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Michael E. Tigar

I am, as you can all see, in the same room with Chesterfield Smith. That is almost all anybody needs to say about the independence of the American lawyer. I hardly need to explain the idea of independence in a state that produced Chesterfield, Tobias Simon, Sandy d'Alemberte and Chester Bedell. But you have invited me here and we have broken bread, and you did ask that I talk about this subject.

As you reflect on the word "independence," each of its many meanings speaks to us as lawyers. There is an old saying, "independent as a hog on ice." That metaphor does not mean much in Florida, where you don't have much ice, but it was vivid for my grandfather. Independent as a leaf on the water would express the same thought, that of being borne along by forces that one does not control. That is not a meaning of independence that resonates for lawyers.

There is a sense of independence as solitude, as the transcendental philosophers told us. Henry David Thoreau said:

> *To be a philosopher is not merely to have subtle thoughts, nor even to found a school, but so to love wisdom as to live accordingly to its dictates, a life of simplicity, independence, magnanimity and trust.*

That is a sense of independence that we would all do well to cultivate. We get so buried in the work that we're doing that we forget sometimes to take that walk around the block or that walk in the woods to clear our heads and put our ideas, and our lives, in perspective. I see so many lawyers who feel chained to their professions and their work. They have lost this meaning of independence.

Independence can also mean — and maybe this is more central to what lawyers are about — freedom in a personal relationship. This sense of independence may be contrasted, if you will excuse the psycho-babble, with co-dependence or undue dependence. The 19th century feminist Lucretia Mott said this:

> *Let woman then go on, not asking favors, but claiming as a right the removal of all hindrances to her elevation in the scale of being. Let her receive encouragement for the proper cultivation of all her powers, so that she may enter profitably into the active business of life ....Then in the*

marriage union, the independence of the husband and wife will be equal, their dependence mutual, and their obligations reciprocal.

This sense of independence should speak to us as lawyers in many senses. The most obvious, and the way that Ms. Mott meant it, is that we are each independent actors, responsible for our own actions and entitled to respect based on our work. Artificial barriers to our advancement are illegitimate, whether those barriers are of age, gender, color or any other criterion than our fidelity to our profession.

There is a second, deeper meaning implicit in Ms. Mott's words. Let us consider our relationship with our clients from the point of view of independence. Of course we *depend* on our clients. That is how we make a living. Our clients *depend* on us. That is how they solve their problems. And yet, one of the things for which they *depend* on us is our *independence.* To illustrate this simple proposition, suppose your sister-in-law calls you up. She says,

"How are you doing?"
"I'm doing fine, Sylvia. How are you?"
She says, "You know your brother, Howard?"
"Yes."
"I just killed him."
And you say, "The no-good putz probably deserved it."
She says, "Will you represent me?"

No matter what you think about Howard or Sylvia, you're not going to do it. Why not? Because one of the things that Sylvia is entitled to is the independent judgment of somebody who's not so tied up in the situation that they can't see it clearly. That independent judgment is one of the things that distinguished our patron Chester Bedell. I was talking a moment ago to his grandson, and he told me of watching the old man argue a case and saying of the client, "Oh, that lady's guilty." The point is that whether or not she did the acts ascribed to her, she was entitled to and was receiving the independent judgment and action of her lawyer, this giant of the bar, who brought his intellect and advocacy to her defense.

I see a lot of gray hairs in this room, in addition to my own. How many of you have fired a client? Good! There it is. I want the record to reflect that most of the hands in the room went up. Isn't it a delightful

experience? There's nothing about the independence of the Bar that is more delightful than firing a client. I can remember sitting in a room with a client who, as a matter of fact, had retained me in the past, had paid me in the past, that I'd looked forward to having a relationship with that would put another child through graduate school and the client had been sued. We met with the chief executive officer and the general counsel. "Look. I have got an extension of time for the answer and with the answer I'm going to file a motion for summary judgment."

The CEO said, "That's not the way we do things. We file 500 interrogatories. We take the deposition of everybody in sight. We file paper after paper. We go back and back and back and build the file and build the file and then after three or four years, we may seek summary judgment. Then we get them."

I replied that this was not the way I did things. I thought it best for the client to get this contingent liability off the books, and to do so without chewing up the shareholders' money and the court's time.

It must be said, however, that independence has a dangerous side. It is inherent in our system of legal rules, and perhaps lawyers learn this in law school. We learn to take each part of an intellectual proposition and break it down into its sentences, words and phrases, to see each concept independent of the other concept. There are judges who use this technique in deciding cases. This sort of independence existed long before the term *deconstruction* was even invented, although that term certainly applies to it.

