

Seven Habits of Effective Lawyers

The Challenge: Rise Above the Noise

In 1959, when I joined John Downs in St. Johnsbury, there were about two hundred lawyers in the state. In the meantime, the population of the state has increased about 60 percent. Today there are more than 3,100 lawyers in Vermont, an increase of over 1,500 percent. In 1960, the ratio of lawyers to the population in Vermont was about 1:1,945. Today, it's 1:200, half again greater than the national ratio.

In 1960, Vermont was commonly thought of as a legal backwater, attracting few lawyers. Today, many lawyers choose the Vermont lifestyle, despite the prospect of smaller incomes. Over time, the Vermont bar has become less personal, more competitive. In the first year of my practice, I was on a first name basis with almost all the active practitioners in the state. I can still name every lawyer practicing in Caledonia County in 1960. Today, there are law firms in my home city of Burlington that I've never heard of. Inevitably, the bar has paid a price in collegiality and professionalism.

The challenge is to become known and hired. The Vermont lawyer, particularly the new Vermont lawyer, must find ways to distinguish himself or herself—to *rise above the noise*. One way, of course, is by establishing a reputation for skill. Without technical know-how, a lawyer can't expect to be effective and doesn't deserve to practice. In everything I say below, it's assumed that the lawyer possesses a high level of professional skill. What I hope to explore is some other, non-technical, qualities that help a lawyer rise above the noise.

What is Success?

Being an effective lawyer is a step to a higher end: success. Just what is success? Success, in the dictionary sense, is the achievement of something desired, planned, or attempted.¹ Or the prosperous achievement of something attempted; the attainment of an object according to one's desire: now often with particular reference to the attainment of wealth or position.² Woody Allen defined success as eighty percent showing up. A classmate at the University of Chicago

Law School defined success bluntly. Make lots of money. Sometimes, I am tempted to define success as "retiring before you're found out."

For our purposes, I propose the following definition of the successful lawyer:

The successful lawyer contributes positively to the peaceful functioning of society and, in the process, achieves economic security.

This definition focuses on the historic function of lawyers: promoting a peaceful society.

The Lawyer as Peacemaker

In his *Notes for a Law Lecture*, Abraham Lincoln wrote: "As a peacemaker the lawyer has a superior opportunity of being a good man."³ After our ancestors became fruitful and multiplied, an intermediary was needed as peacemaker between combatants and between people and the mysterious power of the gods and government. The quasi-priestly role of the lawyer reflects the religious origin of law.⁴ For Spinoza, the biblical prophets served chiefly a political, law-giving function.⁵ The thaumaturgic (miracle working) and mantic (divination) functions were there just to give the prophet's legislative pronouncements authority. Today's lawyer serves a similar hieratic function. In the place of the gods we have government, or what my teacher Karl Llewellyn called "law-government."⁶ To the non-lawyer, government can be just as menacing and unapproachable as the gods were to the ancients. Government, like the gods, needs to be accessed and propitiated with prescribed incantations and offerings. The lawyer, like the ancient shaman, is presumed conversant with the mystic formulary.

Like other practitioners of sorcery, lawyers as a class tend to be unloved. As Llewellyn wrote about another contemporary practitioner of the magic arts: "Does your heart warm to the surgeon as he draws on the rubber gloves, and asks you whom to notify?"⁷ If unloved, we can still aspire to success, worthily defined.

Here are seven habits that will help a lawyer to be effective and achieve success as I've defined it.

The First Principle

The paramount axiom of successful lawyering is this:

*The lawyer is an integral part of the overall economy and needs to adhere to the rules, customs, and usages of business people. We are no longer an island in the economy, entire of ourselves. We are part of the larger economic continent.*⁸

Everything that follows is, in a sense, a footnote.

Lawyers must adapt their practices to the ways of the larger community. For example, business people expect prompt replies to telephone calls and correspondence. And they assume that the people and companies they deal with understand the economic context within which business is done.

Here are some habits that we can cultivate to supplement our technical skills.

