The Twenty-Fourth Annual
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"THE INDEPENDENCE OF THE AMERICAN LAWYER"

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MARTIN A. DYCKMAN

Waynesville, North Carolina

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Martin Dyckman covered local, state and national government and politics and wrote editorials and opinion columns during a 46-year career with the St. Petersburg Times, where he retired in 2006 as associate editor.

From 1969 to 1976 he was chief of the newspaper's state capital bureau at Tallahassee, where his investigative journalism contributed prominently to the resignations of two Supreme Court justices and to the constitutional amendment providing for merit selection and retention of Florida appellate judges. The Florida Bar Foundation recognized his articles on prison reform and judicial reform with its 1984 Medal of Honor award, making him the first journalist so honored.

The newspaper's 1971 series, "Criminal Justice in Florida: Reform or Revenge?," of which he was the principal planner and author, received the Public Service Award of the Associated Press Managing Editors Association, an American Bar Association Silver Gavel, and first-place awards from the Florida Bar and Florida Society of Newspaper Editors.

He is the author of two books, Floridian of His Century: The Courage of Governor LeRoy Collins, and A Most Disorderly Court: Scandal and Reform in The Florida Judiciary, both published by the University Press of Florida. The Collins biography won the Charlton Tebeau award of the Florida Historical Society and a bronze medal in the Florida Book Awards.
Dyckman's recent speeches include appearances before the Sixth Circuit Bench-Bar Conference in November 2008 and the Inns of Court at Miami in January 2009.

He and wife, Dr. Ivy J. Dyckman, make their home at Waynesville, North Carolina, where he is at work on a book about Governor Reubin Askew and the Golden Age of the Florida Legislature.

He graduated from Florida State University with a BA in American Studies, served in the U.S. Army Reserve, and in his only professional foray outside the print media was an investigative reporter and editorial writer for WJXT in Jacksonville in 1968-69. After returning to the Times he also served as a national correspondent in Washington from 1976 to 1979 and as chief editorial writer in St. Petersburg. His last posting, in 2000, was to write editorial and columns from the capital at Tallahassee.

THE INDEPENDENCE OF THE AMERICAN LAWYER
GUEST SPEAKER: MARTIN A. DYCKMAN

Paper presented at the World Marriott
June 26, 2009, Orlando, Florida

I appreciate deeply this opportunity to speak to the Chester Bedell Memorial Foundation on the independence of the American lawyer. I know that it is not your custom to have non-lawyers at this podium, so the honor is a rare one. I consider it much more of a compliment than Jimmy Adkins once paid me in offering to make me a lawyer without benefit of the Bar exam. The Florida Supreme Court could do such a thing in those days and did so twice, but not for the reason Justice Adkins had in mind. His ultimate motive, he said, was to immediately disbar me.

I would not be surprised if some of you regard the news media as he did. . .intrusive, obstreperous, aggressive, uninformed, eager to find fault. You have had clients whom the media treated roughly. I know that Chester Bedell had several. Some of you perhaps resent it when journalists oversimplify complex issues, as when the slogan "tort reform" appears without quotation marks to identify it as a term of propaganda, or as when the media treats such debates as of consequence only to the trial bar.

However, there still remain some of us ink-stained wretches who acknowledge the indispensable importance of an independent bar. We know that there would be no freedom of the press but for independent lawyers such as Andrew Hamilton, who defended John Peter Zenger in the face of the common law doctrine that truth was no defense to seditious libel. Ever since, attorneys have been the allies of the media in many ways and in many causes.

Without independent lawyers, society would observe no law but that of the jungle. Those who fondly quote out of context Shakespeare's line, "The first thing we do, let's kill all the lawyers," impress me as being as fundamentally hedonistic and antisocial as the character into whose mouth the Bard put those words.

But I don't need to preach to this choir about the independence of lawyers. Rather, I want to emphasize something that Judge Gerald Tjoflat told you from this podium several years ago. "Without an independent bench," he said, "an independent Bar is but an illusion."

