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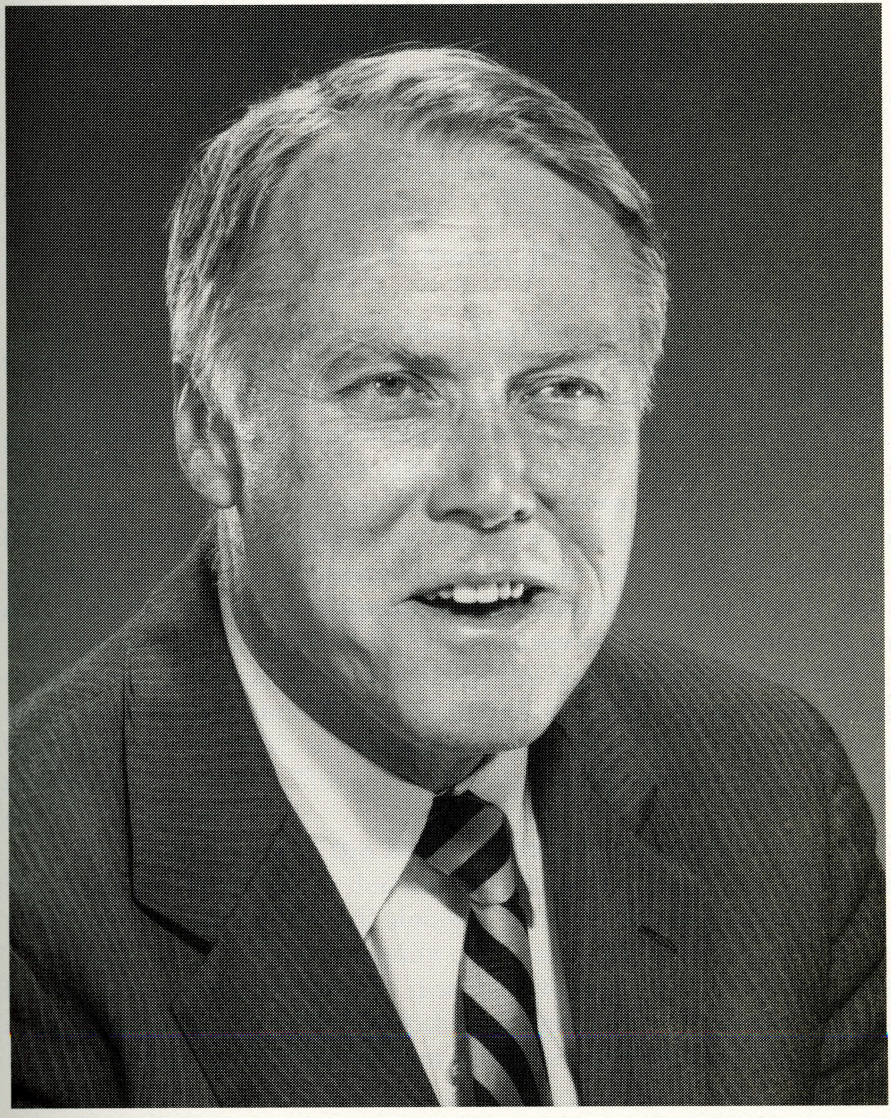

John T. Noonan, Jr.

PROPTER HONORIS RESPECTUM

THE LAWYER WHO OVERIDENTIFIES WITH HIS CLIENT

*John T. Noonan, Jr.**

The classic case cited by John Wigmore for recognition of the lawyer-client privilege is *Annesley v. Earl of Anglesea* (Exchequer, 1743).[1] The privilege, in fact, goes back far earlier. It was, for example, invoked by counsel for a bribegiver in the investigation for bribery in 1620 of Francis Bacon, Lord Chancellor of England.[2] But the reasons for the privilege never seem to have been more fully explored by lawyers than in *Annesley*. One reason urged by counsel is this: "In pleading, it is 'ponit in loco suo attornatum,' the attorney is as himself. And it is contrary to the rules of natural justice and equity, that any man should betray himself."[3] The attorney-client privilege is, in other words, a logical extension of the privilege against self-incrimination. As a person should not be forced to act so unnaturally as to testify against himself, so a person's attorney—who is as himself—should not be forced. The key to the argument is the identification of client with lawyer.

