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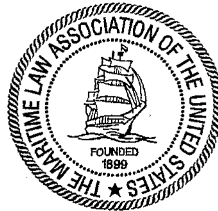

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EDITORIAL COMMENT

There were so many fine speeches at the wonderful MLA Centennial that we decided to publish a second volume of the centennial issue of the MLA Report containing copies of those speeches that we could obtain so that our membership will have them for easy reference. Not all of the speeches were available for transcription, but we hope this special issue will be a permanent record of some of the highlights of that wonderful centennial celebration.

The Editors of the MLA Report congratulate the MLA Officers, President McCormack, the Centennial Committee, the MLA Board and all those who contributed to making the Centennial a truly memorable occasion.

Gordon W. Paulsen,
Editor

[11688]

Law Day Eucharist
St. Paul's Chapel
New York, New York
May 3, 1999

Address of Charles S. Haight, Jr.
Senior United States District Judge,
Southern District of New York

Uphold me, Lord, for it is scary up here.

Mary Jane and I were in California last summer when Father Sloan and David Robinson telephoned to say that Bishop Grein had selected me to receive this Law Day honor.

I said I was sure that there was some mistake, but they said no, this was my Bishop's decision, and an obedient Episcopalian would accept it gratefully. I am, therefore I do.

But I felt a continuing sense of unease, and so I asked my surprise callers: "Will I be expected to say anything?"

They said: "Well, yes, you will be expected to say a few words."

"Where will I be expected to say them?" I asked, summoning up the comforting vision of a small gathering in the Bishop's anteroom, attended only by my immediate family.

They said: "You will be expected to give an address from the pulpit of St. Paul's Chapel in Trinity Parish."

My comforting vision had sunk, but in John Mortimer's great phrase, I continued to cling to the wreckage. "Will anybody be there?" I asked.

"We certainly hope so," my callers responded, with some asperity, for I think they were beginning to share my initial misgivings about the wisdom of the Bishop's selection. "We expect a number of lawyers, judges, clergy, and a Bishop or two."

If they intended that response to reassure, they failed in their purpose.

In my twenty-three years as a trial judge, I have grown accustomed to sitting on my courtroom perch and looking down on lawyers. The lawyers must perforce look up at me; and, God help me, I have come to regard that as very meet, right, and indeed, the lawyers' bounden duty.

But as an Episcopalian and a trial lawyer, I have been raised to sit in lower places and look up at judges, clergy, and, most assuredly, at Bishops.

Therefore, to speak from this historic pulpit to a congregation such as this, brings so dizzying a reversal of roles, so precipitous a change in altitude, as to cause physical and spiritual vertigo.

It is very scary up here.

And my unease is enhanced by a tension that I have always felt between certain Scriptural and theological passages and what lawyers, members of our ancient profession, do and say.

Thus in Paul's first epistle to the Corinthians, the comforting words "Oh death, where is your sting? O grave, where is your victory?" are followed immediately by: "The sting of death is sin, and the strength of sin is the law."

And he writes to the Galatians:

> That no man is justified by the law in the sight of God is evident; Christ has redeemed us from the curse of the law.

The contemporary theologian Richard Foster writes in his book *Celebration of Discipline*:

> The law can deal only in extremes. It is incapable of bringing about the necessary transformation of the spirit.

He adds that it is possible to turn the spiritual disciplines

> into another set of soul-killing laws. Law-bound discipline breathes death.

Turning to the New Testament, with the aid of my concordance I can find only two passages where Jesus converses with individuals specifically identified as lawyers; although I think I have detected a third.

In Luke 12:45, Jesus has just finished denouncing the Pharisees, who were accompanied by a group of lawyers.

> One of the lawyers answered him, teacher, when you say these things, you insult us too.
>
> And he said, woe also to you lawyers! For you load people with burdens hard to bear, and you yourselves do not lift a finger to ease them.

This is the only passage in which Jesus addresses what we may call the members of a bar association about the burdens of litigation and what lawyers do. He continues in that critical vein for some time. There is not a gentle or encouraging word in what Jesus says, and we read without surprise Luke's report that the lawyers "began to be very hostile" toward him.

But we can detect a less harsh note when Jesus encounters a sole practitioner in Luke 10:25:

> Just then a lawyer stood up to test Jesus. Teacher, he said, what must I do to inherit eternal life?
>
> He said to him, what is written in the law? What do you read there?
>
> He answered, you shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind; and your neighbor as yourself.
>
> And he said to him, you have given the right answer; do this, and you will live.

The encounter could have ended with those words of Christ, words of approval and promise. But the lawyer in Luke belonged to that breed of trial lawyers familiar to every trial lawyer and judge in this congregation: he had to ask one more follow-up question:

> But wanting to justify himself, he asked Jesus, and who is my neighbor?

And Jesus responds with the ageless parable of the Good Samaritan. Not that Jesus needed a lawyer's question to prompt the parable; but the passage does not end there. Jesus has a question for the lawyer:

> Which of these three, do you think, was a neighbor to the man who fell into the hands of the robbers?
>
> He said, the one who showed him mercy. Jesus said to him, go and do likewise.

This unnamed member of the bar thereupon vanishes from Scripture. We do not know if he did as Jesus commanded. But we present-day lawyers may take some comfort in the awareness that Jesus apparently thought that he could.

Jesus's encounter with an individual I am certain is a lawyer, although he is not identified as one, occurs in Matthew 22:15. We read that the Pharisees, offended by Christ's teachings, "took counsel how to entangle him in his talk." I think the more accurate phrase would be "retained counsel," for the Pharisees came up with that most formidable weapon in the legal arsenal, a tax lawyer, who put to Jesus a good tax lawyer's question:

> Is it lawful to pay taxes to Caesar, or not?

Jesus answered:

> Show me the money for the tax.
>
> And they brought him a coin. And Jesus said to them: Whose likeness and inscription is this? They said: Caesar's.
>
> Then he said to them: Render therefore to Caesar the things that are Caesar's, and to God the things that are God's.

If the trial lawyer we met in Luke had been there, we could have counted upon him to ask a follow-up question, such as "Well, specifically, what things are Caesar's, and what things are God's?" But he was not there; and so the Pharisees' response is muted: When they heard it, they marveled; and they left him and went away.

I marvel at this passage because I find it profoundly reassuring. It is a divine declaration of the doctrine of separation of church and state. Jesus is saying, I believe, that members of our profession may serve what is good in the law — "rendering to Caesar" — while at the same time continuing on our spiritual journey, rendering to God.

And Bishop Grein encourages me in that interpretation by saying, in his letter of invitation to this Eucharist:

> An attorney's service to the community is equally a calling and vocation to serve God as any ordained ministry.

I offer three suggestions on how to make the legal profession a more effective ministry.

First, we should not mistake Caesar for God. Judges must be particularly careful about that. My mentor, Chief Judge Brieant, made that point from this pulpit a year ago.

The title and trappings of the judicial office, the judge's elevated courtroom perch, fee lawyers' coerced expressions of respect, the diplomatic peals of laughter with which they greet the frailest judicial jest, all tempt the judge to regard himself or herself as at least a minor deity, and perhaps not so minor (but I am not here to talk about the Court of Appeals).

There is a broader point to be made here. Judges and lawyers must not lose sight of the difference between law and religion, if they are to uphold the rule of law in such a way as to render service both to Caesar and to God. Let me illustrate that point with a personal experience.

A judge of our Court assigned a criminal case for trial holds a scheduling conference. The defendants, defense counsel, and the prosecutor are present in the courtroom. It is the first time that you see the defendants and they see you. You read the indictment over before going out to conduct the conference.

So a day came when I read this indictment. There were two defendants. The indictment charged them with wire fraud and mail fraud. Before I went out to the courtroom I thought my court clerk had an odd expression on his face. The two defendants were there. One of them was dressed in the full panoply of a Bishop of the Church; and indeed, his attorney introduced him as a Bishop. I was not familiar with the Bishops' diocese, as described by defense counsel, although I wish to stress that there seemed nothing particularly Anglican about it. The other defendant was dressed in ordinary clerical garb. He was identified as the Bishop's chaplain.

By this time the prosecutor was very upset. He said to me: "You have to tell these defendants they can't come into court dressed up like that and you

certainly can't let them dress up like that in front of the jury." And I said "Why not?" And the prosecutor said, "Well, it is a fraud. They don't have any religious faith. They are just fraudsmen and this is just a transparent part of their scheme." I said, "I don't see how you can be so sure of that." "But it is obvious," said the prosecutor, who formally moved for an order forbidding the defendants from wearing clerical garb in court and particularly in the presence of the jury.

I wasn't sure about my authority to do that, so I did some research into the law and I found two instructive cases.

In one of them the United States Supreme Court dealt with a mail fraud indictment which charged defendants with a scheme to defraud through representations of their religious doctrines or beliefs, which the government alleged were false, and known by the defendants to be false. The Supreme Court held that all the jury could properly consider was whether or not the defendants believed their representations of faith to be true. The jury was not competent to pass judgment on the truth of the religious belief itself. Justice Douglas wrote:

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury, charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.

Then I found an English case in the House of Lords, a civil case. A cloistered order of English nuns had been left a great deal of money in trust, but the condition of the trust was that the nuns be engaged in charitable work. The trust was attacked, probably by some dissolute nephew, on the theory that cloistered nuns were not engaged in charitable work. The nuns lost the case because the House of Lords concluded that "charitable work" as that phrase was used in the trust, required a demonstrable public benefit. One of the Law Lords wrote this:

> My Lords, I would speak with all respect and reverence of those who spend their lives in cloistered piety, and in this House of Lords Spiritual and Temporal, which daily commences its proceedings with intercessory prayers, how can I deny that the Divine Being may in His wisdom think fit to answer them? But, my Lords, whether I affirm or deny, whether I believe or disbelieve, what has that to do with the proof which the court demands that a particular purpose satisfies the test of benefit to the community? Here is something which is manifestly not susceptible of proof. But then, it is said, this is a matter not of proof but of belief, for the value of intercessory prayer is a tenet of the Catholic faith, and, therefore, in such prayer there is benefit to the community. But it is just at this "therefore" that I must pause. It is, no doubt, true that the advancement of religion is, generally speaking, one of the heads of charity, but it does not follow from this that the court must accept as proved whatever a particular church believes. The faithful must embrace their faith believing where they cannot prove: the court can act only on proof.

And so the sisters lost their trust.

And so I let my two defendants appear at their trial in clerical garb, because the genuineness of their professed belief, their theological entitlement to holy orders and the trappings of the Church, were not for this lay magistrate to determine.

At its core, the ministry of the legal profession lies in its service to the rule of law. That is perhaps an overworked phrase these days; but the rule of law in a democratic society is nothing less than the guarantor of all our freedoms, including, one might note in this place, the freedom of religion.

I like to think that Shakespeare's real view of our profession is found, not in the line that is quoted all the time, but in Ulysses' speech in *Troilus and Cressida*. To the Elizabethans, the concept of the rule of law was expressed by the word "degree;" and Shakespeare has Ulysses say:

> Take but degree away, untune that string, and hark what discord follows! Each thing meets in mere oppugnancy. Then everything includes itself in power, power into will, will into appetite.

But I find the greatest dramatic exposition of the rule of law in Robert Bolt's *A Man for All Seasons*, his play about Thomas More.

More, still the Chancellor of England, is increasingly oppressed by his ecclesiastical and political enemies; but he insists upon extending to those enemies the benefit of the rule of law, albeit at the risk of his own life. This distresses his son-in-law, William Roper, a young lawyer. Roper, who loves and is frightened for his father-in-law, and driven by that fear and love into irritation, says to More:

> So now you'd give the Devil benefit of law!

And More says:

> Yes. What would you do? Cut a great road through the law to get after the Devil?

And Roper answers:

> Oh? I'd cut down every law in England to do that!

And More replies:

> Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast — man's laws, not God's — and if you cut them down — and you're just the man to do it — do you really think you can stand upright in the wind that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

I am persuaded that lawyers and judges of good will, who preserve and protect the rule of law, man the fragile barricade that safeguards the nation's freedoms, from tyranny on the one hand and anarchy on the other. And I dare to hope that manning that barricade qualifies as service both to Caesar and to God.

But it can be scary up there. I think today of two colleagues on my Court who are under the 24-hour a day protection of United States Marshals for the indefinite future because of their turns on the barricade in recent terrorist trials.

I will conclude with the observation that in order to perform their secular ministries, Christian lawyers and judges rely upon two sources of strength: faith and prayer.

Our faith must, given the inherent differences between religion and the law, transcend the boundaries of the law.

"The common law," Lord Coke said, "is nothing else but reason." "Faith," St. Paul wrote, "is the assurance of things hoped for, the conviction of things not seen." Which is to say: things that lie beyond the power of reason.

It would be reversible error to instruct a common law jury in Pauline terms of faith. You must find the facts, we tell jurors, solely on the basis of evidence that is present, not hoped for, that is seen, not imagined. But Christian assurance and conviction, that sustain us in our ministry, are not found in the Federal Rules of Evidence. For we know that the end of the day — at the end of a life — it is by faith, and not by acts, that we are saved.

As for prayer, judges and lawyers must pray for themselves, but we also urgently need the prayers of others. I will take advantage of this Law Day Eucharist to ask this congregation to join in prayer for those who practice the profession of law.

Lord, bestow Thy grace upon lawyers and judges, so that, by serving and upholding the rule of law, they may both render to the temporal Caesars of this world the things that are theirs, and render under Thee, who art eternal, the things that are Thine, thereby hastening, in this time and place, the coming of Thy Kingdom.

Amen.

[11697]

Speeches given at the opening of the Blue Ribband Exhibit at the House of the United States Circuit Court for the Second Circuit on the afternoon of Thursday, May 6, 1999

Remarks of Chief Judge Thomas P. Griesa

I want to express the Court's enthusiastic thanks for the Ocean Liner Exhibit. It is fascinating. It is beautiful.

I would like to say something in a personal vein. I first came to New York in 1960. I started as an associate in an admiralty firm on Wall Street — Symmers, Fish & Warner.

