The Twenty-Third 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 and Club
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HONORABLE GERALD BARD TJOFLAT
United States Circuit Judge
United States Court of Appeals
for the Eleventh Circuit

Jacksonville, Florida

GERALD BARD TJOFLAT

Gerald Bard Tjoflat received an LL.B. from Duke University School of Law in 1957, after two years of service in the Army's Counterintelligence Corps during the Korean War. He did his undergraduate work at the University of Virginia and the University of Cincinnati. Following a decade in private practice in Jacksonville, Judge Tjoflat was appointed to the Florida trial bench in 1968 (the Circuit Court for the Fourth Judicial Circuit of Florida) and to the U.S. District Court for the Middle District of Florida in 1970. In 1975, he was elevated to the U.S. Court of Appeals for the Fifth Circuit. He became a judge of the U.S. Court of Appeals for the Eleventh Circuit on October 1, 1981, the day the Fifth Circuit was divided into two circuits – the new Fifth Circuit and the Eleventh Circuit. Judge Tjoflat served as Chief Judge of the Eleventh Circuit from October 1, 1989 until September 30, 1996 (and he remains on the court in active service).

For over fifteen years, Judge Tjoflat played a significant role in the administration of criminal justice in the federal courts. From 1973 to 1987, he was a member and, beginning in 1978, the chairman, of the Judicial Conference of the United States Committee on the Administration of the Probation System. That Committee was charged with overseeing the performance of the nation's probation and parole officers and with communicating to Congress--in the form of testimony before the House and Senate Committees on the Judiciary--the views of the federal courts on matters of crime and punishment. From 1975 to 1987, he was a member of the Advisory Corrections Council of the United States, which was charged by statute with overseeing the operation of the federal prison system.

Judge Tjoflat has been involved in the administration of criminal justice at the international level, as well. In 1980 and in 1985, he was a member of the United States delegation to the Sixth and Seventh United Nations Congresses for the Prevention of Crime and Treatment of Offenders.

Judge Tjoflat has been widely recognized for his service to the judiciary and the legal profession and to his community. He has received the Fordham-Stein Prize, in recognition of his outstanding professional conduct and for promoting the advancement of justice in the public mind; honorary degrees from institutions of higher learning; the Duke University Award for merit for his contribution to the School of Law; the Duke Law Alumni Association Award for distinguished public service; the Brotherhood Award, National Conference of Christians and Jews (now The National Conference for Community and Justice); the St. George Award presented by the Presiding Bishop of the Episcopal Church for "outstanding service to the Episcopal Church and to the Scouting Movement"; and the Silver Beaver Award from the Boy Scouts of America (in recognition of his service as president of the North Florida Council, Boy Scouts of America, from 1975 through 1984, and again in 2000 and 2001).

Chester Bedell Memorial Foundation and
Trial Lawyers Section Luncheon

THE INDEPENDENCE OF THE AMERICAN LAWYER (A CANADIAN PERSPECTIVE)

Paper presented at the Boca Raton Resort and Club
June 20, 2008, Jacksonville, Florida

It is an honor, indeed, to stand before you today and deliver this year's Chester Bedell Memorial Lecture on "The Independence of the American Lawyer." Chester Bedell once said, "Trial work is all I know." What an understatement that was. True, he was a trial lawyer. But he was much more than that. He was a generalist who just happened to spend most of his time litigating. He exemplified all of the traits that great lawyers possess, and that enabled him to be independent in his practice of law.

Much has been written about Chester Bedell, the lawyer, but little has been written about Chester Bedell, the man. What was he like in everyday life, from day to day? From whence did he acquire the stuff that made him the lawyer he became? What fed his soul? Aside from John DeVault, Charlie Pillans, and Peter Webster, who trained under Chester, I doubt that anyone in this audience actually encountered him in court or even knew him as a person. I had the privilege of knowing Chester Bedell, the lawyer, and Chester Bedell, the man. I therefore take a few moments of my allotted time to tell you about the Chester Bedell I came to know, encountered professionally, and grew to love as a son loves a father.

I arrived in Jacksonville in 1957, following graduation from law school. I hadn't been here very long before I heard about Chester Bedell; he was one of the deans of the bar and its most outstanding litigator. To the younger members of the bar, he was a veritable icon. The notion that I might have a chance to be involved in a case with or against him - even as an associate assigned to carry the briefcases - never even entered my mind. I was a mere novice. He was a giant of the profession, twenty-five years my senior.

