The Annual

CHESTER BEDELL MEMORIAL LECTURE

"THE INDEPENDENCE OF THE AMERICAN LAWYER"

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The inaugural lecture

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of

Cravath, Swaine & Moore

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"THE INDEPENDENCE OF THE AMERICAN LAWYER"

MR. BOIES:

I'm very pleased to be here for a number of reasons. First of all, it gives me a chance to see one of my oldest and closest friends, Jim Miller, who was recently elected to the Board of Governors of The Florida Bar.

Second, I am very pleased to offer you the first in what I'm sure will be a long series of lectures on this theme. I did not know Chester Bedell. But I do have the sense that we are kindred spirits.

Benjamin Franklin's self-authored epitaph was simply this: Benjamin Franklin, printer. I don't know what Chester Bedell's epitaph was or whether it was self-authored, but I do have the sense that it could very well be: Chester Bedell, trial lawyer. That would be a fitting epitaph, I hope, for me — not soon, I hope, but eventually. And anyone who would feel comfortable with an epitaph like that is someone whom I am proud to honor here, as part of a lecture series in his name.

The third reason that I'm pleased to be here is that the subject matter, the independence of the American Bar, the independence of the American lawyer, is a subject that is very dear to my heart.

I believe, as Chester Bedell believed, that a foundation of our freedoms, and of the political and economic system that we enjoy, is the rule of law, which in turn is based on the independence of the American lawyer.

That independence, in a variety of ways, is under increasing attack and increasing erosion. In part that is because, as Chesterfield Smith has noted, we are asking the law to bear ever heavier burdens in ordering relationships within our society.

That tendency exists also because the law has become much more of a business and less of a profession over the last several decades. It has always been the case that the lawyer, meshing the various constituencies he must be responsible to — his law practice, his clients, potential clients, the judges before whom he appears — has had to manage a complex series of relationships and, in the interest of his independence, has had to ward off the pressures applied from each of those constituencies.

Those pressures have become increasingly intense. In part because law and litigation play a greater role now in our society than in decades past, in part because of the increasing complexity of that law, in part just because of the changes we have seen in the development of our society in the decades of this century, those pressures — those pressures on the independence of the American lawyer — have become increasingly intense, increasingly hard to resist.

It's always been the case, certainly since Abraham Lincoln's time, that lawyers have had to be concerned about developing the economic aspect of their practice as well as simply carrying out a profession. That has become particularly true, I think, as starting salaries for the young lawyers have increased, due in no small measure to the firm with which I'm associated in New York.

This concern for economics is also reflected in the attention given it at most every Bar convention I have attended in the last ten years. One of the most widely attended series of seminars in those conventions has been on law office economics: How to use word processing systems, how to use

computer systems, how to use paralegals, how to hire more associates and get more leverage — all things that from an economic standpoint are probably quite desirable, all things that make our work as lawyers much more efficient.

But those concerns, if uncontrolled, also tend to exert pressures on us trial lawyers to take cases we might not otherwise take, to try cases in ways we might not otherwise try them, to use resources we might not otherwise use. By building up those resources, we have built up our overhead, we have built up a particular mode of practice.

And without in any sense saying that we ought to go back to a period where we have simply one or two or three-lawyer firms, without saying in any sense that we ought to give up what I think are true enhancements of our efficiency in serving our clients, it's terribly important to our independence that we think about doing what we as lawyers, and peculiarly as trial lawyers, are really designed to do. That is to serve our clients' interests as officers of the Court.

We must be conscious that that is our obligation. It's not our obligation to be sure our overhead is taken care of. It's not our obligation to make sure all our paralegals are usefully employed. Our obligation is to serve our clients' interests as officers of the Court.

Another kind of pressure upon the independence of the American lawyer comes from your clients. Who hasn't had a client say, "Well, I think your bill is reasonable, but what I would like to know is how many hours did you work? Who else worked on it? What is the billing rate of each of those lawyers? And describe for me in detail what each of those tasks were."

The firm I'm associated with has a very simple rule, which is: we don't do that. That response costs us clients from time to time, but it does, we believe, preserve what we think is the fundamental reason we like practicing law, which is our

ability to determine in our own judgment what's the right thing to do for a client, what's the right amount of resource to apply to a client's matter, and at the end what is a reasonable fee.

