

(Penulis Jemputan/Invited Writer)

“Faithful” Masters of The Reasonable

SENIOR JUDGE GORDON J. LOW

JUDGE BRUCE JENKINS

U.S. DISTRICT COURT

I have been in Malaysia for approximately six months, at the invitation of just retired former Honorable Chief Justice Zaki of the Federal Court of Malaysia, sharing with judges and Bar members the U.S. experience regarding the principles, skills, and processes of mediation in aid of an effort to develop and implement a more main stream court-lead mediation program in Malaysia. Notice, I said the U.S. experience, or at least my exposure and involvement in the U.S. experience in mediation. I am concerned that the U.S. experience may not in a valuable way transfer to Malaysia. Each country has different cultural, social and economic environments. But hopefully some of our experience may be of some value to you.

I am given to understand that the focus of the conference is on consumer law. It is the general protocol, at any conference, symposium, or gathering of this genre, for an introductory or keynote speaker, to not directly address the topic or subject matter of the conference, but rather to do so perhaps obliquely, in discussing matter of general principle which may have some bearing on the subject matter at hand. I intend to be faithful to the time honored and revered practice whether, I agree with it or not.

First, I want it understood that I claim none of what I will share with you today as originally my own. In that regard, I am uncertain as to whether I have ever had an original thought, so what I say I have gleaned from others and if I have the source I will acknowledge it, but I claim no originality. Second, I am a champion of the law and of lawyers. I will tell anyone that lawyers, as a profession, are the finest of human beings. They are so, despite all the lawyer jokes to the contrary. Someone observed that the trouble with lawyer jokes is that lawyers don't think such jokes are funny and nobody else thinks they are jokes.

Yes, I said lawyers are honest, dedicated, and decent professionals. What profession has a higher set of professional and ethical standards to prohibit unacceptable conduct, but to avoid even the appearance of impropriety? What profession prosecutes its own for violation of those standards? It is lawyers who are the guardians of civilized society which in turn creates a climate and atmosphere, and a world of civility, where people can seek liberty and successfully find peace and happiness. Only in a civilized society can commerce and the advantages of industry and exchange successfully

take hold and flourish. Where, but in a civilized society, can there even be a concern about consumer rights and protections and environmental concerns? These are topics and issues and concerns for civilization, not barbarity, and lawyers have been the catalytic keys and promoters of civilizations throughout the history of the world. To that end, much of the world's core legal system is governed by principles of the Common Law and its procedural application and with its genesis in what became the British Empire. The world has benefited immeasurably from the blessing of the Common Law in its remarkable civilizing influence. It is the lawyers who created, developed and nourished the common law. It did not just happen. It was created and sustained by lawyers.

Lawyers have been from the beginning of civilization the “grease of society” which keeps it from grinding itself into powder. It is said that people don't change; they are the same today as they were thousands of years ago. We after all, have the same gene pool and are the products of those same genes passed down through the ages. There is no reason to think that pool has improved over the eons. But times change, even if people do not. This is a new time, a dynamic time. Civilizations have come and gone, but the world has never seen times like these. This is a high tech, fast paced, instantaneous communication, nano-second information, travel around the globe in a day world. We might have breakfast in Kuala Lumpur, lunch in London, and dinner in New York, with breakfast again tomorrow in Tokyo, Beijing or Mumbai or Moscow or Buenos Aries. Never before even conceived opportunities exist. You are likely all in possession of, and many of you tinkering with, hand phones or Ipads and texting with someone ten thousand miles away-maybe even looking at them—instead of paying attention to what I am saying. You can all multitask now as never before.