The great ocean liners were still running. I would watch the daily notice in the *New York Times* to see when they were leaving or arriving. Whenever possible, I would go down to Battery Park and watch them pass. If I thought I was late, I would literally run from my office to the park to make sure I was there when the liner went by. To me it was as great a sight as seeing the pyramids — to stand and watch these magnificent vessels. Also there was nothing like the sound of the whistles from those ships, with that great volume and depth. I remember the Queen Mary, the Queen Elizabeth, the United States and the France.

These are vivid and delightful memories to me. I am so glad it is brought to life in the exhibit.

Remarks of Charles S. Haight, Jr.
Senior United States District Judge,
Southern District of New York

The opening of the Blue Ribband exhibit, evoking the gracious and luxurious era of the great Transatlantic liners, now alas replaced by plastic food at 35,000 feet in economy-class discomfort on soulless aircraft, imbues this occasion with the magic of history.

The history of admiralty law in America, from colonial days to the present, has been enriched by role models, jurisprudence, icons, symbols, traditions, and other sources of inspiration which have come to us from England. You are about to encounter one of those sources of inspiration in the person of Sir David Steel, the Admiralty Judge of the United Kingdom, who will address you shortly.

I want to say a few words about another English symbol that has become a part of this Court's heritage: the Silver Oar of the Admiralty. This is an exact replica; the original may be found in the Museum of the City of New York.

Its first use was as the mace — that is to say, the symbol of authority — of the Vice-Admiralty Court of the Province of New York. That colonial court had existed since 1678, when the English Governor General appointed Stephen Van Cortland, then Mayor of New York, to be its first judge. Mayor Giuliani has shown no interest in a comparable appointment.

The Vice-Admiralty Court of the Province of New York came to an end on December 19, 1775, as the result of the American Revolutionary War, or, as Mr. Justice Steel may refer to it, the Recent Misunderstanding. The Court's last official act was the taxation of a bill of costs — thereby proving once again that there is nothing new under the sun.

This silver oar was crafted in about 1725 by Charles LeRoux, a noted Colonial silversmith. It has the inscription "Court of Vice-Admiralty New York" with the British Coat of Arms on one side and the Crowned Anchor, which was the seal of the Admiralty Court of Great Britain, on the other. In 1941 the oar was obtained from private ownership and presented to the Southern District of New York, the direct descendant of the Colonial admiralty court, by a group of maritime lawyers headed by Charles Burlingham.

While I have summarized the history of our Silver Oar of the Admiralty in this country, such symbols of authority go much farther back in history.

The first admiralty court in England, we are taught, was established in 1360. Let me quote from an article by my former partner, Gordon Paulsen:

> At that time comparatively few people could read and write. Officers of the Courts (and other officers), when serving their warrants, required some tangible and visible symbol or badge of authority to use as credentials, in order to have their papers accepted. For the High Courts of the Crown, this symbol took the form of a silver mace, bearing the Royal Arms, which was carried by the Marshal or Bailiff. The staff of the mace was hollow and the papers were carried inside it.

In the Admiralty Courts the mace was replaced by a silver oar. Not only did the Bailiff carry this when serving warrants but also, when Court was sitting, he would precede the Judge into the courtroom, bearing the oar and waving it over the Judge until he was seated. After that, the silver oar was placed carefully in a cradle below the Judge's bench, where it rested throughout the session of the Court.

When you think of it, such a mace was an all-purpose tool. Imagine an English Bailiff in the year 1360. He is sent to execute a warrant for the arrest of a suspect who cannot read or write. The Bailiff shows the mace to the suspect, and says: "You are under arrest. Come with me." The suspect says: "No, I won't." The Bailiff unscrews the top of the mace, extracts the warrant, reads it to the suspect, and says: "Come with me." The suspect says: "No, I won't." The Bailiff then carefully refolds the warrant, places it back in the mace, screws on the top, and hits the suspect over the head with it.

The oar's use as the mace of the Admiralty Court of England may be traced back to the reign of Henry IV, 1367–1413. Vice Admiralty Courts were established in a selected few of the Crown Colonies, of which New York was one.

Thus, in the presence of this oar, we play our part in a tradition of the admiralty law that stretches back over 600 years.

Lastly, I invite you to consider the shape of the Admiralty Oar: the beauty of its utilitarian simplicity.

We live in an age when the latest, most expensive Silicon Valley device becomes obsolete in twelve months. The oar has never changed. You sit in your ship, grasp the oar's handle, place its blade in the water, pull, and the ship moves through the water; and so humankind has been progressing since the beginning of recorded time. This sophisticated audience is surely aware that at the battle of Salamis, in the Aegean Sea in the year 480 B.C., when the Greek fleet defeated the Persian fleet under Xerxes the Great, the principal warship was the trireme: 150 feet long, 18 foot beam, drawing 4 feet, equipped with a bow ram, and powered by three banks of oars, port and starboard, manned by 200 rowers. These ships were built not just before the age of steam, they were built before the age of sail; and I do not doubt that their oars looked just like this one.

So there is something eternal about the oar; and it is wholly fitting that the oar is a symbol of the law of the sea: for the sea itself is eternally fascinating, and so are ships and those who go down to the sea in ships, who by their daring or timidity, courage or cowardice, foresight or foolishness, triumphs or tragedies of navigation, give employment to admiralty lawyers and judges, thereby generating that equally fascinating body of law that we call admiralty.

SPEECH OF
HONORABLE MR. JUSTICE DAVID STEEL

A quick preview of this remarkable exhibition down the hall way reminded me of the sense of dismay I felt as a young boy of 9 on learning that the S.S. United States had snatched the Blue Ribband away from — if one is allowed to use the expression in these politically correct times — the two Old Queens. The announcement seemed to exemplify the transfer of prestige and power from the United Kingdom to the United States in the aftermath of the Second World War.

The die, of course, had been cast a long time earlier. Whatever self regard my country may have had at its imperial zenith at the turn of the century, the defining moment in the development of the Western World was the loss of the 13 revolting colonies in 1776.

There may still be some among you who think you have His Majesty King George III and his ministers to thank. As a result of unpublished recent historical research, I can now reveal that you owe it all to the English Admiralty Court.

The story starts in 1763. In that year, the Earl of Egmont became Lord High Admiral. He had a problem which I, and maybe some of you, share. He had two sons and he was anxious to see them in gainful employment. The good Earl had the bright idea of appointing his elder son, Charles Percival, to be Registrar of the Admiralty Court. He appointed his younger son, Spencer Percival to succeed him in due course.

The post of Registrar was a valuable sinecure and, by the nepotistic standards of the day, the appointments looked very sound. However, there were two problems.

The first, and perhaps the minor difficulty, was that Charles was 8 years old and Spencer only 2. The second troublesome feature was that for a boy of his age Spencer must have been mighty ambitious. He obviously made it pretty plain that he was not prepared to wait for the Grim Reaper to gather-in Charles. Daddy Egmont acted quickly. In 1764, Spencer was made Registrar of the Admiralty Court for the Americas. This imaginative appointment was short-lived. In 1768 for reasons that remain obscure, the Admiralty Court of the Americas was split into four and Spencer was forced to retire at the ripe old age of 6.

The colonists, presumably wounded by the sudden departure of their beloved young Registrar, now turned nasty. It is fair to say that there are some historians who still insist that trouble lay in the Stamp Act of 1765, passed by Parliament in London to pay for the expensive seven years war, which culminated in the French being driven out of Canada in 1760 (a fact which, if I remember well, General de Gaulle appeared later not to have noticed).

In 1778, three years into the Revolutionary War, the Admiralty Court again nearly played a pivotal role in the affair. By now, my predecessor Sir George Hay was Judge of the High Court of Admiralty. He was obviously horrified to be asked to be one of the commissioners appointed, as it was put rather quaintly, "to treat with the American Colonies." Indeed, the very idea appears to have been enough for him to commit suicide. It is possible, however, that in the full traditions of appointees to the Admiralty Court, the real explanation lay in the fact that his affairs had, in the maddeningly coy expression of his biographer, become "Embarrassed with the irregularities of his private life."

Fortunately for the future United States, his successor as Admiralty Judge, Sir James Marriott, made a major contribution to the successful outcome of the war from the colonists' point of view. He was a member of Parliament as well as Admiralty Judge and thought it quite bizarre that the colonists were complaining of taxation being imposed without representation. In his view, in a laughable contribution to a Parliamentary debate on the colonies in 1783, it was obvious that, as the charters of the 13 colonies declared them to be part and parcel of the manor of Greenwich, America had the inestimably advantage as a result of being represented by the members of Parliament for the County of Kent.

I suppose it may have been pure coincidence but the better view must be that, in light of this wonderful insult, the colonists were so outraged that the war was over in a matter of months. As I told you, you have much to thank my predecessors for. In the circumstances I am not remotely surprised that I am a guest of honour today. Indeed, given my Admiralty pedigree, I feel I can almost claim honorary citizenship.

In the traditions of American judicial opinion writing, there is in fact a footnote to the story of how the Admiralty Court won the Revolutionary War. Hardly was the war over before we were faced by revolting Frenchmen. Initially they were fully occupied in killing each other. But the arrival of Napoleon Bonaparte led to general war in Continental Europe. By 1812 we had him beat and indeed he was exiled in Elba off the coast of Italy.

What did you do? Yes — you declared war on us. And guess who was our Prime Minister. Why our old friend Spencer Percival. He presumably had managed to muddle along without the perks of a registrar until succeeding Pitt as Prime Minister. But he could not escape the curse of the Americas. Our only Prime Minister to be assassinated, he was shot down in the lobby of the House of Commons in 1812. Some historians suggest that the assassin was a mad man. Conspiracy theorists may think that the explanation lay across the Atlantic. Equally it may be that it so infuriated my fellow countrymen that we burnt down the White House in 1814.

You can now understand why I approach the centennial of the United States Maritime Law Association with a degree of nervousness. My anxiety is heightened by what happened when I arrived at Trinity House in London a few years ago for a dinner to celebrate the 500th Anniversary of the Admiralty Court.

As I approached the front door, a taxi drew up and the then Admiralty Registrar got out. He was carrying the great silver Admiralty Oar, a vital part in our celebratory regalia. The doorman at Trinity House was overcome with excitement. Holding myself and others back, he shouted in that London cockney accent that gets so confused with aspirates, "Make way, make way for the Admiralty Whore."

This great silver oar still sits in my court whenever I am hearing an Admiralty Civil action. It was made in about 1660 following the Restoration of the Monarchy in the form of Charles II at the end of our civil war. In those days, indeed right up to 1829, the oar not only represented the authority of the court in civil proceedings but also in criminal matters. Following sentence of death, pirates had the comfort of being led to the scaffold by the Admiralty Registrar carrying the great silver oar, the gallows being placed with Germanic precision at the low water mark in the dock at Wapping to reflect the Admiralty Court's jurisdiction over the high seas.

Charles II had a younger brother. He was James Duke of York. He also should be remembered today. There are three things about him that are important. First, he was Lord High admiral. Second, he was a man of property. Indeed, he was given New York in 1664 which in those days included New Jersey. Thirdly, he was a catholic. As a result of this last characteristic he fell foul of the Test Act of 1673 which banned Catholics from holding office under the Crown. It follows that we are celebrating today not just the 100th Anniversary of the birth of the United States Maritime Law Association but also the 225th anniversary of the Admiralty Court's assis-

tance to the colonies in winning the Revolutionary War and yet again the 300th anniversary of the death of the man who might otherwise have become James the First of New York. When and if you get a drink perhaps you give a silent toast.

Speech by the Honorable Charles L. Brieant at the Centennial of the Maritime Law Association on May 7, 1999[1]

Good afternoon. First I would like to thank the Association for bringing about this forum and for inviting me to speak. Also, I would like to welcome my fellow members of the Maritime Law Association and fellow lawyers to the Mother Court right here in New York, a city with such a strong maritime tradition.

Some of you may know that I had a hand in drafting the Code of Professional Conduct of the Maritime Law Association. As a member of a very large, diverse and dedicated committee that was charged with that responsibility, I attended the meeting in New York but somehow couldn't get to New Orleans. I also had the honor of being invited to speak on professionalism and civility among members of the maritime bar in May 1997, before a group of young maritime lawyers like yourselves.

The ethical responsibilities of lawyers generally was a hot topic at that time and has become more so since then. Our profession is under close public scrutiny concerning how we do our work, and how we relate to our professional colleagues, our clients, the courts and the public interest. Because of the conflicting obligations which affect lawyers and the increased complexity of our times, it is no longer possible for law schools and law firms to turn the new journeyman lawyer loose armed simply with the 10 commandments, the golden rule and a copy of the federal mail fraud statute.

Recently I was invited to participate in a panel discussion that actually turned out to be more like a contentious debate, on the ethical implications of Multi-Disciplinary Practices in which lawyers and accountants comprise a single, non-traditional enterprise rendering a single service to a client using the abilities and skills of two or more traditional professions. We discussed the lawyer's deepest darkest fear, the unauthorized practice of law, by which the legal profession means the irresponsible and unethical practice of cut-rate; and we discussed the apparent death or decline of professionalism in the bar, which seems to be progressing hand in hand with these changes and with the rise of law as a business.

[1] The author gratefully acknowledges the thoughtful assistance of Erin A. Walter, Esq., law clerk for the 1998–1999 term.

Central to the discussion was the current widespread criticism of lawyers, including the accusations that lawyers have lost the civility, candor and other honorable qualities they once displayed in dealing with their colleagues, the courts, and also with their adversaries, not to mention their own clients, qualities that allowed us to call our calling a profession, and not a mere money-getting trade. According to an article in the New York State Bar Journal, in 1992, 40% of lawyers and judges in New York reported lack of civility and professionalism as a serious problem. In 1996, the American Bar Association Committee on Professionalism concluded that the lack thereof was a serious problem and suggested: (1) continuing legal education with minimum ethics and professionalism requirements; (2) enactment of civility codes; and (3) encouraging trial courts to promulgate and enforce civility norms among its practitioners. The New York State Bar Association has suggested likewise.[2] The New York State Bar Association President's message included the admonition that we must: (1) constantly bear in mind that our primary goal as lawyers is not to win at any cost, but to resolve the dispute within the framework of the law; (2) always accord respect to our opponents, their clients, and the judicial process; (3) assure that each party to a dispute or negotiation feels that he or she has received a fair hearing; and (4) when acting in a judicial capacity, refuse to tolerate, condone or reward conduct by counsel that demeans or incites, rather than persuades.