From my perspective, the independence of the Florida judiciary has been endangered since the 2001 legislature converted the judicial nominating commissions into the functional equivalent of gubernatorial patronage committees. Before that coup, there were no culture wars over Supreme Court appointments. Now, there are. The Bar lost the fight on that occasion, with too little apparent concern on the part of the general membership. The Florida media, I am sorry to say, performed

even worse. That episode exemplifies, with consequences still to be seen, what happens when the media fails in its duty to aggressively oppose the abuse of political power.

The media is my message to you today. Without independent, aggressive, and effective journalism, the independence of the judiciary will be an illusion. And, in the next blink of an eye, the independence of lawyers will become the illusion of which Judge Tjoflat spoke.

American journalism is in more peril than I could have imagined merely a few years ago. There is a clear and present danger, in my opinion, of entering upon that worst of all possible worlds Thomas Jefferson conceptualized when he wrote in 1787, "The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them."

To be sure, Thomas Jefferson was no Floyd Abrams. That letter meant simply that he distrusted government even more than he distrusted the press. "Advertisements," he wrote in 1819, "contain the only truths to be relied on in a newspaper." However, he perceived even the highly partisan press of his day as a lesser evil than a government ungoverned by informed public opinion.

To imagine such a wasteland, consider Watergate without the Washington Post and the Pentagon Papers without the New York Times. But for Gene Miller and the Miami Herald, Freddie Pitts and Wilbert Lee would still be in the Florida State Prison for murders to which another man confessed. Without my old newspaper, the St. Petersburg Times, Northwest Florida State College would still be spending six million dollars of your money to construct an aircraft hangar for the major campaign contributor of a House speaker. The British Parliament's current expense account scandal owes to an American-trained reporter whose litigation pried open the embarrassing records.

In the 1970s, it was independent and competitive journalism that salvaged the independence of the Florida judiciary.

When this story begins, in the 1970s, the Florida Supreme Court was dominated by its senior justice, B. K. Roberts. He manipulated the political and personal weaknesses of several of his colleagues who owed their presence more to politics than to the qualifications that ought to define a judge. There were few decisions with which Roberts did not agree, and they never went against the interests of his friend Ed Ball or the du Pont trust which Ball controlled. As I learned many years later and have reported in my book, Roberts considered himself to have

been Ball's private attorney throughout the twenty-seven years he served on the court. He remarked to a visitor in 1965 that he was being paid to write title opinions for Winn-Dixie. That year was notable for the case of Foley v. Weaver Drugs, in which the Supreme Court asserted the power to review per curiam affirmances by the district courts of appeal. The result in Foley relieved Winn-Dixie and other Florida retailers of any product liability for defective packaging. Very recently, I was informed that Roberts tipped off the Legislature in 1973 that the court would deny a massive tax refund claim in a case that was awaiting oral argument. The legislation to put his name on the Florida State University law school building was pending at the time.

Soon after, in July 1973, the court approved the Bar's petition to strengthen the Code of Judicial Conduct by prohibiting corporate board memberships and other forms of extrajudicial income. This necessarily involved restating the code, including the ex parte provisions that you all know by heart. Almost simultaneously, several of the justices were flagrantly flouting them. Others were ignoring their explicit duty to report what they knew.

The story actually begins two years earlier when newly elected Justice Hal P. Dekle lobbies Circuit Judge W. L. Fitzpatrick of Panama City on behalf of a minor Dekle campaign supporter from Miami in regard to a pending civil case. After a second contact from Dekle, Fitzpatrick recuses himself. The Judicial Qualifications Commission soon hears about it. When Dekle is questioned, he explains plaintively, "What's a politician to do?"

Those five words spoke volumes about what was wrong with the court in those days.

