OLD WINE INTO NEW BOTTLES AND OLD WINE INTO NEW BOTTLES *REVISITED*

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ABSTRACT

Professor Schill, a long-time friend and avid supporter of the *Houston Journal of International Law*, published the first of these two essays, *Old Wine into New Bottles*, two years ago. The piece received such a warm welcome from the community that Professor Schill was inspired to follow up this year with a sequel, *Old Wine into New Bottles Revisited.* These essays are heart-felt reflections on legal ethics, and represent the best advice to young and old lawyers alike on how to conduct themselves in the profession.

OLD WINE INTO NEW BOTTLES

"If John Brown Says The Ship Can Sail, The Ship Can Sail"

Judge Thomas M. Kennerly wrote the above note to Deputy Clerk Louise Berley when young lawyer John R. Brown advised her that security had been arranged with an opposing attorney to allow a ship to sail. Even after a lifetime of honors, this confidence in his integrity remained one of Judge Brown's proudest memories. Would a judge express a similar confidence in a lawyer today?

A pronounced trend toward questionable and uncivilized behavior among lawyers has developed over the past few years.

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There is a lack of respect for the courts and an acceptance of the principle that victory in litigation justifies any conduct. Behavior that starts with discourtesy sometimes ends with problems with the truth.

There are several reasons for these trends. One is the fact that legal ethics course requirements in law schools are considered a drudgery by both students and professors, and rarely given the attention they deserve. Demands by clients for a given result often tempt attorneys to pursue improper conduct in order to retain the representation of the client in a shrinking and increasingly competitive legal market. There is a notable lack of mentoring between older and younger lawyers which could pass along the professional conduct and values that are our heritage.

Underlying all these aspects is the pressure that law firms are increasingly applying to their partners and associates to maximize their hourly and monetary figures. Coupled with a shrinking client base, there is a tendency by some lawyers to prolong litigation in order to expand billable hours and impress the firm's review committee. The fact that mentoring younger lawyers does not factor into billable hours undoubtedly affects the time spent by older lawyers interacting with the younger members of the firm.

My observations are based on the thirty-six years of experience I have had practicing maritime law in Houston. My views are not parochial, since maritime law is both national and international in nature.[1] There is a significant consistency among ports and nations regarding acceptable ethical conduct by lawyers. The legal profession must not permit additional time to pass without returning to civil conduct in the adversarial context.

I follow the practice of reviewing with my law school classes the lessons which are taught in kindergarten. They are simple and have an analogy to the contemporary practice of law.

1. Tell the truth.
2. Do not shove.
3. Wait your turn.

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1. Admiralty practitioners are not considered to be a part of the International Law category. This is a puzzling situation since we deal with ships of many national flags and clients who reside in many nations.

4. Raise your hand.
5. Clean up your mess.
6. Respect the other students.
7. Take a rest.[2]

I would add three additional points: (1) don't fudge with the judge, (2) if you have to think about it, don't do it, and (3) when in doubt, tell the truth.

One of our local federal judges summarized the problem on the basis of "how can you teach something which someone should have learned on a mother's lap." It is submitted that these points can not be taught to students at a graduate school level, but it does no harm to take opportunities to remind the legal profession of simple ethical standards and acceptable conduct.

The Houston admiralty bar was of a limited number thirty-six years ago. There were four federal judges in the Southern District of Texas and seven members of the Court of Appeals for the Fifth Circuit, which covered an area from El Paso to Savannah. Additionally, maritime legal work was funneled to the "out port" lawyers by Protection and Indemnity (P & I) representatives or law firms in New York. There was little contact with the overseas client. Serious matters would attract New York lawyers into the "out ports" since there was a prevailing notion held by shipowners and their P & I clubs that these lawyers had superior expertise. The practice, which later, evolved was for local attorneys to handle matters which occurred in their ports.