Maritime attorneys, I believe, have escaped much of the criticism that has attached to lawyers in response to the perceived loss of professionalism in the practice of law. It seems that for some reason or reasons, the Maritime Bar has retained the hallmarks of professionalism and civility that may have been lost to lawyers in general. The Maritime Bar remains a small, relatively tight-knit group of specialized professionals with their own time-tested set of rules on how to run a law firm and with their own set of values. The Maritime Bar has long had a great reputation for being candid, honorable, collegial and respectful of adversaries. For maritime lawyers, these qualities are part of what it means to practice law and they can be yours without in any way diminishing your undivided loyalty to your client, or your vigor in support of the client's cause.

The history and traditions of the Maritime Bar go far to explain this disparity. Admiralty and Maritime law long has been practiced by a distinct segment of the bar and the substantive and procedural law have differed materially from the common law.

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[2] 70 N.Y. St. B. J. 59, 60 (Nov. 1998)

Admiralty law, or the Law Merchant, was practiced in England by a specialized segment of the bar and was conducted in the Admiralty Court. In America in the Eighteenth Century, lawyers distinguished themselves in Maritime Law. In New York, they were leaders of the bar, both before and after the Revolution. In the Nineteenth Century, specialized individuals practiced in the port districts. And beginning in the Twentieth Century, Maritime practice increasingly fell to major, long-established and highly regarded Maritime firms, well-known to the general bar for their expertise, as well as their commitment to ethical conduct.[3]

Up until July 1, 1966, the Federal Courts admitted Maritime Lawyers as "Proctors" and had "Rules of Admiralty" separate and distinct from the Federal Rules of Civil Procedure. In 1966, the "Rules of Practice in Admiralty and Maritime Cases," promulgated by the Supreme Court in 1920, were rescinded, and most of those rules were folded into the 1966 Federal Rules of Civil Procedure. At the same time, the Supplemental Rules of the Federal Rules "for certain admiralty and maritime cases" were adopted because, according to the Advisory Committee, "certain distinctively maritime remedies must be preserved in [the] unified rules." The Supplemental Rules address only maritime attachment and garnishment, actions in rem, possessory, petitory,[4] and partition actions, and actions for exoneration from or limitation of liability.

In addition to this specialization, Maritime lawyers did not try cases to a jury, except personal injury cases governed by the Saving to Suitors Clause. Maritime lawyers were international and they accepted international principals of conduct. Each commercial trading nation understood that it had to treat traders fairly because some day its own ships would be in someone else's port. As a result of this, there developed among Maritime lawyers

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[3] Graydon S. Staring, *The Proctor's Dilemma: Certifying Specialties in Admiralty*, 28 J. Mar. L. & Comm. 503 (1997). Mr. Staring is a partner at Lillick & Charles LLP (San Francisco).

[4] *Petitory Action*: A droitural action; that is, one in which the plaintiff seeks to establish and enforce, by an appropriate legal proceeding, his right of property, or his title, to the subject-matter in dispute; as distinguished from a possessory action, where the right to the possession is the point in litigation, and not the mere right of property. In admiralty, suits to try title to property independent of questions concerning possession are referred to as "petitory suits," which suits must be based on a claim of legal title; the assertion of a mere equitable interest is not sufficient. *Hunt v. A Cargo of Petroleum Products Laden on Steam Tanker Hilda*, 378 F. Supp. 701, 703 (D. Pa.). In Louisiana, an action brought by an alleged owner out of possession against one having possession to determine ownership, in which plaintiff must recover on strength of his own title, not on weakness of defendant's title. *Saucier v. Crichton*, 147 F.2d 430, 433 (5th Cir.).

accepted principles of international law and a high code of ethics. The clients knew what they were doing and knew what the lawyers were doing and everyone acted based on custom and practice without much concern for the Statute of Frauds or the prospect of juries interpreting and perhaps nullifying their contracts. Thus Maritime lawyers were more able to trust one another, and there was a greater premium on candor and truthfulness, honesty, collegiality, and mutual respect. So, because I perceived these traditions to be still alive, and this history was very much a part of the present, initially, I did not believe that it was necessary or advisable that the Association fashion a code of conduct specific to the Maritime Bar. I have come to recognize, however, that in light of the massive changes in the legal profession in general and in light of the failure of the federal courts in which you work to provide any clear guidance in matters of ethics and professionalism, the Association was well-advised at this point in history to "get it in writing."

Maritime Law today embraces a large number of international conventions and special statutes, as well as a rich and distinctive case law jurisprudence. It differs in many and sometimes complex ways from the common law of torts, contracts and securities. The competent and successful general practice of Maritime Law therefore requires personal and institutional understanding of the differences and continued adherence to those high ethical standards to which I just referred.

Each of the ethical and professional standards articulated in the MLA Code of Conduct is of great value to the judiciary. The code goes beyond a code of ethics and emphasizes civility and professionalism, something most State codes have not done. The code provides generalized standards of conduct expected of all attorneys historically only "in the spirit" of the State rules. Louisiana is one of the exceptions. On January 10, 1992, the Louisiana Supreme Court adopted a Code of Professionalism separate and distinct from its Code of Ethics. The court also requires as part of its Continuing Legal Education program, one hour of professionalism in addition to the one hour of ethics previously required. Perhaps the Maritime Bar had something to do with this considering that Louisiana is one of the centers of our Maritime Practice. From September 1997 to September 1998, the Eastern District of Louisiana carried a number of Maritime Personal Injury cases three times that of its two closest Maritime competitors, the Western District of Washington and the Southern District of New York, although there were more Maritime and Admiralty cases, including Marine-Contract, Marine-

Personal Injury, and Marine-Products Liability, filed in the Southern District of New York than in any other district court.[5]

The Federal Courts too have tried to inject professionalism and civility into their rules of conduct by giving broad interpretation to the phrase "conduct unbecoming a lawyer,"[6] which phrase is supposed to encompass the federal courts' "code of conduct." The Federal District Courts govern attorney conduct through a bewildering maze of inconsistent local rules; the Southern District of New York simply adopted the New York Code of Professional Responsibility.[7] In addition, each district court has its own ideas about professionalism.

The appellate courts are no clearer or more uniform. The Supreme Court has interpreted Rule 46 of the Federal Rules of Appellate Procedure, that is, "conduct unbecoming a lawyer," to mean "conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice, [according to] guidance provided by case law, applicable court rules, and the 'lore of the profession,' as embodied in codes of professional conduct."[8] Whatever that means. In attempting to apply Rule 46 and the Supreme Court's interpretation, the Circuit Courts of Appeals generally rely on the ABA Code of Professional Responsibility as a guide to interpreting Rule 46 but also insert into the analysis their own views of civility and integrity.[9]

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[5] In 1998 in the Southern District of New York, there were 748 Maritime cases filed, 373 of which were admiralty cases. The nature of the suits filed were 630 Marine-Contract, 117 Marine-Personal Injury, and 1 Marine-Products Liability. These suits made up 7% of the civil cases filed. In 1998 in the Eastern District of Louisiana, there were 684 Maritime cases filed, 73 of which were admiralty cases. The nature of the suits filed were 255 Marine-Contract, 426 Marine-Personal Injury, and 3 Marine-Products Liability. These suits made up 18% of the civil cases filed. In 1998 in the Western District of Washington, there were 379 Maritime cases filed, 72 of which were admiralty cases. The nature of the suits filed were 106 Marine-Contract, 266 Marine-Personal Injury, and 17 Marine-Products Liability. These suits made up 14% of the civil cases filed. *See* Office of Administration of the United States Courts, *Judicial Business of the United States Courts 1998* at Table C-3 through C-5; S.D.N.Y., E.D. La., and W.D. Wa. district court clerks' offices.

[6] *See* Federal Rule of Appellate Procedure 46.

[7] *See* Local Rule of the Southern and Eastern Districts of New York 1.5(b)(5).

[8] *In re Snyder*, 472 U.S. 634, 645 (1985) (discussing Fed. R. App. P. 46).

[9] *See, e.g., United States v. Cintolo*, 818 F.2d 980, 996 (1st Cir. 1987) ("As sworn officers of the court, lawyers should not seek to avail themselves of relaxed rules of conduct. To the exact contrary, they should be held to the very highest standards in promoting the cause of justice. See ABA Model Code of Professional Responsibility EC 1–5 ("A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise."); EC 9–6 ("Every lawyer owes a solemn duty to uphold the integrity and honor of his profession;

At least the Federal Bench, the State of Louisiana and the Maritime Bar recognize the value to the judiciary and to the legal system of integrity and civility of lawyers. Judges can best perform their function when they know that they can rely on the attorneys to do their job, and do it right. Judges are concerned with administering justice for the litigants, and the resolution of disputes in a fair and reasoned fashion. This means sound decisions generated on an adequate record. The litigants come to court to fight their battles and the attorneys are supposed to be the litigants' champions, somewhat as in mediaeval times when disputes were settled by trial by battle or trial by ordeal. Of course we still have trial by ordeal in the Federal Court; we call it discovery.

Delay and unnecessary expense are the twin enemies of justice. An attorney's first duty is to make a conscientious and gracious effort to resolve a dispute amicably and early, so as to save the client the stress and expense of litigation, and avoid wasting the scarce judicial resources which society has made available to aid in the settlement or decision of cases. The national average percentage of disputes reaching trial in the federal courts is only 2.6% and the average time for disposition is eight months. This cannot be accomplished without the trust and goodwill of your adversary and the court. The unreliable, untrustworthy, mad-dog lawyer so popular in fiction is probably a failure even in landlord-tenant court. In your work, that lawyer is not only a failure, but a disaster, to the client and to the court.

In the words of a country lawyer as proud of that description of lawyering as I am, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough." — Abraham Lincoln, 1850.

In discussing the MLA Code of Conduct specifically, I will focus on the standards of the code that I find most helpful to the judiciary.

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to encourage respect for the law and for the courts and judges thereof; ... to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public").'"); *United States v. Agosto*, 675 F.2d 965, 969 (8th Cir. 1982) ("The district court is charged with the responsibility of supervising the members of its bar." *Cohen v. Hurley*, 366 U.S. 117, 123–124 (1961). Among the factors to be considered in exercising this responsibility are the ABA Code of Professional Responsibility, the Court's duty to maintain public confidence in the legal profession and its duty to insure the integrity of the judicial proceeding.").

Number 2 — "I will comply with all rules and codes of professional conduct, respect the law and preserve the decorum and integrity of the judicial process." It is very important to maintain integrity in the judicial process, otherwise judges and the process lose all credibility with the litigants, the bar, and the public.

Number 3 — "I will be civil and courteous to all colleagues, parties, witnesses and the courts, recognizing that effective representation is undermined by antagonistic behavior." This helps the courts immensely because civility allows attorneys to negotiate reasonable and fair settlements, and in other contexts, it helps the judge to do his or her job, which is efficiently to manage his or her docket and not be required to take time out to deal with petty, time-wasting squabbles among attorneys. Antagonistic behavior gets you nowhere in life, especially in court. There are many important but unreviewable decisions and rulings which must be made in the course of litigation. A trial judge will discharge his or her responsibility better, and achieve greater justice and make better rulings, if fully informed as a result of cordial and gracious discourse; and many items can be agreed upon during such conferences and hearings with the court, to the advantage of all sides of the case. Here, as in many situations, virtue is its own reward.

Number 4 — "I will keep my word in the conduct of my legal practice and treat my colleagues, parties, witnesses and the courts with respect and dignity." One should not make promises one does not intend to keep. Fulfilling promises is important to the courts because it shows respect, engenders trust, and keeps the lawsuit on track. Being irresponsible and unreliable always gets you in trouble and hurts your client. It may defeat a just result. Keeping your word means keeping your good name. That is all you have in life as a lawyer.

In general, treating the court, adversaries and others with respect allows them to trust you and your judgment. A colleague, litigant, or judge will be far more likely to listen to you, to accept what you say with an open mind, and perhaps even to take your side or accept your representations and arguments if you treat that person and everybody with respect. Being disrespectful gets you nowhere and may well be self-defeating. Damage to your reputation may carry over to the next matter to your detriment.[10]

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[10] *See Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1275 (7th Cir. 1983) ("After all, an attorney's and/or a law firm's most valuable asset is their professional reputation for competence, and above all honesty and integrity.").

The rules I just discussed are really rules of civility, integrity, and respect.

Number 6 and number 7 are about efficiency— Number 6 — "I will resolve all disputes expeditiously and not engage in any course of conduct which unnecessarily increases costs or delays litigation" and Number 7 — "I will engage in the discovery process, seeking an expeditious result for my client's legitimate interest, while avoiding abuse and harassment of witnesses and parties."

If there is one thing that the judiciary appreciates it is the efficient and expeditious resolution of a lawsuit. Every lawsuit must be dropped, settled or tried, and it is the judge's and the attorneys' responsibility to ensure that disputes are resolved as quickly and inexpensively as possible. It is wonderful when the judge can be relieved of his or her duties as home-room school teacher and does not need to micro-manage the work of the attorneys in this endeavor. Federal Rule of Civil Procedure 26 also provides direction in this regard with respect to the efficient taking of discovery, if there is such a thing.

Number 9 — "I will not mislead or make misrepresentations to the court." This is a no-brainer and I believe, one of the tenets of all codes of professional responsibility for lawyers. There are countless disciplinary cases in federal and state court sanctioning attorneys for this conduct. Judges absolutely must be able to rely on the representations of an attorney. I always assume that what an attorney says to me is true. If a judge cannot assume that, nothing would get done. Judges would spend all of their time making findings of fact on trivial matters before ever reaching trial.