Nearly everything about the JQC was secret at the time. In camera it found Dekle guilty of unethical conduct but could not agree by a two-thirds vote on either a public or private reprimand. The case sat on the shelf until other events forced the JQC's hand.

Meanwhile, Claude Kirk had appointed David McCain to replace the late Justice Campbell Thornal. McCain's appointment was utterly political, consummated over the Bar's strong but confidential objections. McCain's service as a Kirk appointee on the Fourth District Court of Appeal had already drawn unfavorable attention to his ethics. Campaigning to keep the Supreme Court seat in 1972, McCain hooked up with a labor union local whose president and two other members were appealing a bribery conviction. McCain tried to fix their case by telephoning Judge Joseph McNulty of the Second District Court of Appeal. When that didn't work, McCain voted in the Supreme Court majority in Nell v. State, which overturned the convictions and eviscerated the bribery statute. The JQC knew about that but apparently could

not agree on doing anything about it. Had it been investigating, I doubt strongly that Richard Earle Jr., the JQC vice chairman at the time, would have tipped me to get the story from Judge McNulty. Dick Earle thought,I believe, that it would take a newspaper expose to get the commission to act.

We come now to that memorable month, July of 1973, in which the justices reconsidered the code of judicial conduct. One doubts whether, in that process, some of them paused to read it. Justice Joseph A. Boyd Jr. played golf that month with an old friend, Ed Mason, an attorney for two utilities interested in the court's pending decision in Gulf Power v. Bevis. It was a hugely important case involving Governor Reubin Askew's new corporate profits tax. They did more than just talk about the case, which would have been grievous enough. Mason testified that it was agreed that he would provide a memorandum to help Boyd "articulate," as Mason put it, the opinion Boyd was supposed to write for the court. In other words, it was a draft opinion, with no notice to the governor and attorney general, the opposing parties.

Boyd saw the light when his law clerk, Roger Schwarz, came across the document and asked, "What the hell is this?" Soon after, Boyd insisted that Schwartz watch him tear the document into what he later described as "seventeen equal parts" and flush them down a toilet.

But by then Schwartz had shown the strange document to David LaCroix, who was Chief Justice Vassar Carlton's law clerk. Unknown to them, Mason had given another copy to Dekle. When Dekle saw that Boyd had changed his vote and had written an opinion against the utilities, Dekle gave Mason's memorandum to his law clerk to draft a so-called dissent. All this happened, incredibly, after Dekle knew someone had blown the whistle on him in the Panama City case.

When Dekle's "dissent" circulated, en route to becoming a majority opinion, Schwartz and LaCroix recognized it. LaCroix alerted the chief justice, who ordered Dekle to rewrite it to erase the extraneous taint. Dekle's copy of Mason's document and Dekle's own first draft vanished we know not how. By now, the entire court knew something unethical had transpired, but the court's instinct was to cover it up. Only the law clerks were offended by that.

Newspaper competition blew the lid. It began, ironically, with a competing newspaper's report of an anonymous document alleging that the court had been bribed in a pari-mutuel racing date case. The court in those days did seem to regard itself as the Florida Racing Commission of Last Resort. That particular allegation, however, was unsourced, unsubstantiated, and unfruitful. But it did prompt my editors to assign me to look for fire behind the smoke. I went to see Richard Earle, who told me about McCain's call to Judge McNulty, and

I broke the McCain story in August 1973. That was after the Gulf Power intrigue had begun but before we knew about it. By now the JQC had a keen interest in McCain that went beyond the Nell case, but still was unable to get an investigation under way.

Soon after, Schwartz and La Croix came across a memorandum that McCain's secretary had written to him. This is what it said: "Judge Dekle asked me to write you this note. HPD says that he thought you were with him on his (quote) dissent (close quote), that Ed Mason spoke to him on it but missed seeing you." Now the law clerks had documentary evidence of ex parte lobbying. They had seen and heard enough to trust no one but the press to do anything about it. That is how I came to have a copy of the note that McCain's secretary had typed.