The chance of being involved in a case with him materialized in 1961. The Bedell firm brought suit in federal district court on behalf of St. Joe Paper Company against Hartford Accident and Indemnity Company and one of our firm's clients, Fidelity and Casualty Co. of New York. Chester and a younger partner, Harris Dittmar, handled the case for St. Joe. I appeared for Fidelity. St. Joe was seeking to recover under Hartford and Fidelity policies that insured it against the dishonest acts of employees, in this case the manager of St. Joe's box plant in Pittsburgh.

The case was hotly contested, and what I learned from Chester and Harris - the care they took in preparing their case - proved to be invaluable.

I had the privilege of encountering Chester in the same district court for a second time, in a suit I filed on behalf of Southern Bell against Florida East Coast Railroad to enforce a contract the railroad had entered into with A.T.& T., Southern Bell's predecessor, in 1917. The contract was of indefinite duration, and Southern Bell took the position that the contract was therefore interminable. Bob Smith worked with Chester in this case, and, once again, what they taught me about preparing a case for trial could fill a book. The experiences I gained in these cases were pure gifts, which I cherish to this day.

In 1967, while these two cases were ongoing, I got involved in a proceeding in which I needed the assistance of someone with the wisdom of Solomon. Representing pro bono a tiny group of communicants in my Episcopal parish, I had filed with the Bishop of Florida a complaint alleging that the parish's rector had engaged in several immoral acts and thus was subject to discipline. The rector and his supporters, which made up the majority of the parish, responded with a vengeance. The Diocesan Standing Committee, which served as the ecclesiastical trial court, ignored the canon law's procedural rules and dismissed the case without hearing from my clients. They were terribly distraught. I turned to Chester, a communicant of another Episcopal parish, for advice. After studying what I had presented to the Bishop, he concluded that the Standing Committee had to reconvene and hear what my clients had to say. The letter he wrote to the Committee was straight to the point and a masterpiece of diplomacy. The Committee immediately saw the error of their ways, reinstated the charges, and held the hearing the canon law required.

In June 1968, I left the practice of law for a spot on the bench of the Fourth Judicial Circuit of Florida. In 1970, I joined the United States District Court for the Middle District of Florida. Chester Bedell appeared before me on several occasions while I was a judge of that court and, after 1975, while I was serving on Fifth Circuit Court of Appeals. The manner in which he represented his clients was always the same. The Fellows of the American Bar Foundation provided an apt description of how Chester went about his work in honoring him in 1977:

a splendid advocate, effective but always ethical, forceful yet always scholarly, tenacious but nevertheless courteous, tolerant yet unyielding in

his personal standards of morality. . . . A man of unlimited durability, unbounded energy, keen insight, high legal scholarship and sympathetic humanitarianism

I should add to this description the hallmark of Chester's work: thorough, if not exhaustive, preparation.

In his final years, Chester and his wife, Edmonia, were close neighbors, and we had occasion to visit. What he shared with me on these occasions gave me further insight into what his law partners witnessed every day - what made him the incredible lawyer he was.

Chester Bedell was a member of the "Greatest Generation," those born between 1901 and 1924. Their values - especially their moral values, their sense of decency, courtesy, and civility - derived from America's Judeo-Christian heritage and were passed on to them by their forebears. The characteristics of the Greatest Generation were high achievement, idealism, fearlessness, but not recklessness, patriotism, and moral sensitivity.

As a whole, the lawyers of the Greatest Generation ascribed to this value system. Not all actually did, of course. Some paid these values lip service and got into trouble, but the vast majority adhered to them day in and day out. Peer pressure exerted by practitioners like Chester Bedell, who set an example for others to follow, especially younger lawyers, ensured this adherence. As a result, there was no cause for the legislative or executive branches of government to intervene, to regulate the legal profession. Lawyers were fully capable of regulating themselves - they were truly independent.

Chester Bedell exhibited this independence in various ways. I am told that he never took a retainer; he charged his clients case by case. This gave him the freedom to refuse to represent a client for any reason. And the clients he had could not control him. Given this independence and his stellar reputation, Chester could ignore the crowd's reaction to his representation of a presumably guilty and much despised accused. To him, what the public might think was irrelevant. Like all great lawyers, all he was after was the truth and due process, and the justice they combine to yield.

Chester Bedell was a lawyer's lawyer. His reputation among the members of the bar was such that attorneys who were in trouble, charged with a criminal offense or an ethical infraction, sought him out, and he frequently took their case. The charges against many of these lawyers turned out to be baseless, a circumstance that no doubt cemented his

belief that lawyers cannot function properly - cannot adequately represent their clients - unless they are truly independent.