As I said the last time I spoke to these issues, I would urge you to read the code and each time you go to a meeting or a conference or a settlement discussion or negotiation or a trial, remember who you are and remember the fine tradition that you carry with you every day. As Chief Justice of the Supreme Court Earl Warren once said, "In civilized life, law floats in a sea of ethics." We Maritime lawyers live in civilized life and if you remember that and you follow the unwritten as well as the written code of Maritime lawyers, you will find smooth sailing ahead as we enter the Twenty-First Century.

CODE OF PROFESSIONAL CONDUCT OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

by James F. Moseley*

I. INTRODUCTION

In May, 1996 an MLA Study Group was appointed to study professionalism and professional conduct. It was hoped that the end result would be a Code that would benefit the members, the Maritime Bar and the Courts.[1]

The Study Group was carefully selected so as to include leaders of the bench and bar, all geographic areas, all age levels of practitioners, and also various disciplines within the practice of admiralty law. The Study Group consisted of: Ben L. Reynolds, Chairman, John D. Kimball, Vice Chairman, James K. Carroll, Secretary, George W. Healy, Andrew A. Tsukamoto, Richard C. Binzley, Hon. Susan H. Black, United States Circuit Judge, United States Court of Appeals for the Eleventh Circuit, Hon. Charles L. Brieant, Jr., United States District Judge, Chief Judge of the Southern District of New York, Hon. Alma L. Chasez, United States Magistrate Judge, United States District Court, Eastern District of Louisiana, Hon. Edith Brown Clement, United States District Judge, Eastern District of Louisiana, Tucker H. Couvillon, Hon. Harold R. DeMoss, Jr., United States Circuit Judge, United States Court of Appeals for the Fifth Circuit, John J. Devine, Paul D. Hardy, Hon. Alex T. Howard, Jr., United States Senior District Judge, Southern District of Alabama, Bruce A. King, J. Dwight Le Blanc, Raymond T. Letulle, Frank J. Marston, Agnes Martin, Michael A. McGlone, Joseph P. Milton, Thomas J. Muzyka, Howard L. Myerson, Michael D. O'Keefe, Hon. Thomas C. Platt, United States District Judge, Eastern District of New York, W. Boyd Reeves, Kenneth E. Roberts, Howard J. Sobczak and Charles F. Tucker.

The Study Group had numerous meetings and telephone conferences. Drafting and redrafting occurred during 1997. The completed Code was submitted to and approved by the MLA Board of Directors. Thereafter, the Code was submitted to the MLA Fall Meeting in Palm Desert, California in October, 1997 and unanimously passed by the membership.

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* Partner, Moseley, Warren, Prichard and Parrish, Jacksonville, Florida; Former President of the Maritime Law Association of the United States, 1996–1998.

[1] At the time the Study Group was appointed and when the Code was completed, the writer was the Fortieth President of The Maritime Law Association of the United States.

II. THE CODE

1. I will provide the highest level of competency and efficiency in the performance of all legal services.

2. I will comply with all rules and codes of professional conduct, respect the law, and preserve the decorum and integrity of the judicial process.

3. I will be civil and courteous to all colleagues, parties, witnesses and the courts, recognizing that effective representation is undermined by antagonistic behavior.

4. I will keep my word in the conduct of my legal practice and treat my colleagues, parties, witnesses and the courts with respect and dignity.

5. I will maintain the trust of my clients by keeping them well-informed and actively involved in making decisions affecting litigation.

6. I will resolve all disputes expeditiously and not engage in any course of conduct which unnecessarily increases cost or delays litigation.

7. I will engage in the discovery process, seeking an expeditious result for my client's legitimate interest, while avoiding abuse and harassment of witnesses and parties.

8. I will contribute time and resources to *pro bono* activities.

9. I will not mislead or make any misrepresentation to the court.

10. I will exemplify and instill in others the tenets of this Code of Professional Conduct.[2]

III. BACKGROUND OF PROFESSIONALISM IN THE MARITIME WORLD

When one encounters the First Edition of *The Law of American Admiralty*, one is struck, not only by the simplicity but the eloquence of Erastus C. Benedict's view of the practice before our Admiralty Courts in the mid-Nineteenth Century.

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[2] Also printed in Section III, page 17, Directory and Bylaws of the U.S. M.L.A. (1998–1999), Document No. 738.

Three characteristics are prevalent. The first is his great admiration for the "profound sagacity" and the practical wisdom of our fathers, in providing for an unknown future, and a territory to be extended indefinitely under the forms of our double government. He expressed the judicial and commercial impact of the Constitution: "that wisdom is especially apparent at this time, when the Commercial Era with its new means and its new discovery is opening before us a most conspicuous and responsible career among nations." The respect that he evinces in the constitutional framework under which we work today comes through with a substantial force upon the reader.

His second characteristic is his concern that the writing be directed to those who do not already understand the subject. He felt too many books addressed only the experienced admiralty practices. He was addressing not only those with experience but those who were learners. He was a mentor.

Thirdly, he had a genuine humility in that he felt that his writing may have been an obvious departure from the common standard of excellence established in other books and he hoped that he had lived up to the standards of other writings. Otherwise, he felt that he would not have accomplished his purpose.

Undoubtedly, Mr. Benedict had no written code to guide him, but he hardly needed one. His conduct reflected a code, that not only he, but many others throughout the country lived by. Perhaps Mr. Benedict was guided by what he had observed through his years of studies as well as his extensive travels.

In 1430 the Guildhall in London created four symbols of civic virtue. These symbols first constructed seven hundred years ago are still on view today. They are: discipline, temperance, fortitude and justice. These symbols, taken with several others, symbolize law and learning. Perhaps these symbols served as an earlier "Code."

A decade and a half before Benedict's Preface to his *First Edition on Admiralty*, the French lawyer and jurist, Alexis de Tocqueville, traveled throughout the length and breadth of the United States as it then existed. He made numerous observations about the American character. His observations on all facets of American life and government seemed to provide us with an accurate reflection of life at that time. He stated:

> In America there are no nobles or literary men, and the people are apt to distrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society.

> If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar.

Such was the character and reputation of the American lawyer in the Benedict era. Today it is not enough for us to say that we wish to be the same way. In fact, we are not perceived to be the same way by any measure. Therefore, our MLA Code of Professional Conduct is to serve as a guide to help us remember the standards that have existed for over a hundred and fifty years and that have been embodied in the values of The Maritime Law Association of the United States that marks its centenary this year.

On the lighter side, one must always remember that lawyers have always been the subject of jokes and other uncomplimentary comments. However, for the most part these were directed in good natured comments without rancour.

For example, there is the entry in the public records of Watertown, Massachusetts at the end of the 17th Century that stated the township had three hundred and twenty-five inhabitants; two of whom were blacksmiths, three were shopkeepers, and one was a medical doctor. Conspicuously, the clerk added the entry that there were no lawyers, "for which the latter fact we take no credit but give thanks to almighty God." This clever clerk probably sensed that he would be oft-quoted in the future, but was he vitriolic? I think not.

But the public mood has changed. Comments, commentary and conduct regarding the bar are alarming, but nonetheless are manageable. Clearly, something must be done. The issue at hand appears to be complex and overwhelming. But, change must begin with you and me. How then should this issue be approached? Perhaps Mark Twain stated it best when he said:

> The Secret of getting ahead is getting started. The secret of getting started is breaking your complex overwhelming tasks into small manageable tasks, and then starting on the first one.

The MLA has started on the first one. Indeed, the MLA's efforts to right the ship of professionalism or public's perception of it began with the first step of appointing a Study Group.

IV. THE PROFESSIONAL CODE OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

The Maritime Law Association of the United States, of course, was not the first organization that realized that it must continually replenish its considerations of professionalism. The Maritime Bar has enjoyed an unprecedented standard of excellence as recognized by the Federal Courts and indeed by most members of the State judiciary. Hardly any maritime practitioner has not heard a comment, formally or informally, by a court that it is a pleasure to have admiralty practitioners participating in a case before that court. However, we are not and never were "grandfathered" into that favored status and, in fact, would not wish to be. It is an ongoing continuum of hard work, effort, civility, professionalism and integrity by each of us that maintain this high standard and reputation.

There is no more meaningful, yet succinctly written report on our Code than that which was first given to the Young Lawyers Committee and later published. The author, Hon. Charles L. Brieant, who shares the platform today, presents an experienced comment on excellent past performance and his view into the future on professionalism and civility.[3]

In drafting the Code for the MLA, in addition to considering the aforementioned ideals, the Study Group drew upon other professionalism codes from other Associations.

For example, the American College of Trial Lawyers has a rather meticulous Trial Code of Conduct created in 1956. It is eleven pages. It addresses many issues that are helpful in the conduct of a trial but do not give many general principles. However, these were closely considered by the Committee in drafting our Code.

Also, the ABA Code was considered. The original ABA Model Canons of Ethics were later modified into the ABA model code of professional responsibility in 1969. In 1983 aspirational ethics considerations were deleted when the ABA adopted the model code of professional conduct. The current Rules do embody some aspirational sections but many lawyers seem to rely exclusively on disciplinary standards in setting their conduct.[4]

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[3] Brieant, J., *Professionalism, Civility and the Maritime Bar: A View from the Bench*, 28 J. Mar. L. & Com., 551 (1997).

[4] Neuner, *Professionalism*, Tulane Admiralty Law Institute (1999).

Further, other Bar Associations have also adopted professionalism or civility codes. In 1998, subsequent to the MLA Code, the Section of Litigation of the ABA adopted guidelines.[5]

The New Orleans Bar Association in the winter of 1990 adopted a Code of Civility.[6] It covers numerous items. In its preamble it states that in striving to fulfill the lawyer's obligation to the client, the lawyer must be ever conscious of the broader duty to the judicial system which serves both attorney and client. Substantively the Supreme Court of Louisiana on January 10, 1992 adopted a Code of Professionalism.

Shortly thereafter, the American Board of Trial Advocates prepared a Code of Professionalism.

In 1996 the International Association of Defense Counsel adopted its own Tenets of Professionalism.

A further example is found when the Bar Association of Baltimore City adopted professional standards.[7] Variations of the Rules and tenets continue to abound. Recently, standards were adopted in Pittsburgh.[8]

Further, the organized bar has taken steps in my home state. The Florida Bar has a Center for Professionalism with a director and staff. Additionally, in Florida, the Fourth Judicial Circuit (Jacksonville and its surrounding area) has a Mentoring Committee and Board that attempts to put a mentor and a pupil together when the need arises. This is coordinated through members of the judiciary, State and Federal, who play an active part, both on the Board and the Committee.

V. WHAT MUST BE DONE AS AN ASSOCIATION AND WHAT MUST BE DONE AS INDIVIDUALS

First and foremost, we must never let a code gather dust on the page of some directory or hang unheeded on someone's wall. The proper conduct must be preached and taught, learned and studied, considered and continually worked upon. It is an ongoing process by all of us.

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[5] *Guidelines for Litigation Conduct*, Litigation News (March 1999).

[6] New Orleans Bar, *Briefly Speaking* (Winter 1990). This Code was modeled on one developed by the Dallas Bar.

[7] Bar Association of Baltimore City, *Guidelines on Civility*, 1–7 (1996).

[8] *Guidelines on Professionalism for Allegheny County* (1998).

We all face events that are not controllable. However, professionalism is controllable by everyone doing his or her part, individually. Indeed, most events in the world in which we live are outside the control of any of us, our firms, clients, potential clients or the economy in general. But professionalism is not one of these events.

Professionalism must not be something that is "put on" occasionally as we do with a new tie. It must be part and parcel of our legal and individual personality. It is a conscious, everyday thought that must be part of our being. It must be a habit. The observation that is twenty centuries old remains true today.

> Excellence is an art won by training and habituation. We do not act rightly because we have virtue or excellence, but we rather have those because we have acted rightly. We are what we repeatedly do. Excellence, then, is not an act, but a habit.[9]

There are articles and media reports everyday that show that a lawyer's life is changing. For example, the National Law Journal had a front page article relating to "*Marketers Seen as a Key to the Future*" (March 22, 1999). Articles abound that refer to "markets" and what do future or existing clients "want." However, regardless of the changes that are our profession is undergoing, what lawyers need, first and foremost, whether they are a sole practitioner or a member of a small, medium or large firm, is a rekindling of the faith and trust that society once placed in lawyers.

The profession cannot keep pointing fingers at all aspects of the justice system, but we must consider that codes, from whatever source, are to be the minimum guidelines, not the maximum that can be achieved. It requires the young practitioners to listen to their elders. It also requires the elders to mentor the younger. It requires a broad-based scope of contribution to community and the profession. It also requires at the heart an independence and ethical commitment.

In his book, Sol Linowitz wrote on the state of the profession.[10] He stated that he wrote it with sadness and even anger but also with the hope and even a measure of optimism, since he knew if we will deal effectively with our problems and strengthen our ethical and professional commitments that the bar will return.

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[9] Aristotle.

[10] *The Betrayed Profession: Lawyering in the 20th Century.*

Benjamin Sells in his book, *The Soul of the Law*, as extracted in an article published in the *Florida Bar News*, December 15, 1997, deals with a person that he characterized as a "very important partner" who felt that treating one another with basic human respect was too "altruistic." We each need to evaluate our outlook, not just occasionally, but every day.

District Court Judge William Hoeveler sets forth compelling and forceful arguments as to why and how we must get back on track.[11] Honor must not be a casualty of our times.

In an intriguing article on ethics in today's world, one author traces several matters that have been reported in the Delaware Court system.[12] The Delaware Supreme Court defined professionalism as being:

> Professionalism goes beyond the minimum standards required of all lawyers...Professionalism is a higher standard expected of all lawyers...[It] embodies an attitude and dedication to civility, skill, businesslike practice and focus on service rather than making money.