It led to a banner headline in the St. Petersburg Times. The governor's attorney, future justice Arthur England, filed a grievance with the Bar. The story jump-started the JQC. As for the court, its only response was to send a posse to expose and punish the leakers. I received a telephone invitation from the local state attorney, a cousin of Justice Roberts, who was looking for the source. I informed the prosecutor that I would not talk to him without a subpoena and then only with benefit of counsel, and that was the last I heard from him on that issue.

Meanwhile, the JQC was busy. Boyd admitted to shredding the document but denied knowing the provenance. Mason told all. The JQC recommended that the court remove Boyd and Dekle. The other justices chose substitutes who voted instead for public reprimands and held in effect that a judge should not be removed for an ethical violation absent proof of "corrupt motive." House Speaker Donald Tucker ordered an impeachment investigation during which Dekle resigned. Boyd was let off on the House committee's errant assumption that a psychiatric examination would result in his retirement for disability. The committee then went after McCain over the Nell case and other alleged ethical violations.

Amidst that probe, I reported on the affidavit of a union messenger who said he had delivered a manila envelope to McCain and had watched him dump ten thousand dollars in small bills on his desk at the court. The committee voted to impeach McCain on other grounds and he resigned. He was later disbarred over the labor union's case and was a fugitive on federal marijuana smuggling charges when he died in November 1986. His portrait remains on display in the Supreme Court's gallery.

The misconduct that newspapers exposed led to profound improvements in the Florida judiciary. The governor appointed Alan Sundberg to succeed Dekle and Joseph Hatchett to replace McCain. With Ben Overton and Arthur England already on the court, that made

a firm majority for ethical and procedural reform. Meanwhile, the constitution was amended to overturn the corrupt motive precedent, to provide for automatic recusals and automatic substitutions not controlled by the court if ever again a Supreme Court justice is charged by the JQC, to open all JQC proceedings upon the finding of probable cause, and most importantly, to appoint rather than elect Supreme Court justices and judges of the district courts of appeal.

None of that would have happened without a free and competitive press to expose the scandals. Today, you would be facing the prospect of contributing to four contested Florida Supreme Court races next year. This state, rather than West Virginia, might have become the U. S. Supreme Court's exemplar of the ethical outer limits of judicial campaign contributions.

But suppose those events had happened in a future, perhaps not so improbable or remote, when there are far fewer newspapers, the survivors are weak, and the opinions of the people rely even more on cable networks and the internet. I doubt that the cable networks would trifle with the flaccid ethics of a state supreme court or that some unpaid internet reporter would have the time and resources to discover those stories and pursue them from one end of Florida to the other. I wonder whether he would dare to report them without the reputation and financial strength of a major newspaper to defend him against a subpoena for his sources or a SLAPP suit by one or more of the justices.

Investigative journalism bears a high cost. You can surmise what Gannett had to spend to slay the dragon of false light. For exposing rampant corruption in the Southern Methodist University football program, the Dallas-Times Herald suffered an advertising boycott that led eventually to its demise. Gene Miller and the Miami Herald had been on the Pitts-Lee story for eight years before Governor Askew pardoned the innocent men.

When the bell tolls for any newspaper, it tolls for thee. It tolls for everyone. Competition is essential to a free and effective press.

Without competition, we might have sat forever on the story of McCain's bribe. We were concerned that the union messenger would be a shaky witness and he admitted having told a different story to a federal strike force. Then reporter Duane Bradford of the Tampa Tribune scooped me with a story that McCain had paid off a second mortgage with roughly 10,000 dollars in tens and twenties that he said he had accumulated in a glass jar. The Tribune story about McCain dealing in funny money, even though it related to an earlier occasion, gave us the confidence to print what we had and to wait for the retraction demand that never came.