But you are lawyers, at least most of you are, or you may be here by mistake. And you and I are addressing legal issues in much the same manner and fashion as did Lord Coke, who almost five hundred years ago so bravely fought for the supremacy of the Common Law over the monarchy. With all the deference and respect I can muster to him, and with unending gratitude to him for his defense and promotion of the Common Law and for the millions of volumes of the said Common

Law now filling our law libraries and electronic data bases--these are new times and the procedural methods of solving legal issues five hundred years ago present some difficulties in today's world. Is the role lawyers have taken and so wonderfully served mankind still relevant today? Yes! However, now as never before, the times require us to "be faithful". To explain what I mean and to illustrate. I want to relate to you a story. It is an American story to be sure, but I believe it will have some application here. It is a story wonderfully told, and from which I freely quote, by David Shrager former President American Trial Lawyer's Association and which was published in the *Trial Magazine* some many years ago and entitled: "*He Was Faithful*".

Many of you may recognize the name of William H. Seward. He was governor of New York, a United States senator representing the state of New York, the principal founder Republican party, the upset loser on third ballot to Abraham Lincoln in the 1860 Republican convention. He was Secretary of State in Lincoln's Cabinet and perhaps best remembered for what is described as "Seward's Folly" related to the purchase, of Alaska from Russia. But in March of 1946, William Seward was a trial lawyer, in Auburn, New York, a quiet farming community near Lake Ontario. One night John VanNest, a respected Auburn farmer, his pregnant wife, elderly mother, and their sleeping child were all fatally stabbed. There appeared no provocation or apparent motive. The assailant was promptly apprehended and readily confessed, showing not the slightest remorse and threatening he'd do more. The Defendant's name was William Freeman. He was a young man who suffered from three severe disabilities; he was a convicted thief, deaf, and he was black. On the way to the court house for his arraignment, he barely escaped summary justice from crowd. When in court, the judge asked, "Will anyone defend this man?" After a brief silence, Mr. Seward, who was in the court arose and said, "May it please the court, "I shall remain counsel for the prisoner until his death." There was no public defender, no public funds in those days. But Seward, driven by a fierce sense of commitment and principle, developed an overwhelming factual support for a defense of insanity.

Five years earlier Freeman had been a bright, hardworking common laborer, but was charged with stealing a horse and convicted on the sole testimony of another young black man, who it turned out was the actual thief. For the conviction, however, he spent five years in prison. Upon his release, he was offered the customary few dollars which he refused saying "I've worked five years and will not settle so." It was simply too late. In prison he had been repeatedly beaten for protesting his innocence. In one such protestation, he head was split open with a board, leaving forever him deaf and unable to utter an intelligible sentence. At the homicide trial, Seward's closing remarks were made,

in defending a black man, charged with heinous crime against a respected white family, before an all white jury in the midst of a courtroom crowd calling for revenge. He said, "The color of the prisoner's skin... is not impressed upon the spiritual, immortal mind which works beneath. In spite of human pride (and prejudice) he is still your brother and mine, in form and color accepted and approved by his Father, and yours and mine; and bears equally with us the proud inheritance of our race--the image of our Maker. Hold him then to be a man...and make for him all the allowance and deal with him with all the tenderness which, under the like circumstances, you would expect for yourselves." Seward knew there was no chance for acquittal, but he would have his say a proud lawyer and advocate. "I am not the prisoner's lawyer. I am, indeed, a volunteer on his behalf...I am a lawyer for society, for mankind; shocked beyond the power of expression, at the scene I have witnessed here, of trying a maniac as a malefactor..." At the conclusion of two hours of summation, Seward said, "I remember that it is the harvest moon, and that every hour is precious while you are detained from your yellow fields. But if you shall...in the end have discharged your duties in fear of God and in love of truth justly and independently, you will have laid up a store of blessed recollection for all our future days, imperishable and inexhaustible."

The jury promptly returned a verdict of guilty and judge sentenced William Freeman to be hanged. The Supreme Court of New York reversed the conviction. Freeman was never retried. He died in his cell in chains in August 1847. Seward survived his client twenty five years. In accordance with request he had made in his remarks to the jury, an inscription was placed on Seward's tombstone in Auburn N.Y. Those remarks were; "In due time, gentlemen of the jury...my remains will rest here in your midst. It is very possible they will be unhonored, neglected, spurned! But, perhaps, years hence, when the passion and excitement which now agitate this community shall have passed away, some wandering stranger, some lone exile, some Indian, some negro, may erect over them a humble stone, and thereon etch... "He was Faithful." Seward the trial lawyer tells us all we need to know on the subject of the commitment we owe to our clients, our profession, to our system of justice and to civilization. "He was faithful."

