The Twentieth Annual
Chester Bedell Memorial Lecture

"THE INDEPENDENCE OF THE AMERICAN LAWYER"

Presented to The Florida Bar
By
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The Trial Lawyers Section

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TALBOT (SANDY) D'ALEMBERTE

Tallahassee, Florida

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Sandy D'Alemberte, President Emeritus of The Florida State University and former Dean of the FSU College of Law, was educated in the public schools of Tallahassee and Chattahoochee, Florida. He earned his Bachelor's degree with honors from the University of the South in Sewanee, Tennessee and, after service as a naval officer, received his juris doctor with honors from the University of Florida College of Law. During his years of practice, Mr. D'Alemberte concentrated on media and public law work, including the proceedings that led to the first rule allowing camera access to courtrooms and as Chief Counsel in the impeachment proceedings against three justices of the Florida Supreme Court. Mr. D'Alemberte served as a representative of Dade County in the Florida House of Representatives where he chaired several committees, including the Judiciary Committee that drafted and passed a major judicial reform constitutional amendment in 1972 and was named Most Outstanding Member of the House (1972). After leaving the Florida Legislature, he chaired the Florida Constitutional Revision Commission and the Florida Commission on Ethics. He served as President of the American Bar Association (1991-92), President of the American Judicature Society (1982-84), and ABA Section of Legal Education and Admission to the Bar. Mr. D'Alemberte has received many honors for his years of service to the Bar and the law, including the ABA Medal in 2003, the 2001 Wickersham Award given by the Friends of the Law Library of Congress, the 1996 American Judicature Society's Justice Award for his efforts to improve the administration of justice in the United States, the 1996 National Council of Jewish Women's Hannah G. Soloman Award, the 1993 Academy of Florida Trial Lawyers "Perry Nichols" Award, the 1993 Florida Academy of Criminal Defense Lawyers Annual Criminal Justice Award, the 1990 Jurisprudence Award form the Anti-Defamation League of South Florida, the 1987 Florida Bar Foundation Medal of Honor, the 1986 National Sigma Delta Chi First Amendment Award, a National Academy of Television Arts and Sciences "Emmy" in 1985 for his work in open government, particularly in the opening of court proceedings to electronic journalists, the 1984 Florida Civil Liberties Union "Nelson Poynter" Award, and the ABA Section of Legal Education Robert J. Kutak Award and the ABA World Order Under Law Award.

THE INDEPENDENCE OF THE AMERICAN LAWYER

A topic inspired by the life of Chester Bedell.

Chester Bedell's legacy.

This lecture series — "The Independence of the American Lawyer" — is appropriately named for Chester Bedell because he was the epitome of the independent lawyer. John DeVault, who practiced with Chester Bedell, points out that you can walk around Bedell firm today without seeing the usual professional credentials, diplomas displayed in the offices. This is because Chester did not display diplomas - and he had no diplomas. He did attend the University of Florida and the University of Virginia for brief periods but did not graduate from either college or law school. He elected to read for the law with his father, George Bedell, a prominent Jacksonville lawyer.

A review of his many cases beginning in the mid-1920s and extending through an extraordinarily productive professional life will demonstrate that Chester Bedell handled a great array of cases, beginning with three reported cases in 1926, two appeals to the Florida Supreme Court and an admiralty case in federal.

In one of his earliest cases, he was asked by the Chairman of the State Welfare Board to appear pro bono for a defendant who reacted to his father's abuse of his mother by killing his father. Chester took on this case even though he was not yet 21 and he tried it a week before he turned 21. A mistrial was followed by two other trials, both with hung juries. Chester decided that the prosecution was abusing its discretion and he took the case to the Supreme Court on the theory that the prosecution only have three strikes, but he failed to convince the court and he had to try the case the fourth time. He got an acquittal.

In the years to follow, he represented a great range of clients in all types of litigation: corporate clients, cities and counties, personal injury plaintiffs and probate petitioners, defending and suing railroad companies, foreclosure and mandamus actions, anti-trust suits, defended a variety of criminal cases at trial and on appeal and handled significant civil trials and appeals.

When we say that Chester Bedell was a Florida trial lawyer who was regarded by his contemporaries as the "lawyer's lawyer," we are saying a great deal. Think of his contemporaries: Cody

Fowler, Chesterfield Smith, Dixie Beggs, Reece Smith, Scott Loftin, Bill Frates, Bill Colson, Billy Gaither. . . the list is long. So long, in fact, that its mere recital reminds us that Florida has been the home of some remarkable trial lawyers.