The relationship between members of the admiralty bar was a close one with civilized behavior being the norm in most instances. Depositions were not set by notice, faxed or otherwise; the date for the deposition was agreed upon by all counsel after a series of conferences. Rule 33 (interrogatories) and Rule 34 (request for production) were not used as a means of punishing your opponent or requesting information which had no bearing on the litigation. In fact, they were rarely used. Infor-

2. This point leads to an unrelated question of sabbaticals for lawyers at given intervals. I suggest to the younger members of the bar that this point should be considered if you are to retain a healthy physical and mental condition in the years ahead. These seven points set forth above are from the publications of Mr. Robert Fulgham.

mal requests were made for documents and information, and when this data was supplied there was no doubt that all documents had been produced. The shredder probably had not been invented because no one would think of using one. If a client requested improper behavior from the attorney, the norm was for the attorney to advise the client to seek alternative legal representation. Letters setting forth agreements between the lawyers were not exchanged since it was assumed that the lawyers would be bound by their word. In the event of a misunderstanding, it would not be unusual for one of the parties to state, "If you say I said it, I did."

One additional item is noteworthy. The judicial system was treated with more respect. No one would send an associate or paralegal to a docket call or a conference with the court. It was unacceptable to consider an ex parte conference with a judge. You did not appear before a judge with your opponent for an unscheduled conference unless an appointment had been made in advance with the judge's secretary. Pleadings and briefs containing typographical errors, erroneously cited decisions, wrong citations or intemperate language were not filed with the court. Depositions were not interrupted with intemperate outbursts or obscene language vilifying opposing counsel. Courts were not called on to resolve a dispute during the deposition.

I am sure that to most of you the admiralty legal world as described sounds completely unrealistic or naive. Some of you probably view the legal framework which has been outlined as being a Camelot world which did not exist. I can assure you that this world did exist, and it worked. There were exceptions, but they were few and dealt with swiftly by other members of the admiralty bar. One thing was sure—your word was good and woe to one who went back on an agreement.

You might wish to consider the reasons for the "new world order" in the practice of law and in particular admiralty practice. There are presently many more attorneys who are competing for a reduced base of clients. There are fewer legal controversies due in part to the amendments to the Longshore Act, the improved navigational safety measures, and the use of containerized cargo. An increased number of lawyers treat each case as being a potential "home run" for financial rewards. Pressure is placed on the lawyers, especially the younger ones, to bill out an unrealistic number of hours for the purpose of producing maximum fees. In short, we have become tradesmen

in white collars. We have surrendered the traditional notion of law as a profession in an ever growing demand for financial reward. The number of attorneys who are determined to make a real difference in our society diminishes each year. Many new members of this profession no longer attempt to become giving members to a society that has bestowed many opportunities upon each one of them.[3]

The future need not be written off. There are maritime areas which show promise for expanded legal work. One example is the relatively recent changes in the controversies involving water and shore pollution by vessels. Another is the increased intermodal transportation of cargo between the U.S. Gulf ports and inland points in Mexico. Many of the international shipments move pursuant to "house to house" terms on the bills of lading. It will be necessary for us to learn the various features of the Mexican and to a lesser extent the Canadian legal systems. Judicial vacancies in the federal courts have been filled, and new rules are being placed into effect with the requirement that litigation be fully prepared for trial or settled at an early date.

The question which is before us is whether we are sentenced to despair over the present system with only fond memories of the "old ways" or can affirmative changes be made. It will take a significant effort on the part of the members of the bar to insist upon civilized behavior from an opponent within the framework of the adversarial system. It will also take some courage on the part of the judicial system to impartially require that the State Bar Standards of Behavior be followed rather than routinely disregarding a lawyer's misbehavior or problems with the truth. The older lawyers must impart to the younger ones those grand traditions and principles which are so necessary for a functioning profession and society. Why not return to the concepts taught to you in kindergarten:

1. When you leave a work area in a mess, return to clean it.

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3. For a discussion of this in greater detail, see SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994); *see also* Thomas Gibbs Gee & Bryan A. Garner, *The Uncivil Lawyer: A Scourge at the Bar*, 15 REV. LITIG. 177 (1996).

