The Nineteenth Annual
Chester Bedell Memorial Lecture

"THE INDEPENDENCE OF THE AMERICAN LAWYER"

Presented to The Florida Bar
By
The Chester Bedell Memorial Foundation
in cooperation with
The Trial Lawyers Section

Boca Raton Resort & Club
Boca Raton, Florida
June 25, 2004

ARTHUR R. MILLER

Cambridge, Massachusetts

ARTHUR R. MILLER

Arthur Miller is the Bromley Professor of Law at Harvard Law School where he has taught since 1971. He is internationally known for his work on courtroom procedure, a subject on which he has authored or co-authored more than 40 books. He has also written extensively on copyright, unfair competition and remedies. He is perhaps best known for his work on the right of privacy and his book, The Assault On Privacy: Computers, Data Banks & Dossiers, has been extremely influential.

Professor Miller has served as a Commissioner on the United States Commission on New Technology Uses of Copyright Works, as a reporter for and a member of the Advisory Committee on Civil Rules of the Judicial Conference of the United States, and a reporter for the American Law Institute's Project on Complex Litigation.

For eight years Professor Miller hosted a weekly television show, Miller's Court, has appeared frequently on ABC's Good Morning America and Nightline, and has moderated numerous Socratic dialogues on acclaimed PBS series including The Constitution: That Delicate Balance; Managing Our Miracles: Health Care in America; and The Presidency. Professor Miller won an Emmy Award for the episode of The Constitution series entitled, The Sovereign Self: The Right To Live, The Right To Die.

The Chester Bedell Lecture

THE INDEPENDENCE OF THE AMERICAN LAWYER

Florida Bar Association Meeting
Boca Raton, Florida June 25, 2004

Arthur R. Miller

It is a pleasure to be with you today. This is a great bar association in a great state. I did not know Chester Bedell personally, but I know enough about his career and reputation to be truly honored to have been invited to deliver this year's Lecture on "The Independence of the American Lawyer," a subject he cared passionately about throughout his distinguished career.

Although our country's legal system and we lawyers and judges working within it certainly have faults, I think that by and large we have good reason to be pleased with the performance of our profession, our laws, and our courts. First and foremost, the Constitution of the United States and those of our states promise to protect the fundamental rights of all persons subject to them, and for the most part, that promise has been fulfilled, although sometimes it has taken time to achieve certain goals. Our justice system is sensitive to the rights of the individual and the importance of assuring a fair process on both the civil and criminal sides. Americans with grievances against their government, businesses, or other persons have greater access to the courts than people in almost all other countries on Earth. Most of the time, the interactions of lawyers and judges produce a reasonably good result; in short, we usually "get it right." One major reason for the degree of success our legal system has achieved is the American ideal of lawyer's independence, and by extension judicial independence, which actually are realized in practice more often than cynical observers are apt to believe.

Now, what do I mean by "the independence of lawyers"? Many states have regulations that purport "to protect the independence of lawyers" by, for example, prohibiting them from sharing fees with non-lawyers. This sort of jealous guarding of professional boundaries, which, let us admit, is based on economic as well as professional motivation, really is not the kind of independence I'm talking about today. I think we should be more concerned about larger concepts of lawyer independence. We must maintain independence of thought and action to do our work professionally and ethically and in conformity with the

adversary model we have chose for ourselves. Without 360° independence, we would not only degrade ourselves as professionals and impair our ability to discharge our duty to our clients, but we also would not be able to engage in a wide range of socially useful activities, including pro bono work for various types of disadvantaged people, or to participate in the formulation and resolution of the important policy issues of the day. We would not be able to be the kind of "lawyer-statespersons" that E. Norman Veasey, the great Chief Justice of Delaware, urged us to be in a speech earlier this year. He said:

> "Lawyers need to be imbued with the grand vision of the statesperson - one who does the right thing when confronted with vexing challenges and dilemmas such as those in the corporate world, not to mention criminal cases. Also lawyers should be - and are - returning to the 'good old days' when they were on school boards, hospital boards, religious organizations and great fund raisers for charities. Also we are seeing more and more lawyers volunteering for pro bono representation of the indigent. These are the lawyer-statespersons."