I do not believe that this fiction, attractive though it is, especially in regard to the criminal defense lawyer, is the real reason for the privilege, at least in the full-blooded form in which it exists today. The real reason is the desirability of lawyers educating clients in the law—that is, educating them so that they come to realize the purposes and limits, the malleability, and the strength of the legal system as it applies to their affairs; for lawyers can enter on this work of intimate

* Judge of the United States Court of Appeals for the Ninth Circuit.

1 17 How. St. Tr. 1139 (Ex. 1743). For John Wigmore's citations of *Annesley*, see JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 166, 272, 278, 280, 1013, 1099, 1130, 1154, 1361, 1362, 1364, 1431, 1487, 1605, 2213, 2290, 2291, 2294, 2298, 2310 (3d ed. 1940).

2 *See* JOHN T. NOONAN, JR., BRIBES 348 (1984).

3 *Annesley*, 17 How. St. Tr. at 1225.

education only if their clients can disclose their affairs candidly and fully to their counsel.[4] The lawyer-client privilege rests on this secure foundation, not on a metaphor that takes the lawyer for the client and turns them into a unity.

If lawyer and client are not the same, what kind of relationship have they? An experienced Boston lawyer and provocative writer, Charles Curtis, once indicated that they might be like lovers or even spouses.[5] Describing the duty a lawyer has to the client to protect his confidence and the duty the lawyer has to the court not to deceive it, Curtis added, "If I ask you which of two girls you love the most, you are in effect declining to answer when you say 'Both.'"[6] Curtis suggested that similarly a lawyer is plighted to both court and client, and he concluded that this dual loyalty is "somewhat bigamous."[7]

This metaphor does not illuminate the relation of duties to client and duties to court, and it misleads as to the relation of lawyer to client. The lawyer has a specific duty to preserve the confidence of the client, but that duty is subordinate to an equally specific duty not to participate in fraud upon the court. A hierarchy of duties—not a conflict—exists. The lawyer does not have two husbands or two wives. The metaphor of sexual love or marriage is inappropriate in suggesting a unique personal bond that does not exist in the lawyer's relation either to the court or to the client. In the biblical tradition that has informed our culture, husband and wife are one flesh.[8] Lawyer and client are not one flesh. The lawyer is not a bigamist.

Another authority, Charles Fried, has described the lawyer as a friend, a special purpose friend, and has elucidated the lawyer-client relation in terms of this universal category.[9] Friendship is a form of love. In Thomas Aquinas's fundamental account of love, the beloved is one who meets a need—we desire the beloved because he or she does meet the need. But the beloved is also one whom we love because he or she is like us. In every love these two dynamisms are at work—the desire to have the need met, the desire to bestow good upon one's alter ego; the one impulse, if you like, selfish, the other

4 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2001).

5 *See* CHARLES P. CURTIS, IT'S YOUR LAW 10–25 (1954).

6 *Id.* at 20.

7 *Id.*

8 *See Genesis* 2:24.

9 *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-client Relation*, 85 YALE L.J. 1060, 1065–76 (1976).

altruistic, and the selfish or the altruistic preponderating in varying degrees depending on the nature of the love.[10]

It has been unkindly observed in response to Fried that lawyers are paid and a special purpose friend who is paid is a prostitute.[11] This sharp retort fails to allow for the element of identification that is present in friendship. A relationship that is purely exploitative, a relationship that uses another person only as a means to meet a need, is not love and so is not friendship. The lawyer, as Fried rightly sees, is not mere means. The client is, to a degree, identifying with this better self. Conversely, since friendship is mutual, the lawyer is finding in the client a satisfaction of needs—not only the need for a fee, but the need to have the lawyer's skills appreciated, the need to play a part in the world, the need to make a difference. The lawyer is also, to be effective, identifying with the client, with the client's troubles or problems, with the client's expectations and goals. The lawyer wants to confer a good upon the client. Rejecting the metaphor of *Annesley* and rejecting the strong version of friendship in its conjugal or sexual form, I cannot reject the view that the identification which occurs in the love that informs friendships must be present if the lawyer is to do the lawyer's work well.