But Chester Bedell *did* stand out even in this distinguished company and Chesterfield, presenting the American Bar Foundation Service Award in 1977, said that if Florida lawyers could conduct a secret ballot and vote for the best trial lawyer and the most gracious and ethical person practicing law in Florida, they would cast their votes for Chester Bedell.

Chester Bedell was the "lawyer's lawyer" in another sense: Throughout his career, lawyers who found themselves in trouble turned to him. The list of his clients is very long and distinguished: Hollis Rinehart, Walter Arnold, Senator Harry King, Perry Nichols, Pinellas County Attorney C. Ray Smith, W. Robert Smith, Jacksonville City Commissioner Claude Smith.

I am honored to be here and speak at an occasion that recognizes one of the greatest Florida lawyers, a trial lawyer who handled both civil and criminal work, a man whose firm represented corporations, individuals and governments and a man whose work reminds us that the best advocates are those who remain truly independent: who follow their own internal compass, and who remember that their independence, their moral steadfastness, their rock-steady ethics are why clients have sought their assistance in the first place.

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One of the benefits of the invitation to give this speech is that it has given me the opportunity to reread the speeches given in the years since this lecture was inaugurated. During those years, the lectures have provided excellent insights, some very useful suggestions and, often, good humor.

The topic of these lectures has been unvarying: "The independence of the American lawyer." Most often, the Bedell lectures have focused on the word "independence." While I hope to end these remarks with a similar focus, I first want to discuss the phrase "American lawyer" and think out loud about how American lawyers – particularly American trial lawyers – are different from others.

Of course, this has been a topic of interest dating back at least as far as 1832, when Alexis de Tocqueville published his great work, "Democracy in America," in which, on a tour of the early United States, de Tocqueville sought to pin down what "American" truly means.

De Tocqueville, who observed America and authored his book in the early 1830s, was trained as a lawyer and was, by birth, a member of the French aristocracy. His idea of an "aristocrat" was of a person who followed a code of honor which recognized obligations to others in the community.

In his famous work he said:

> Lawyers belong to the people by birth and interest and to the aristocracy by habit and taste; they may be looked upon as the connecting link between the two great classes of society.

Not quite a century later, Louis Brandies used the same frame of analysis when he criticized lawyers: "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."

On the same subject, Woodrow Wilson, speaking to the American Bar Association, observed the changes in the role of lawyers which were occurring in the early 20th century. "Lawyers," Wilson said, "constructed the fabric of our state governments and of the government of the United States, and throughout the earlier periods of our national development provided over all the larger processes of politics. . .Public life was a lawyer's forum. . ." Wilson described a new character – the "new type of lawyer" who, he asserted, had become the "prevailing type":

> Lawyers have been sucked into the maelstrom of the new Business system of the country. . .[Lawyers] do not handle the general, miscellaneous interest of society. They are not general counselors of right and obligation. They do not bear the relation to the business of their neighborhoods that the family doctor bears to

> the health of the community in which he lives. They do not concern themselves with the universal aspects of society. . .

In more recent times, this same theme, the theme of disconnection, has been echoed. We can get a sense of how modern observers look at lawyers merely by reciting the titles of their works: Running from the Law, The Betrayed Profession, The Trouble with Lawyers, Making It and Breaking It and the best of these books, Dean Anthony Kronman's The Lost Lawyer.

This passage from de Tocqueville is one of my favorites, and it fits with others where de Tocqueville labels lawyers "aristocrats." By this he does not intend to imply they belong to a privileged class but, rather, people who, because of their privilege, are called to fulfill duties to society, a duty to support those less able to support themselves.

Are we still the connecting link, "aristocrats" in de Tocqueville's sense? In a nation which has been increasingly separated by class and wealth, with a vastly increasing disparity in wealth, with a new class of super-rich and a culture of greed in so many of our businesses and professions.

In my opinion, lawyers are an important connecting link, although I do not believe that all lawyers play this role. By and large, it is trial lawyers who still serve as the connecting link in America; and it is the independence of trial lawyers that matters most.

I do not for a moment downplay the role of the small firm lawyer, whose work is essential. My father was a lawyer who practiced in Chattahoochee, Florida. No one disputed him when he introduced himself as the President of the Chattahoochee Bar Association – he was the only lawyer in town (outside of the mental hospital, at least). His office had clients waiting when he arrived in the morning and he gave caring counsel and support to them. He was a poor example of law office management. His account books were incomprehensible and he often took no fee or accepted a smoked ham and vegetables for his fee. He tried cases, but he would never have called himself a trial lawyer. I have no doubt that there are today many lawyers who like my father, are as dedicated to their clients and who serve people with a real need. These lawyers have

retained their independence and they do serve as "connecting links."