2. Think about the consequences of improper conduct with your opponent because such behavior presents a two way street.
3. Does a work life of constant agitation and feigned hatred for your opponent have a negative effect on your mental and physical health?
4. How are you going to explain the unproduced document or unadmitted fact when the true facts are finally known?
5. Does it really pay to seek clients by spreading untrue remarks about a particular client's present attorney?
6. Will the court find it acceptable if you fax deposition notices at 7:00 p.m. on a Friday evening for Monday; stated in another way, do you want the same thing to happen to you?
7. How will you explain an untruthful billing system to a client?

You might wish to consider the following:

1. Meet with your opponent before discovery is noted and motions are filed. The purpose of the meeting is to seek those areas upon which an agreement can be reached and the points which will be contested.
2. Request the voluntary stipulation of certain facts and ask only for the documents which you need. Give a realistic settlement figure to your opponent prior to starting prolonged discovery.
3. Attempt to determine if depositions and production of documents can be set by agreement for a time certain.
4. Seek the intervention of the court only when necessary and develop a program for abbreviated motions and statements of legal authorities.
5. Files do not exist for you to satisfy a yearning for travel to faraway places with strange sounding names. It is counterproductive to set depositions in Paris for May or the Virgin Islands in January. If you wish to travel, do so on your own time and money.
6. Avoid taking a case and beating the very last billable hour out of it before initiating settlement. Your fee may be substantially less and the case concluded at an earlier date, but your client will be happier and more

> likely to return to you the next time he or she needs legal assistance.

The bottom line then is that the most important part of your case is serving your client. In the long run, a return to civilized, ethical conduct will result not only in satisfied clients, but will also increase your own feelings of self-esteem and elevate the standards of the legal profession.

In conclusion, I would like to present a hypothetical situation which was given to a recent law school class, along with the three replies:

> You go to work for a firm which requires minimum annual billable hours of 2700; also, a hero's list is handed out each month showing the associate who has billed the most hours. The hours which you turn in are the ones which actually are spent on each task, yet at the end of the month it is noted that you are in the last place of the hero's list. You work on Saturdays and on some Sundays, but the results are the same. An older associate explains the concept of "value billing" which is the theory of set hours for each task even if the actual time you spent is significantly less. This course of action will result in meeting the firm's minimum schedule and a higher place on the Hero's List. What will you do?

Three class members gave the following answers:

1. Hand in an immediate resignation.
2. The job market is tight today. I would hang around for two or three years in order to become marketable.
3. The use of this firm's billable hourly system as suggested by the senior associate is acceptable since a lawyer is entitled to recover by the billing process those hours spent in law school.

These answers were not the result of an unusual naivete or premeditated unethical beliefs. They are a cross section of today's student and society. The interesting question is the answer you give in a moment of being true to yourself. One student's evaluation form at the conclusion of the semester con-

tained the following comment:

> "His [the professor's] moral preachings serve little purpose in the course, except to deviate from the subject matter."

I hope that my views and the issues raised prove to be productive in your law practice.

OLD WINE INTO NEW BOTTLES *REVISITED*

Two years ago, I advanced some thoughts reflecting upon ethical problems and conduct of a civilized nature in the context of the legal profession. The article was prompted by recalling conversations with Judge John R. Brown and the increased problems in concluding simple legal disputes. An attempt has been made to restate these views in a different context, as well as to introduce other issues.

My remarks will be based upon over thirty-seven years of general maritime practice in Houston before federal courts on the Texas Gulf Coast. I am in some respects a legal dinosaur since my time as a lawyer has been with one law firm with my attention directed to one area of legal practice. I suspect that this professional route was prompted by the days of mutual loyalty and respect between the attorney, the law firm, and the clients. To my thinking, there have been some recent negative trends that impede these relationships.