1. The Effective Lawyer Communicates Precisely and Abundantly.

a. Listen!

We lawyers are good talkers. We're not always good listeners. What does the client really want/need? Sometimes money is a proxy for something else. I think of a medical malpractice case I mediated. The doctor had made a mistake, and the plaintiff's husband died as a result. The widow was asking for money. Naturally. As the late Phil Saxer used to say, "Courts don't award blue ribbons." As the bereaved woman told her story, it became clear that what she *really* wanted was not money so much as an acknowledgement from the doctor that he'd erred—and an apology. The doctor, a kindly and honest man, knew he'd made a mistake. He said so, and he apologized. Once the plaintiff's real goal had been satisfied, the money part was settled quickly. *Postscript*: before the mediation broke up, the widow and the doctor—plaintiff and defendant—hugged each other and cried.

The lesson: *listen*. With all your faculties, not just your ears. Communication implies a *common* understanding, standing in the shoes of the other.

b. A Major Cause of Client Unhappiness

With almost fifty years at the bar, I've seen/adjudicated/heard of/read about lots of professional conduct complaints. If there's one common thread in the majority of these cases, it's poor communication. "He never returned my calls." "He wouldn't answer my letters/e-mails." "The only time I heard from her was when she sent me a bill or told me to get ready to give a deposition (what's that, anyway?) in two days."

You'd think that today, in the era of e-mail, there'd be no such complaints, because it's so easy to keep clients up-to-date. I warn my clients at the beginning that they'll get lots of e-mails from me, including copies of all correspondence. If they feel overloaded—well, that's why God created the *delete* key. So far, I haven't had a single client complain about TMI—too much information.

Clients hate it when lawyers don't return calls. Doesn't it frustrate you when you try to reach your physician, jump through twelve recorded menus, leave a voice mail—and hear nothing back? Many clients are invested emotionally in the case. It may be a small blip on your crowded radar, but to the client it can be most important thing in his life at the moment. And the client judges your response by *his* perception of its importance—not yours. I confess I'm a bit obsessive about this. In the days before BlackBerry® and cell phones we had pagers that would alert us to a call. We'd get a beep, call a toll-free number, and hear the message. I used to carry these around the country, so that I could return calls quickly, even when I wasn't at my desk. Perhaps I was grandstanding a little, but I've never had a client complain that I returned a call too quickly. Prompt return of calls tells the client that she's important enough to you to drop everything (or appear to) and call back promptly.

If a client ever asks you for an update on her case, you're simply not doing your job. The client shouldn't have to ask.

c. Internet Rhythm

It wasn't that many years ago that some of my colleagues at the bar prided themselves on never touching a computer. It sullied their hands, like (gasp!) typing their own letters. The secretary⁹ was there to do such menial labors. Today, many lawyers do their own word processing. I do. (Twenty-five years ago, as I was banging out documents on my oversized Osborne Executive, a client

passed by in the hall with the remark, "There's either the most efficient lawyer or the most expensive secretary in the office.") Lawyer word processing hasn't made staff assistants obsolete. Instead of taking dictation and typing, many have been freed to integrate into the law practice with greater skills than they were allowed to cultivate before.

The Internet should be a source of regular resort. When I started law school, I was enchanted by the heady smell of the West Reporters. Today, we find cases online. We cut and paste to incorporate quotations into briefs. We Shepardize® our cases online. We learn about our clients and their adversaries with the aid of Google®. Business and institutional clients of economic consequence have Web sites. Ditto lawyers. There can't be many Luddite lawyers left who reject computers. But there are many who fail to exploit the wondrous medium to the fullest. The economic world of which lawyers are a part (First Principle) operates in the *rhythm of the Internet*.¹⁰ Our clients expect us to do the same.