When we move away from the general practice lawyer and look at those who practice in larger firms in specialized practices, it is clear to me that it is only those who do trial work are connected in any significant way with what de Tocqueville called "the people."

The corporate trial lawyer plays this role only when she takes up pro bono clients; after all, most of her other work places her in the service and company of people of privilege, frequently the very wealthy. People who spend their daily life in that way often do not commit themselves to working as a connecting link.

It is the plaintiff's personal injury lawyers and the criminal defense lawyers who provide the real connecting link in today's society. Indeed, it is ironic that the very people who are doing their daily work to assure government and corporate accountability are those who are most often the targets for political attack.

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Some of you will note that I have left prosecutors off my list of lawyers who today provide a connecting link. I have done so with some sadness because I think it is possible that prosecutors could play a very important role in achieving a more just society. But that will require a major shift in the culture of prosecutor's offices, which today do not often focus on the impact of their work on our society.

I acknowledge that there are occasionally prosecutors who care for justice and think about the implications of their activity on the community and we have several in Florida today. Janet Reno was such a prosecutor and she demonstrated what a prosecutor who had some vision and courage could do and Harry Shorstein stands out as an ethical lawyer who cares about the larger public interest.

Still, what I have to say about prosecutors, state and federal, is not the usual theme for these lectures. The topic is the "independence of lawyers" and, so far, no one has argued for anything other than increased independence. Still, I believe that Chester Bedell, whose first trial experience was with an over zealous prosecutor, would agree with my argument that the unbridled discretion of prosecutors leaves them with too much independence and not enough accountability.

I am worried by the tendency of prosecutors to play the game and to keep score by the number of convictions and length of prison terms.

On the political front, prosecutors continue to press for more power for themselves not only in charging but in sentencing, for draconian laws, for longer mandatory prison terms, for more intrusions on our liberties and more disruption of our communities. Prosecutors are not at all reluctant to urge the enlargement of their role at the expense of the judiciary and this can not be a good thing for our judicial system.

Since this indictment is so strongly worded, let me give you two examples about what troubles me about prosecutors (not all prosecutors for, as the saying goes, some of my best friends have been prosecutors).

I recently read a comprehensive report titled "Convicting the Innocent – A triple failure of the justice system," and it is a powerful study of wrongful convictions in Anglo-American justice systems. It concludes:

> Although the issue of wrongful conviction is often portrayed as a "liberal" issue focusing on the rights of an accused person, it is very much an issue that affects public safety and confidence in the justice system. Every time we convict someone of an offense for which they are innocent, the justice system fails in three ways. Along with the direct impacts on the person who is wrongfully convicted, the actual perpetrator remains free to continue victimizing others. Equally disconcerting, we re-victimize the victim or the family of the victim by undoing the emotional closure that has already taken place, and reopening a wound which, with an increasingly cold evidentiary trail, may never be healed.

The author: Bruce MacFarlane, Q.C., Deputy Attorney General for the Province of Manitoba, Canada.

Can you imagine such a report coming from today's Department of Justice or from a commission organized by the State Attorneys of Florida?

I cannot.

We have a department of our federal government which we call "Justice" that is not only silent in the face of overwhelming evidence of human rights abuses, but active as apologists for those abuses. I fear that they are not advancing the cause of connecting the classes of society and, even worse, I believe we are disconnecting the United States from the rest of Western civilization on issues of human rights.

In this State, we have been dealing with the issue of whether DNA testing should be made available to prisoners with a colorable claim of Innocence. I have been working with the Florida Innocence Initiative, and I have been amazed that prosecutors have not stepped forward in the leadership of the forces to advocate DNA testing. Wouldn't you want to be assured of your decision to prosecute and convict? Wouldn't you want to find the guilty person if you have convicted an innocent person? Why would a prosecutor refuse to deny DNA testing to a prisoner who had made consistent claims of innocence and who offered to pay for the testing?

So I find myself in the curious position of arguing not for more independence but for less independence for the prosecutors. In 1979, Chester Bedell wrote a letter outlining some of the major cases he had handled in his career and the last case he mentioned was a case in which an overzealous prosecutor had secured a conviction of his client by introducing evidence that the prosecution had denied in pre-trial pleadings that it would use. Chester's comment: "The case is interesting because of the tactics employed by the prosecutors which accounted, in large part, for the reversal of this conviction."

