

The Twelfth Annual  
Chester Bedell Memorial Lecture

"THE INDEPENDENCE OF THE AMERICAN LAWYER"

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*By*

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*in cooperation with*

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## "THE INDEPENDENCE OF THE AMERICAN LAWYER"

### WARREN B. LIGHTFOOT

Chester Bedell epitomized the independent American lawyer. It is a great monument to him that this bar on an annual basis stops to reflect on what our independence means, for it is the very essence of the American lawyer. Any diminution in that aspect of our identity would have alarming implications for our system of jurisprudence and for the public. For the past ten years, commentators have observed repeatedly that our independence is in decline. In 1988 Stanford Law Professor Robert Gordon published a thoughtful article in which he describes the influences tending to diminish our professional independence. He says large firm practice is so intense that it saps the energy of its lawyers, making them slaves to the billable hour and leaving no time or motivation for outside commitments. Moreover, lawyers for big corporations are overly subservient and exert minimal control over their clients. Conversely, he argues, lawyers for tort plaintiffs, divorcing spouses and small businesses have much more autonomy but those lawyers tend to make the important decisions themselves without a fully informed client, and their independence shades into self-interest.

In 1993 Tony Kronman, Dean of the Yale Law School published his book, "The Lost Lawyer", echoing many of Professor Gordon's themes and lamenting the decline of our independence. Dean Kronman reminds us that in the final analysis all we really have to offer our clients is deliberative wisdom and that "deliberation requires not only sympathetic engagement but detachment too." Dean Kronman says that because of the increase in billable hours and the demands of modern practice, we become narrower people (our horizons shrink), and we lose the breadth of experience required for independent judgment. Simultaneously with this shrinkage, we become more and more dependent on a few important clients or referrers of business, Kronman argues, and our professional detachment is diminished. Finally, he says the more we depend on others, the greater the pressure becomes to conform our views to theirs, with a lessening of our independence.

I believe these academicians are wrong; I believe that as a whole, our colleagues are more independent than at any time in this century, and I want to tell you why I believe that. Let's look for a moment at a historical perspective of our independence. In the early years of this republic, the practice of law did not consume so much of the lawyer's time and a great many practitioners were involved in public service in addition to their primary vocation. In 1835 Alexis de Tocqueville observed in Democracy in

America that we alone stood between the wealthy and the American people, moderating the influence of each:

“In America there are no nobles or literary men, and the people are apt to distrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society.

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If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar.”

Further he noted that when the American people are intoxicated by the impetuosity of their ideas, the lawyers are a moderating influence without whom the republic could not survive. So we begin our analysis with the clear image of an independent bar. If we fast forward seventy-five years we see that times have changed. Railroads have become powerful clients and have led the way in placing lawyers on retainers, to the point that Louis Brandeis in his famous 1914 speech said:

“It is true that at the present time the lawyer does not hold as high a position with the people as he held seventy-five or even fifty years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people.”

In my view that was the low point of our independence. But what we need to do now is fast forward another seventy-five years to the end of the 1980's, and we can see the vast changes that occurred on the legal landscape during that period. I want to talk about those changes and what they have meant to three great segments of our bar: criminal lawyers, corporate defense lawyers, and plaintiffs' lawyers.

We came through the fifties when a few lawyers took on McCarthyism; when the courage and skill of men like Joseph Welch reminded us of what it meant to take on popular demagoguery. Then we moved into the tumultuous sixties and seventies with civil disobedience and civil rights testing the constitution and testing the mettle of our colleagues in daily frontline confrontations. Those days required not only great moral strength but physical courage, and those of our number who practice criminal law today look back at the sixties and seventies for continuing inspiration.

Indeed all of us learn every day from our brothers and sisters at the criminal bar what true independence means: that public opprobrium and even the threat of economic sanctions cannot affect our professional decisions. This segment of our bar receives too little recognition, in my opinion, for the countless times they deal with undeserved vilification by the press and public, nonetheless staying the course.

When we look about us to see who really upholds bedrock constitutional values on a regular basis, it is our colleagues of the criminal bar. Consider the situation we would have if not for an independent criminal bar. Alexander Solzhenitsyn describes such a wasteland in Volume One of his Gulag Archipelago. With great distaste he describes trial after trial in which the defense lawyers are recruited to the prosecution's viewpoint, saying at one point: “A Soviet defense lawyer is first of all a Soviet citizen” and “like all workers he too is outraged at the [political] crimes of the defendants.” Our criminal law practitioners are among the most self-reliant because oftentimes the monetary reward fails to compensate for the disrepute they endure from some segments of the public. Observing our colleagues at the criminal bar and the daily recriminations they face reminds us of Boswell's question to Dr. Johnson: “What is the greatest of virtues?” and Dr. Johnson's reply, “Courage, sir, for without courage, there can be no other virtues.” Similarly, the lawyers who practice at the domestic relations bar probably encounter more overt hostility than any among our number, and the independence of their judgment in those matters often preserves the very sanity of their clients.