2. The Successful Lawyer Respects the Economic Value of Her Services to the Client.

Think again of the First Principle. Lawyers are part of the economy, just like clients. Business and institutional clients no longer think of lawyers as denizens of a remote world where the normal canons of cost and benefit don't apply. Companies are exercising close control over lawyer costs, unthinkable a half-century ago. Lawyers handling insurance cases often chafe at this. While the standards and guidelines imposed by some companies may be unrealistic, and sometimes ethically dubious, they reflect a growing consensus in the business world that lawyers are part of that world, and not immune to its customs and usages. When a client consults a lawyer, the desired outcome has an economic value to the client. Economics play a role in the investment the client is prepared to make to achieve the desired goal. The effective lawyer is mindful of the cost-benefit calculus in her representation of the client—even if the client is not.

a. A Case of Economic Blinders

Failure to respect the economics of a case not only alienates clients. Worse, it can lead to discipline. In 1989, young Timothy Clark was arrested in Acton, Massachusetts, for operating a vehicle under the influence. His father, Laurence, consulted with several

lawyers who quoted a fee of between \$3,000 and \$10,000. He then consulted Laurence Fordham, who told Clark that he had never defended a DUI, had never handled a criminal case, and had never tried a case in district court. Fordham made it clear that he'd have to spend much more time getting up to speed than a lawyer experienced in such cases. Undeterred—and perhaps encouraged by the fact that his lawyer spelled Laurence the same way he did—Clark hired Fordham. As expected, the bill went through the roof, over \$50,000. Clark refused to pay. Ultimately, a bar complaint was filed against Fordham for charging an excessive fee. The Massachusetts Supreme Judicial Court found Fordham in violation of DR 2-106 for charging an excessive fee, even though Clark knew going in that Fordham would have to educate himself, even though it was stipulated that Fordham or his associates had actually done all the work for which Clark had been charged, even though the case went to trial, and even though Timothy was found not guilty.¹¹ The court was mindful of the economic value of Fordham's services, even if the client (at least at the outset) was not.

Although the complaint was not exactly a "slam dunk,"¹² as George Tenet might put it, the lesson is clear: lawyers must respect the economic calculus of the engagement, even if the client, at least initially, does not. Clients who come to the lawyer insisting that "this is a matter of principle, not of money" rarely mean it when the bills start rolling in, and the lawyer had better approach such engagements with caution.

b. The Pareto-savvy Lawyer

The quantity and quality of work the lawyer does on a case should take account of the Pareto Principle,¹³ also known as the 80/20 rule: a small number of causes is responsible for a great number of effects. Examples: on average, twenty percent of a company's customers will produce eighty percent of its profits; about twenty percent of employees will account for eighty percent of absenteeism. How does this apply to the lawyer's work for the client? Twenty percent of the time and effort will take the matter eighty percent of the way to perfection. Getting from eighty to one hundred percent—that final twenty percent—will consume eighty percent of the total investment of time and effort. For many—perhaps most—cases, eighty percent is just fine.

Admittedly, there are cases where one hundred percent is called for. One doubts that Bill Gates was looking for eighty percent in the defense of the bet-the-company antitrust suit against Microsoft. This doesn't refute the rule. With what Microsoft had at stake, it was economically worth a one hundred percent legal effort.

Notice how different practicing Pareto is from law school. In law school, investment of time is theoretically unlimited. When a law student researches a question, she's expected to read every case, Shepardize every case, leave no stone unturned, no theory unexplored. That kind of work earns As in law school, but can get an F from a client, looking at the bill. When I presented this thought to a meeting of lawyers in my firm, one associate later rebuked me. He said that I seemed to be encouraging B- work. Not at all. I was encouraging A work for the client, recognizing that such work might earn no better than a B- in law school. The economics of law school research are different from the economics of working for paying clients.¹⁴

c. Helping the Client Think Economically

At the beginning of the engagement, the successful lawyer helps the client define realistic goals, achievable at a proportionate cost. As Professor Frank J. Scardilli of Cardozo Law School, formerly Chief Circuit Mediator of the Second Circuit Court of Appeals, likes to remind us: "*The lawyer must be an agent of reality to the client.*" This implies a respect for economic realities, as well as an awareness of the legally achievable.