I. CONDUCT BEFORE THE COURT

Some months ago a news story appeared on the front page of *The Houston Chronicle* regarding judicial sanctions imposed upon two attorneys for misconduct before the Court.[4] It should be inconceivable that any attorney would knowingly participate in unethical behavior before the Court. This conduct deserves prompt sanctions, and attention by the appropriate grievance committee. One irrefutable concept in the legal practice is that

4. For a recent comment upon this problem, see Mark Ballard, *In the Line of Fire*, TEX. LAW., Feb. 5, 1996, at 1.

an attorney should deal in a forthright manner with the court and opposing counsel.

Each issue of the *Texas Bar Journal* has several pages devoted to disbarment proceedings and reprimands involving attorneys who are licensed to practice law in Texas. These reported instances might represent only a small percentage of lawyers who engage in unethical conduct in their practice of law. Is this a new trend or a behavior pattern that is only now receiving attention? My personal view is that the current problems are not total strangers to the past but are now much more prevalent.

Another concern is whether clients and opposing counsel are candid in the production of discovery documents. The Rule 26 procedure does not represent a novel practice to admiralty lawyers. There has always been an informal exchange of documents during the course of the pre-trial stage of litigation, and in the past this practice was followed without the necessity of relying upon Rules 26, 33, and 34 of the Federal Rules of Civil Procedure. Also, the withholding of negative documents was not an issue since all parties understood that there had been a complete exchange. Now, a national forest is destroyed in order to satisfy the unending discovery requests of all parties involving significant litigation. The process is not concluded until the last motion to compel and reply has been ruled on by the Court.

II. ABUSE OF DISCOVERY

The federal discovery rules were promulgated for the purpose of facilitating the preparation of a case for trial and reaching a fair result based upon truth. These rules are increasingly used as a means of punishing the opposition and/or to increase billable hours in a file. Additionally, depositions are usually noticed by a formal pleading setting an abbreviated time frame for the presentation of witnesses, as opposed to the lawyers conferring with each other for setting a date and time that is convenient to the parties and witnesses. Why not return to the earlier practice of lawyers reaching agreements on a discovery schedule and time track to be followed in trial preparation?

III. EARLY SETTLEMENT NEGOTIATION

Many cases could be disposed of in a reasonably short period following the commencement of the litigation. The informal exchange of documents, a prompt appreciation of the issues presented by the facts, and an early settlement conference could be productive. One impediment to this procedure is that all possible billable hours might not have been produced from the litigation; however, an early disposition of a case will usually result in a happy client. Also, from an historical perspective, a lawyer's role has been to adjust legal disputes in an organized society and not to turn each controversy into a scorched-earth episode which at the end of the day produces no real winners.

IV. ARROGANCE

This label is attached to the legal profession by many clients and members of the public who have dealt with attorneys. The criticism, whether deserved or not, needs to be addressed. Consider: (a) answering your telephone without one or two screening processes seeking the identity of the caller and the subject of the call; (b) returning telephone calls and answering letters promptly; and (c) speaking to clients, witnesses, office staff, court personnel, and other attorneys in a civilized manner. Unquestionably, you should treat the men and women you encounter during your career as human beings worthy of respect. The legal profession has made it possible for the great majority of us to live in a more comfortable lifestyle than most in our society. A law license simply does not anoint any of us with any superior intellectual or social power.

V. SELF-INTEREST

Some lawyers, however, will never earn sufficient fees to satisfy their self-esteem or desire for a lifestyle to which they deem themselves entitled. Their goals, in a "celebration of greed . . . [that] degrades the very idea of a profession,"[5] simply are to acquire money, power, and the trinkets of an affluent society.[6] This problem not only interferes with productive attorney-

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5. Dr. Bonnie Wheeler, *Professionals, Culture, and the Law*, 57 TEX. B.J., 549, 551 (1994).