I started by championing lawyers, and I want to make it clear that is lawyers and to be sure, the courts, that are the anchors of society, the anchors of civilization. When parliaments, legislatures, congresses are responding every time someone says "there ought to be a law" the courts are considering, pondering and rethinking. They are slow by design. Someone aptly said that lawyers and the courts keep society's and civilization's keel down and its sails up. The ship needs to be righted constantly and it is the courts and lawyers

and their application of the principles of the Common Law which provide the ballast. But time is always of the essence--now, far more than ever before. The ponderous nature of the courts and the slow, deliberate, seemingly glacial movement of issues through them is incompatible with the needs of society today--especially in consumer protection and in environmental matters. Five or even ten years of litigation may have been the norm for much of the history of the Common Law, but today--especially in the realms of consumer law--"justice delayed is" indeed "justice denied."

The world has changed, ways of living, communicating, traveling, methods of commerce, environmental changes and consumer protection needs have changed, and with those changes, so have the opportunities and our professional obligations. But the courts and their way of doing business, for the large part have not. For example, forty years ago when I was first introduced to the practice of law, when the judge wanted a brief in thirty days, it took that time to research and to write it. The research was done in the library with monstrous key-word indexes, and references. The paper chase took weeks of research. Even the typing of the material on manual typewriters with four pages of carbon and onion skin paper, with no copiers, not even "white out" was permitted, the thirty days and every minute of them were needed. Now the same research is done in minutes on an electronic data base. The checking and cross checking is instantaneous, the word processing is electronic and even e-filing allows us to skip killing of trees. But, of course, Counsel still wants the thirty days.

Our profession requires us, as the leaders of the law, the guardians of society, to do more than just "faithfully" mechanically respond in the same ponderous way we always have in the past. For while we do so, consumers are hurt, industry goes on at a lightning pace, or is unreasonably slowed or halted with opportunities missed, the environment is irreparably harmed or unreasonably closed and placed off limits. Now, even more than ever, our profession requires us to be the "faithful" leaders in meeting society's and civilization's needs. The business, technological, fast paced world of innovation, creation and consumerism requires much more of us than simply hanging onto the old, faithful and reliable, institutions of the past, but also in adjusting them to better meet the needs of our times, all the while holding on to the best of the old institutions and principles to keep the boat steady in these anything but steady times. All this may require changes in our techniques. However, regardless of how we respond with our training, expertise, education, institutions, and traditions, first and foremost is that to the Rule of Law and to humanity, we must remain "faithful."

This requires that we change and improve our system and the changes are being made. Call it judicial

reform or simply procedural adjustments, it is needed and is occurring and there one aspect of that change or reform I would like to further address. Court backlogs are in some cases being reduced through better case management and ADR. So though change is desperately needed, it takes time. As one observed, "judicial reform is not for the short-winded. It is a distance run and not a sprint." The need for change and the principle of faithfulness have both to be considered together. If I were to ask you what you learned in law school, and for your answer to be, not a thousand pages long, not a *Brandeis Brief*, not a thirty page memorandum, but in one word, what would be your response? I would, without apology and with the willingness to take on any challengers, assert that the one word is "reasonableness." I am hardly the first to make that argument. It is the principle of law which is the overriding, under-girding, permeating principle of every aspect of the Common Law. It is the controlling force in contract, tort, corporate, business, property, legislative, evidence, procedural, and every other facet of the law you have studied and now apply in your practice--yes and including, and perhaps especially consumer and law.