Several years ago, a manufacturer asked me to sue a European sales agent¹⁵ for breach of a best efforts contract. As we chatted about the case, it became evident that what the client really wanted was, not a lawsuit, but more sales in Europe. Instead of a lawsuit, the two of us traveled across the Atlantic, where we'd arranged a meeting with the agent at a comfortable country inn. In the course of a civil conversation between my client and the agent, it became clear that the agent believed that my client hadn't been providing enough technical support. In the end, an understanding was reached, and the parties had a jointly profitable relationship going forward. No lawsuit. Even with the legal fees and travel costs paid by the client, the cost to the client was minimal, compared to the cost of litigation. And who knows how the litigation would have come out?

The client obtained a good result at an economically rational cost.

In every case, we need to ask the question, "what makes economic sense?" Part of our job is to help the client understand the economic realities of our representation, measured against realistic goals.

3. The Effective Lawyer Understands the Corporate Food Chain

You've been hired by an insurance claims representative to defend an insured in an automobile PI case. You'll report case progress to the claims rep. The effective lawyer will recognize that the claims rep has a boss, perhaps the claims supervisor. The claims supervisor may report to the general counsel, who has to justify herself to the vice-president of finance, who answers to the company president, who's responsible to the board of directors. There you have a corporate food chain.

What happens if the case is mishandled? You have to tell the claims rep, who has to tell the supervisor. If the case was *badly* mishandled, the supervisor will have to notify the general counsel—and so on up the line. Now as each person perched on a higher rung of the corporate ladder is forced to deal with bad news, the direction of communication changes. It flows downhill. The GC blames the supervisor, who turns on the claims rep, who blames ... who else? You. The moral might simply be "do good work." But claims representatives aren't content with good work alone. They need to know what's going on, stay on top of things, so that a drop-in from the supervisor will be met with a file full of current, pertinent information. This means that part of your job is to make the claims rep who hired you look good. How do you do that? Aside from doing quality legal work, you keep the claims rep's file in such a condition that when the supervisor wanders around and takes a look at the file, he'll tell the claims rep something like, "Boy! You're sure doing a great job keeping Attorney Jones's feet to the fire. I like the way you insist on constant reporting." Of course, the claims rep did not insist on anything. You, as an effective lawyer, recognized that part of your job was protecting the person who hired you from looking bad to the supervisor. Without prompting, you kept the claims rep copied with everything pertinent. Given a choice in the future between hiring you and the less communicative Brand X down the

street, the claims representative is going to go with the lawyer who makes him or her *look good* to the supervisor. You.

Please don't mistake this for cynicism. Abundant reporting is no substitute for good substantive work. My point is that good substantive work is not enough, if your meager communications get the person who hired you in hot water with someone higher up in the corporate food chain. This is a corollary to the First Principle: we never lose sight of economics, and the job security of the person who sends you work is a vital part of his or her economic universe.

4. The Effective Lawyer Cherishes the English Language

Intuition undoubtedly plays a large role in lawyering, and the life of the law may be, as Oliver Wendell Holmes wrote in 1881, experience.¹⁶ But the essence of legal *thought* is logic. Lawyers think discursively. Lawyers deal in concrete facts and abstract concepts. Thinking about facts and concepts requires words. Words to a lawyer are like fine tools to a cabinet maker. To be effective, both must be sharp, precise.

a. In Quest of the Right Word

English has become the *lingua franca* (to mix a metaphor) of world commerce. Unlike most widely-spoken Western languages, English rejoices in an abundance of words that mean much the same thing. "Much" the same thing, but not "exactly" the same thing. Exploring the nuances of words should be part of the lawyer's recreation. Finding *le mot juste* should bring joy to the lawyer's heart. But alas! We multiply words, cheerfully committing redundancies, lest we omit whatever word it is that says exactly what we want to say. Why else do testators "give, devise, and bequeath"? There *is* a difference between devise and bequeath. Sadly, I conclude that the multiplication of words is the resort of lawyers who haven't bothered to learn the precise meaning of any of them. Justice William C. Hill of the Vermont Supreme Court was highly literate, but occasionally even good Homer nods. In *Burns v. Times Argus Ass'n*¹⁷ he wrote that in a defamation suit, actual malice must be proved "with clear and convincing clarity." "Clear ... clarity"?