Mr. Pileggi is quick to point out that maybe there is just a general decline in plain, old fashion good manners and common courtesies. However, he takes it one step beyond. He states:

> One problem many encounter is the apparent advantage others sometimes gain by using sharp tactics, such as rushing to file a discovery motion. If one does not respond in kind, will it be interpreted as a weakness? If the obnoxious attorney who quickly files a motion with the court instead of trying to resolve pre-trial discovery matters is rewarded by a harried judge who grants the motion, perhaps with costs, what message does that send to the other attorney who wanted a chance to resolve it informally?

V. CONCLUSION

Hopefully, each member of The Maritime Law Association of the United States values and reveres the standard of excellence and professionalism that

[11] Hon. Willliam Hoveler, *The Lawyer's Honor*, ACTL Bulletin 4 (Spring 1999)

[12] Pileggi, *Ethics: Professionalism in a High-Tech Legal World*, The Bencher AIC January/February 1997.

has been achieved in the past. There is no reason why this standard should not continue long into the future. The Code is a conscious and objective embodiment of those principles that have assisted in creating the success of the Association.

When all is said and done, there is a bond within the Association that each member strives for the highest standards. Regardless of any duty or responsibility anyone has within the Association, each member is a leader in the Association and in their maritime bar of their community. It is a stewardship and a leadership position from which we must continue to evoke standards that have been created in the past and from which we must ensure that those standards, such as our Code, are always viewed as the minimum standard and not the maximum.

Leadership of the type that will bring higher professionalism was perhaps best expressed by an anonymous author as follows:

> The world needs more men who do not have a price at which they can be bought; who do not borrow from integrity to pay for expediency; whose handshake is an ironclad contract; who are not afraid of risk; who are honest in small matters as they are in large ones; whose ambitions are big enough to include others; who know how to win with grace and lose with dignity; who do not believe that shrewdness and cunning and ruthlessness are the three keys to success; who still have friends they made twenty years ago; who are not afraid to go against the grain of popular opinion and do not believe in 'consensus'; who are occasionally wrong and always willing to admit it. In short, the world needs leaders.

Our Code, taken to heart and put in practice, is a great chart for the future. Use it as a guideline and share it with others so that they may use it as their guideline. Be a good steward of our traditions and our standards as we move into the Association's second century.

FROM A CLIENT'S PERSPECTIVE: A LOOK AT THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

by Richard A. Corwin, Esq.*

Clients cannot argue with and, indeed, should find comforting and very much to their liking, the tenets/concepts of the MLA's *Code*:

> Paragraphs 1 and 2 concerning competent and efficient handling while simultaneously adhering to *Rules* and *Codes of Professional Conduct.*
>
> Paragraphs 3 and 4 concerning acting courteously and in a civil manner towards and keeping one's word and treating with respect and dignity colleagues, parties, witnesses and the courts, and, although not mentioned, presumably clients as well.
>
> Paragraphs 6 and 7 concerning expeditiously resolving disputes and avoiding both unnecessary increase in costs and delay in litigation while simultaneously seeking an expeditious result reflecting the client's legitimate interests (and not abusing witnesses or parties and, although again not mentioned, presumably not abusing or harassing your client).
>
> Paragraphs 8 and 9 concerning actively furthering *pro bono* activities and neither misleading nor making a misrepresentation to the court and promoting the tenets of the code.

Such conduct on the part of a maritime lawyer could only well serve a client. And not only should a client believe itself well served by such conduct but he or she should recognize that the basic concepts underlying your *Code of Professional Conduct* are part and parcel of your client's dealings in the maritime industry. I say that for some of the same historical reasons which Judge Brieant cited as causing the Maritime bar to have a reputation for being candid, honorable and collegial.

Your clients work in a relatively small, tight knit international industry doing business, to some extent, based upon customs and practices estab-

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lished over a long period of time. In that relatively small, tight knit industry, persons who are not candid, honorable and collegial are rather quickly found out while others in the industry continue to deal with their colleagues candidly and honorably, and to enjoy a reputation for doing so.

As a result, many of your clients should find the basic concepts underlying your *Code of Professional Conduct* to be part and parcel of their day to day dealings in the maritime industry. Because you are part of that industry, when your clients first ask you to represent them they will do so believing you will act in accord with the concepts of candor, honor and collegiality.

Clients and lawyers must communicate with each other to put a premium on what Judge Brieant has stated to be "candor and truthfulness, honesty, collegiality [and] mutual respect," conduct which necessarily will lead to a feeling of trust between you and your client. And "trust" leads me back to the *Code of Professional Conduct*, and particularly to paragraph 5 of the code which I skipped over when summarizing the *Code*'s benefits to your clients.

The word "trust" appears in the *Code* only at paragraph 5. The word "client" is in the *Code* only at paragraph 5. The concepts encompassed in the other paragraphs of the *Code* dance around "trust," but I believe the writers of the code did well to put "trust" together with "client." Paragraph 5 says "I will maintain the trust of my clients by keeping them well-informed and actively involved in making decisions affecting them." Paragraph 5 of the MLA *Code of Professional Conduct* is the main focus of my comments to you today.

Paragraph 5 has a three part structure: maintaining the trust of your clients, keeping your client well informed, and involving your client in decision making. You are to "maintain" the trust of your clients. By using the word "maintain," the *Code* assumes trust exists between you and your client at outset of the lawyer-client relationship. This stands to reason. The client makes the first move. By handing a problem or dispute or project to you, your client has put his trust in you to do all of the things you undertake to do in the other 9 paragraphs of the *Code*. The client trusts you to handle the matter professionally. The client trusts you, as the second part of paragraph 5 says, to keep the "client well informed." Paragraph 5 strongly implies that if you keep your clients well informed then you thereby will maintain the trust the client initially has placed in you.

The third part of paragraph 5 also implies that you will maintain the trust of the client by actively involving your client in "making decisions affecting

your client." I believe, and I expect clients in general would say, that you will not be able to maintain your client's trust if you involve your client in decision-making but do not keep your client "well-informed." That is to say, I believe that if you keep your client well informed then your client's involvement in decision making will naturally follow, although the reverse may not be true.

If you keep your clients well informed then you will maintain their trust and you will find that your clients will be involved in making decisions affecting them. I believe it true that virtually all clients believe complete, effective communication between lawyer and client is the key to a healthy lawyer-client relationship.

Believing that complete, effective communication was so important to the lawyer-client relationship, I wondered how much attention has been accorded lawyer — client communication in connection with the Rules of Ethics and of Professional Conduct. I was surprised to find not a great deal.

I looked at a few text books used in legal ethics/professional responsibility classes at law schools, for example, *Professional and Personal Responsibilities of the Lawyer* (published in 1997 as part of the University Casebook Series) of the Foundation Press' and *Professional Responsibility* (published in 1995 as part of West Publishing's "Black Letter Series" for law students). Neither of these relatively recently published texts for use in law school courses has a chapter, section or discussion concerning (or seemingly even recognizing) a lawyer's obligation to keep the client well-informed.

Finding nothing in those texts, I decided to immediately go to what is, for lawyers admitted in New York State Courts, the keystone of professional conduct, *i.e.*, the Disciplinary Rules of the New York Code of Professional Responsibility. I found that New York State's rules not only do not contain a word about communication, to my reading they do not suggest the lawyer has any obligation to communicate anything concerning the handling of the matter to the client. Indeed, the New York rules largely are cast in terms of what you are not to do.

However, I did find that effective January 1, 1998, the Appellate Division of the Supreme Court of New York mandated that every lawyer with an office in New York must post in a place visible to all clients of the lawyer a "*Statement of Client's Rights*." A copy of that Statement is attached to this paper.

Of the 10 paragraphs in the New York "*Statement of Client's Rights*," two deal with communication between lawyer and client:

Paragraph 5 You are entitled to have your questions and concerns addressed in a prompt manner and to have your telephone calls returned promptly.

Paragraph 6 You are entitled to be kept informed as to the status of your matter and to request and receive copies of papers. You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter.

Considering what might pertain to lawyer-client communication from a perspective much broader than that of the State of New York, at least two Rules of the American Bar Association's "*Model Rules of Professional Conduct*" specifically address the nature of communication between lawyer and client:

Rule 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but the lawyer may discuss the legal conse-

quences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Impliedly, other of the ABA's *Model Rules of Professional Conduct* involve communication (for example, rules dealing with fees, confidentiality of communications, conflict of interest, terminating representation, etc.).

Details, background, context and application of ABA Rules 1.2 and 1.4 can be found in the *Annotated Edition of the Model Rules* published by the ABA and in at least two loose-leaf services: "*The Lawyer's Manual on Professional Conduct*" published by the ABA with the Bureau of National Affairs, and "*The Law of Lawyering*" published by Aspen Publishers. I found Professor Charles Wolfram's *Modern Legal Ethics*, a practitioner's handbook published by West Publishing, to be a very readable and very valuable resource despite that it is almost 14 years old. As a client I recommend it to you. I have principally drawn on all of the above sources in preparing my remarks today.

Why is communication important between lawyer and client?

As one author has said, a lawyer's ability to communicate with a client is the legal equivalent of a doctor's "bedside manner." For anyone who has been hospitalized or has had a close relative hospitalized, that is a meaningful analogy and one that you should have in mind when communicating with your clients.

As said earlier, communication serves to maintain trust between lawyer and client. The word "maintain" implies, and correctly so, that before the client approaches you to request representation the client already trusts you, trusts your judgment, trusts in your competence and trusts that you will keep the client informed. Complete, even overdone, communication nearly always will ensure that trust is maintained.

Communication serves to avoid disputes, to minimize concerns a client may have, and to prevent a client from distorting minor complaints into major complaints. Communication also serves to ensure your client knows the level and nature of expenses and extent of services being provided for which you expect to be paid. As a corollary to the notion of lawyer-client communication minimizing client complaints, effective lawyer-client communication will serve to protect you from me, the client.

Not unknown is for us, clients, to ask you to represent us because we know we are right and because we know the other person is dead wrong. Everything you say to us is absorbed only after getting through that filter. So if you tell us something of significance that we may not want to "remember" ("to get your side of the story into evidence at trial three witnesses from Bhutan and five from Papua New Guinea have to be brought to New York" or "your chances are no more than 15–20%" or "your recoverable damages are probably not really $270,000 but more in range of $20,000 or $30,000" or that "the other side is making a persuasive argument that pages missing from the log book should result in an inference adverse to you"), then confirm in writing what you say; or, if you keep time entries, at least note the significant aspect of the communication in your time entry. A client's memories of what you say can be selective. Effective communication can protect you from that selective memory.

Paragraph 5 of the MLA's *Code of Professional Conduct* wherein you affirm you will keep us, your clients, "well-informed and actively involved in making decisions" affecting us, your clients, parallels the ABA's *Model Rule* 1.4 (b) requiring a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." This Rule is included in codes adopted by many States and highlights an important "why" of lawyer-client communication: to explain the matter to enable your client to make informed decisions to reach the client's objectives.

After considering two types of lawyer-client relationships, one the "*Lawyers as Hired Guns*" (the lawyer slavishly does the bidding of the

client) and the other "*Lawyers as the Master of Ship*" (the lawyer controls the ebb and flow of the representation in all significant respects), Professor Wolfram concludes that a third type of lawyer-client relationship is best: the "Cooperative Model."

Because paragraph 5 of MLA's *Code of Professional Conduct* dictates that you keep clients not just "informed" but "well-informed" and dictates that you not just "involve" clients in decision-making affecting clients but "actively" involve clients in such decision-making, I believe the MLA's *Code of Professional Conduct* rejects the "Hired Gun" and "Master of the Ship" approach to lawyer-client relationships and instead adopts, indeed demands, that you engage in the "Cooperative" lawyer-client relationship "in which the lawyer and client assume joint responsibility for the representation" (page 156, *Modern Legal Ethics*). From a client's perspective, I believe a significant benefit of the MLA's *Code of Professional Conduct* is that it requires the "Cooperative" model of lawyer-client relationship.

Knowing "when" you should communicate with your client is almost always wrapped up with your knowing the answer to "what" you should communicate to your client.

Paragraph 5 of the MLA's *Code of Professional Conduct* obliges you to keep your clients "well-informed." I believe this obliges you not just to inform your client of developments, issues, problems, etc., as they occur during your representation but also to periodically keep your client informed that no developments, no issues and no problems have occurred.

Informing your client that nothing has occurred is valuable information. The client can do nothing; or the client can ask you what can be done to move the matter along; or the client can report to his board or superiors or insurers or excess insurers that "nothing has happened since the last report" evidencing that you and your client are up to date and not ignoring the matter.

The ABA's *Model Rule* 1.4 (a) also seems to require such periodic "nothing has happened" reporting. *Model Rule* 1.4 (a) requires that the lawyer "keep a client reasonably informed about the status of a matter." Because this requirement does not indicate a lawyer need report the status of a matter only when something of significance occurs, the ABA drafters' intent must be that the lawyer is periodically to report on the status of a matter irrespective of whether significant developments have occurred.

Decisions from various jurisdictions and for enforcing various rules and codes of conduct provide guidance as to what and when you must communicate with your client. For example, you should notify your client of or inform your client concerning:

Upon becoming aware that the client had been named in a civil action. *Shalant v. State Bar*, 658 P.2d 737 (Ca. 1983).

Of the scheduling of a hearing and that a hearing has been vacated. *In re Getty*, 452 N.W.2d 694 (Minn. 1990) and *See People v. Hohertz*, 926 P.2d 560 (Colo. 1996).

That a dismissal of a client's claim is imminent even if the client earlier expressed an intention to no longer prosecute the claim — the client may have had a change of intention. *See In re Rosenthal*, 446 A.2d 1198 (NJ 1982).

That an opponent offers to resolve the dispute through alternative dispute resolution. *Michigan Informal Ethics Opinion* RI-255 (1996).

That you are unable to carry a matter forward promptly. *See, e.g., Passanante v. Yormark,* 350 A.2d 497 (NJ 1975); *In re Putsey*, 675 N.E.2d 703 (Ind. 1997).

That you have failed to act on your client's claim and that, therefore, the client may have a claim against you. *See Tallon v. Committee on Professional Standards*, 447 N.Y.S.2d 50 (1982); *In re Higginson*, 664 N.E.2d 732 (Ind. 1996).

