the rebellious nobles or the defeated king, the Magna Carta planted the seeds of the democracies that would follow. In time, it became the cornerstone of British law, and it contributed to the drafting of our own Constitution.

But the Magna Carta omitted three key words that would appear 574 years later in our Constitution: “We, the people.”

The Magna Carta conferred no rights on the people. It did not reflect an understanding that the ruler held power only because the people chose to confer that power upon him. While it did suggest that at least some people had some rights that a monarch was obliged to respect, those rights did not extend to everyone.

The genius of our Constitution is not just its outright rejection of monarchy, but its creation of an entirely new type of state. Our founders were writing on a clean slate. And they wrote that the “people of the United States” did “ordain and establish this Constitution.”

There would be no king, only an elected president whose powers are defined in Article II and limited by the powers of the other two branches.

Our Congress, while bicameral like Parliament, does not consist of an unelected House of Lords and an elected House of Commons. Further, the Bill of Rights limits its power, for example, stating in the first amendment that Congress “shall make no law” establishing religion, prohibiting free exercise of religion, abridging freedom of speech or freedom of the press, or prohibiting peaceable assembly.

And Article III provides for an independent judiciary to hear “all cases,” and guarantees the right to a jury in criminal trials.

Of course, in 1789, our founding fathers did not use the phrase “We, the people” to refer to all of the people then living in the new states.

Thousands were trapped in slavery or bound servitude; women had no individual rights; and only men who owned property were treated as full citizens. Yet, the evolution had begun, and it could be delayed, but not denied.

The genius of this country, which our profession has done so much to support, has been to adapt old legal traditions to the demands of progress, to achieve that difficult balance between

preserving worthwhile traditions and embracing positive change. The process is not always easy. Indeed, it is often uncomfortable, yet it is constant and inevitable.

Some changes are dramatic and fundamental, like the end of slavery or the granting of women's suffrage. Others are subtle and incremental.

I graduated from law school in 1968. My husband, Gill, and I were sworn in as members of the Illinois bar together, along with one other married couple. It was so novel that our pictures appeared in the Illinois Bar Journal. The caption identified us as "Mr. and Mrs. Gill Garman," much to the chagrin of my father, who would have liked to have seen me identified as Rita Bell Garman. But frankly, in those days, it did not occur to me to insist on the inclusion of my family name.

I was more sensitized to the issue by 1988 when I read a news article about a woman lawyer who appeared before Judge Hubert Teitelbaum in the U.S. District Court for the Western District of Pennsylvania. The attorney introduced herself in court as Barbara Wolvovitz.

The judge, a graduate of the University of Pittsburgh law school, was aware that Ms. Wolvovitz was married to a member of the faculty there. He ordered her to use her husband's name as her surname and then threatened: "Do what I tell you or you're going to sleep in the county jail tonight."

When Wolvovitz's co-counsel, Jon Pushinsky, protested, the judge held him in contempt for "officious intermeddling" and sentenced him to 30 days in jail.

During the trial, Judge Teitelbaum barred Pushinsky from using the title "Ms." When referring to a witness, saying, "I ordinarily do not allow anyone to use that 'Ms.' in this courtroom."

Not surprisingly, Wolvovitz moved for a mistrial. Judge Teitelbaum responded, “What if I call you ‘sweetie’?” Perhaps realizing that he had crossed a line, he then said that he would just address her as “counselor,” and he vacated the contempt citation of her colleague.

While the jury was deliberating, Judge Teitelbaum apologized to Wolvovitz, saying, “I have always referred to married women by their married names. This is the way my generation was taught. I recognize your right to be addressed in any manner in which you see fit, and I apologize for my comments and the resulting situation.”

But it was too late for him to stem the tide of criticism. The story was picked up by the local papers, and then by the Associated Press. It made its way to the New York Times and then the A.B.A. Journal. He was called a bully and denounced for his “shockingly sexist treatment.”

Even at the time, and even as I was surprised and offended by his conduct, I could not help but feel a bit sorry for this man who was so set in his ways and so closed to the idea of accepting change.

When this story was in the press, I was the presiding judge in Vermilion County, and I resolved that I would not allow myself to become stuck in the past, but would strive to understand the changes that were taking place in society, in the law, and in the practice of law, so that I could be a better judge. I had no idea how rapid the pace of change would become.

As judges and practitioners, we must constantly adapt to a changing legal environment that exists in a changing society. In the past generation, we have seen dramatic changes in the legal landscape – the advent of no-fault divorce and prenuptial agreements, the implementation of nondiscrimination laws, the expansion of criminal activity to cybercrime, the challenge of integrating intellectual property law with the era of the internet, and too many more to enumerate.

In addition, we have seen – and will continue to see – emerging technologies that affect not only the practice of law, but society itself.