It is, it seems to me, at war with the view of society that lawyers ought to have. Take the recent United States Supreme Court case of *Texas v. Cobb,* which was decided 5 to 4. Cobb was in jail. He had a lawyer for the crime for which he was arrested. Five members of the Supreme Court say that he's not entitled to counsel for a related offense The "right to counsel," considered in isolation from the reality of Cobb's situation, does not attach to him. Therefore, the police are not subject to any of the constraints on interrogating a represented person. One can reach such a result only by breaking down the right to counsel into so many different pieces that the right loses meaning. The right to counsel for some poor person dragged in off the street and put in the

police station is designed to redress the imbalance between that suspect and the organized apparatus of the police and prosecutors.

Whether or not you agree with this analysis as applied to the *Cobb* case, you could, from your own experience, come up with examples of how breaking an issue down into analytical pieces can eliminate the broad-gauge moral and ethical questions that lurk in it.

Usually, however, when we speak of independence of the Bar we are talking about our proudest boast, which is independence from the state. We lawyers are independent of the authority of officialdom. We have the right, therefore, to expect that our brothers and sisters at the Bar will not revile us based on the cases we choose to take. We have the right to expect that they will defend our choices of the cases we take.

This independence, and the Bar's obligation to support it does not, however, excuse us as individuals from making some independent determination as to what we ought to do. But so long as we are defending a client within the law's bounds, we are exercising this historic independence. There is an eloquent statement of this principle, perhaps the most eloquent in all of legal history and I'll tax your patience by reading it to you. Lord Brougham was an English lawyer in the early part of the 19th century He became chief Counsel for Queen Caroline, the wife of King William IV, when the King prosecuted her for adultery in the House of Lords, by filing a bill of pains and penalties.

A somewhat rebuked Brougham was reminded, as his defense of the Queen gathered momentum, that he was endangering the crown itself, putting in issue the very idea of King William's continued service as king. Brougham was urged to throttle his defense back just a little bit. He said:

> *I once again remind your lordships, though there are some who do not need reminding, that an advocate in the discharge of duty knows but one person in all the world, and that person is his client. To save that client by all means, and at all hazards and costs to all others, and among all others; to himself, is his first and only duty. And in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Nay, separating the duties of a patriot from that of an advocate, he must go on, reckless of consequences, though it should be his unhappy fate to involve his country in confusion.*

He was matched in his eloquence, I think, only by Lord Erskine, who by that time had become so old that he was in the House of Lords. He was among the "peers," who were the jury in the case. Erskine said in his speech to the House of Lords,

> *"Proceedings of this kind, my lords, have never been tolerated save in the worst of times and have afterwards not only been reversed but scandalized."*

These remarks summarize our independence and our obligation to the client.

Now, however, I am going to address another aspect of this issue of independence and loyalty. I take this occasion to disagree with one of your prior speakers, Stephen Jones. I have done so in print. Certainly his sacrifice of his practice in representing Timothy McVeigh deserves our appreciation. Throughout the preparation for Terry Nichols' trial, I had a very different view of how one ought to deal with the media than he did. I thought, indeed, that putting your theory of the case out every day for the media could only serve to harm your client because jurors would inevitably be disappointed at the difference between your media description of what the evidence was going to be and what you were actually going to be able to present to them.

In addition, as I said over and over on the way into the court, "I'm here to try a case to 12 citizens of Denver and I think they'll like it better if they hear it first."

This disagreement over media relations is only the beginning, however. After the case was over, Timothy McVeigh filed a claim of ineffective assistance of counsel, attacking Stephen Jones for having signed a book contract during the time that he was representing McVeigh. I'm not here to comment on the merits of that. Mr. McVeigh was entitled to file such a motion, and to have it heard.

Stephen Jones has taken the position that Mr. McVeigh's motion *pro tanto*, suspends the entire lawyer-client privilege and that Jones is therefore free to blast his client in the public press as well as to respond to the allegations under judicial supervision. That is not the law about

lawyers' obligations. When your client attacks you, you have the right of reply; that right is limited to replying effectively under the supervision of a court. It is not a license to go out in the public way and to denounce your client. And I respectfully suggest that taking that broader view does not do a service to the profession. Particularly when the lawyer who does it, announces in the same breath that he's printing 50,000 new copies of his book, which he intends to sell and the royalties of which he intends to collect.

Our independence from the state does not exist for its own sake. It exists so that we can give our clients our undivided loyalty. We owe them that loyalty even though they attack us and our work, except to the limited extent necessary to reply to those attacks under judicial supervision. That is sometimes a difficult price to pay, but it is the bargain we made when we entered this profession.

We must also be careful because the public reputation of our profession is at stake. Look around this hotel where you're meeting. Even in this setting, you hear comments here and there among people who watch you come and go. In high profile cases particularly, we have this special obligation.