The Alabama State Bar recently dedicated a memorial in Monroeville, Alabama to the ideals personified by Atticus Finch in To Kill a Mockingbird, and afterwards we received a letter from Harper Lee, the author. In that letter Ms. Lee said that our profession has always had “some real-life heroes—lawyers of quiet courage and uncompromising integrity who did right when right was an unpopular and sometimes dangerous thing to do.” Ms. Lee's words describe a number of our colleagues at both the criminal and domestic relations bars.

What about the corporate lawyer; those of us who are regularly advocates for large businesses in today's world? Have we become sycophants as Brandeis noted near the turn of the century? I submit to you that we have not. In today's climate more and more cases involve extraordinarily high stakes and corporations must defer to the judgment of outside trial lawyers, in matters of discovery, in tactics, in evaluations, in decisions about when to settle and when to fight. Moreover, the transitory nature of today's

practice gives us great leverage with our corporate clients. We know they distribute their work widely on occasion; we know that budgetary constraints may make the work unattractive to us next year or the next. Because a particular large client may well not be ours tomorrow, we have much more latitude in telling them exactly what they must do and what we are willing to do.

Where defense counsel interface with large corporate defendants, our colleagues bring important attributes. First of all, we offer our good names and our integrity, and our clients need those more than ever before in today's punitive damages and sanctioning atmosphere. Our clients know that trial judges respect us and listen to us and trust us; that appellate judges credit what we say the law means; and that our opponents can bank what we tell them. Those elements are priceless to a beleaguered corporate defendant; they are lifeboats available when the ship is sinking. My friend Judge Bill Hoeveler, who stands for the very best of our aspirations, likes to quote Robert Louis Stevenson's observation that "personal honor is the distinguishing badge of the legal profession." Ultimately the corporate defendant is paying for just that - our good name and our honor — and we exact more than monetary payment in return. We insist that corporate behavior be modified not only in the current instance but for other occasions in the future.

At no time in our country's history have corporate defense lawyers held such sway in boardrooms. They listen to us, not because they want to or they like us more than they used to, but because we alone hold a map for survival in the minefield of today's high stakes litigation. And we in turn can insist that clients join us in heeding Dean Roscoe Pound's admonition: that in addition to asking whether certain conduct is lawful, we should also ask whether it is the right thing to do.

All of us defense lawyers can search in our years of practice and can find a few times when we have truly made a difference, with a company saved, or jobs created or conditions improved. Think about it, you defense lawyers; you are always more liberal in your thinking than your clients, and that very contrast places today's corporate lawyer, in Tocqueville's words, squarely between the wealthy and the people. It is my belief that we have a great influence on corporate America; that our rectitude time and again sets the standard for our corporate clients in their approaches to litigation, and indeed, in fundamental questions of right and wrong.

The last great division of our bar comprises those who regularly represent

the little people, the powerless; for ease of reference, the plaintiffs' bar. As I said, these lawyers are the most autonomous; they have no board of directors looking over their shoulder. They have the awesome responsibility of advising the truly unsophisticated clients, and necessarily must play major roles in every decision. Literally, because their clients' livelihoods sometimes depend on them, plaintiffs lawyers every day make the lonely, stress-filled decisions about what to accept or not accept in settlement; about which cases to undertake; about how much money to spend on a risky case. The recent book written by Jonathan Harr called a civil action captures the awesome responsibility assumed by plaintiffs lawyers; I recommend it to you. More than any other segment of the bar, these practitioners exercise their independence on a daily, if not hourly, basis.

And look at the changes affected by our brothers and sisters at the plaintiffs' bar. Because of them and their independent decisions, women and minorities are protected in the workplace; because of them the disabled are accommodated, civil liberties are preserved; because of them, American products are the safest in the world; because of our colleagues who represent plaintiffs our environment is cleaner than ever before; our workplaces and recreation areas are the safest in the world. Our members of the plaintiffs' bar exert an enormous influence and have literally transformed the face of this country. The public good is unquestionably served by the efforts of this proud segment of our bar.

These positive aspects of our practice are not, however, part of the public's perception of us. But that is because we live in an age of images, particularly where the press emphasizes one sentence, one sound bite, frequently out of context. Everybody worries nowadays about images; corporations and individuals worry about their images. The press and the public complain about our images. And my answer to those critics is, "we're going to be the best lawyers we can be, and our image will take care of itself." We're not in a popularity contest; we never have been. We're supposed to be tough, resourceful advocates for our clients and within the bounds of propriety, we're trying to prevail. To the press and public, I say, don't come patronizing us and telling us we need to work on our image. That's not a concern that governs what we do as lawyers.

If Governor Leroy Collins had worried about his image, he would never have gone to Selma; he would never have taken the stands he took in the sixties. If Alabama lawyer Fred Gray had worried about his image, Rosa Parks would have languished in jail and the civil rights movement might have foundered. Governor Collins and Fred Gray have become legends, and

I am proud to be a member of their profession. We don't make the laws and we don't interpret them, but we are called on to use them for the benefit of our clients and that is precisely what we do, as hard as we can.