That you have changed your address or your telephone numbers. *See, e.g., In re Carrigan*, 452 A.2d 206 (NJ 1982).

If recommending a course of action that may adversely affect your client, then advising of the risks and of the alternatives and of their consequences. *See Smith v. St. Paul Fire and Marine Ins. Co.*, 366 F.Supp. 1283 (M.D. La 1973), *aff'd*, 500 F.2d 1131 (5th Cir. 1974).

Meaningful advice, based upon having sufficiently educated yourself, about options available. *Mason v. Balcom*, 531 F.2d 717, *reh'g denied*, 534 F.2d 1407 (5th Cir. 1976).

After diligently investigating a claim against your client, advising of any potential defense (but not of every remote possibility — *Smith v. St. Paul Fire and Marine*, 366 F.Supp. 1283 (M.D. La 1973), *aff'd*, 500 F.2d 1131 (5th Cir. 1974)) or invalidity of the claim. *Muse v. St. Paul Fire and Marine Ins.*, 328 So.2d 698 (La. App. 1976).

Of facts suggesting that your client's legal objectives in a transaction are at risk and of the legal implications of those facts. *E.g.*, *Republic Oil Corp. v. Danziger*, 400 N.E.2d 1315 (Mass. App. 1980).

Of adverse consequences that may arise from the execution of an agreement. *See Ramp v. St. Paul Fire and Marine Ins. Co.*, 269 So.2d 239 (La. 1972).

That an agreement into which your client is considering entering will create more extensive obligation than your client wishes to assume. *See Viccinelli v. Causey*, 401 So.2d 1243 (La. App. 1981).

Of available alternative dispute resolution options if the court or opposing counsel propose it, or if you believe ADR is a viable option. *Kansas Bar Assoc. Ethics Comm. Op.* 94-1 (April 15, 1994).

Of your belief, if held, that no actionable claim exists. *In re McCausland*, 605 N.E.2d 185 (Ind. 1993).

Of motions to compel discovery of your client or of court imposed sanctions upon your client. *In re Schwartz*, 496 N.W.2d 605 (Wis. 1993).

Of your departure from your firm if you are a partner in the firm. *See, e.g., Palomba v. Barish*, 626 F.Supp. 722 (E.D. Pa. 1985).

In so far as settlement is concerned, no doubt exists as to your obligation "to abide by [your] client's decision whether to accept an offer of settlement of a matter" (Rule 1.4 (a), ABA's *Model Rules of Professional Conduct*). Because paragraph 5 of the MLA's *Code of Professional Conduct* requires that you keep your client "well-informed" and "actively involved in making decisions affecting them" certainly you must do so regarding any activities impacting on settlement.

Some decisions in the area stand for the obvious:

> You may recommend acceptance of a settlement but you may not coerce your client into acceptance. *In re Lewis,* 463 S.E.2d 862 (Ga. 1995).
>
> A failure to communicate a settlement offer to your client is a violation of professional standards. Indeed "[e]ven when a client delegates authority to [you], the client should be kept advised of the status of the [settlement]." *See Comm. On Professional Ethics v. Behnke*, 486 N.W.2d 275 (Iowa 1992).
>
> You must explain to your client the net recovery (or net outlay) involved in the settlement because if you fail to do so you will have failed to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding [your] representation." *See* Gafni, *Foreward: The Model Rules — A Practioner's Guide to Avoiding Malpractice*, 61 Temp. L. Rev. 1045 (1088).

As part of your obligation to keep your clients well-informed and actively involved in decision making, some information not mentioned in what I have read should, I believe, be included in your communication with your clients. I will mention several although they may strike you as commonsensical.

In the context of representing a business organization, one way to get your client actively involved is to ask your client to identify precisely what entity or entities you represent and to advise you as to what role that entity has in the dispute, matter or transaction. With cargo owners, vessel owners, NVOCC's, insurers, charterers, and terminals having multiple entities and layers, to not ask your client early on to identify who you represent puts you at risk.

Communicate with your client to ensure no trade secrets, private corporate arrangements, or other sensitive information exists which your client may not want to reveal which may, therefore, have to be subject to a confidentiality order or agreement. Communicate to your client adjournments, extensions of time and other postponements so that your client does not believe some event or activity took place only to later learn you agreed to a delay. If mediation or other form of ADR is to come into play, clearly communicate to your client whether the client or someone from the client business must appear in person or may appear by telephone or may simply arrange to be available to participate. Explain the options and possibilities.

Rule 1.2 (a) of the ABA's *Model Rules* states that you "shall abide by a client's decisions concerning objectives of representation" (save for instances of criminality or improper conduct) and that you "shall consult with [your] client as to the means by which they are to be pursued." Consulting with your client as to the means by which you will try to meet the objectives set by your client requires communication, a well-informed client and an actively involved client.

Although "it is generally agreed that a lawyer has the right to control the tactics or procedural elements of a case, by virtue of his or her superior knowledge of the law and status as a member of the bar" (p. 16, *Annotated Model Rules of Professional Conduct*, 3d Edition, citations omitted), in order for your client to make intelligent decisions regarding the objectives to be set for your representation, you are under a general duty to inform your client of all relevant facts and issues. *United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992).

It also should be said that a lawyer must have the client's consent before making a decision that will affect a substantial right or interest of the client. *Graves v. P.J. Taggares Co.*, 616 P.2d 1223 (Wash. 1980). Professor Wolfram has said that "Nothing lends more vitality to the client-lawyer relationship than effective communications between lawyer and client." (p. 163, 164, *Modern Legal Ethics*). He goes on to note that the importance of such communication is reflected in the "extra-ordinary protection" afforded communication between lawyer and client. How should such communications take place? Obvious forms of communication are face to face meetings, telephone conversations, and written communication in the form of letters, telefaxes, e-mail, and so forth. Verbal communication is fine up to a point, but for significant issues to be thoroughly considered, written communications are preferable.

When considering how you can most effectively communicate to ensure your client is well informed, remember the notion of "bedside manner." Simply forwarding piles of pleadings, motion papers and litigation developed paper you are serving upon/receiving from your adversary is not, I believe, effective communication. It is no better communication than a medical doctor who, after silently examining you, hands you a prescription and says "take this."

For effective communication, you should explain the "whats" and "whys" of what you have done, are doing and propose to do and explain how those activities impact on the objectives of your client who is paying for you to meet those objectives. Your written communications dealing with issues, fact

or legal, can be written in a format similar to a legal brief with an introduction stating the purpose of your communication, identity of any issue being presented for decision, relevant facts, brief summary of your recommendation followed by a more detailed explanation and a conclusion reviewing the decisions/matters as to which you are requesting your client's response.

Although often not thought to be, your bill, if it is a time-based bill with entries describing the services performed, is an important form of communication with your client. Clients do read your bills, and that is almost always after having taken a peek at the bottom line. That peek will set up the mindset for the level of concentration or scrutiny to be applied to your bill. You should review your bills as a form of communication with your client.

But in the end, the "How" of communication is not nearly so important as the need for you to communicate with your client to keep your client well-informed.

The MLA's *Code of Professional Conduct* sets out laudatory tenets for maritime lawyers the adherence to which can only benefit clients. Under paragraph 5 of the MLA's *Code*, your effort to "maintain the trust of [your] clients by keeping them well-informed and actively involved in making decisions affecting them" most certainly will benefit your clients and, therefore, will redound to your benefit.

A multitude of reasons exist as to why you should keep your clients well informed, and for the most part common sense will dictate when to communicate and concerning what and how to communicate. Jim Moseley's paper exhorts you to "rekindle the faith and trust that society once placed in lawyers" — I exhort you specifically to maintain the trust and faith of your clients by keeping your clients well-informed, by actively involving them in the making of decisions that affect them, and by engaging in cooperative representation with them.

STATEMENT OF CLIENT'S RESPONSIBILITIES,* NEW YORK STATE BAR ASSOCIATION

Reciprocal trust, courtesy and respect are the hallmarks of the attorney-client relationship. Within that relationship, the client looks to the attorney for expertise, education, sound judgment, protection, advocacy and representation. These expectations can be achieved only if the client fulfills the following responsibilities:

1. The client is expected to treat the lawyer and the lawyer's staff with courtesy and consideration.

2. The client's relationship with the lawyer must be one of complete candor and the lawyer must be apprised of all facts or circumstances of the matter being handled by the lawyer even if the client believes that those facts may be detrimental to the client's cause or unflattering to the client.

3. The client must honor the fee arrangement as agreed to with the lawyer, in accordance with law.

4. All bills for services rendered which are tendered to the client pursuant to the agreed upon fee arrangement should be paid promptly.

5. The client may withdraw from the attorney-client relationship, subject to financial commitments under the agreed to fee arrangement, and, in certain circumstances, subject to court approval.

6. Although the client should expect that his or her correspondence, telephone calls and other communications will be answered within reasonable time frame, the client should recognize that the lawyer has other clients equally demanding of the lawyer's time and attention.

7. The client should maintain contact with the lawyer, promptly notify the lawyer of any change in telephone number or address and respond promptly to a request by the lawyer for information and cooperation.

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* The Statement of Client's Responsibilities is the product of "a unique collaborative effort between the Office of Court Administration and the New York State Bar Association." Joshua M. Purzansky, *Lawyers' Rights and Client's Responsibilities*, N.Y. L.J., Feb. 26, 1998, at 2. Unlike the Statement of Client's Rights, it is not a court rule. The Office of Court Administration has no jurisdiction over clients. However, lawyers may post it in their office and distribute it to their clients.

8. The client must realize that the lawyer need respect only legitimate objectives of the client and that the lawyer will not advocate or propose positions which are unprofessional or contrary to law or the Lawyer's Code of Professional Responsibility.

9. The lawyer may be unable to accept a case if the lawyer has previous professional commitments which will result in inadequate time being available for the proper representation of a new client.

10. A lawyer is under no obligation to accept a client if the lawyer determines that the cause of the client is without merit, a conflict of interest would exist or that a suitable working relationship with the client is not likely.

STATEMENT OF CLIENT'S RIGHTS

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, ALL DEPARTMENTS*

The Appellate Divisions of the Supreme Court, pursuant to the authority vested in them, do hereby, effective January 1, 1998, add Part 1210 to Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York as follows:

Section 1210.1 Posting

Every attorney with an office located in the State of New York shall insure that there is posted in that office, in a manner visible to clients of the attorney, a statement of client's rights in the form set forth below. Attorneys in offices that provide legal services without fee may delete from the statement those provisions dealing with fees.

The statement shall contain the following:

1. You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and personnel in your lawyer's office.

2. You are entitled to an attorney capable of handling your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge).

3. You are entitled to your lawyer's independent professional judgment and undivided loyalty uncompromised by conflicts of interest.

4. You are entitled to be charged a reasonable fee and to have your lawyer explain at the outset how the fee will be computed and the manner and frequency of billing. You are entitled to request and

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* Because changes to these rules are made at the court's discretion, readers are strongly cautioned not to rely on the text set forth herein without first verifying its accuracy with the clerk of the court.

receive a written itemized bill from your attorney at reasonable intervals. You may refuse to enter into any fee arrangement that you find unsatisfactory.

5. You are entitled to have your questions and concerns addressed in a prompt manner and to have your telephone calls returned promptly.

6. You are entitled to be kept informed as to the status of your matter and to request and receive copies of papers. You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter.

7. You are entitled to have your legitimate objectives respected by your attorney, including whether or not to settle your matter (court approval of a settlement is required in some matters).

8. You have the right to privacy in your dealings with your lawyer and to have your secrets and confidences preserved to the extent permitted by law.

9. You are entitled to have your attorney conduct himself or herself ethically in accordance with the Code of Professional Responsibility.

10. You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, age, national origin or disability.

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[11739]

Convergence and Divergence in Marine Insurance Law*

LORD MUSTILL**

I still remember the candid appraisal of the first address which I ever gave in the United States, many years ago, overheard by a friend in the coffee house during the mid-morning break. It was to the effect that "the material was OK, but he was kinda British." I am greatly touched that someone British should be invited, on this notable occasion, to honor the dedicatee of this evening's talk: someone who is at the same time American through and through and yet is able to capture the essence of the relation between our two deeply bonded countries, and our two deeply bonded legal systems.

It is indeed a notable occasion because, in the year 1998, we are within touching distance of the year 2000, and yet can celebrate a continuous relationship, through Nicholas J. Healy, with the year 1948. As for the former, we may not trouble whether the next millennium will begin on January 1, 2000, or January 2001. This is matter of taste and simple arithmetic. Nor need we inquire whether the false programming economies of the 1960's will actually yield the electronic chaos so widely forecast: although this provides a handy reminder that planning for the future cannot safely be founded on the assumption that the future will be the same as the present.

Still less need we have in mind the various apocalyptic manifestations which the credulous now anticipate. We need only note that January 1, 2000, will on any view be a day to remember, and as we look forward to it we must be prompted also to look back. There is a special reason for this in the year 1998: for the year marks the 50th anniversary of the founding by the dedicatee of this lecture of the firm whose name he shares. Almost the entire postwar history of maritime law, and particularly of marine insurance law and practice, thus marches alongside the rising career and esteem of Nicholas Healy.

It is therefore worth while to look back to the year 1948, to see what our backward glance can teach us: for leaving simple curiosity aside, the purpose of looking back is to profit from experience. L. P. Hartley's novel, "*The Go-Between*," begins: "The past is a foreign country: they do things differently there."[1] To visit

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[1] L. Hartley, *The Go-Between* 9 (1953).

the past is a kind of foreign travel by which, if we allow, our horizons can be enlarged and our perceptions made more sharp. What do we learn from surveying the past 50 years?

