The Second Annual

CHESTER BEDELL MEMORIAL LECTURE

"THE INDEPENDENCE OF THE AMERICAN LAWYER"

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The Florida Bar
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HON. PARKER LEE McDONALD

Chief Justice
Supreme Court of Florida

"THE INDEPENDENCE OF THE AMERICAN LAWYER"

THE CHIEF JUSTICE:

As a judge, it is particularly satisfying to sit down and break bread with trial lawyers. You, with whom we work on a daily basis — you upon whom the people rely so much to champion their causes, present their problems, and resolve their disputes. The spotlight shines on the trial lawyers. It is the drama of the courtroom that draws the attention of the public. It is the performance of the lawyers in the courtroom that is the major criterion upon which the public judges lawyers and the legal system. It is there where the emotions range from high to low. The ABC Sportsworld starts its programs with the description of the thrill of victory — the agony of defeat. I suspect that all of you have felt the emotions of each. One of the differences between lawyering and judging is that judges are deprived of the great joys of winning and escape the despair of losing.

And do you know of any time in life that seems longer than the time between the announcement of "the jury has a verdict" and its publication? When I was a trial judge I was often tempted to mischievously prolong the proceedings when I inspected the verdict before its publication — a frown, a look of concern, surprise, a big smile, a snicker, a condescending look. Most of the time I resisted that temptation. Having tried a few cases myself many years ago, I was familiar with the

emotions, the anxiety and sometimes agony that lawyers and litigants experience at that moment.

I originally accepted the invitation to speak today with the idea of talking about bench-bar relations. I was then asked to include some remarks on Chester Bedell's favorite topic, the independence of lawyers. These topics are not mutually exclusive.

I endorse the concept that for lawyers generally, and for trial lawyers particularly, to effectively fulfill their role in society, it is of paramount importance that lawyers be independent from external pressures. In proceeding with a cause, part of your task is to formulate a strategy, to fashion a blueprint, to plan and develop a theory of the cause entrusted you. Having done so, you proceed to build on that plan, and to take the steps necessary for a successful conclusion. You are to be creative, innovative, fully utilizing your mind, employing the experiences of yesterday, forging a plan for today that could have an effect on tomorrow. Lawyers should be fearlessly protective of any encroachment or usurpation of the use of their own independent judgment; lawyers should zealously avoid distractions which are contrary to the best interests of their clients or the cause which they pursue.

Simultaneous to enjoying the privilege of independence in the undertaking, lawyers must employ a great deal of internal control, of internal discipline. The more one is internally disciplined, performing competently and professionally, the less likely external forces will be employed. Conversely, when under the guise of independence a lawyer employs excesses, thwarts traditional rules of fair play, of necessity external forces come into play. Let me employ an allegory: ''American motorists have the independence of driving where and when they want so long as they responsibly use that independence.'' Yet if the motorist is not disciplined to obey the traffic regulation, that person should not be startled by the

sound of a siren. And so it is with lawyers. For awhile one may get away with infractions, but sooner or later an offending lawyer will be tripped up along the way.

Lawyers have a great need for independence in the selection of their causes and their clients. Yet sometimes some fear taking worthy cases because it is socially unpopular. A fear of criticism or fear that such an undertaking may curtail future business or future clients, the safe refuge of abstinence supplants fearless advocacy. You have to use your judgment whether these are appropriate considerations.

We are engaged at the moment in some soul searching debate as to what extent if any, and if some, in what manner the newly adopted right of open advertising should be regulated. Should the traditional concept of independence of lawyers extend to unfettered rights to pursue clients in any way that lawyers deem appropriate? A brief filed by the Federal Trade Commission before us so urges. Professionalism calls for independence, but true professionals impose upon themselves disciplined accountability. Many say that with the commercialization of the legal profession we are slipping from a profession to a trade. Regulation of trade by *outsiders* is a frequent occurrence. At the moment, at least, we, the legal profession, do have the independence of regulating ourselves. Will we lose this? Among the matters presented to us this week was a proposal which would require certain lawyers who advertise to furnish information about themselves which is not required of other lawyers. Should we adopt this? If so, do we unreasonably trespass on the independence of lawyers? Is there a difference in regulating a lawyer on how he gets a client and having independence of the lawyer in how he performs for that client once he gets him?