The notion that lawyers should be independent and self-regulating was still in vogue when I came to the bar in 1957. Lawyers knew the difference between right and wrong, and for the most part said, "No," when a client suggested a course of action that would be illegal or immoral or not in keeping with the standards of ethics and professionalism expected of practicing attorneys. This explains why a course in ethics or professionalism was not part of law school curricula. The ABA's Standards for Legal Education, which effectively governs law school accreditation, did not mandate a course in ethics until 1973. Prior to the 1970s, it was assumed that entering law students were well grounded in the moral principles of their forebears, and the same code of civility and manners they espoused. It was also assumed that when students graduated from law school and entered the practice of law, the legal profession would ensure - through peer pressure and mentoring - that they conducted themselves in keeping with these principles and the highest standards of the profession.

The assumption that peer pressure and mentoring would ensure such behavior was based on how the typical law firm was structured. Let's assume that a law firm resembles a pyramid. From the late 1940s and early 1950s - when those who had served in World War II were graduating from law school - to the late 1960s - when law school admissions began exploding - this pyramid was tall and had a narrow base. The ratio of partners to associates was one to one, at most one partner for two associates. The partner, a seasoned veteran, taught the new associate how to behave toward the firm's clients, opposing counsel, and the courts. This mentoring was constant. The salary paid a new associate was low enough to permit the partner to take the associate along to a court proceeding, a transactional closing, or a labor negotiation. The associate's time would be treated as "dead time," in that the firm would not bill the client for it. It was part of the firm's cost of doing business.

That is how Chester Bedell started out following his admission to the bar, in 1925, at the age of twenty one. After one year at the University of Florida College of Law, he withdrew, because he found the instruction boring, and returned to Jacksonville - to complete his legal education under the tutelage of his father, George C. Bedell, with whom he practiced until his father's death in 1947. The cost of Chester's training was born by his father, not by the clients.

By the 1970s, when the ABA mandated that the law schools have

a course in ethics, the law-firm pyramid had flattened out due to the huge influx of young lawyers and law firm leveraging - a state of affairs that has continued to this day. Today, in many firms, the ratio of seasoned partners to associates may be one to five or even ten. Consequently, if there is any meaningful mentoring of a new associate at all, it is done by an associate with perhaps only one or two years of experience. The result - the blind leading the blind - is predictable. Associates are left to their own devices. In dealing with opposing counsel, especially attorneys of their own generation, they sometimes resort to the law of the jungle.

The lack of mentoring - and the blind leading the blind scenario - is nowhere more manifest than it is in the public sector, especially in the state criminal courts. The circuit judges assigned to the criminal docket will tell you that in lots of cases - especially those with indigent defendants represented by court appointed counsel - it is all the court can do to keep a proceeding on track, and, at trial, to keep the attorneys from overreaching. The judges will say that the younger lawyers act as if they have had no mentoring. Not infrequently, both the prosecutor and defense counsel are novices. Neither are adequately prepared. Some seem unaware of what thorough preparation is, and the time and effort it requires.

Chester Bedell was standing in their shoes in the Summer of 1925, when shortly after being admitted to the bar he represented pro bono a young man his age charged with murder. The accused had allegedly killed his father for abusing his mother. The case was tried four times. The first three trials ended with hung juries. The fourth, which was held after the Florida Supreme Count denied Chester's petition for a writ of prohibition barring a retrial, resulted in an acquittal. It would be interesting if somehow we could compare the preparation Chester invested in that case with the preparation today's young lawyers invest in their cases.

Circuit judges assigned to the criminal docket will also tell you that the level of civility, courtesy toward opposing counsel, and respect for the court that today's young lawyers exhibit leaves much to be desired. I have observed this lack of preparation, civility, courtesy, and respect for the bench in reading the transcripts of some of the state criminal trials I have reviewed on the defendant's petition for a writ of habeas corpus.

The independence of lawyers and the independence of judges are inter-dependent, tied inextricably together. Without an independent bench, an independent bar is but an illusion. To be independent, each

must enjoy the public's trust and confidence. The public knows, albeit intuitively, that justice, in the litigation context, is a three-legged stool. The three legs are an independent bar, officers of the court who adhere to the highest ethical and legal standards of the profession; an independent judiciary, consisting of judges who obey their oaths of office and administer justice fairly and impartially; and witnesses, who are likely to tell the truth, as their oath requires, if the first two legs of the stool are sturdy. When one of the three legs collapses, justice is denied. When the denial, or perceived denial, of justice appears to be commonplace, the public reacts. Where the fault lies with the bar, the public pressures the legislative and executive branches to intervene. The same is true where the fault lies with the judiciary.

