The Thirtieth 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 and Criminal Law Sections

Boca Raton Hotel & Club
Boca Raton, Florida
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HONORABLE DONALD M. MIDDLEBROOKS

West Palm Beach, Florida

DONALD M. MIDDLEBROOKS

Judge Don Middlebrooks graduated from undergraduate and law school at the University of Florida and received a Master's Degree in Law from the University of Virginia. At Florida he was both President of the student body and President of Florida Blue Key. Her served as General Counsel for Florida Governor Reubin Askew. While working for the Governor, he conducted the investigation which led to the pardon of Freddie Pitts and Wilbert Lee, two men who were convicted, sentenced to death and served over ten years in prison for murders they did not commit. He also was responsible for drafting the Sunshine Amendment, the constitutional initiative that added financial disclosure and other ethical requirements to the Florida Constitution.

During his twenty years in private practice, Judge Middlebrooks concentrated on media and public law, which included representation, along with Sandy D'Alemberte, of a broadcast company in Florida Supreme Court proceedings which led to camera access to courtrooms. His pro bono cases included representation of a death row inmate in clemency and post-conviction, of a Circuit Judge on charges brought by the JQC for writing an article expressing doubt about the death penalty, and a political committee contesting the jurisdiction of the Federal Elections Commission. He was a member of the Florida Ethics Commission, The Florida Supreme Court Commission on Criminal Discovery, and the Commission on Child Welfare established by the Florida Legislature. He was President of the Florida Bar Foundation, and participated in creating the interest on trust account program, which provides funding for legal services and programs to benefit the justice system. He also chaired the Florida Bar Children's Commission, the Palm Beach County Children's Services Council, and the Palm Beach County Criminal Justice Commission.

Judge Middlebrooks was appointed a United States District Judge for the Southern District of Florida in 1997 by President Bill Clinton. He is Chairman of the Eleventh Circuit Committee on Pattern Jury Instructions. Among his noteworthy cases are *Bush v. Gore*, the initial federal case arising out of the 2000 Presidential Election; *Florida Wildlife Federation v. U.S. Corps of Engineers*, involving the siting of the Scripps Research Institute's Florida Branch; *Boy Scouts of America v. Till*, which held the Boy Scouts could not be banned from meeting in school facilities in Broward County; and *United States v. Royal Caribbean*, holding that international law did not preclude the government from prosecuting a cruise line for dumping oil into the ocean and falsifying records in order to conceal it.

INTRODUCTION

MRS. WALBOLT:

Good afternoon.

To the press Judge Middlebrooks is best known for the judge who presided over the Republican Party's challenge to the state the Florida's recounting of the ballots in *Bush v. Gore*. But to the legal profession Judge Middlebrooks is best known as a lawyer who dedicated his career to the improvement of the administration of justice, to improving access to justice, and to improving good government.

As general counsel for the late Governor Askew, Judge Middlebrooks was an active participant in getting the Sunshine Amendment to the Constitution passed and getting the first ethics law regarding state politicians disclosing their finances enacted. In private practice he helped the Florida Bar Foundation prepare its submission to the Florida Supreme Court and to the Federal Reserve System of its then revolutionary IOTA funding program which did so much to enhance the delivery of legal services to those in need of access to courts in our state. And with the issues of low interest rates today, the gester of the Criminal Law Section to the Florida Bar Foundation is going to be greatly appreciated.

Judge Middlebrooks was very, very active in public service and in the practice of law. He was president of the Legal Services in Florida, a director of the Florida Bar Children's Fund, head of the Volunteer Attorneys Resource Center, that helps civil lawyers who are handling death row inmate cases, president of the Florida Bar Foundation and much, much more.

He's been described as "intellectually honest, confident in his reading of the law and unafraid to do what he thinks is right." A fitting description for the lawyer who is going to present the annual Bedell lecture today.

Please welcome, Judge Middlebrooks.

A CHALLENGE FOR INDEPENDENT LAWYERS: ACCESS TO THE COURTS

Thank you for the opportunity to provide my thoughts on the independence of the American lawyer, in honor of Chester Bedell. To the American Bar Foundation, Chester Bedell epitomizes the best of the American Trial Lawyer, and through this speech, I have learned why -- his values, the meticulous way he prepared, the integrity that guided every aspect of his life. It has been said that example is the school of mankind. Trial lawyers have no better teacher than Chester Bedell.