First, that certain things do not change. Technical expertise and hard work are of course as indispensable to successful practice of the law as they were 50 years ago. These are, in the main, taught accomplishments. There are others which cannot be taught: honesty, courage, frankness, objectivity, and magnanimity. These cannot be learned from books. So far as they are not inborn, they must be absorbed by osmosis from the environment in which the practitioner grows up. A law firm — any association of lawyers — in which these qualities are taken for granted bears the marks of a success more valuable by far than mentions in the list of Top 20 earners, the celebrity legal profiles, and the flashy: opportunism celebrated in today's periodicals of the legal demi-monde. It is no good being sentimental about the common law, calling it "Our Lady of the Common Law," as was the fashion some decades ago. It is not a person, and it is not intrinsically noble: it has had its own share of incompetents and villains. Yet for all its flaws and clumsiness the common law has been and remains a powerful instrument of justice. In its pragmatic and un-doctrinaire approach it has been well-tuned to the general cast of mind of the peoples whom it has served. It has been the backbone of our liberties. Four hundred years ago, courageously waging a legal battle of the highest constitutional importance, a great lawyer called it "the golden metwand"[2] and we see it glimmer, sometimes faintly but never wholly obscured.

Enough, however. Perhaps I draw too close to the cracker-barrel; perhaps I make our dedicatee feel uncomfortable. If we have learned that some virtues do not change, what else can we learn from the past?

Well, we learn a tougher lesson, which is that some things do change, and change around us, whether we like it or not. In its least palatable form this lesson teaches that although technical accomplishment and hard work are indis-

[2] Or metwand: a measuring rod. King James I took it upon himself to pronounce judgment in a civil case. The judgment was quashed by the common law judges, who thought the King had "excellent science, and great endowments of nature," but was not learned in the laws of his realm. Civil cases were to be decided, not by natural reason, but by the artificial reason and judgment of law, which required long study and experience. The law "was the golden met-wand and measure to try the causes of the subjects." With this the King "was greatly offended, and said, that then he should be under the law, which was treason to affirm." Coke replied, quoting Bracton: "*quod Rex non debet esse sub homine, sed sub Deo et lege* [That the king ought not to be under man but under God and the law]." Prohibitions Del Roy, 77 Eng. Rep. 1342, 1343 (K.B. 1607).

pensable they do not guarantee survival. The landscapes of the past are haunted by the ghosts of redundant skills. Think of the fletchers who made the arrows which the bowmen shot at Agincourt. The arrows which they could make today would run just as far and true, but where are they now? Where are the gold-beaters, the falconers, the wig-makers? In our own legal world, where are the scriveners and the special pleaders? All of these people were highly skilled, yet their skills have become redundant because the world has passed them by. Skill alone is not owed a living. No skill is immune to change.

Other lessons follow quickly behind: that change is inevitable, but that the rate and direction of change are not constant. Looking back across the centuries to the world of Italian commerce the thoughtful student of marine insurance would have seen some things which had survived essentially unchanged. But he would of course have recognized that the world within which the insurance was written was now different beyond recognition. Moreover, he would see that the changes were cyclical: sometimes very slow, sometimes accelerating. Perhaps he would be particularly struck by the events which happened within a space of some 30 years in the first half of the last century. The first railway; the electric telegraph; screw-driven trans-Atlantic crossings; the submarine cable; the Bessemer steel process; primitive typewriters; uniform cheap postal services; the foundation of organic chemistry, a step with philosophical implications as profound as those of genetic engineering; the first photographic prints. At the same time, capital was on the move from land to industry; and on the move from individuals to joint-stock companies and then to limited liability companies. These innovations, once established — and it happened quickly — transformed the geographical and economic setting of international commerce. The world abruptly shrank, with the increased speed and reliability of communications and transport. The graph of world trade climbed ever more steeply. New types of transactions, and new means of financing them, had to be devised, and were devised.

All this required a new framework of law, which had to be invented, and invented quite quickly. Because England was still the center of world trade — the apex of commercial transactions — the burden fell on the English courts, which by good fortune possessed two priceless advantages. First, the timing was right, for the judges of the common law courts, in the middle years of the last century, formed the strongest judicial cadre which has ever sat in England; one which could perhaps be ranked with any court which has sat anywhere, at any time. These men were notable not just for their intellects but for their understanding of how commerce worked in practice, so that sound jurisprudence could provide a framework within which new business methods could safely and yet freely evolve.

This word "freely" calls up the second advantage which the courts possessed; namely, the absence of a codified civil law. Codes have great benefits, in the shape of certainty, accessibility, and rigor. But they are always out of date, and inhibit rapid responses to new situations. The judges of the mid-19th century were free to answer the new demands with new doctrines. These developments, though perhaps most elaborately wrought in England, were not, of course, confined to that country. The courts of all the major trading nations tackled, in their different ways and with different degrees of challenges of a new commercial order. The outcome was not, unfortunately, a new mercantile law of nations pervading all commercial dealings, wherever done. Even today, more than a century later, no such law has spontaneously evolved. Still, even if there was no single law of international trade, there were laws of trade altogether more fully developed than those which existed before the major economic and technological shifts which inspired them.

Amidst all this ferment of innovation what was happening to marine insurance? Not much, seems to be the answer. From Iris Origo's wonderful book, "*The Merchant of Prato*," we learn that 600 years ago Piero Datini would insure his goods on voyages as far afield as Britain at premia varying from 3½% to 8% on policies covering "act of God, of the sea, of jettison, of confiscation, of princes or cities or any other person, of reprisal, mishap or any other impediment." [3] He grumbled of his insurers that "when they insure, it is sweet to them to take the monies; but when disaster comes, it is otherwise and each man draws his rump back, and strives not to pay." [4] Attitudes did not change greatly in the centuries to come, nor did the essential shape of the insurance. The extraordinary tenacity of the Lloyd's standard form will be familiar to all present here today. For 100 years and more after they were abolished by the Declaration of Paris, "letters of mart and counterman" were still expressly covered. Has there been within living memory, and indeed within the memory of our grandparents, a loss by "rovers" or that strange peril "surprisals"? Surely not, but there they stayed in the SG Form. Even the seemingly straightforward peril "takings at sea" was so unfamiliar that a most distinguished English judge wholly misconstrued it on first reading, the error being corrected only some years later when historical research disclosed its true meaning.

What can we learn from these antique survivals? First of all, I believe, that a convergent market, coupled with its supporting law, tends to be conservative. If everyone contracts on much the same terms against a background of laws which are much the same, it saves time and trouble. Instead of having

[3] I. Origo, *The Merchant of Prato* 140 (1957).

[4] *Id.* at 139.

to negotiate every bargain from the ground up, and then rate every bargain uniquely on its own merits, the risk analysis can be performed against the background of a pricing structure which everyone knows and understands. Radical innovation is a nuisance, and even if some divergence from the norm is needed to deal with new or unusual situations, it is more convenient to do this by mutating the existing formulae rather than writing the whole contract afresh; and in due course the mutations settle down to standard terms, such as the Institute Clauses. In the end, the contract document becomes an unsystematic patchwork of unrelated clauses, having the character neither of the original policy nor of a coherent system of risk distribution. This inefficient basis for the conduct of an important industry survived only because it looked and felt familiar: and the law built around the contracts also remained largely static because it too looked and felt familiar.

The resulting longevity of forms, however outmoded and imprecise they may be, brings with it a longevity of law. Similar problems arising in different jurisdictions on the same contract wordings tend to produce similar solutions; and these solutions, which are originally no more than exercises in the analysis of language, eventually congeal into what are seen as rules of law. So that, for example, questions arising on "perils of the seas" or "inherent vice" are seen as issues of law, rather than simply as the application of words to individual factual situations.

This is not, however, a complete explanation of the homogeneity and resistance to change of marine insurance law. Another factor was the development, in more recent times, of a dominant market, international in business but localized in execution, which tended to carry with it a dominant system of law. London was not, of course, the only place to conduct insurance business, nor necessarily the best place, but it was where the greatest volume of business was done. Inevitably, the law of the central market tends to have a powerful influence on legal systems elsewhere. Thus, the laws of Australia, Canada, Hong Kong, New Zealand, and Singapore are all derived from the English Marine Insurance Act 1906. This was not, I believe, the finest flower of English commercial legislation, but it was there, ready at hand, as a tolerably complete and accurate formulation of a common law set of rules, widely accepted and understood. The law of the United States, at least before *Wilburn Boat Co. v. Firemans Fund Insurance Co.*,[5] also drew heavily on English sources. There was thus a substantial degree of de facto harmonization clustered around this single model.

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[5] 348 U.S. 310, 1955 AMC 467 (1955).

There was, however, another, less obvious, source of convergence in marine insurance law, namely the cosmopolitan character of the learning. Recently, while leafing almost at random through the treatment of the topic by Chancellor Kent, I found references to the Consolato del Mare; the Ordinances of Stockholm, Hamburg, Bilbao, and the States General, amongst others; Bynkershoek; Le Guidan; Emerigon; Valin; Pothier; Boulay Paty; Roccus; Pardessus; Santerne; and Majens. Kent, like his exemplar Mansfield, drew on the civil law to fill the gaps in his common law sources. Later writers on both sides of the Atlantic drew on these and similar authorities, and drew on each other without discrimination of origin. Even in the 1990's, an English judge, attempting a full survey of an old problem, would turn to Phillips and Parsons as well as to Arnould, MacLaghlan, and Arthur Cohen. In a real sense a contract of marine insurance was underpinned by the law and usage of nations; as Pothier described it, a contract "du Droit des Gens." It was truly a "transnational" contract before that jargon was invented.

One further source of convergence may be mentioned briefly, namely, the development of the P & I Clubs. Uniquely, they embrace at the same time international risk-takers and international risk-bearers, and they may well claim to be the most completely globalized of all commercial enterprises, yet the claims-handling regimes operate according to a unified practice, and impose a unified concept of what maritime risks are all about.

Let us return to our introspective practitioner, contemplating the past and the future as they would have appeared in 1948. He or she would, I believe, have learned from the past that change in the commercial context of marine insurance was inevitable and that the changes might well be unexpected in kind and degree, but would also have learned that the cohesive forces which I have mentioned had enabled marine insurance to survive pretty much unchanged. From this, the practitioner would have deduced that whatever the future might hold, the same forces would operate as effectively as before and that the industry would continue to be homogeneous.

In one sense this prediction would have been right. The world has become unrecognizable but (if the paradox may be forgiven) in a recognizable way. Certainly, nobody could in 1948 have foreseen the world in which we now live. The phenomenal economic and political resurgence of the defeated great powers. The unlooked for rise of a Western Europe whose pervasive internal unity is much greater than its public squabbles might suggest, coupled with a steady expansion towards the East. Above all perhaps, the total collapse of the collectivist economy in the world's second great power, and its replacement by . . . who knows what?

In a negative sense, even the most dedicated pessimist could hardly have envisaged, that in place of the calm, rational, and orderly community of states, which as we then hoped would be knitted together by the firm but kindly authority of the United Nations, we should, at the turn of the century, be witnessing tribalism, religious strife, forced migration, terrorism, desperate poverty, and genocide. Yet these changes, breathtaking as they are, do not differ in kind from those of the preceding 150 years. Devastating wars; revolutions; anarchism; the rise and decline of empires; the emergence from seclusion of the Far East; emancipation; the erosion of organized religion; universal franchise. And so much more. Through all of this the small quiet world of marine insurance, and the small quiet world of maritime law, survived not only unscathed but seemingly unchanged.

So also with technological change. In the world of admiralty, ships have, of course, multiplied in size, as their crews have shrunk in number; navigational methods are quite different from those which had served for a century; great ports have disappeared and others have sprung up; traditional cargoes and traditional cargo routes have changed; and, of course, the container revolution has entirely reconstituted the manner in which, and the terms on which, general cargoes are carried. Yet these changes were no greater than those which I have already described in the first half of the last century, and in the subsequent 100 years which brought technological strides such as wireless telephony and heavier-than air flying machines, which only a dreamer could have conceived. From all this, the world of marine insurance law emerged virtually unchanged. An observer could well have expected that the cohesive forces which had held that world together in the past would still do so in the future. Moreover, although the observer in 1948 (a year before the first electronic programmable computer came into use) could not in practice have imagined the world of information technology as it exists today, nevertheless, if he had been given the gift of foresight, he might well have seen it as a cohesive force. After all, electronic movement of ideas will lead to pooling of ideas, which may in turn lead to homogeneity of ideas, just as the widespread and instantaneous movement of popular cultures may be leading to an erosion of cultural differences.

This would have been a perfectly sensible approach at the time, but I believe that we can now regard it as mistaken, or at least seriously over-simplified. If we look backwards, we are reminded of the inevitability of change and also learn from the past 50 years that change does not happen at a constant speed or in a constant direction. Computers are the most conspicuous example. At first, development was quite slow. Now they not only have capabilities unimaginable only a few years ago, but the rate of change of their

capabilities is itself changing all the time; the computer world is accelerating, and the demands made by users of the world order which computers and the information networks sustain are accelerating in step. Everything is on the move. People eat on the move, telephone on the move, are already beginning to compute on the move. They expect quick responses—fast ideas as well as fast foods. The old watchword, "If it ain't broke, don't fix it," has been replaced by the programmer's motto: "If it works, it's out of date."

Like it or not — and it makes no difference whether we like it or not — established methods are not so much rejected as left behind. The law of marine insurance is unlikely to be an exception. Indeed, anyone with direct experience of the English appellate courts' recent struggles[6] to apply the classical law of Pothier and Mansfield, Duer and Arnould, to the very un-classical events in the London market during the 1970's and 1980's must wonder whether the tradition is getting near to the end of the road. It is, I believe, too much to hope that the forces of tradition, habit, experience, and intellectual rigor which have so far held marine insurance law and laws together have sufficient internal cohesion to keep them converged in the future. Nor am I convinced that there is sufficient flexibility in the system to allow a mutation fast enough to match the changes in their environment. If so, local jurisdictions will strive to find their own individual solutions, and this is bound to lead to fragmentation. The solutions found may differ not only from each other but from the axioms which have bound transnational insurance law together for so long: (even dare one breathe the thought) the principle of utmost good faith.