The need for independence takes many forms: independence in the practice of law, independence from public opinion, independence from clients, and independence from government. Obviously, these four categories of independence are not mutually exclusive, but using them as a matrix for discussion may clarify the subject as a whole.

First, independence in the practice of law is considerably less common - and less feasible - today than it once was. Most lawyers no longer fit the old pattern of the "free professional" - the independent attorney, working in rural or small communities as Chester Bedell did when he entered practice in 1925 in Jacksonville, alone or with an assistant or partner or two, perhaps sharing an office with another lawyer, as Abraham Lincoln did with William Herndon. In that environment, which some of you still enjoy, the lawyer was self-employed, without long-term ties to particular clients and completely free to pick and choose among the cases offered to him. And, it should be noted, in the vast majority of instances - but not all - it was a "him," not a "her." Lest you think I am a hopeless romantic, I do understand that there were pressures in the intimacy of that closed-society world that compromised lawyer independence.

Today many lawyers are in large - sometimes extremely large - firms, and many others are essentially employees of businesses or other large public and private institutions, and they often have less freedom to choose their own work and make decisions than Lincoln did. Although lawyer independence probably always has been subject to a variety of pressures, the pressures of today seem more intense and limiting. Driven by what I believe to be an excessive preoccupation with billable hours and the so-called bottom line, the practice of law, particularly in the major cities, is becoming a business, obscuring what it means to be a professional. Indeed, that notion has been repeated so often it has become a cliche. And any movement toward (or at least an acceptance of) multi-disciplinary law firms *may* - and I emphasize *may* - obscure our obligations to client and court or diffuse our responsibility or reduce the significance of our advice. (On the brighter side, the development of the Inns of Court movement seems to be having a positive effect.)

Moreover, in too many firms - and in too many courts - an understandable desire to reduce cost and delay - for efficiency - has led to a preference for avoiding trials if at all possible. Too often the trial lawyer is dominated by the pretrial lawyer or the settling lawyer or the risk-averse lawyer or inhibited by client or judicial pressures. Although compromise is desirable, this can, at times, prevent lawyers and the judicial system from achieving the best result for clients and for the public at large.

Finally, beyond the control of any lawyer or group of lawyers, is the constantly increasing complex character of the law and the regulated nature of our society, both of which heighten the responsibilities imposed on the practicing lawyer and the judge. Fortunately, lawyers today are better trained and many have wide-angle vision and are quite responsive to the needs of clients and community.

Turning to the second category, independence from public opinion may seem a somewhat strange-sounding objective in a society in which the people rule, or at least choose their leaders. But it is also a society that respects the rights of unpopular individuals and groups and ideas, and lawyers must strive to protect that ideal. Indeed, in our commitment to freedom of expression, we have spawned the most amazing array of media which, when they get into frenzy mode, occasionally produce popular prejudgment and even prejudice. We cannot

succumb to that. Conversely, the allure of media exposure and self-aggrandizement must be avoided if it compromises or even endangers the interests of our clients or contributes to the public's lack of confidence in our system. In truth, getting in front of a television camera can be a narcotic. Believe me, I know.

The importance of not bowing to the will of the crowd was illustrated in Boston even before the thirteen seaboard American colonies declared their independence from Great Britain. On the evening of March 5, 1770, a crowd of several hundred men and boys assaulted eight British soldiers, not just with shouts and curses but with snowballs, ice, and stones. One soldier was knocked down and hit again as he got up. Without any order to open fire, the soldiers did so, killing five men. The patriot Samuel Adams promptly spread the word - with the help of an inflammatory drawing by a kindred soul, Paul Revere - that this was an unprovoked Massacre, and that night is now called the Boston Massacre in our history books. But the very day after the shooting, Sam's cousin John Adams agreed to defend the soldiers and their captain in court against charges of murder and against popular opinion.