How should we deal with the excess power of the prosecution? Today, the only means for investigation and discipline of an elected State Attorney is through impeachment: a notoriously cumbersome process, hard to invoke even where, in the mid-1970s, there are major problems in our judiciary. We might think about allowing the Judicial Qualifications Commission to investigate the conduct of State Attorneys since The Florida Bar is not allowed to do so.

We might also ease the rigid rules which give absolute immunity to State Attorneys even when they use their discretion to put on witnesses they know will lie.

We should look to the lessons which come from the large

number of wrongful convictions in this country and ask that law enforcement reform the way they do business. We should have all confessions recorded, we should adopt the British practice of open file discovery and we should require the disclosure by the police and the prosecutor of all the evidence that is potentially embarrassing to the prosecution, rather than limit that duty of disclosure to "material facts," a standard subject to the prosecutor's discretion.

And we should introduce some balance into the prosecutor's discretion to ask for long sentences. U.S. District Court Judge Gregory Presnell issued an opinion last month that discussed the policy of the Department of Justice to always seek the statutory sentences without regard to the principles of U.S. Booker, which placed discretion in judges to depart from sentencing guidelines. He stated, "the policy of the Department of Justice to oppose as unreasonable any sentence that falls below the applicable guideline sentencing range, save those the Department authorizes in its sole discretion."

Judge Presnell observed that the position of the Department was one that ignored the Supreme Court decision in Booker and "displays disrespect for the law."

How can we introduce balance when the present system allows the prosecutor to press for the longest possible prison terms and then publicly denounce judges who impose shorter sentences as, "soft on crime?"

How can we make prosecutors accountable without destroying their discretion? I do not have a comprehensive answer, but I would we might bring some reason into the system by asking that all prosecution requests for sentences carry a fiscal note. If a prosecutor is asking for a ten year sentence, she should state the price tag for that sentence. How much is it going to cost the citizens of Florida? How much cost will there be to the individual and the family? How much will society lose in the process?

As Justice Anthony Kennedy observed, we have a prison system that now houses over 2.1 million Americans and the impact of this system is disproportionate on minorities. In August 2003, he said: "In countries such as England, Italy, France and Germany, the incarceration rate is about 1 in 1,000 persons. In the United States it is about 1 in 143. . .Nationwide, more than 40% of the prison population consists of African-American inmates. About 10% of African

American men in their mid-to-late 20's are behind bars. In some cities more than 50% of young African-American men are under the supervision of the criminal justice system."

This is a large and costly system driven by people who are not accountable. They reap the political benefit of claiming to be tough on crime but they take no responsibility for the terrible costs that result for imprisoning so many people.

You will say back to me, maybe, "But our topic is independence, and you must admit that American prosecutors are independent." My response is that those who live in a culture that has them so scared of public criticism and allegations that they are "soft on crime" are the least independent of us all. They have allowed themselves to be pressed into the service of a system which, as Justice Kennedy has so eloquently stated, needs to refocus on achieving justice rather than securing convictions.

* * *

In what ways is the trial lawyer in this country more independent and in what ways less independent that when Chester Bedell entered the Bar? The Bar Associations are certainly better organized and there is a much better rationale for distinct governance of lawyers through the Supreme Court. The Bar today is much less of a trade union and something more akin to a public service organization; that has not always been true.

On the other hand, corporate lawyers, even corporate trial lawyers, now seem to be more dependent on their clients and more controlled by their clients – they are, in a word, less independent. When a conflicts check shows no conflict, corporate lawyers still turn down cases where there is an "issues" conflict. That is to say, lawyers are wed to the broad interests of their corporate clients and they fear that clients will disapprove if they take the plaintiffs' side in a class action case or prosecute a product liability case. Since any real independence requires that lawyers think they are independent and act on that premise, I greatly fear that our fear of corporate counsel disapproval saps our independence.

I doubt that the fear of retribution from corporate interests is well founded. Indeed, it has been my experience that clients seek out the best lawyer; they often admire a person who, like Chester Bedell, refuses to be owned by any interests. What client would

have dared tell Chester Bedell that he would lose business if he was an advocate for a client asserting a claim against a corporation?

Clarence Darrow continued to represent the railroads even after he took on representation of unions; Louis Brandeis was the counselor to wealthy interests even while he pursued important public interest cases. And this behavior has persisted: When the Florida East Coast Railroad was sued in a wrongful discharge case the plaintiff was represented by the legendary Perry Nichols, the railroad hired for its defense the best lawyer it knew, Bill Frates, who had consistently won plaintiff's cases against the railroad. (As a one-time railroad defense lawyer, I can testify to how good Bill Frates was, particularly when he had Pete Fay with him.)