Furthermore, the spirit of rapid change for its own sake is not the only intangible agent of fragmentation. Three powerful shared impulses of the world at large, which the shrewd lawyer of 50 years ago could not have foreseen, are bearing down on the little microcosm of marine insurance. The first is the environmental movement, unknown as a public phenomenon before Rachel Carson, now one of the most powerful and pervasive of political (with a lower-case initial) forces. This audience will need no reminding how profoundly the economic structure of maritime transport insurance is being forced into a different shape by modes of thought to which traditional economic weights and measures are an irrelevance. Environmentalists are zealots, as immune to gentle persuasion as to personal gain. The smoke-filled

[6] *See, e.g.*, *Pan Atlantic Ins. Co. v. Pine Top Ins. Co.*, [1995] 1 A.C. 501, [1994] 2 Lloyd's Rep. 427 (H.L.); *Eide U.K. Ltd. v. Lowndes Lambert Group Ltd.*, [1998] 1 Lloyd's Rep. 389 (C.A.); *Royal Bokalis Westminster N.V. v. Mountain*, [1997] 2 All E.R. 929 (C.A.); *St. Paul Fire & Marine Ins. Co. (U.K.) Ltd. v. McConnell Dowell Constructors Ltd.*, [1995] 2 Lloyd's Rep. 116 (C.A.).

room — if there are any left — is not for them. They are a power in the land, and their influence reaches from the land to the sea. The traditions, practices, and tacit assumptions of the world of commerce, and of the ancillaries to commerce such as insurance, must take them into account. They are here to stay, and because their impulses come from feeling, and not analysis, the old ways of thinking will not be able to accommodate them.

A second external movement with an inevitable impact on the closed world of insurance is consumerism. This has two potential effects. In the first place, it has tended in some countries — such as the United Kingdom — to engender specialist regimes, for example an insurance ombudsman system, which operates outside the ordinary legal system in accordance with its own rules and practices. Of course, P & I insurances, excess of loss cover, and so on are not consumer insurance, nor (for the moment) is the insurance of small items of cargo. Even those countries which have passed special consumer insurance laws have not applied them to transactions of the kind we discuss today. But if it works, and if it seems fair, it is bound to leave its mark. And because the whole point of these procedures is that they do not proceed according to sharp-edged fixed norms, they speak for diversity, not convergence.

In a more general sense, consumerism promotes divergence. It is the aim of the movement to protect a sectional interest: namely, in the broadest terms, the interest of the acquirer of goods and services. This is antithetical to the idea that it is the provider of insurance who needs protection against the cynical insured who hides the truth. Decision makers faced with defenses founded on this 200-year-old concept may not be much impressed, and may react against it in their decisions. The result may be a case-by-case approach which obstructs the development of a consistent jurisprudence; and also a situation-by-situation attempt on the part of insurers to outflank consumerist tribunals by means of specially-drawn provisions which again lead to fragmented decisions, rather than the tolerably coherent law built up around standard forms.

Apparently allied to consumerism, but in fact quite different from it, is what one may call "claims-itis": the idea, absolutely pervasive in the Western world, that there is no such thing as bad luck; that every hurt is somebody's fault; and that the sufferer has an innate moral right to have the hurt assuaged by money from somebody else. This is obviously not the place to debate whether this attitude is healthy, or whether it has been fed by a rights-based jurisprudence, or anything else of the kind. It will not go away, and the principle that, as was explained to Alice, "All shall have prizes," may collide

with marine insurance law in the same way, if not to the same degree, as in other fields. Once one departs from the assumption that only those win prizes who have a proved legal right to them, and that the prizes should be commensurate with a proved loss, the choice between the claimant's grievance and the insurer's deep pocket becomes irrational, and a coherent legal order cannot survive.

The third new player is the European Union, which through its competition department has for some years been taking a close interest in the pool arrangements of the P & I Clubs. They are an obvious target for action under Article 85 of the Rome Treaty,[7] although it has taken time for the Brussels authorities to show their teeth. In the event, it may well be (although of course I am not qualified to speculate) that the very real advantages to shipowners and to those who suffer serious harm as a result of shipowners' culpable acts will be seen to outweigh the anticompetitive structure of the inter-Club arrangements, and that some form of exemption or other mitigation will protect them from being unravelled. If so, then the cohesive forces presently exercised by the Clubs through a unified market presence and broadly comparable terms and practices will continue to apply.

But the signs are there, and the breakdown of traditional reticences, of the feeling that each one should steer clear of the other's patch, that the cobbler should keep to his last, seems likely to encourage those who write liability risks from outside the closed circle of the Clubs to cast eyes on this traditional preserve. Whether this will take the shape of the one-stop shopping which is attracting so much current attention, or whether the large new organizations will plunge straight into offering this kind of business in direct competition with the mutuals remains to be seen; and it also remains to be seen whether they will have the skills, experience, and attitudes to make a success of it. But the trend will undoubtedly be towards diversity of markets, and thence to diversity of contractual structures, and then in the end to diversity of legal frameworks: for the Clubs are important to these frameworks, not because of P & I Club law, of which there is not much, but because of the way in which the Club managers handle the disputes involving their members from which maritime law and legal practice are evolved.

I turn from generalities to practical aspects of the marine insurance market. Those present in the audience will need no reminders of how the picture

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[7] *Treaty Establishing the European Economic Community*, Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958). Article 85 (now 81) prohibits agreements and practices which directly or indirectly restrict or distort competition within the European Union.

has entirely changed. This would merit an entire course of lectures, and there is no time now for more than a brief sketch. All I can do is to identify some of the forces which must be tending to disrupt what was once a closed and coherent market:

1) Mergers and take-overs amongst the risk-takers means a smaller number of available leads. The result will be larger lines, and very possibly the disappearance of the subscription market altogether;

2) Broking firms are consolidating into a very few large operators, with correspondingly increased power to dictate the terms on which they will buy cover;

3) There is now vertical integration amongst the operators in the market, from which it must surely be doubtful that the traditional boundaries of function can ever recover;

4) The current soft market forces insurers away from insistence on standard terms towards a customized product demanded by the placers.

If this change towards corporate internationalism is accurately perceived, one might at first sight think that it will lead to a global product, with consequent convergence of the law built around the product, as it has been in the past. I rather doubt this. For the development of a converged law you need recognized and standardized terms. Made-to-measure insurance cannot supply the consistency needed for steady practice to turn into harmonized new law.

Faced with these fissile tendencies, what are the prospects for convergence? I see little chance that this will come about spontaneously, through perpetuation of the cosmopolitanism of previous centuries. Nor is there any longer a dominant central market place whose lead others will readily follow, simply for convenience. If progress is to be made, this must coordinated, positive action. What form should this take? International conventions scarcely seem a possibility. There is no sign that the institutions of the United Nations have any interest in promoting a treaty solution, and the prospect of producing a text to which Governments would be willing to accede without damaging reservations on the most important points seems remote.

Moreover, I am not sure that a formal normative code is the right way forward. Codifications usually aim to state the law as it has been up to the present, but marine insurance as it has been is not necessarily what we want it to remain, when facing the rapid changes in attitudes, practices, and economic

conditions which are already under way. For example, the traditional distinctions between non-marine and marine cover are beginning to be anachronistic; indeed, given the increasing use of continuous transit, when new forms of transactions and documents (or electronic substitutes for documents) are in the course of evolution, and new legal rules are having to be created rapidly in response, it may seem perverse to insist that cargoes should be insured on the seaborne leg according to rules evolved in days when international trade was unrecognizably different from what it is today. Again, the various rules of agency which cluster around the making and performance of marine insurance agreements may now seem out of contact with the reality of the marketplace. As a final example, one may dare to ask whether the grandest principle of all — the principle of utmost good faith — is in tune with the spirits of the times. I dare to ask: but not yet would have the temerity to answer.

It seems therefore that we need something new, and I doubt whether "harmonization" is the way forward. It is a pleasing image, calling up as it does the less demanding kinds of music. Like many euphemisms, however, it disguises a less palatable truth: namely, that harmonization builds compromise and caution, not boldness and innovation. It is slow to accomplish, and once achieved is unlikely to be attempted again for many years. The result is to leave the law congealed in a form which is permanently out of date. This is not what we want.

A better alternative may well be an international or transnational restatement—perhaps on the lines of the UNIDROIT contract principles.[8] The potential benefits of domestic restatements need no exposition to this audience, especially given the marine insurance project which is already in contemplation here.[9] The prime virtue of a domestic restatement is to clarify and sharpen the domestic law, which paradoxically may only serve to highlight and perpetuate the differences between a variety of national laws. This is not to deprecate the value of restatements, but what we need just as much is some form of international initiative. Just such an initiative has recently been launched under the auspices of the Comité Maritime International, whose study group on marine insurance has already had a successful first conference and is planning for the future. Other vehicles for action will of course be welcome. Perhaps a Scandinavian shipping plan would be a useful model.

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[8] *UNIDROIT Principles of International Commercial Contracts* (1994), noted at 33 I.L.M. 1395 (1994).

[9] *See also* M. Sturley, *Restating the Law of Marine Insurance: A Workable Solution to the Wilburn Boat Problem*, 29 J. Mar. L. & Com. 41 (1998).

Whatever exactly the form, action we must surely take. With convergence needed—and I believe that it is—the industry, the lawyers, the judges, and the dispute resolvers who serve the law must be "pro-active": an ugly word, but it serves the purpose. All concerned—not just enthusiasts for the intellectual elegance of marine insurance law—will need to come forward together, without reticence or false modesty, and exert their muscles.

I have time to mention one final topic, namely dispute resolution. In the past, one could recognize a tri-partite division in the world of insurance. First, there were the people within the working environment, themselves quite sharply ranked. The grandees who wrote the business; the brokers who attended on the grandees (it is no accident that the French word for broker is "courtier"); and the personnel who endeavored to write down in policies what the others had agreed. Secondly, there were the claims people, whose functions were quite different from those who made the contracts which founded the claims. Third, in the outside world, were the lawyers, judges, and arbitrators who dealt with the claims. Between the first and the second and the first and the third of these groups there was relatively little contact.

In some industries it has already been recognized that this sharp division of function is inefficient. It is no good negotiating an agreement which is basically sound if its effect is fuzzy at the edges—unless, of course, it is meant to be fuzzy at the edges, as some agreements are. It is no good concluding a tight contract if it is written down in words which are contradictory, ambiguous, incomplete, or incomprehensible. It is no good having an agreement which is well conceived and reduced to writing, if the dispute resolution procedures cannot be relied upon for at least a fair degree of accuracy in establishing the necessary facts, and applying to them the terms of the contract and the relevant law, when these terms and law are correctly understood. Inefficient drafting and slovenly dispute resolution can subvert the best-planned transaction. The fact that the whole process from negotiation to judgment, award or settlement, is a continuum of risk management has already been recognized in some industries where dispute resolution is an integral and properly thought-out element of the contractual scheme as a whole, rather (as is the case with much marine insurance business) being a Lutine add-on, or left to the whims of local jurisdiction. The result is that marine insurance law, which both governs and emerges from dispute, is not so much convergent or divergent, as simply incoherent.

There is of course another negative aspect of unplanned dispute resolution, namely the distortions introduced by the cost in terms of money, management time, and stress with endless litigation and arbitration. I make no apol-

ogy now for the proceedings, largely concerned with the macro-actions, mostly having no connection or only a formal connection with marine insurance, which until recently occupied so much of the available time in the English commercial courts. Serious injustice was remedied, so far as it could be remedied; neglects and incompetence of a startling degree were exposed thereby. Lessons were taught which one can hope and believe were learned. But the phenomenal expenditure of time, cost, and effort cannot be allowed to become; the norm, as the court itself has repeatedly emphasized. A continuous program of self-reform, originally based on ideas drawn from international commercial arbitration, has been in progress in the English Commercial Court for more than 15 years. It has, however, come to be recognized that this will not in itself solve the problems, and the second stage of the court-based mandatory scheme of alternative dispute resolution has recently been inaugurated. Undoubtedly, as in the first phase, many of the claims will be in the field of insurance.

This is well enough, but it is a local initiative no different in principle from those already in place elsewhere. What we lack is a concerted industry-wide effort not to establish a single monolithic system worldwide (for that would be impossible) but to settle down to think out the best framework for a variety of procedures each available to answer the task in hand; and then to try to persuade those who engage in insurance business, and perhaps even legislatures, that this is the just and economical way into the millennium. There will, however, be a price to pay.

Alternative dispute resolution in all of its numerous forms is deliberately alienated from the courts, and from court-based methods of decision. In the individual case this is quicker, cheaper, and more flexible, but it is also less predictable and has none of the normative function of a decision by a common-law court. The law of marine insurance has gained and kept its strength through the public decisions, open to review, of courts who are consciously motivated by a desire to build on and apply established principles, with personal inclination and concepts of fairness operating only on the margins. Purely informal methods of decision-making lack these constraints, which may lead to better results in particular cases. But they also lack the capability which goes with the constraints, of being able to move forward, building principle as they go, and by doing so providing the makers and performers of transactions, the parties to disputes when these arise, and those who resolve the disputes with a solid basis for the ascertainment of rights. Once decision-making breaks away from the obligation to find an established principle and apply it, the forces which have brought about convergence will be weakened.

All in all therefore, it seems that in the opening years of the next half-century we are likely to see a marine insurance industry governed by divergent marine insurance laws. The problems of change must surely, however, be less acute than in other fields. There, the accelerating changes in technology will bring not only new products and methods but also new problems in risk analysis which will have to be faced without a background of prior experience and with no unanimity about whether the anticipated perils are even real. Genetically modified foodstuffs, electromagnetic fields, and electronic difficulties with Year 2000 are only some of the examples of new areas of potential risk where even the bare existence, let alone the magnitude and potential consequences, of new hazards can at present only be guessed at; yet the insurance industry must somehow ready itself to grapple with them. Our chosen field tonight is, happily, largely free from these unknowns. No doubt we shall see many changes, experience many sources of fragmentation. But there is one ever-present which will bind the subject together for the next 50 years, as it has done for the past 50, and 500. Our enemy and friend, the sea.