His worry about the independence of the Bar, while urgent and persistent, was not unique. Before appointment to the Supreme Court, Louis Brandeis also built a remarkably successful law practice; he too was known for his values and his exhaustive preparation. The year after Mr. Bedell was born, Brandeis warned "that at the present time the lawyer does not hold as high a position with the people as he held seventy five or even fifty years ago. Instead of holding a position of independence," said Brandeis, "able lawyers have to a great extent allowed themselves to become adjuncts of great corporations and have neglected to use their powers for the protection of the people. We hear much of the 'corporation lawyer' and far too little of the 'people's lawyer.'"

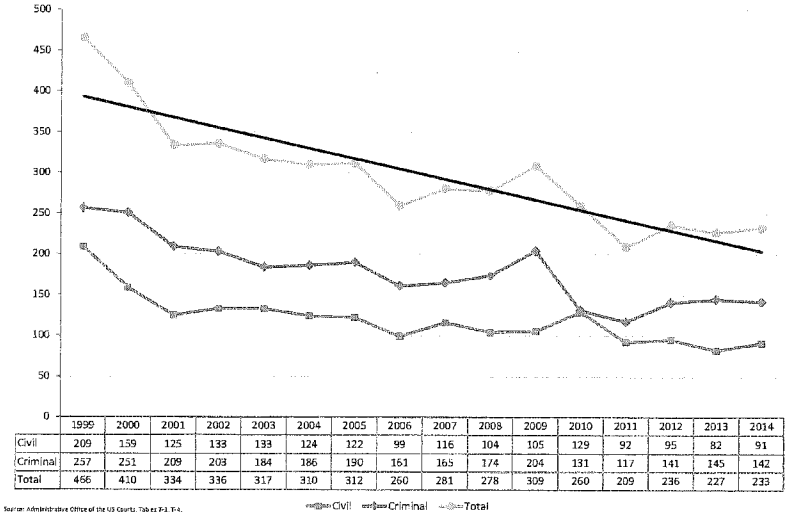
Chester Bedell practiced independence. He did not take on continuing clients so he remained free to represent those who needed his help. He thought a trial lawyer should take on one case at a time. He never turned down a case because a client couldn't pay.

For eighteen years, I have enjoyed watching lawyers try cases. I have seen devastating cross examinations, closings that brought tears, the charity of pro bono service. I have shared the drama of waiting for a jury to return its verdict. But each year, I see less.

I sit on one of the busiest trial courts in the country. But so far this year, I have tried only a handful of criminal cases and one civil patent case. The lawyers were very good, each side had several – the legal fees ran into the millions – but that kind of case cannot sustain the trial bar.

Fifteen years ago, the Southern District tried 466 cases – 209 civil, 257 criminal. Last year, we tried 233 cases – 91 civil and 142 criminal. This is a 50% decline in trials, despite 2 more judges and a 22% increase in filings.