b. The Curse of Jargon and Some Sorry Examples

We love the jargon of our craft. "Clearly" and "obviously" usually introduce propositions that are far from

clear or obvious. "Said" and "aforesaid" creep like lice into our texts. We live in fear of plain language in our contracts, our wills, and our pleadings. But why? Because we haven't taken pains to think about the precise meaning of the words we use. Some people carry an umbrella on a clear, sunny day on the remote chance that it will rain. Similarly, lawyers shelter themselves in an umbrella of multiple synonyms on the off chance that one of them will fill the bill.

Here's another example. I've seen wills that begin this way:

I, John Jones, being of sound mind and memory, do hereby make, declare, and publish this, my last will and testament, revoking all wills by me previously made.

1. I direct that my just debts be paid. Years ago when I was atoning for my sins by serving on the Board of Bar Examiners, I reproduced this language on the exam and asked how much of it was necessary. Well, for starters:

1. What probative effect does the testator's written declaration of the soundness of his mind and memory have?
2. What's the difference between making, declaring, and publishing?
3. What purpose is served by saying that former wills are revoked? Execution of a will automatically revokes previous wills.
4. By directing that "just" debts be paid, is the testator waiving an earlier bankruptcy discharge and the statute of limitations? Collection may be barred, but the debts are still "just."

Why not simply entitle the document WILL OF JOHN JONES and begin with

1. I give my 40-acre farm in Canaan to my son George.
2. &c.

Or, how about this:

Now comes the plaintiff, Henry Stephens, by and through his attorneys, Pickwick, Buzzfuzz & Bardell, and hereby moves the Honorable Court ...

First of all, we don't need to identify the plaintiff by name. Henry's name is in the caption, clearly identified as plaintiff. What's the difference between coming "by" and "through" his attorneys? Why must the law firm be named? After all, who signed the thing?! What purpose is served by "hereby"? Will the court suppose that the motion is being presented by some other, hidden means? And why must the pleader say that he's

moving the court? Is the judge likely to suppose that his motion is addressed to the cleaning crew? Why not simply:

Plaintiff moves . . .

c. A Cure

What's needed here is what the poet Horace called *limae labor et mora*¹⁸: the work and delay of the filing tool, the slow and laborious excision of the superfluous and redundant. Of course, we have to know what's truly redundant. That gets us back to the quest for precision. So how do we lawyers gain proficiency in the precise use of the English language? Read good writing.

As a law teacher, I'm saddened that the demands on students' time prevents them from non-law reading during the three-year crucible of law school. Having graded essay exams both as teacher and bar examiner, I can attest that students with ample legal learning are often woefully deficient in their skill with the stuff of thought—language. Practicing lawyers are as beset with time constraints as students. We must find, or make, the time to nurture our souls with the riches bestowed on us by poets, dramatists, novelists, critics, essayists, and journalists. By steeping ourselves in such writing, we absorb healthy habits of verbal expression. We pick up useful turns of phrase. We learn to fine-tune our language.

We can also learn useful lessons from some writing that was never intended as literature. Take down a volume of the collected works of Abraham Lincoln. Never mind for the moment the great orations—the Gettysburg Address, the Second Inaugural, the Cooper Union. Look at his ordinary, everyday correspondence—appointing a postmaster in Buffalo or requisitioning carts for a general in the field. Note the simplicity, the clarity (the "clear" clarity?), the economy of his language.

By close attention to language we refine our ability to think clearly and express ourselves cogently. I've advised students to polish their writing by meticulous attention to a communication modality they use many times a day—e-mails. E-mails give us innumerable opportunities to practice our communication skills. There's no law of God or man that prescribes that e-mails must be written with typos, sloppy diction, errant punctuation, and absent capitalization. Let your e-mails reflect the fullness of your care, skill, and culture. E-mails are the face you show much of the world. Some correspondents never

know us, except through our e-mails.