As such, you lawyers are therefore, regardless of any field of expertise of practice, in this world the "Masters of the Reasonable." No one else in their professional training and education has spent four to seven years studying that principle. It is the stuff of which the common law is made and to which we must be faithful. I submit, it is needed now, in these times, to even more apply that principle and your mastery of it, to the practice of law. Our role and profession is the creating and making the law applies to the people of the society and world in which we in our times live. To do so, we must break away from the strict procedures of the past which governed our practice of law and use the full accumulation of the Common Law more rapidly and efficiently to today's problems. Certainly the courts and the continued creation of the Common Law are necessary. It is the very backdrop or the specter of court which governs our application of the law. For every lawyer in drafting a contract, a will, a procedure, in advising clients, necessarily has in the back of his or her mind, "What would happen if the language of the contract, or provisions of the will, or facts of the case should need to be reviewed in a court?" Hopefully, the courts will apply to the problem, the principles of reasonableness.

But there is for the most part enough Common Law. Every case need not add to it through a trial and appeal. No client wants to go to trial to get his or her name in the law books.

Most lawyers, I believe, are not very adept trial lawyers, and why should they be? They never get there. Nearly all cases eventually settle, usually however only after years of time, stress, uncertainly and expense. In

that regard, Abraham Lincoln said: "Nobody wins in most cases. Even the nominal winner is often the loser in stress, expense, and waste of time." The studies show that about 98% of all cases settle and only a relatively few are actually tried. My appeal therefore to you lawyers everywhere, is to use your lawyering skills and powers of reasonableness to benefit the world. Not in trial, but to be faithful in striving to find reasonable solutions to legal problems in a timely fashion for your clients without going to court. Someone aptly said: "Every court should be a court of last resort." In court we always hope for a fair result. I think that means a reasonable result. That is the very essence of fairness. I recently saw a cartoon where the fellow was complaining that the world is not fair. He acknowledged that to be the case, but thought that it ought to be unfair once in a while in his favor. But in our work, and with reference to the focus of this conference, it is not fair that consumers be unreasonably exposed to harm, injury or death in favor of profits. Nor is it reasonable that profits not be made in exchange for labor, effort, capital, or risk.

It is not fair that the environment be unreasonably harmed, exploited and ruined for profit. Nor that the earth and its resources not be profitably used for the benefit, both short-term and long-term for mankind and in providing reasonable profits in return for labor, capital, effort and risk.

It is not reasonable that it should take enormous amounts of time or money in our dispute resolution system to right wrongs, to prevent harm, and to obtain redress. It is reasonable that we adapt, modify, change, and improve our system of justice to accommodate the rich and poor, to protect consumers, to provide reasonable profits, to protect the environment and provide a process of dispute resolution. So again my appeal to you is to be "faithful" on behalf of the law, society, and your clients and to use your powers of reasonableness, your mastery of the reasonable, to create opportunities to assist in all of the foregoing.

The purpose of my being in Malaysia is to assist in a small way, in the development and implementation of a mediation program in the courts as a core component of the judicial process to help achieve the foregoing. Mediation allows us to use our skills of reasonableness, our mastery of the reasonable, to better the community of mankind in helping it resolve problems. Our duty is to promote and where possible achieve fairness. You are wonderfully equipped to do so. But it requires faithfulness. It is that commitment that we must have to our clients, to society, indeed to civilization today in providing service to them as masters of the reasonable. Not in just processing matters through an already overloaded court docket, but in being faithful in helping them find solutions to their problems in a society and in times which most dearly need the voice of reason and the blessings of peacemakers. This includes ADR

and especially mediation. Not as a fad, or a nuance, or ancillary avenue or technique in litigation, but as a serious and prominent part of the judicial process. We lawyers must in these times, as never before, exercise our efforts as peacemakers in a civil and expeditious manner using our mastery of the reasonable to serve and maintain civilization. To this we must be and remain "faithful." I urge you to adopt mediation as a problem solving, peacemaking forum and procedure for aiding society and civilization here in Malaysia and world-wide.

Thank you for the opportunity to be with you in this conference, addressing the timely and crucial topic of consumer law.