John Adams had previously opposed British actions in the colonies - defending, for instance, sailors accused of murder after they resisted impressments into Britain's Royal Navy. Nor, to put it mildly, was he in favor of the British stationing troops in Boston. But, above all he believed that no person in a free society should be denied the right to counsel and a fair trial. In one trial the captain was found not guilty. In the other trial six soldiers were acquitted and two were convicted of manslaughter, pleaded benefit of clergy (even though one could not read and therefore could not pass the traditional test of clerical status), and simply were branded on their thumbs.

John Adams' latest biographer, David McCullough, has written:

> There were angry reactions to the decision. Adams was taken to task in the *Gazette* and claimed later to have suffered the loss of more than half his practice. But there were no riots, [and Samuel Adams appears never to have objected to the part he played. Possibly Samuel Adams had privately approved, even encouraged it behind the scenes, out of respect for John's fierce integrity, and on the theory that so staunch a show of fairness would be good politics.]
>
> As time would show, John Adams's part in the drama did increase his public standing, making him in the long run more respected than ever.

And McCullough notes that decades, later, after John Adams had played a leading role in persuading the Second Continental Congress to declare the thirteen colonies independent from Britain and had served as the second President of the United States, he wrote that his work in the Boston Massacre cases was "one of the most gallant, generous, manly and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my country."

There are plenty of contemporary analogs of the despised red-coated British troops of colonial Boston. Representing certain types of clients, in either civil or criminal cases, is apt to make a lawyer unpopular or make him - or her - fear for the future. Criminal defendants as a whole are disliked by the public, and prisoners who file lawsuits - especially when they do it repeatedly - are most likely heartily disliked by the courts and their personnel. Political extremists and terrorists, both domestic and foreign, are probably less popular today than ever before in the aftermath of 9/11. And the public's fascination with the Mafia, as shown by the popularity of *The Godfather* trilogy and *The Sopranos,* doesn't extend to their lawyers, who are characterized by the rubric "mob lawyer."

On the civil side, businesses charged with polluting the environment, gouging consumers, engaging in various forms of discrimination, or endangering the public carry a taint that may rub off on those who represent them. The same often is true for insurance companies and HMO's, as shown by movie-goers' enthusiastic applause for the epithets applied to them by the mother, played by Helen Hunt, enraged by the medical treatment accorded her chronically asthmatic child in the 1998 movie *As Good As It Gets.*

Many people are apt to assume that celebrities get too many breaks from the legal system - and to blame their lawyers. The O.J. Simpson murder case certainly didn't help in this regard. Yet today, generations after their demise, we revere the names Louis Brandeis, Clarence Darrow, Joseph Welch, and Thurgood Marshall - as I think future

generations will honor people like Brendan Sullivan, Johnnie Cochran, Stephen Jones and Michael Tigar, past Bedell lecturers who defended Timothy McVeigh and Terry Nichols for the Oklahoma City bombing, and this state's Roy Black.

On the other side of the ledger, plaintiffs' lawyers often represent clients who are vilified by opponents and the media as money-grubbing malcontents. Think of the incomplete and distorted reportage of the "McDonald's Coffee Spill" case. Even when plaintiffs appear sympathetic, many people aren't happy about the way lawyers work in their behalf. "Pushiness" isn't popular, as least in most parts of the country; even in the courtroom scenes on *Law & Order* viewers hear judges say, "Don't push it too far, counselor." This is part of media stereotyping that goes back at least as far as the repugnant matrimonial lawyer Arnie in *LA Law.* The heroic portrayals of defense lawyers by Raymond Burr in *Perry Mason* and E.G. Marshall in *The Defenders* are largely a thing of the past, along with the fatherly and infallible Marcus Welby, M.D. But we must remember that we have an adversarial system, in which fairness depends on, among other things, spirited advocacy on both sides. We must never allow the desire to be liked or to be quoted to compromise our independence or our willingness to stand up for our clients. And the quest for civility at the bar, although noble, cannot come at the expense of legitimate zealous advocacy for our clients.

One factor that may make it more difficult for lawyers to resist public opinion is the greater attention the news media have been paying in recent decades to certain court cases. I've played some part in this development, I must admit, both in my first of its kind *Miller's Court* program in Boston, which was syndicated for several years, as legal editor for *Good Morning America* for two decades, and on programs on *Court TV* and on WCVB-TV in Boston.