Jury and Non-Jury Trials,
Southern District of Florida, 1999 - 2014

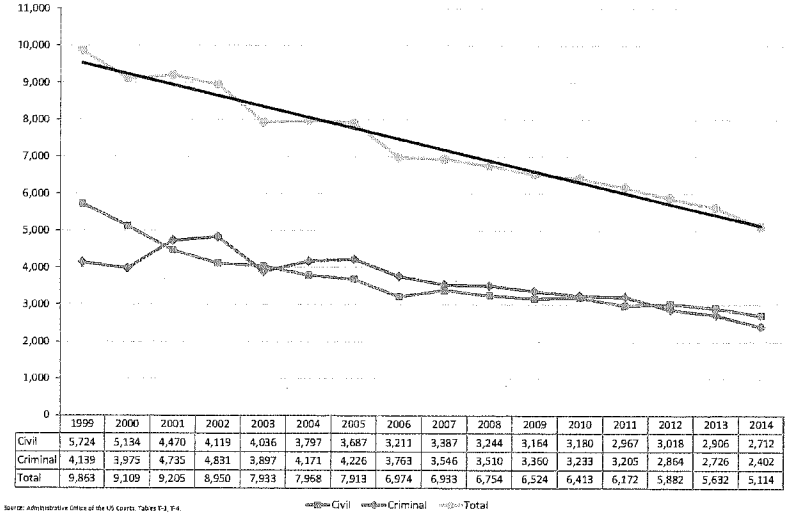


	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Civil	209	159	125	133	133	124	122	99	116	104	105	129	92	95	82	91
Criminal	257	251	209	203	184	186	190	161	165	174	204	131	117	141	145	142
Total	466	410	334	336	317	310	312	260	281	278	309	260	209	236	227	233

Source: Administrative Office of the US Courts, Tables T-1, T-4.

The national statistics are almost identical: 9,863 trials fifteen years ago, 5,114 trials last year with a 12% increase in filings.

Jury and Non-Jury Trials,
US District Courts, 1999 - 2014

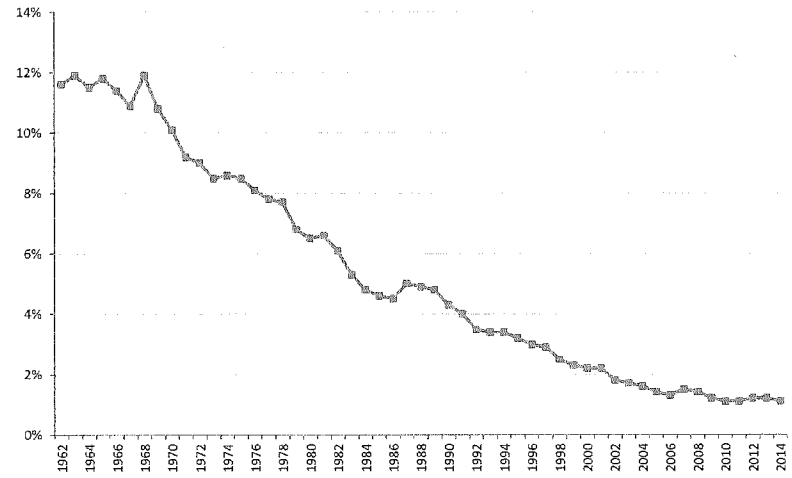


	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Civil	5,724	5,134	4,470	4,119	4,036	3,797	3,687	3,211	3,387	3,244	3,164	3,180	2,967	3,018	2,906	2,712
Criminal	4,139	3,975	4,735	4,831	3,897	4,171	4,226	3,763	3,546	3,510	3,360	3,233	3,205	2,864	2,726	2,402
Total	9,863	9,109	9,205	8,950	7,933	7,968	7,913	6,974	6,933	6,754	6,524	6,413	6,172	5,882	5,632	5,114

Source: Administrative Office of the US Courts, Tables T-1, T-4.

If you look back further, the trend is even more unmistakable. This chart shows the percentage of civil trials in the federal courts from 1962 to 2014. As you can see, it is approaching zero.

Percentage of Civil Terminations During or After Trial,
US District Courts, 1962 - 2014



Source: Administrative Office of the US Courts, Table C-4

The civil trial is simply vanishing.

About a year ago, District Judge Mark Bennett wrote an article in Litigation, the quarterly publication of the ABA Litigation Section. It was entitled *Obituary: The American Trial Lawyer, Born 1641 – Died 20??.*

Bennett wrote:

> The American Trial Lawyer who in innumerable ways, enhanced the lives of so many Americans and made the United States a fairer, healthier, safer, more egalitarian and just nation passed away recently. Although a precise age is uncertain, the ATL is believed to have been at least 371 years old at the time of death.

Cleaner water, hundreds exonerated on death row, safer products, protection of minorities, recovery for those bilked out of their savings, vindication for those wrongfully accused – the American Trial Lawyer fought oppression, unfairness, illegality, discrimination and other injustices – both large and small.

The cause of death: increasingly applied summary judgment procedures, sentencing enhancements, mandatory minimums, abusive discovery, the inability to implement reforms that would reduce the enormous costs of going to trial, the belief that trial judges should be litigation managers, that jury trials are a failure of the system.

What can be done? It's not a simple matter.