There was a time when the change from typewriters to computers was an amazing step forward, and when the availability of faxes and e-mail created entirely new means of delivery of notices and pleadings. Just as practitioners and courts have adapted to the era of e-filing of pleadings, changes has again accelerated.

In fact, I heard on the radio recently that a petitioner in a New York divorce action, whose estranged husband had been successfully avoiding personal service, was allowed to serve him by publication – via facebook!

Can you imagine what Judge Teitelbaum, who passed away in 1995, would think of such a thing! But, certainly, in 2015 service via facebook is more likely to be effective at giving actual notice to the individual than a classified ad in the back of a newspaper.

Who knows where this will lead in the future? What we do know is that the way we do things now will not remain that way forever.

Evolving technology affects the day-to-day operations of the law office and the court system, the actual process of litigation in the courtroom, and the substance of the law itself.

New lawyers coming out of law school have grown up with these technologies. The rest of us have to make an effort to keep up. I am consoled by the thought that as rapidly as things are changing, even our young colleagues will have to work to stay current!

The practice of law has been revolutionized by the availability of computers, word processing, photocopying, e-mail and the internet. But these are merely tools, like typewriters and telephones, which themselves were once great innovations.

The availability of massive amounts of legal information – cases, statutes, administrative rules and decisions, and journal articles – via computer assisted legal research has fundamentally transformed the way a lawyer goes about the work of framing a case, marshalling arguments, and presenting them to a court.

We are now in an era when everyone has access to computer assisted legal research, without the expense of entering into a contract with one of the major providers, who, as Harry Potter would say, “shall not be named.”

Recently, I went to the Illinois Courts website and clicked on the “Supreme Court opinions” link. I entered the search term “felony murder,” and 483 results appeared. Then I searched for Supreme Court cases mentioning the words “pension” and “Constitution,” and I found 8 cases.

The search capabilities on our court’s website are not as powerful as the commercial data services, but the information is freely available not only to lawyers, but to the general public. Such open access to legal information fundamentally alters the landscape of the practice of law.

Similarly, the use of technology in the courthouse and the courtroom has expanded. E-filing is widely available, reducing the expense of printing and delivering papers to opposing parties or filing them with the court. Dockets are computerized; video cameras are allowed in courtrooms; and proceedings are digitally recorded for later transcription.

One challenge that we face is that the use of technology in the courtroom is not limited to judges and lawyers. Parties, witnesses, and jurors bring devices into the courtroom and may use them in ways that are detrimental to the legal process.

A juror may decide to search the internet for information regarding a case, or to look up an expert witness, or to do his or her own “research” about an issue. Another juror may post on

social media about the evidence or deliberations. Judges across the country are dealing with the challenges presented by this kind of juror misbehavior.

On a lighter note, I remember reading a few years ago about a judge who got himself in hot water because he accepted a facebook friend request from a person whose name he did not recognize. As it turned out, she was a juror in a current case. That took some explaining!

In addition to careful monitoring of the use of social media in and by the court, the court must also respond appropriately when a party seeks to admit evidence obtained from social media, personal computers, smartphones, or other devices. Judges rely on practitioners to provide an adequate foundation for these new kinds of evidence.

And the law itself is changing. Concerns about individual privacy and government surveillance require us to consider the meaning of the Constitution and our laws in the era of such pervasive technology.

In addition, an entirely new body of criminal law is emerging under the label of cybercrime, which can include identity theft, hacking, theft of data and proprietary information, and stalking.

In the civil sphere, new technologies may create new types of legal claims, which may or may not fit comfortably into the existing framework of legal doctrines.

The law of libel and defamation must adapt to the era of anonymous internet commentary. Cyberbullying may lead to a claim of intentional infliction of emotional distress. The various privacy torts, such as intrusion upon seclusion, now encompass claims of electronic intrusions.

In this environment, the challenges that we all face are: using new technologies to improve the efficiency and economics of legal practice and the court system, maintaining ethical

standards of the profession in an era of rapid change, and innovating to better serve our clients and the public.

So it seems that I may have strayed far afield the 800-year-old promise of the Magna Carta, but I don't think so.

The Magna Carta as a source of actual legal doctrines carries little weight today. Many of its provisions have been rendered obsolete and others that have stood the test of time have been expanded. But the document remains a powerful symbol. As one historian has said about its content: "It meant more than it said."

The nobles who drafted the Magna Carta and the king who signed it were not concerned with the rights of ordinary people, but that does not lessen its significance as a symbol of liberty and of the right of the people to demand justice from those it empowers to govern.

When members of our profession, whether practitioners, judges, academics, or in other spheres, work to ensure that the law responds social and technological change, we too carry out the promise of the great charter.

Thank you for your kind attention.