There's another case that was mentioned earlier, the case of John Demjanjuk. I was appointed by the court to represent John Demjanjuk in 1992. At that time, he was under sentence of death in Israel for being Ivan the Terrible of Treblinka and the United States Court of Appeals for the Sixth Circuit became concerned that it had extradited him to Israel, or ordered his extradition, but that the government had not disclosed all the exculpatory evidence in its possession. By 1992 it was fairly clear that Demjanjuk was not Ivan the Terrible of Treblinka, that a man named Ivan Marchenko was and that, in fact, there had existed a large number of statements and other evidence that showed that Marchenko was and Demjanjuk wasn't.

I can remember that August day in 1992 when I was about to get on an airplane and fly to Cincinnati, to the Sixth Circuit Court of Appeals, for the first argument. I was standing talking to Ken Starr, who was then Solicitor General of the United States, and Myron Bright of the Eighth Circuit. Bright asked, "Ken, aren't you going to Cincinnati?"

Starr responded, "No, I'm not. Patty Stemler is going to argue for the government and she's been getting ready. We've been working with her. She's going to clean your [Tigar's] clock!"

Judge Bright said in his raspy voice, "Ken, if your case is damn good, why aren't you arguing it yourself?"

We argued and held hearings, and eventually the Sixth Circuit held that the United States had indeed defrauded the courts. They set aside their order of extradition. In Israel, their Supreme Court reversed Demjanjuk's conviction. In a pathbreaking ruling, the Sixth Circuit held that Demjanjuk could come back to the United States. A federal judge then restored his citizenship to him, which had been taken away in the earlier proceeding.

The Demjanjuk family, after twenty years of litigation, during which they spent all the money they had or could raise, sighed with relief. But then, two years ago, the government sued Mr. Demjanjuk again, seeking to denaturalize him again. The government admits that he is not Ivan the Terrible; he's Ivan the Very Annoying.

To take their allegations seriously, however, they allege in this new case that he served at other concentration camps as an S.S. guard. Because the family is broke, I volunteered to try the case, and we just finished that trial in Cleveland. There's not a single witness who places Mr. Demjanjuk anywhere near any concentration camp, or in any position of having served the Nazis. Rather, there are these old and questionable documents with a name on them rather like Mr. Demjanjuk's. This is trial by archive. It is as though you were tried based on the FBI's files, except these happen to be files from some archive in Moscow.

In fact, we have found there is another Ivan Demjanjuk from the same village as the John Demjanjuk, who used to be called Ivan, and who is now on trial. The KGB files that we found show that this other Ivan was suspected of having been the one who served in the camps. The KGB went to try to arrest him in 1969 and he hid out and later committed suicide. The detailed KGB files on this other Ivan have somehow disappeared and our government says they can't find them.

There is a great deal more evidence in the case, and I am sure a gov-

ernment lawyer would argue it differently. I am not here to try that case in front of you. The point is this: The United States Court of Appeals found that a list of lawyers they named had stood in a federal court and said, "We have produced all the discovery," when, in their briefcases in that courtroom at that time, they had sworn statements that would have established Mr. Demjanjuk's innocence. These statements would have, then and there in 1981, caused the release of this man who was instead sent to Israel to stand trial for his life and was condemned to death, having lived in solitary confinement there in a death cell for seven years. The United States Justice Department has not even so much as apologized to the Demjanjuk family, much less taken any steps to discipline these lawyers.

This brings me back to my point earlier. Most of you have fired clients because we insisted on our duty and right to conduct cases within the limits of our ethical rules. We have the same right as we would exercise in our own lives, to expect the wielders of power in the Justice Departments and attorneys general offices and prosecutors' offices to use the same kind of professional judgment that we would use.

We have the right to expect that those agencies will insist that their personnel exercise independent professional judgment, and not simply be automatons doing the state's bidding. We have the right to expect that those agencies will discipline the lawyers who pervert the course of justice by their excessive zeal, by their misrepresentation to courts, and by their inattention to the rights of the people that are standing there with their life or liberty or even property at stake.

I argued an appeal in the Eleventh Circuit a couple of years ago. Judge Hill wrote an opinion reversing the bank fraud convictions of my clients, in a case called *United States v. Adkinson.* In that case, an Assistant United States Attorney talked a federal judge into trying the case on a theory that had been expressly disapproved by the Eleventh Circuit; he argued to the district judge that the Eleventh Circuit seemed like they were about to change their mind.

You know, there are no heroes in that situation. Not the judge to whom, under Article 3, we gave lifetime tenure in the fond, though sometimes forlorn, hope that he'd have a backbone. Nor the United States Attorney who decided to try on one, by stepping outside the

bounds that the rules clearly established.