It's not as if it hasn't been studied. The Judicial Conference in a Report to the Chief Justice and the Florida Bar Special Committee to Study Decline in Jury Trials have both examined the problem. There is consensus that litigation is too costly, discovery is too expensive and delays increase costs but also that Rule changes alone will be insufficient to make meaningful improvement. If we are to reverse the fifty year trend, it will take real change in the way we prepare and try cases.

Chester Bedell tried criminal and civil cases; he thought a trial lawyer should be able to try any kind of case. It is no coincidence that many of the great trial lawyers -- Clarence Darrow, Edward Bennett Williams, Brendan Sullivan, Ted Wells, Mary Jo White -- are among those who have done both. Closer to home, Robert Josefsberg and Jane Moscowitz. Civil lawyers can learn from those who practice criminal law's speedy trial requirements and emphasis on investigation rather than paper discovery.

We need to reexamine the way we try civil cases. Most take too long, are too expensive, and unnecessarily intrusive. People deserve their day in court but shouldn't wait a lifetime to get there.

The one size fits all approach doesn't work – every case does not require document discovery, numerous depositions, pretrial motion practice, and days in trial. A patient with a cold doesn't need a CAT scan.

Discovery is too expensive and often a gauntlet, used to bludgeon an opponent. Much is wasted. A survey prepared for the Judicial Conference concluded that the ratio of pages discovered to pages entered as exhibits was 1000 to 1. There are a lot of haystacks being sifted and not many needles found.

Most agree that early and firm trial dates contribute to speedy, less costly, and more efficient resolution. I use a so-called "rocket docket" to reduce costs with less time for abusive discovery. But it is a blunt instrument. A better way is for lawyers, early in a case, to map out a plan proportionate to the issues and amount in controversy.

Technology is forcing change. Big law firms with libraries, corner offices, and conference rooms may find it increasingly difficult to compete. Abraham Lincoln, who needed no more litigation support than a pad of paper, would be pleased to know that the army of paralegals and associates still commonly present when cases go to trial are being replaced by the iPad.

Substantial portions of trials could be presented more effectively and persuasively through well-produced video and we have the equipment to make this possible and economical. What we don't have are lawyers who are trained to use computers in that way or rules that require lawyers to hone those skills. The American judicial system still demands Broadway-style live dramas with huge production costs while complex ideas are displayed elsewhere through inexpensive YouTube videos.

In an adversary system, it is hard to exercise restraint. But if we are to arrest the decline in trials, everyone must participate. Judges need to be more involved; clients need to insist on limits. The proportionality requirements of the civil rules point the way. Nothing less than the preservation of the civil jury trial is at stake. Dinosaurs remained fiercely independent – but they could not adapt so they disappeared.

There is an unfortunate sequel to Judge Bennett's Trial Lawyer Obituary. In extolling the virtues of the trial lawyer, Bennett wrote: "Hundreds of thousands of lives have been spared from tobacco-related deaths and billions have been saved in health care costs." He also said that because of trial lawyers, individuals and corporations falsely accused of negligence and other wrongs have been vindicated.

Judge Bennett was on a list of trial judges available to try cases around the country. He was assigned a tobacco case. Philip Morris's lawyers filed a motion to recuse based on his article. They did not contend Judge Bennett was biased. Whether he was "actually partial" they said was not the test. They said it was appearance that mattered – that his "effusive praise of products liability plaintiff trial lawyers necessarily suggests to a reasonable observer antagonism to those who defend such lawsuits."

Have we lost our tolerance? Reese Smith said, "As lawyers we speak the language of liberty." Some of us seem to have forgotten how.

Edith Jones, the former Chief Judge of the Fifth Circuit, gave a lecture

on the death penalty at the University of Pennsylvania Law School. She spoke for about 45 minutes and then answered questions. Her remarks focused on three questions: Is the death penalty constitutional? Is it morally justified? Is it working?

Months later, an ethics complaint was filed with the Judicial Conference by death penalty lawyers contending that Judge Jones had discussed pending cases, criticized rulings of the Supreme Court, exhibited bias toward certain defendants, and displayed a lack of appropriate judicial demeanor.