We're not purely a service industry. We are not simply hired out on an hourly wage, although it sometimes seems that it is becoming increasingly difficult to do anything else. But we like to think of ourselves as professionals, people who are going to devote the amount of time necessary to try a particular case the right way — even, perhaps, if we're not going to be able to bill the full amount for it. And we're entitled, if we do a particularly good job, to charge something that is not merely based on the number of hours that went into it.

Of course client pressure is not just pressure for more details in billings. There is pressure on the part of the client more and more to assume the task of the trial lawyer, to make the trial lawyer really someone who executes, not somebody who performs the professional function of representation.

The growth of inside counsel has been, I think, a very healthy development. Inside counsel have taken a lot of the more tedious burdens off of us. Inside counsel — particularly the best — are also a needed spur to efficiency and a source of special knowledge; and, at the same time, the tendency of many clients, and through them the tendency of their inside counsel, is to want to control what the lawyer does, to want to supervise what the trial lawyer does, to want to influence the arguments that we make in court. Sometimes and more dangerously, that desire for client control arises from a different view of what is good for the client, not in a litigation interest but perhaps in a public relations interest or something of the sort.

It has become more difficult for clients to resist seeking that control, and more difficult for lawyers to resist ceding that control. Particularly with the legal profession becoming more

of a competitive industry, with lawyers constantly competing not only in terms of service but also price, it has become harder for clients to resist seizing some of that control that has traditionally been the province of the American lawyer, and peculiarly of the American trial lawyer. Whatever elements of control may be ceded by the people who draft contracts and do mergers and acquisitions, areas perhaps in which the business justification is paramount, when it has come to trying lawsuits, the emphasis has been historically on the judgment and on the independence of the American trial lawyer.

I think that is something that is worth preserving, not only for our own benefit, as would a labor union, but ultimately for the benefit of the client as well. Ultimately, I think the client is best served by hiring a capable and experienced trial lawyer who expresses his best judgment and is prepared to stand up for that judgment, even if it means — usually it does not — but even if it does mean losing that particular client, either for that matter or perhaps completely. Ultimately, I think a client is best served by a trial lawyer who will decline to bring an unmeritorious case, or make an unmeritorious argument, even if that is not what the client believes at the time.

A third area where I think we see, have always seen, but perhaps increasingly see, pressures on the independence of the trial bar, is from future clients or potential clients. Increasingly there is pressure in many areas of the law not to take positions or cases that are going to be viewed as against the interests of the group of clients that you want to represent.

So you begin to find antitrust lawyers who represent plaintiffs but not defendents, or defendents and not plaintiffs. You begin to find libel lawyers who represent plaintiffs or represent defendants but don't represent both of them. One of the things that caused a great deal of stir when I took on the Westmoreland case was that I was asked by a reporter, "Would you have taken on Westmoreland's side of the case if

he had come to you first?'' I said, ''Well, I'm not sure about that, but I certainly would take on an appropriate libel case on behalf of a plaintiff if I were convinced that that was an appropriate case to bring.''

That caused a substantial amount of consternation at the time with certain First Amendment lawyers who were inclined to view all libel cases as infringing First Amendment freedoms, infringements which they had an institutional interest in beating back.

Whether it's in antitrust area or in labor law — and labor law has probably been more divided like this for longer than either antitrust or libel law — or even in the securities area, or in corporate takeovers where now law firms are beginning to specialize either in the defense or the takeover side of the battle, you find lawyers restricting their practice, saying, ''I'm only going to represent this type of plaintiff or this type of defendant because I don't want to risk offending the potential clients that I want to appeal to.''

I think that is a very dangerous tendency, I think that is very dangerous to our independence. I think that is very dangerous to the kind of legal system we want to have, where good representation is available for meritorious cases and people don't have to go through the filter of a lawyer thinking, ''Is this kind of case going to be acceptable to my clients or my future clients?''

I tend to think most lawyers overestimate how seriously their clients are going to be concerned about that. I think you'll find some grousing. I think you'll find perhaps a few clients who want to go elsewhere. You may take some heat from some of your clients if you find yourself representing an antitrust plaintiff or a libel plaintiff when your typical work is representing defendants.