5. The Successful Lawyer Expands His or Her Horizons, Especially by Reading

a. Lord Bacon: "Reading Maketh a Full Man"¹⁹

Boswell, remarking on Dr. Johnson's breadth of knowledge, compared it to lawyers, who, as *Quicquid agunt homines* (whatever people do) [is involved] in the matter of law-suits, are sometimes obliged to pick up a temporary knowledge of an art or science, of which they understood nothing till their brief was delivered, and appear to be much masters of it.²⁰

This is the domain of the lawyer: whatever people do. No human endeavor or science is foreign to the law. It follows that the successful lawyer will exert herself to learn as much about the material of life as possible. As beings with discrete life spans, we can't personally experience more than a tiny part of the vastness of human activity. But we can broaden our perspective by vicarious experience through reading and attention to the other creative arts.

Lawyers practicing domestic relations law will profit from Ibsen and Tolstoy. The tort lawyer whose practice deals in human frailty will deepen understanding from Shakespeare's plays, Mozart's operas, and Bergman's films. The business lawyer can get insights into human nature via Hobbes, Adam Smith, and Leo Strauss. Carl Sagan, Stephen Jay Gould, and Edward O. Wilson can help us understand how our lives and those of our clients play into the larger canvas of nature. In short, thoughtful absorption of literature and the other arts can help us as we struggle toward that most precious of a lawyer's endowments: wisdom. The lawyer who knows everything about law and nothing about life is like a carpenter who knows everything about lathes and chisels, but nothing about wood.

b. Specialization and its Discontents

Specialization is the rule today. When I started in practice nearly fifty years ago, we lawyers did everything. I drafted deeds and wills. I wrote business contracts. I tried law suits. I prepared people's income taxes. I did title searches. I'd be committing malpractice today trying to do much of that. I decided to specialize as a litigator before the world made me obsolete.

The generalist is, for better or worse, pretty much passé. Life and the law

have become too complex for the jack-of-all-trades lawyer. But specialization is a narrowing of focus. Evolutionary biologists teach us that in the animal kingdom specialization leads to extinction. A lawyer may not become extinct through specialization, but he can become less adaptive to the changing practice environment if he doesn't lift his eyes now and then and survey the changing landscape.

Newsletters, paper and electronic, tell us what's going on in fields of law that seem remote from our own specialized practice. As no legal niche, however small and elite, exists in isolation from the law as a whole, we become better specialists by staying in touch with as much of the broad legal universe as we can.

6. The Effective Lawyer Keeps Her Word—in All Things

One of my heroes, the Hindu philosopher Vivekananda, wrote: "If you really want to judge of the character of a man, look not at his great performances ... Watch a man do his most common actions; those are indeed the things that will tell you the character of a great man."²¹ Since we were children, we understood that we must keep promises. But what qualifies as a promise? Black's Law Dictionary defines promise as

The manifestation of an intention to act or refrain from acting in a specified manner, conveyed in such a way that *another is justified in understanding that a commitment has been made* ...²²

An undertaking qualifies as a promise in the strong sense only if the person to whom it is made has a warrant to rely on it as a commitment. Not every undertaking is a promise in this sense. "I'll stop in and say hello if I'm in town." "I'll give you a call one of these days." "I'll give your regards to my brother." Such statements are what linguistic scholars call "pragmatics," language that's more gestural than denotative. To give an extreme example: the acquaintance who greets you with "How are you?" doesn't expect you to respond with a recital of your blood pressure, heart rate, hematocrit, and bilirubin. The question has a gestural meaning that departs sharply from the literal. Similarly, "I'll pass on your regards" isn't necessarily meant literally. It may be no more than an ad hoc social lubricant.