6. This idea was taken from the inaugural address of Dean Frank Read of

client relations, but also leads to decisions based on short-term goals while distorting long-range advantages. The desire for increased income has a tendency to foster total self-interest to the detriment of positive relations with clients, partners, co-workers, and employees in the office. Other unfortunate consequences are damaged personal relationships, inflated hours, unacceptable fees, and legal matters that are pounded to death in order to produce the last possible billable hour. Settlement negotiations are postponed until this goal has been achieved. This type of lawyer is not a productive member of our profession but in reality is an insensitive technocrat, lacking in the human spirit that is necessary for the expectations and good of society.[7]

Our state and private law schools were not founded to produce men and women whose goals are self-centered lives. Our purpose is to guard the fruits of this Republic and to serve a social purpose. Former Texas Supreme Court Justice Saint John Garwood repeatedly reminded law students that each educated individual owes a certain portion of his or her life to the general community. The message seems to have become lost. One explanation is the billable hour syndrome which is promoted possibly by self-interest, but more importantly by *the firm's* unrealistic expectation and requirements for each lawyer, especially the younger ones. The hourly demand is leading to a developing malaise among the new members of the profession to inquire, "Is it really worth it?" Mid-level partners are seeking a change of careers, leaving behind a group that is devoted to the billable hour. Creativity, imagination, mentoring, individuality, humanism, and social responsibility are casualties of the prime goal associated with maximizing chargeable time. Consideration must be given to the question of whether we, as a profession, are on the wrong course.[8]

South Texas Law School.

7. *See* Wheeler, *supra* note 5, at 550–51.

8. *See id.* at 551. Dr. Wheeler offers a definition of professional responsibility that goes beyond consideration of ethical behavior. She states:

> [B]ut in my view, professional behavior requires three other elements: an absolute fidelity to law as a disciplined branch of knowledge and wisdom, an abiding sense of service and obligation each lawyer owes society, and a commitment to the civilized and thoughtful courtesies each lawyer owes all other members of the legal guild.

Id.

VI. YOUR WORD

You have no future as a lawyer unless your word is good. It is a difficult reputation to build and an easy one to lose. The old maxim was, "If you say I said it, I said it." This theory simply no longer works. There is a constant flood of confirmatory letters, and judicial requirements for agreements between lawyers to be reduced to some form of document in order to be enforceable.

One element on the check list upon being assigned a new file is to inquire of other attorneys whether a lawyer, who is unknown to you, can be trusted. A negative reply will result in significantly more work on your part and a file jacket bulging with paper.

One example of my point of how legal issues should be resolved is a substantial cargo case that was recently settled in our local federal court with four law firms involved in the litigation. The controversy involved a generator which was shipped by sea from Dalian to Singapore. The claim concerned a significant amount in controversy, but there were issues of the $500 package limitation being applicable, stowage deviation, the court's *in personam* jurisdiction over the defendants, and venue. The lawyers had an immediate grasp of the problems and trusted each other. The initial course of action was to seek prompt mediation as opposed to multiple motions and voluminous briefs. The controversy settled during the course of mediation, with no motions filed with the court, no depositions taken, and an informal exchange of requested documents between the attorneys without the necessity of a Rule 34 request for production, or a Rule 33 set of interrogatories. The legal fees were low, the disbursements minimal, and the litigation was dismissed within six months of being filed. Is this case an isolated one, or should it be used as a chart for the future? My recent experience shows that this type of disposition sadly is the exception and not the rule.

VII. MICRO-MANAGING OF CASES

This is a new phenomenon on the landscape, and it probably results from escalating legal fees and the arrogant behavior of lawyers. The lawyer to whom the file is assigned must request the client's permission before taking any action. It is the

legal equivalent of asking the teacher for permission to be excused. The clients, many of whom are not trained in law schools, direct each move made by the attorney. We are transformed from lawyers into marionettes whose successful low bid "won" the contract. Attorney-client discussions of strategy and objectives should be encouraged, but the lawyer must not lose his or her independence of judgment or action. The result of client micro-management will be lawyers who are "hired guns" in whom the judges or other attorneys have no confidence.

You must consider the actions you will take if a client withholds or destroys evidence. What will you do when the client suggests or has adopted an unethical procedure? Will your action be predicated upon the type of case or the fee potential?