But neither the Times nor the Tribune nor any other out of town

paper is now available, except to someone sitting at a computer, in the capital city of the nation's fourth largest state. The Atlanta Journal-Constitution, which once declared that it "Covers Dixie Like the Dew," has shrunk its circulation to Metropolitan Atlanta. Nearly every day brings another story of a major American newspaper shutting down, purging its staff, filing bankruptcy, cutting circulation, cutting content or shifting it to the internet, or being offered for sale at distress prices. Even the New York Times Company is in such financial straits as to threaten the survival of its subsidiary, the Boston Globe. Imagine, if you can, Massachusetts without the Globe.

Some statistics suggest that more people are reading newspapers on line than used to read them in print. I am skeptical. Are they reading the whole paper or only the links that catch their eyes or reinforce their existing opinions?

Moreover, no matter how on-line readership may be flourishing, it does not pay the bills. Internet ads earn far less than run-of-press advertising. Newspaper advertising sales declined by 28 percent in the last quarter.

One can, of course ,run an internet news site on the cheap. One paperless "newspaper" in Pasadena has outsourced its reporting to part-timers who live in India. They cover city hall by webcam, and thus missed two council members stalking out of a meeting in protest. Those Indian beat reporters will never meet their sources eye to eye, take a cue from body language, browse through records that are not on line, or manage in any way to develop the personal rapport that encourages potential sources to stake their careers on their faith in a reporter, as the Supreme Court clerks did with me.

I admire the laid-off or bought-out journalists in Palm Beach County and elsewhere who are working without pay for start-up websites intended to replace what they were paid to do. Devotion goes only so far, however; there are families to be supported and good journalism is not cost-free.

Bill Keller, the executive editor of the New York Times, wrote in a staff posting four months ago what this all means. "There is a diminishing supply of quality journalism and a growing demand," he said. "By quality journalism I mean the kind that involves experienced reporters going places, bearing witness, digging into records, developing sources, checking and double-checking, backed by editors to try to enforce high standards. I mean journalism that, however imperfect, labors hard to be trustworthy, to supply you with the information you need to be an engaged citizen."

He concluded on the optimistic note that "the market will find a way to make the demand pay for the supply."

Perhaps, but it was an enormous mistake for the Times and other newspapers to accustom the public to reading them on-line for free. Now they need to find a way out of that. To do so without violating the antitrust laws seems to me to be a tall order. Newspapers that do not compete for circulation or local advertising can and should consider pooling their coverage, as the Times and the Miami Herald are doing with their Tallahassee bureaus. The risk there is to the competitive spirit, but it is better to cooperate than to let issues go unreported for lack of staff with which to compete. However, some newspapers are now cooperating to cover communities where both circulate, and that is a concern.

I cannot foresee what, if anything, will be the salvation of the rambunctious, fearless, and professional news media, as we have known it, that is so central to the character of America as we know it. Standing here today, I can only urge you to care about it as much as I do.

My book, A Most Disorderly Court, was inspired by David LaCroix, one of the clerks who were central to the story. When it was published, I sent him a copy and he sent a note in reply.

"Thank you for the book and for the acknowledgement," he said. "It surprised me that I got very emotional when I read it. It took me a few minutes to figure out why.

"Back then, I didn't think about any consequences. I just knew the right things to do and did them. But there really were consequences. I lost my job on the Court that I loved, and I lost good job opportunities after that. I was slandered by several justices. I also lost a few friends. And I was obligated to be interviewed and to testify several times in the two to three years following the events.

"Something else I never really thought about back then was that nobody—not my parents, any of my friends, any other attorney—nobody—ever thanked me. I muyst have had some feelings about that, however, that I stuffed, because that was what your acknowledgment brought up. I felt like I had finally been thanked. So I really appreciate that."

The next time something goes deeply wrong in our system of justice — as you can be sure something sooner or later will — I hope there will still be people with the conscience and the courage to divulge it, and that they won't have to wait thirty years for our appreciation But most of all, I hope there will still be newspapers willing to hear what they have to say and able to report it.

Thank you.

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