''*Judge*,'' you say, ''you the court system have trespassed on my independence in the handling of litigation by imposing time standards on us. It is my decision when to bring a case to

trial. You should not inject your views on when I should bring a case to trial." "I am sorry," the judge responds, "but the judicial system consists of many cases. The public cannot understand long delays. Indeed, there should not be any, but without effective case management there will be. The court calendar must be supervised to assure efficient use of judicial manpower. The whole system is tarnished by unreasonable delays and convenient continuances. Yes, we recognize that we are trespassing to a limited extent on your independence, but under the circumstances it is called for and necessary to assure access to the court and speedy dispositions of the controversies."

I am sympathetic and in accord with your views that judges should refrain from interfering with your orderly presentation of a case. The decision of what to present and how you present it is the trial lawyer's responsibility. We on the trial bench should be careful in trespassing into the areas of your responsibility. Few judges do so when it is evident that a lawyer, using his independent judgment, has prepared his case, is striving to properly serve his client, is familiar with basic court procedures and etiquette, and is following the rules. But when a judge ascertains that a lawyer is fudging and cheating by comments or improper innuendoes, when the rules are being thwarted or bent, that lawyer should not be surprised to see a judge riding his back. An unfortunate by-product of this is that this back riding frequently carries on to the next trial even though trial counsel's conduct is entirely appropriate in the new case. By your abuse, you have lost your credibility.

Lawyers enjoy, and should rightly do so, a great deal of independence in the clients and causes he takes. But, I should remind you, that in the oath you took such a cause should not be rejected for reasons of lucre or malice. At the moment, at least, you are not required to perform pro bono work. You have the independence to do so or not. I believe that most of you do. You have the independence to make a decision on

this, but even that is not completely free. Doesn't your conscience bother you just a little bit to see legal needs unattended to because the one in need is unable to pay? Don't you feel that you are missing out on a feeling of fulfillment and satisfaction when you fail to do your part?

You have the right to make an independent judgment on whether or not to join the IOTA program. This program, instituted by my former colleague, Arthur England, and administered by the Florida Bar Foundation has so much to offer at so little a price. You don't have to join and you do have to use your independent judgment in your particular case whether to or not, but in most instances it is the responsible action to take.

Let us speak for a moment on fees. Having not charged a fee for over 26 years I am somewhat handicapped in a meaningful discussion of this. But I do see a lot of bar dispute cases caused by fee disagreements. Certainly a great deal of independence should be afforded a lawyer in his fee arrangements with his clients. Partly because of public outcry, and fueled by proposed legislation, we recently imposed caps on contingent fees. This came about only because of claims of abuse, claims of excessiveness. For the same reason, we requested the Bar to submit to us proposed rules on referral fees — another perceived abused process which has been exacerbated to some extent by some lawyers advertising for cases which they have no intention of personally handling. The regulation of advertising may well harm many legitimate and needed services. Our decision must be predicated on a determination of whether the independence of lawyers in setting fees, including referrals, has been abused, and our involvement should be no greater than that necessary to correct the abuse. Once again the question is asked, is it time, or appropriate, to call upon external forces because internal discipline has not been employed.

When we created an integrated bar, it was necessary to trespass to some extent on the individual independence of the lawyer. We at least regulate ourselves. Nevertheless, we must be alert to not over regulate. With modest self control by lawyers, the way we employ our thoughts, our skills, our talents and, yes, our ethics, we need not do so.

Beauty is in the eyes of the beholder, it has been said. To me there is no greater beauty than seeing a skilled professional lawyer perform in court, both at trial and on appeal. I have watched many a mismatch and some rather ugly encounters, but when intellectuals employing their skills, their finesse, and fully employing their own *independent* judgment present the controversy, it is indeed an event of beauty.

The courts and the trial bar have a common purpose — to maintain a legal system where the rights of litigants can be resolved. There is no room for confrontation between lawyer and judge. The independence of neither extends to that type action. In its stead, the rule should be cooperation to assure that the issues are properly decided, and thus rationally decided. To accomplish this, internal discipline by both lawyer and judge is required. If we pursue our roles and fulfill our responsibilities as we should, then the independence of the lawyer and the independence of the judiciary will persevere. I suspect that I can count on you.

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