One final point: When is the last time a client said thank you in the context of a good legal result on your part? When is the last time a client stayed with you in a situation involving a negative result in a case?

VII. OTHER ETHICAL ISSUES

There are similar problems that must be considered by an attorney for a personal injury litigant. The following situation is worth considering. Assume your client experienced severe injuries while working aboard a vessel on the navigable waters of the United States. This worker probably will have significant permanent disability requiring extended future medical care. The facts can probably be presented either way on the status issue within the framework of the employee-employer relationship, i.e. whether the worker was employed as a "seaman" for the purpose of Jones Act coverage or was a non-crewmember coming within the scope of the Longshore Act. If your client is not a crewmember, this worker would be entitled to maximum weekly compensation payments of $782.44 pursuant to the Longshore Act,[9] in addition to medical care. As many of you know, attorney's fees associated with a longshore or harbor worker's claim are of a limited amount, while such fees in Jones Act actions are not subject to statutory regulation. Assume further that if the judge or jury in a Jones Act case finds the

9. This rate is in effect until September 30, 1996, at which time it will be adjusted upward in conformity with the rate of inflation.

injured worker to be a seaman, there is a likelihood of a significant percentage being assigned to the plaintiff's negligence. Are you going to risk this client's unquestioned right for significant future weekly compensation benefits under the Longshore Act for the prospect of a substantial legal fee which would follow a favorable finding on the Jones Act coverage?[10]

IX. PRO BONO

There is a movement within some Texas legal circles to require a lawyer to perform a minimum number of *pro bono* hours each year in order to retain the license to practice law. These proponents usually give *pro bono* the definition of providing legal services limited to the indigent. While this is unquestionably a noble goal that many in our profession pursue with little or no recognition, you should consider whether this definition is too narrow. One of my subjects has been a lawyer's obligation to society, but I think there are meritorious ways of meeting this obligation other than providing legal services to the forgotten members of our society.

Some of us have no legal training in landlord-tenant disputes, divorce actions, illegal immigration, wills, actions against merchants, and other important and sometimes complex legal areas which concern those who cannot afford legal services. Some lawyers however have valuable abilities to teach, mentor, tutor, raise funds, and perform other social services. Some of these services do not involve the poor, but they are directed to improving the community. My personal belief is that this type of voluntary work is of a *pro bono* nature.

One unanswered question connected with legal services to the indigent pursuant to a mandatory *pro bono* concept concerns legal malpractice and insurance to cover this risk. If attorneys are required to perform legal services outside their area of expertise, consideration should be given to providing them with a statutory exemption from claims of malpractice associated with such legal services.

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10. The injured worker is not entitled to Longshore Act compensation benefits if he or she is classified as a seaman for Jones Act purposes. The two statutes are mutually exclusive.

X. SABBATICALS

The one area of academia from which we can learn a lesson is the practice of giving professors extended time off from teaching duties at the conclusion of each seven-year period. The stress and extended hours which have become the home turf of lawyers are such that members of the legal profession should take a six-month leave at the end of a seven to ten year period of work. Judges should also consider the benefits of this program. You would be afforded an opportunity to place your work in a proper perspective, have a rest, consider various ideas, have time for introspection, rebuild damaged relationships, and perform some form of community service. There is the prospect that the lawyer might choose a different field of practice or make a career change following the sabbatical. If so, should this decision be considered a negative factor in the consideration given to the adoption of such a practice?

There will always be the lawyer or judge who considers himself or herself to be indispensable. I suggest that some day you will either be disabled or die, and the legal profession will have no problems in continuing to function. There will always be someone to take your place, or perhaps your place need not be filled.

XI. CONCLUSION

I conclude by thanking you for giving consideration to my thoughts. My basic intent in presenting this paper is to raise the question of whether we have become slaves to the icon of billable hours in order to collect the trinkets of an affluent society. There will be no general agreement upon ideas that I have raised, since we are lawyers engaged in an adversarial process and are by nature contentious. Hopefully, some points deserving further consideration and discussion have been reviewed.