Chief Justice Roberts transferred the complaint to the Judicial Council for the D.C. Circuit, a special committee was appointed, along with special counsel.

The lecture was not recorded. Special counsel interviewed Judge Jones, reviewed handwritten notes outlining her planned remarks, and spoke with almost all of the attendees at the lecture, mostly University of Pennsylvania law students. Recollections differed, particularly with respect to nuance and tone. With a 74-page opinion, the Special Committee recommended that the Judicial Council dismiss the complaint.

The opinion is reasonable and does a good job explaining the canons of judicial conduct. But it is disappointing that a serious and outspoken judge can be forced to defend herself for the content of a law school speech about the death penalty.

Barry Cohen is a county judge in Palm Beach County, who spoke out about racial injustice, particularly the disproportionate incarceration of minorities. The state attorney's office compiled a file based on statements going back over several years, including remarks made when he was invited to a symposium on racial profiling, and statements taken out of context from judicial orders, where, while expressing reservations about police conduct, he ultimately ruled for the state. Using that file, they unsuccessfully sought to recuse him in all criminal cases. The Attorney General's Office appealed but lost. A complaint with those allegations was then filed with the JQC. Judge Cohen was reprimanded for speech about matters of public concern despite agreement that none of his rulings or decisions were ever adversely affected.

Searcy, Denney, Scarola, Barnhart & Shipley is a Florida law firm. They say their lawyers have a passion for justice.

Their website included statements that the days "where we could trust big corporations – are over," that "[g]overnment regulation of . . . consumer safety has been lackadaisical at best," "that when it comes to 'tort reform' there is a single winner: the insurance industry." The Florida Bar says those statements violate its advertising rules because they aren't "objectively verifiable."

The law firm said it had "32 years of experience handing mass tort cases, resulting in justice for clients in a wide variety of circumstances" and claimed to be "one of the few law firms in the country to successfully represent innocent victims of dangerous supplements." According to the Florida Bar, this must go unsaid because words like "justice" and "successfully" are inherently subjective.

I had always thought that opinion deserved the highest protection. But I am not here to analyze how the First Amendment applies, or how the case now winding through the courts should be resolved. My argument is different – the rules should be abandoned. They are unworkable, unproductive and stand in the way of serious engagement.

As I drove down here, I passed a billboard that says "Steinger, Iscoe and Greene, Got Me $1 Million."

Taxis display the same message.

Apparently these signs pass muster because they are "objectively verifiable." Those who believe limits on advertising can restore professionalism need to recognize, that train has left the station.

After he became a Justice, Brandeis wrote that, when dealing with falsehoods and fallacies, "the remedy to be applied is more speech, not enforced silence."

Ten years ago, Sandy D'Alemberte spoke here about how trial lawyers serve as a connective link between people, institutions, and government. To connect, lawyers need to communicate.

Judges and lawyers have front row seats as justice unfolds or injustice persists. We have a duty to speak out – to arouse, to inform, to warn of dangers, to identify opportunities. Some speech will irritate or anger, some will be unwise. Some may be embarrassing. But to be relevant, we must engage.

Walt Kelly's *Pogo* put it best: "We have met the enemy and he is us." Through excessiveness we are litigating ourselves out of existence. And in limiting speech, we ignore that as trial lawyers, we speak the language of liberty.

Thomas Jefferson described the jury trial as the only anchor ever yet imagined by which a government can be held to the principles of its constitution. But like an anchor it can dissolve in rust through lack of care and infrequent use. We share a responsibility to make sure it is renewed and maintained.

Were Chester Bedell practicing today, I can't say for sure that he would rival Steven Spielberg as a video producer or outdo Apple as a marketer. But I do believe he would recognize that, while maintaining his integrity, to epitomize the best as a trial lawyer he might just have to do both.

THE BEDELL LECTURERS

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Benjamin R. Civiletti 1989
Brendan V. Sullivan 1990
Julius LeVonne Chambers 1991
Roxanne B. Conlin 1992
Joe Stamper 1993
William Steele Sessions 1994
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Hon. Belvin Perry, Jr. 2012
Kenneth W. Starr 2013
Hon. Joseph W. Hatchett 2014
Hon. Donald M. Middlebrooks 2015

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