This is not a mea culpa. I think explaining the law and how it functions to the public is generally a good thing. And it cannot be done by media people. I don't think we can depend on the media for accuracy, insight, or balance. Errors abound; for instance, too often TV news declares that someone found not guilty has been found innocent or treats a denial of certiorari by the U.S. Supreme Court as a decision on the merits of the case. Far too often the media, print as well as broadcast, have no property sense of proportion, as evidenced by the

present maniacal, repetitive, and overblown coverage of the Peterson murder case, Kobe Bryant, and Michael Jackson. Perhaps too many years have now passed since the first Sam Shepard trial - unquestionably one of the worst media circuses in history, as the U.S. Supreme Court noted - so that we have forgotten its lessons. The "court of public opinion" is not, and cannot be, a real court of justice. When we get caught up in the vortex of media activity we should not participate in the pandering to the lowest common denominator. We should exercise independence from the media.

Independence from clients, our third category, has two aspects. Once hired, a lawyer wants, for good reason, to be able to follow his or her own professional judgment instead of the client's agendas and dictates, when the two conflict. Being of a somewhat whimsical temperament, I was delighted to learn that when one of my predecessors in giving this Lecture, Michael E. Tigar, asked his audience how many of them had ever "fired" a client, most of them raised their hands. That should be done when necessary. A lawyer must follow his or her professional muse; we didn't go to law school to become running dogs or ventriloquists' dummies for our clients. We cannot become beholden to our clients the way many doctors are to their HMO's. The statement "My client made me do it" is not a viable excuse. It is an admission of abdication of responsibility. If we are to give our clients the best professional advice we can, we must follow a principal I first heard from my TV mentor Fred Friendly that I obviously paraphrase: "It is not enough to tell a client he, she, or it has a legal right to do something. The independent lawyer goes further and counsels whether it is the right thing to do."

The other aspect of independence of clients is resisting being "typecast" or pigeon-holed as a particular kind of lawyer when choosing which clients or cases to accept. And here I recall that Lord Williams of Mostyn, another Bedell lecturer, thought it a good thing that English trial lawyers are sometimes called upon to prosecute a case for the Crown and sometimes to represent a defendant.

That "barrister" tradition used to have equivalents in this country as well. For some people, it still does. David Boies, the first Bedell lecturer, has done a great deal of exemplary work both for plaintiffs and for defendants. Sadly, that sort of versatility or "switch-hitting" is largely gone from many parts of our profession. The pressures of

specialization and the deepening divide between the plaintiffs' bar and the defense bar has done this in. The sometimes subtle but often explicit pressures of partners and "anchor" clients has made crossing the "v." unthinkable in many fields, antitrust, securities, defamation, and labor law among them.

Yet some of the greatest lawyers I know manage to represent a wide range of clients. My own experience suggests that the "v." isn't an impassable barrier. I often have been called into class action litigation to lawyer on the plaintiffs' side, but I've done the same on the other side as well - in fact, some of my appearances before the U.S. Supreme Court were as counsel for companies challenging class actions. Sadly, some defense lawyers I've worked within the past apparently have written me off because of the work I have done for plaintiffs and therefore have consigned me to the dark side. But I persevere and continue to work both sides of the "v." Bear in mind that when more of us were generalists, there was less chance that we would be dependent on a particular client.

[I'm fortunate in enjoying a kind of independence that many lawyers don't have, either. As a scholar I can research and write as I want to, and as a lawyer I can practice as I see fit. And working at both careers makes me less dependent on either one than I'd be if it were my only one.]

Finally, our fourth category. Americans tend to take the independence of lawyers from the government for granted - except, of course, in the case of lawyers who actually work for our federal, state, and municipal governments themselves. Lawyers in many other countries don't have the benefit of any such assumption. A criminal defense lawyer in the former Soviet Union or in China today has no independence worthy of the name.

But it's not that simple. In the United States lawyers are officers of our courts and do have obligations as citizens. But we do not have to be tools of whoever happens to be exercising governmental power at a particular time.