The effective lawyer is cautious about writing off undertakings to pragmatics. Each of us has his own sliding scale with

promise on one end and pragmatics on the other. One person's pragmatics may be another person's promise. Therein lies the problem. The effective lawyer's index is always much closer to the promise end of the scale than the pragmatics end. To the ordinary lawyer, "I'll call you at three" means "I'll call you sometime around three: maybe three-fifteen, maybe three twenty-five, maybe some other day." The effective lawyer presumes that her own undertaking is at or close to the promise end of the scale. If she says she'll call at three, she calls exactly at three. If, in the meantime, she finds that she can't call precisely at three, she e-mails the other or has her assistant call him to say that she can't keep the commitment and suggest another time. Which, agreed upon, she will adhere to strictly.

This doesn't mean that the effective lawyer should be neurotic. There's space for the purely social remark, not to be taken literally. But the effective lawyer has a "default setting" close to the promissory end of the scale.

The effective lawyer does better than her word. Now, "better" doesn't mean calling ten minutes before the time set. That's inconsiderate. But if you promised to have the draft contract ready by Friday, submit it by Thursday. If you told your boss you'd be in Saturday by nine, be in by eight thirty. This is not trivial. Consider Amazon. Have you ever noticed that when Amazon gives you an expected delivery date, the book almost always arrives earlier? If the shipment is delayed, you get an e-mail from Amazon—before the promised time—with a revised delivery date. Amazon's word is a commitment to do better than promised. The effective lawyer will learn from Amazon.

Vivekananda was right. Effective lawyers are great in small things. Everyone expects you to keep your promise to settle a case for an agreed sum. Everyone expects you to do the work your client hired you to do. But everyone does *not* expect you to adhere faithfully to commitments that the ordinary lawyer treats as casual.

7. The Effective Practices Civility

In 1969, PBS televised Kenneth Clark's eleven-hour series, *Civilization*. Lord Clark narrated the expanse of organized society from ancient beginnings to modern times. At the end of the eleventh and final episode, he summed up. After reviewing the sweep of man's accomplishments and failures from the

dawn of civilization, through antique Greece and Rome, through the Dark and Middle Ages, to the Enlightenment, the political and industrial revolutions, down to modern times, what was the chief lesson to be drawn? What lofty philosophic principle encapsulated the whole of civilization? According to Lord Clark, it was *good manners*.

Lord Clark was not resorting to a bromide. For him, good manners meant something profound: a bridge between people. It softens the Hobbesian conflict that nature has instilled in each of us to win space, fame, and fortune at the expense of others. It is the central ingredient of an ordered society. We speak of "law and order." But, in fact, the phrase should be "order and law," because without order there can be no law in a meaningful sense. And without the unwritten law of good manners—common courtesy, decent regard for one another as fellow voyagers in this short life—order begins to fall apart. This unwritten law is what we mean by civility.

Civility should have special resonance for lawyers, who are, after all, charged with invoking the institutions that keep the peace. If good manners were general among lawyers, there would be no need for the growing list of civility codes of courts and bar associations.²³ These codes command behaviors that are already second nature to effective lawyers. Such lawyers don't need the codes. By nature or education, they conform to or surpass the standards set out in them.

The effective lawyer understands the difference between an adversary and an enemy. He knows that, apart from the inherent value of civility—independent of any reward—civil behavior has an instrumental value as well. The lawyer who shows kindness and consideration to an adversary will eventually be in need of it himself.

Former Governor Lee Emerson practiced in the small town of Barton, Vermont. He was an effective lawyer and therefore a gentleman. In one of the first cases I tried as a newly-minted lawyer, I represented the plaintiff in a \$50 tort case. Lee was defending. I managed to present my case without getting beyond the low *prima facie* barrier. The judge directed a verdict in favor of Lee's client. But Lee recognized that my case was a just one. He persuaded his client to pay the \$50 even though I lost the case. Many years later, I was representing the State Highway Board in the land taking

cases for I-91. Some of Lee's land had been taken, and he filed an appeal *pro se*. Checking the statute, I noticed that (in those days) the plaintiff had to file a recognizance bond unless represented by a lawyer. As Lee was filing *pro se*, his failure to file such a bond was fatal, and I moved to dismiss. Lee: "It looks like you got me, Bob." Needless to say, I called my bosses at the Attorney General's office and prevailed on them to waive the defect.