And just as unrelentingly, we police ourselves and discipline ourselves to a degree far beyond any other profession. Architects, engineers, physicians, preachers, bankers and journalists do not even come close. The American lawyer is scrutinized more closely than any profession on earth, and we welcome it; it is part of the price of independence. Such scrutiny serves the public, and it makes us better lawyers. None of us is perfect but all of us require certain standards of one another.

Our critics point out those among us who don't measure up, and not only do they tar us with the same brush, they go further and say our profession is responsible for many of society's ills. But think about it; we live in a time of shifting mores, of increasing violence, of family abuse. Sometimes the very fabric of society seems to be tearing: a confrontational, in-your-face mentality pervades; we see incivility among motorists, professional athletes, government employees, salespersons; we see slipshod work, persons without pride in their production, outright dishonesty. Our profession is a part of that fabric and is not immune from this generalized decline in values. But more than most, we fight it; we continue to hold our colleagues accountable, we insist on our standards and we continue to strive for civility among our members. More than most, we are mindful of our moral and ethical obligations; more than most, we remember that everything we do and say reflects not only on us personally but also on our profession.

Look at what we do for society as lawyers; we manage disputes, we reduce the friction generated everyday in the workplace and the marketplace because we provide an outlet and frequently a cure. Other societies have fewer lawyers, but the governments of those countries are far more intrusive than ours; it is precisely the presence of our profession that permits this country to be so unregulated. So although the press and the public like to say that lawyers are a necessary evil, the truth is that most of this country's bedrock values are in place because of lawyers, and many of this country's most positive changes occurred because of lawyers.

So we labor on, making small differences often and occasionally a significant contribution. Justice Oliver Wendell Holmes was a realist about the practice of law. He said this about us: "We cannot live our dreams. We are lucky enough if we can give a sample of our best and if in our hearts we can feel that it has been nobly done." All of us occasionally achieve that

goal in our practice, and those few times make our other travails worthwhile.

Finally, our independence enures to the public's benefit in one final way, and this one is outside the practice of law. Because our time is our own and we have to answer to no one on a regular basis, we give back to our communities to a degree unmatched by any other profession. There is a passage in the Book of Luke that cuts across all creeds. It says that "to whom much is given, much is required." We have been given much, in terms of a capacity for analysis, an ability to solve problems, the training to organize and prioritize, and those same qualities lend themselves to serving our communities. Just look at what our colleagues do outside the profession. In addition to the demands of practicing law, our lawyers bear children and raise them; they coach little league; they serve on church and synagogue boards; they preach a sermon occasionally; they quite literally put God before Mammon; they serve on library boards, school boards, city councils, United Way; they provide leadership to countless educational and charitable organizations. A year ago the largest peacetime gathering in world history convened in Atlanta, conceived by Billy Payne, a lawyer, and implemented largely by his committee of nine, of which five were lawyers and one was the spouse of a lawyer. In Salt Lake City the Winter Olympics of 2002 will be led by Tom Welch, a lawyer and the spearhead for the entire organized effort. I say to the press and public: don't come patronizing us and saying that lawyers are just in it for the money; our profession gives more back to society than any other in terms of volunteer time.

So it is true: we cannot live our dreams, but we have been given a unique opportunity to serve our clients and at the same time the public. And on rare occasions in all of our lives we can look back and know we have made a difference in someone's life. It is my belief that we make a difference many more times than we are aware of. We are the guardians of our country's mores in a very real sense; we are watched, we are emulated, and what we do directly affects the rest of the nation and its quality of life in a special way. Other societies pay highest tribute to their monarchs or to their deceased military or political leaders. In this country, by contrast, we exalt a simple document displayed at the National Archives. That document was written by lawyers and every day is being preserved by lawyers. I, for one, am proud to be among that number, and I am proud to join you in celebrating the extraordinary legacy of Chester Bedell.

### THE BEDELL LECTURERS

David Boies	1986
Hon. Parker L. McDonald	1987
Robert W. Meserve	1988
Benjamin R. Civiletti	1989
Brendan V. Sullivan	1990
Julius LeVonne Chambers	1991
Roxanne B. Conlin	1992
Joe Stamper	1993
William Steele Sessions	1994
Lord William of Mostyn QC	1995
Ambassador Sol M. Linowitz	1996

The Chester Bedell Memorial Lecture on "The Independence of the American Lawyer" is an annual event at the Trial Lawyers' Section luncheon meeting at the Convention of The Florida Bar. The Bedell Foundation, which receives tax-deductible contributions for support of the Lecture, was created by the Jacksonville Bar Association in 1981, to help preserve the independent bar and to extend that sense of history, duty and destiny that Bedell exemplified in more than 50 years of practice in the courtrooms of Florida.