A case from colonial times that we often look back on as the genesis of freedom of the press helps illustrate the importance of this kind of lawyer's independence. A German immigrant printer, John Peter

Zenger, was charged with seditious libel because of criticisms aimed at the royal Governor of New York he had published in his newspaper. The Governor hand-picked two judges to hear the case, one being the man he had appointed as the colony's Chief Justice after removing his predecessor. The new Chief Justice then disbarred Zenger's first two lawyers. At that point, Zenger's friends (who actually had written the controversial articles) induced Andrew Hamilton to come all the way from Philadelphia to take over Zenger's defense. Hamilton, I suppose, was thus the original "Philadelphia lawyer" [-and he also designed the building in that city known to us all today as Independence Hall. More to the point, Hamilton] [and] was reputed to be the best trial lawyer in America.

The judges would not allow Hamilton to prove that the criticisms of the Governor published in Zenger's newspaper were true, partly because, as the Attorney-General argued, truth was not a defense to libel - in fact, a true libel was thought worse than a false one. That accurately reflected the state of English law at the time. Hamilton argued, with more eloquence and patriotism than citation of legal precedents, that truth could not be a libel. In effect, he urged the jury to nullify existing law. In spite of a strong jury charge to the contrary by the Chief Justice, the jurors did just that, whereupon the courtroom resounded with three "huzzas!" The next day Zenger was released from the city jail - having spent eight months there since his arrest.

I am not advocating wholesale jury nullification as a regular means of effecting needed changes in the law. But I think the Zenger case illustrates that if government, or some part of it, tramples on the rights of the people, lawyers will have the independence, the courage, and the resourcefulness to resist effectively.

I cannot refrain from asking, despite the emotional baggage the subject carries, in the context of our post-9/11 lives: Are we, the nation's lawyers, properly discharging our obligations as the heirs of John Adams and Andrew Hamilton? Are we demonstrating appropriate independence from the government in defense of civil liberties? Yes, we are beset by the threats and realities of terrorism. But as Wendell Phillips, a lawyer, said more than 150 years ago, "Eternal Vigilance is the price of liberty." That is true in bad times as well as good ones. There are those who say, far from being vigilant, the lawyers of this nation - the guardians of those liberties that distinguish our society

from other societies, have become passive and quiescent. Last year at the ABA's annual meeting I had the privilege of moderating a panel entitled "The Media's Coverage of the Law: What's Good, What's Bad and What's Downright Ugly." The discussion was very lively, indeed exciting. One of my panelists, Helen Thomas, a White House correspondent for more than fifty years and never known for being shy, demanded to know - at the top of her voice - where all the lawyers are in this time of increased government intrusion on our personal rights and civil liberties. When will our voices be heard and our skills employed? Where is our independence?

Another Harvard Law professor, one who died only a few weeks ago, taught us all a great deal about lawyer independence, especially that a conscientious public servant may - and should - refuse an improper order even from the President of the United States, and even though it may cost him his position. Archibald Cox - my teacher, my colleague, and, always, my model - and another fiercely independent lawyer of my acquaintance, Elliot Richardson, the then Attorney-General, new that devotion to truth and to the rule of law were more important than simply doing what they were directed to do by higher authority. The plaque accompanying the portrait of Professor Cox that hangs at Harvard Law School notes that the cartoon strip *Doonesbury* had named an award for him: "An Archie," which the cartoonist had written was "Short for Archibald Cox. The idea is to press your investigation with such integrity and vigor that you end up getting fired."

May we all show that kind of independence if and when it's needed. Indeed, may we all be imbued with sufficient independence so that we know how to invoke it when we are confronted by pressure - no matter what the source of that pressure may be. After all, ladies and gentlemen, we are the keepers of the flame that glows in the torch of Lady Liberty. It is our legal system and you, its practitioners, that guard the thin, and occasionally indistinct, line that separates civilization from the jungle.

Thank You

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
Warren B. Lightfoot	1997
Lawrence E. Walsh	1998
Stephen Jones	1999
Hon. Michael L. Bender	2000
Michael E. Tigar	2001
Morris S. Dees, Jr.	2002
Paul Morella	2003
Arthur R. Miller	2004

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