It has been a very interesting phenomenon to watch corporate interests reach out to plaintiffs lawyers as the lead counsel for important trial work. These lawyers have not given up their independence.

Nor has the truly independent lawyer ever been frightened of popular disapproval: John Adams took on the representation of the British soldiers charged in the Boston Massacre. The 2001 Bedell lecture was given by Michael Tigar, who stands as an incredible modern example of a great lawyer who refuses to give up his independence and who is willing to take on unpopular causes. Who ever knew Chesterfield Smith to trim his sails when a client felt that Chesterfield was on the wrong side of a political issue?

Lawyers will not be independent unless they think of themselves as independent and unless they are willing to stand up to clients when they threaten to compromise that independence. Chesterfield Smith once counseled Bill McBride, who told him that some banking clients objected to Bill's work on behalf of Buddy McKay's candidacy for U.S. Senate. Bill said, "Shall I tell them that my political opinions are not for sale?" Chesterfield said, "No. Tell them that you are not paid enough to echo their opinions. Your billing rate is only $150 and hour and if they would like to also buy your political opinions, you will have to raise your rate to $1,500 an hour." That was Chesterfield's way of saying that independence is ten times more important than the clients knew.

When we look further at the implications of the word "American" in the title of this lecture series, we are brought to realize that the American lawyer is a particularly privileged individual. We practice in a profession that is largely self-regulated and we enjoy great power. Our Constitutions provide for one branch of government to be dominated by lawyers; we have society's approval to do things other citizens can not do. We sign our name on a piece of paper that accuses others of awful things and we cannot be sued for defamation; we sign another paper and summon others from their work to testify in our cases. We take away liberty and property and we call powerful corporations and governments to account.

Of course, much of this empowerment of lawyers is also true of other common law jurisdictions and of most countries in the Western world. Indeed, if we are looking for literary models of lawyer independence, I do not think we can improve on Horace Rumpole and the lawyer/author who created him, John Mortimer.

But we need to remember that for much of our life time there have been vast areas in this world where lawyer independence was non-existent. What can you say of those who continued to practice law in Nazi Germany, or the former Soviet Union up through the final decade of the last century?

One of the great experiences of my life was to be President of the American Bar Association just after the Berlin Wall fell, and to participate with some remarkable lawyers, judges and professors in the provision of assistance to those who began to establish or reestablish the Rule of Law.

In one memorable encounter, Patsy and I went to Prague just after the Velvet Revolution. The Russian tank that had been turned on its side and painted pink was still in the main square. You could feel the excitement of people who were out on the streets, enjoying freedom that they had not known during the years of Nazi and Soviet domination.

One of the people we met was the new Chief Justice of what was then still Czechoslovakia. He had been Vaclav Havel's defense attorney, and I asked him what he had done to defend Havel. He smiled modestly and said, "Under the old system, there was nothing that could be done to defend against the State's charges, and you could only mitigate but mitigation was not possible for some one who was as firm in his convictions as Havel. So, I did the only thing that Havel would let me do. I brought him cigarettes." We talked about

the needs of his country and he gave a surprising answer when I asked him for this ideas about where to begin with a reform agenda. He had been talking about the need to get people engaged in productive work and I assumed he would urge a commercial code or a corporation law but, instead, he told us that the place to start was the criminal law because that law criminalized the very behavior that was essential in an open market economy.

The more contact I had with the brave people who were forging new constitutions, building new institutions and reordering their society to allow real freedom, the more I came to appreciate the role of the American lawyer.

Ironically, at the very time that large numbers of American lawyers were volunteering their time and energy to help the emerging democracies of the former Soviet Bloc, lawyers were under a steady assault by President George Bush and Vice-President Dan Quayle, who began an assault that is still underway, hammering away on the theme that lawyers file frivolous suits and hamper American productivity. Never deterred by the absence of any evidence for their claims, they blithely used the core technique of modern propaganda: repetition.

What I came to see was that, with a campaign to reduce regulation of corporate interests, the only mechanism for corporate accountability was the independent lawyer.

I came to see that, where lawyers are not allowed to challenge government action, not allowed to sue the government and not allowed to zealously defend those who are charged, government power becomes too great and tyranny quickly follows.

I came to see that the independence of lawyers is one of the most important principles in our society.

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
Talbot (Sandy) D'Alemberte	2005

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