To make the point in a slightly different way, we have the obligation to tell our clients that they're wrong as well as when they're right. That is part of our independence. And we have the same right and duty to enforce on other members of the Bar the standards that we set for ourselves. After all, this profession, this wonderful profession of ours, gives us such freedom to do what we want to do.

Everybody in this room has been successful in the law. Maybe we are not all as rich as the investment bankers or as the dot-com people used to be, but, of course, the dot-com people used to be and half the investment bankers are in Club Fed. So we should count ourselves pretty lucky and that luck includes this ability to make choices.

To take an analogy from the criminal law, we are not like the street criminals who may not have meaningful choices in their lives and therefore turn to crime. We are like the white collar defendant, whose offense, if any, was done with calculation of the benefits of wrongdoing and the potential consequences if he or she is caught. We have little, if any, excuse for exercising our independence to make wrong choices. Again, this is a product of our good fortune to be in this profession of ours.

And so if we all agree that in at least some sense of the word, independence of the Bar is a good thing, I want to ask, "What are we doing with it, with this independence?" We can wander around, transfixed by our independence and unable to make the choices meaningfully. Erich Fromm wrote,

> *"Freedom, though it has brought [modern man] independence and rationality, has made him isolated and, thereby, anxious and powerless..."*

I want to ask, in conclusion, whether this independence can truly be justified.

Next month, on July 4, we are going to celebrate the nation's independence. On July 3, 1776, John Adams wrote home to his wife from Philadelphia and said in effect, "Abigail, dear, Tom Jefferson and the boys and I are going to do something tomorrow here in Philadelphia. It will be kind of hard to get to work because it'll be 4th of July but we are

going to declare independence. In doing so, we are building on the legal work I did going back to the 1760s, litigating against the British government's writs of assistance." That letter of John Adams, which I have freely paraphrased, exists.

We all know what happened on July 4,1776. Thomas Jefferson had ridden into town with a draft and the eventual signers worked it over. What did they sign? It is, I submit, inaccurate to call it a declaration of independence. It is a *justification* of independence because, even though the colonists believed to the depth of their being that they were entitled not to be ruled by King George, they, nonetheless, thought they had to give reasons. They said, in words we recall:

> *We hold these truths to be self-evident; that all men are created equal, that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the government; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.*

But before these magisterial words, they said:

> *When, in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them to another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.*

There it is. If you want to be independent, you must convince "the opinions of mankind" that you are entitled to be. Now, suppose those of us in this room were to sit down today and say, "let us justify the independence of the Bar."

We have more than 200 years of experience, free from the yoke of King George. How well has our stewardship of the law and of justice

been carried out, so as to entitle us to the independence that we seek? Are enough people getting enough justice?

How is it that 20 years ago, 15% or 20% of law students that came out of law schools could find jobs in public interest and public service? And today the percentage is more like 3%, because of the funding cut-backs in legal services programs and legal services for the poor.

How is that we have an unprecedented number of people on death row across the country in the same turn of time where death penalty resource centers have been abolished and the Supreme Court has held you don't have the right to counsel once you get past the direct appeal process, even though it's only in the post-conviction review process that you often discover the ineffective assistance of counsel issues that have become so important in death penalty litigation?

How is it that, although there are notable exceptions, lawyers in law firms across the country are not spending enough time with *pro bono* work?

Could we, in short, write a justification of independence that would command decent respect? Or, rather, have we spent as a profession too much time worried about issues like unauthorized practice and, you know, how's the Bar going to be organized, and so on? All important issues to be sure but, it seems to me, never to be relegated to a position ahead of our obligation to preserve justice.

I'm not trying to preach at you. I work at a law school that has three times the national average number of people going out into public interest and public service. In this room, are leaders of the Bar filling this justice gap that exists. I am, however, suggesting that we cannot take our independence for granted. For with independence goes responsibility, not only to our clients, the ones that we happen to be representing, but to all of those people out there who are seeking justice.

We have a monopoly on access to justice, as a practical matter, and like all monopolists either we're going to be regulated so hard it'll make us scream or we're going to justify our independence from that regulation. We do not own and did not invent the law. We have received it, in

more or less good condition, from those who came before us who gave it to us with a profound hope. That hope, echoing all of those hopes of that client community we serve, was that we wouldn't hurt it too much while we were holding on to it and that, if at all possible, we would take this thing called the law and make it a little better for everybody during the time that we were holding on to it. And if we can honestly say that that's what we did, we are like the people who wrote that document on July the 4th, 1776, entitled to our independence.

THE BEDELL LECTURERS

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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.