I'd like to think that I would have done the same in that case, even if Lee had not indulged me when I botched a simple case. But I will admit that there was a special satisfaction in being able to repay an older colleague's kindness.

And, Finally ...

Robert Fulghum's 1986 book title—*All I Really Need to Know I Learned in Kindergarten*—says it all. I've said nothing that you didn't learn a long time ago; I've just added some details. And I've suggested that we lawyers are effective when we attend to these old lessons. Lawyers are a vital part of the order that historically precedes the rule of law. We play that role most effectively when we deploy the resources of consideration, kindness, and common sense with which we were all equipped in the distant past and too often forget when it comes to practicing our special craft.

As I near the end of my career, I take the most inner pleasure, not in the cases I won, but in the collegial friendships I've made with colleagues over the years—many of whom I knew first as adversaries. I'm not sanguine. I fear that, urged on by the ancient drive for domination, few of your colleagues will pay heed to the lessons I've learned in nearly a half-century of practice. But, as Llewellyn wrote at the very end of *Bramble Bush*:

"[T]wenty years from now it will give pleasure, it will give foolish pride, it will give honor, to meet those few and take them by the hand."²⁴

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¹ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1793 (3d ed. 1996).

² OXFORD ENGLISH DICTIONARY (COMPACT ED.)

3134.

³ 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 81 (Roy P. Basler ed., 1953).

⁴ See N.D. FUSTEL DE COULANGES, LA CITÉ ANTIQUE, bk. III, chap. 11.

⁵ BARUCH SPINOZA, TRACTATUS THEOLOGICO-POLITICUS *passim* (Samuel Shirley tr., 1925).

⁶ See, e.g., Karl N. Llewellyn, *Law and the Social Sciences – Especially Sociology*, 62 HARV. L. REV. 1286, 1292 (1949).

⁷ KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 171 (8th prtg. 1985).

⁸ Apologies to John Donne. But then, plagiarism is the sincerest form of flattery.

⁹ Today known as an assistant or administrative professional.

¹⁰ I owe this useful phrase to a Finnish colleague, Ms. Kirssi Komi, senior litigation counsel of Nokia Corporation.

¹¹ Matter of Fordham, 423 Mass. 481, 668 N.E.2d 816 (1996).

¹² The Board of Bar Overseers had earlier dismissed the complaint.

¹³ Named for Vilfredo Pareto (1848-1923), French-Italian sociologist, economist, and philosopher.

¹⁴ To be sure, the occasional devoted associate will do the A work, but charge the client only for B-work. This is commendable, up to the point where the economics of the firm's partners enter the picture.

¹⁵ I have altered the facts a bit to preserve confidentiality.

¹⁶ OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Mark DeWolfe Howe ed., 1963) ("The life of the law has not been logic; it has been experience.").

¹⁷ 139 Vt. 381, 388, 430 A.2d 773 (1981).

¹⁸ HORACE, ARS POETICA, ln. 291.

¹⁹ Francis Bacon, *Of Studies*, in THE ESSAYS, 209 (Penguin Classics 1985).

²⁰ JAMES BOSWELL, LIFE OF JOHNSON, chap. [for year] 1759, available at <http://andromeda.rutgers.edu/~jlynch/Texts/BLJ/blj59.html>.

²¹ KARMA YOGA AND BHAKTI YOGA 6 (Ramakrishna-Vivekananda Center 1982).

²² BLACK'S LAW DICTIONARY 8th ed., 1249 (8th ed. 2004) (emphasis added).

²³ A list of such codes, with links, can be found at <http://www.abanet.org/cpr/professionalism/profcodes.html> (last accessed May 7, 2007). The Vermont Guidelines of Professional Courtesy (incorrectly linked in the previous URL reference) are available at www.vtbar.org/Upload%20Files/Attachments/guidelinesofprofessionalcourtesy.pdf (last accessed May 7, 2007).

²⁴ LLEWELLYN, BRAMBLE BUSH, *supra* note 7, at 181.