But what most clients ultimately want, particularly in the more important litigation confronting them, is the best lawyer

that they can find, the most experienced, the most capable. And if you provide them with that service, provide them with that expertise, and provide them with that judgment, ultimately they are going to be accepting of those other kinds of cases, as long as they are meritorious, that you're associated with.

A fourth kind of pressure on the independence of the American lawyer comes from a source that we ought to and usually can think of not as a source of adversity but as a source of protection, and that is the Courts.

Every lawyer has an obligation, trial lawyers peculiarly so, as officers of the Court to attempt to fulfill our obligations within the constraints that are accepted and within the constraints that the Courts properly expect from us.

But I think we have seen in the Courts, over the last decades, some pressure to erode the independence of the bar. This pressure is perhaps in part a consequence of judges becoming more activist, trying more to redress what they may think is an imbalance of ability between two lawyers in a particular case, in part a result of a judicial desire to impose ever stricter standards of conduct on the trial lawyer, in part an attempt to substitute for the lawyer's judgment a judicial determination of how vigorous a defense a client is entitled to. We have seen — thankfully, not universally, nor even in the majority of cases, but increasingly and I think disturbingly — we have seen pressure from the judiciary to impress additional control on the lawyer's independent judgment, attempts to restrict what the lawyer does and can do for his client.

In the fifth and final area I want to touch on, the source of pressure comes from the other elements of government, be it Congress or the executive branch, also attempting to constrain the ability of lawyers to represent their clients.

Whether that pressure is applied by government threats in RICO cases to seize the lawyer's fee if it is found to have been

paid from ill-gotten gains; whether it is an attempt to eliminate as a practical matter the attorney-client and work product privileges; or whether it is an attempt in Foreign Corrupt Practices Act cases to make the lawyer an unwilling, sometimes unwitting, informer on his client — all of those tendencies, and the social and sometimes political purposes that motivate them, are very serious threats to the independence of the American lawyer.

And in the long run, those threats also endanger the broader social and legal objectives that we as a society have and ought to have.

I think that all of these kinds of pressures on the American lawyer are pressures that we can resist. They are pressures that we ought to resist. But they are part and parcel of the increasing complexity of the legal work that we do, of the legal economics that we are confronted with, and of the legal standards that society increasingly depends on to order relationships between companies and between individuals.

We were talking at the head table and exchanging Professor Dershowitz stories. Professor Dershowitz is a graduate of the Yale Law School, now a teacher at Harvard Law School. In his syndicated column he recently described Judge Scalia, recently nominated to the Supreme Court, and soon-to-be Chief Justice Rehnquist, as two of the best nineteenth century minds in the United States.

On another occasion, Professor Dershowitz once described my law firm as the best nineteenth century law firm in the United States. In the context we are talking today I could take some pride in that description. Although I should note that the reasons for his comment were probably different from the matters I'm addressing here and may have had more to do with what he thought was inadequate representation of women and minorities among the partners of Cravath.

But there is a sense in which I think the old-fashioned, if you will, virtues of the American trial lawyer still serve — the

virtues of independence, aggressiveness in pursuit of a client's interests, and fierceness in reserving to the lawyer's judgment the important questions of what is a meritorious claim, what length he should go to prepare his client, the extent the lawyer should go in defending his client's interests.

These decisions the lawyer himself should make; not the client, not the Court, not the law office economics manager, not the government prosecutor, but the lawyer, deciding independently what advances his client's interests consistent with the obligation that he has as an officer of the Court.

I think that is the bedrock of our legal system. I think that is what ultimately assures us, in the long run, of the rule of law. This question of independence is the kind of battle we're going to face increasingly over the next years and decades, because the trends that have brought us to this point are not going to be reversed.

You're not going to see the law go back to less of a commercial enterprise. Much as we might wish it to be so, I don't think you're going to see less emphasis on the law as the ultimate orderer of personal and professional and business relationships in this country.

I don't think you're going to see a reduction in the kinds of pressures that lead courts and the Congress and prosecutors to try, in particular cases, to work their objectives and work their will through trial lawyers.

So, I don't think the tendencies that have brought us into the kind of conflict that exists today are going to be reduced.

If we're going to preserve the independence of the American trial lawyer, we're going to have to do it in the face of continuing pressures that go exactly the other way. I'm sure I've left you no doubt where I think we ought to come down. And while I did not know him, I'm also sure Chester Bedell would have us come down the same way.

Thank you.