The legal profession has been striving to maintain the public's trust and confidence for a half century or more. Evidence of this is reflected in the ABA's Standards for Legal Education and the mandate that a course in ethics be part of law school curricula. When lawyers or judges fail to conduct themselves as expected, and the failure becomes widespread, the legal profession reacts by promulgating rules - tweaking old rules or drafting new ones - in an effort to solve the problem at hand. Typical vehicles are the ABA Model Rules of Professional Conduct for lawyers and judges, and the rules of procedure for civil and criminal litigation. When public outcry is loud enough, the legislative and executive branches also get in the act, an example being Sarbanes-Oxley, which creates criminal penalties for in-house counsel's failure to report certain fraudulent activity.

The problem of drafting a rule proscribing specific behavior is that the rule's drafters focus on that behavior and not on the unintended, and often undesirable, consequences - of which they are unlikely to foresee - that eventually flow from the rule's application. In a society, such as ours, where many citizens ascribe to the notion that behavior that is not explicitly proscribed is permissible - that we are free to do as we wish as long as there is no a rule against it - rule making of the sort lawyers and judges embark on frequently causes all sorts of mischief down the road. When the unintended, and undesirable, consequences eventually come to light, we simply have another go at drafting a rule to deal with them, and so on - until our rule books are so full that it would take a Philadelphia lawyer to tell you how to navigate the labyrinth to a safe harbor. This is what happens when we abandon the fundamental moral value system of our forebears and opt for a system of fine-tuned rules.

We in the federal judiciary have been guilty of using this ad hoc

rule-making approach time and time again - in drafting rules of procedure. Rules 11 and 16 of the Rules of Civil Procedure are classic examples. In my view, they have not enhanced the orderly and efficient prosecution of civil litigation; to the contrary, they have added to the transaction costs of litigating civil cases in the district courts, thereby rendering the district courts unavailable to many of our citizens. The transaction costs are so great in some classes of cases that even large corporations avoid the federal courts, if at all possible. In short, they have little, if any, confidence in the ability of the federal courts to do justice. This circumstance invites further regulation, which, all too often, is counterproductive.

Assuming that promulgating more and more specific rules will not solve the problem of inappropriate professional behavior, and in light of the public's growing distrust of lawyers and loss of faith in our courts' ability to do justice, the independence of lawyers and judges will continue its downward spiral. What can be done to reverse this unfortunate trend? I have a few suggestions, some of which, I am sure, are not original.

First, ethics must be taught in every course in the law school's curriculum. Some courses are particularly amenable to teaching ethics: civil and criminal procedure, contracts, torts, business associations, and legal writing.

Second, young lawyers desperately need mentoring. The American Inns of Court, which Chief Justice Warren Burger fashioned along the lines of the English Inns of Court, constitute excellent fora for mentoring. The opportunity for the young lawyers to hear what the seasoned lawyers have to say and to establish mentoring relationships that might endure for years can be of inestimable value.

Third, seminars on ethics and professionalism also serve as important tools for the betterment of the profession. My experience is that hypothetical ethical problems can be extremely challenging and oftentimes quite humorous.

Fourth, there needs to be far more interaction between the bench and bar than now exists. Judges - especially those of us who have been away from the practice of law for several years - need to be kept abreast of the day-to-day problems lawyers face. Judges need to be aware of the transaction costs they sometimes needlessly create for the litigants because of the way in which they process cases. And lawyers need to understand the negative effect the manner in which they prosecute their cases may have on the litigants standing in the queue waiting to be heard.

Finally, if Chester Bedell was speaking to you at this moment, he would say that the independence of the American lawyer depends, as it always has, on the moral character and integrity of the members of the bar. He would acknowledge that the legal profession has become, in many respects, more like a business than a profession; that it is far more difficult for house counsel in a large corporation or an attorney in a large law firm to be independent than it is for a lawyer in a small law office; that the law schools are turning out so many graduates that the profession can hardly assimilate and train them; that the organized bar is so large that real personal relationships are difficult to develop; and that the level of civility is not what it should be.

Chester Bedell was the quintessential role model. He firmly believed that how he conducted himself from day to day, in his law office, in the courtroom, or in his private affairs affected in some way, perhaps imperceptibly, how other lawyers conducted themselves. I close this lecture in that vein, by reading a passage from the Book of Genesis that I am sure was close to Chester's heart. Cain had killed Abel, and God asked him where his brother was. Cain's reply was, "I do not know. Am I my brother's keeper?" Chester Bedell thought of himself as his brother's keeper, his brother being a fellow lawyer. To him, everyone is somebody's role model, somebody's keeper. So it is with all of us.

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