To illustrate my point, I shall take one incident in the life of a famous and successful lawyer, who was an even more famous and successful judge. The incident must be held in perspective. It was culled by this lawyer's enemies from a career of over thirty years at the Boston bar as the most damaging episode they could urge against his appointment to the Supreme Court of the United States. It is far from encapsulating the whole legal practice of Louis Brandeis. But we are all human, and it is an episode in which a strength of Brandeis that could be a weakness manifested itself.

The panic of 1907 was in full swing. The morning of September 3, 1907, Abe Stein, seller of goatskins and sheepskins to tanneries, received a telephone call in New York that Jim Lennox was in trouble.[12] Lennox, a tannery owner, owed Stein about $200,000.[13] Stein took the afternoon train from New York to Boston, bringing with him his

10 *See* THOMAS AQUINAS, SUMMA THEOLOGICA pt. II–II, q. 26, arts. 4–8 (Fathers of the Eng. Dominican Province trans., Benzinger Bros., Inc. 1947).

11 *See* William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 108.

12 *The Subcommittee of the Committee of the Judiciary of the United States Senate, On the Nomination of Louis B. Brandeis to be an Associate Justice of the Supreme Court of the United States*, 64th Cong. 1104 (1916) (testimony of Abe Stein).

13 *Id.* at 1105.

lawyer, Moses Stroock.[14] On the train they encountered a friend of Stroock's, Henry Siegel, who told them that if they wanted counsel for an important case in Boston, Louis Brandeis was their man.[15]

The next morning Stein and Stroock saw Lennox, who told them that he had enough assets to pull through but needed $700,000 to straighten out his affairs.[16] Stein suggested Lennox's creditors might help work out a solution.[17] Stroock told Lennox that he needed counsel and suggested Brandeis.[18] The group then adjourned to Brandeis's office, where a telephone call by Stroock to Brandeis had arranged for their reception.[19] Lennox was accompanied by two business friends, William Spaulding and a Mr. Coburn.[20] Stroock at once retained Brandeis to act for Stein.[21] Who would represent Lennox was left open. It was assumed that Stein and Lennox had the common objective of seeing Lennox through his crisis of solvency. Brandeis disclosed that his partner, George Nutter, did work for another New York creditor of Lennox—Weil, Farrell & Co., notebrokers—but Nutter saw no objection to Brandeis going ahead with the parties in the office.[22]

Brandeis now interrogated Jim Lennox closely about his finances. A stenographer was brought in to record the questions and answers and, as a result of the controversy over Brandeis's nomination to the Court, this stenographic record is now public.[23] Spaulding, Coburn, Stein, and Stroock were still present, so Lennox cannot have believed that he was talking only to his lawyer; yet, he showed a candor that only the sense that he was talking to people on his side could have induced.

Brandeis's questions established that Jim Lennox and his father Patrick, as partners, ran two tanneries at Peabody and Salem, Massachusetts; that their gross sales were about $1 million;[24] that the business had been losing money in recent years;[25] that the assets of the

14 *Id.* at 1104–05.

15 *Id.* at 1105.

16 *Id.* at 1106.

17 *Id.*

18 *Id.* at 311 (testimony of Moses J. Stroock); *accord id.* at 1105–06 (testimony of Abe Stein).

19 *Id.* at 1105–06 (testimony of Abe Stein).

20 *See id.* at 311 (testimony of Moses J. Stroock).

21 *See id.* at 312.

22 *See id.*

23 *See id.* at 775–91 (testimony of Edward F. McClennan).

24 *Id.* at 776.

25 *See id.* at 783.

business were about $800,000 and the liabilities $1.2 million;[26] that the two Lennoxes had other property that, if sold at its highest value, could meet the liabilities;[27] and—a key disclosure—that Lennox in getting credit had not always been honest in his financial statements.[28] Brandeis advised Jim Lennox to talk to his father and see if he had any preference as to counsel.[29]

The following day, September 5, Jim Lennox met with Stroock and Brandeis. Brandeis said, "Well, now Mr. Stroock, I should think that the question we ought to decide now is as to whether I should act for Mr. Lennox in this matter or not."[30] Lennox said he wanted to pay one hundred cents on the dollar.[31] Brandeis noted Lennox's vulnerability because of his inaccurate financial statements.[32] Brandeis lectured him on the seriousness of statements to lenders and predicted he could have a good deal of trouble. Brandeis said:

> [I]f we all agree that what we want to do is to distribute this property according to the legal rights of creditors, I could be more useful to that end by acting for Mr. Lennox instead of for Mr. Stein . . . . I should feel if I were acting for Mr. Lennox as trustee, that it was the duty of the trustee to see that everybody got his legal rights as nearly as we could make it . . . .[33]

Brandeis then proposed that the Lennoxes make an assignment for the benefit of creditors. Stroock said, "Mr. Brandeis'[s] suggestion is the best."[34] Lennox asked, "You are speaking now of Mr. Brandeis acting as my counsel?"[35] Brandeis intervened, "Not altogether as your counsel but as a trustee of your property."[36] Lennox responded, "I came to you, and I shall certainly do whatever you say; that is why I came to you."[37]

On the basis of this conversation, both Lennox and Stroock inferred that Brandeis had assumed the position of Lennox's counsel.[38] Brandeis's office filled in the blanks in a printed assignment for the

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26 *Id.* at 784.
27 *See id.* at 786.
28 *See id.* at 783.
29 *See id.* at 786.
30 *Id.* at 788.
31 *See id.* at 787.
32 *See id.*
33 *Id.* at 789.
34 *Id.* at 790.
35 *Id.*
36 *Id.*
37 *Id.*
38 *See id.* at 1119 (testimony of James T. Lennox) (stating that Brandeis was employed "absolutely" as Lennox's attorney); *id.* at 1087 (testimony of Moses J. Stroock)

benefit of creditors.[39] Both Lennoxes signed it, transferring all of their property to the assignee, who was Brandeis's partner, George Nutter.[40] Nothing in the stenographic report of the conference indicates that Brandeis told Lennox that an assignment for the benefit of creditors was an act of bankruptcy.[41]

Five days later, after Nutter had found the Lennoxes' books in unsatisfactory condition, Nutter recorded the assignment.[42] Shortly thereafter, the Brandeis firm, acting for the notebrokers, Weil, Farrell & Co., instituted involuntary bankruptcy proceedings against the Lennoxes, alleging the assignment as the act of bankruptcy.[43]

Jim Lennox thereupon retained as counsel an eminent trial lawyer, Sherman Whipple, who called on Brandeis, who told him, "I did not intend to act personally for Mr. Lennox, nor did I agree to."[44] Whipple replied: "Yes, . . . but you advised him to make the assignment. For whom were you counsel when you advised him to do that, if not for the Lennoxes?"[45] Brandeis said, "I should say I was counsel for the situation."[46]

Whipple could not refrain from retorting:

> I must say, Mr. Brandeis, it looks to me very much, according to your principles, as if when a man was bankrupt and went to a lawyer, and the lawyer advises him to make an assignment for the benefit of his creditors, he assigns his lawyer with it, very much in the way a covenant runs with the land.[47]

Brandeis replied:

> Mr. Whipple, I think that is a very unkind and very ungenerous statement for you to make. It impugns my motives, and I can only assure you that I had no such motive in doing it. I was merely occupying myself in seeing that this property, which was brought into my office in this way, was equitably and fairly distributed among the creditors, and I was looking after the interests of everyone.[48]

(stating his understanding that "at that time Mr. Brandeis was representing Mr. Lennox").

39 *See id.* at 1087–89 (testimony of Moses J. Stroock).

40 *See id.* at 796–800 ("Interview—Re Lennox Matter"—Sept. 5, 1907) (discussing the assignment from Patrick Lennox and James Lennox to George R. Nutter).

41 *See id.* at 791–96. Lennox denied that Brandeis informed him. *See id.* at 1115 (testimony of James T. Lennox).

42 *See id.* at 804 (testimony of Edward F. McClennan).

43 *See id.* at 287 (testimony of Sherman L. Whipple).

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.* at 287–88.

On reflection Whipple agreed that Brandeis's motives had not been mercenary. Brandeis, he thought, had acted as he had because he

> was so much absorbed in the question of caring for the situation, and so much interested in the development of his ideas as to how this estate should be administered, that he unconsciously overlooked the more human aspect of it, which would perhaps have appeared to another; that here was a man confronted with perplexities and charges and troubles, who wanted his personal and individual care and attention. But I think Mr. Brandeis looked upon it as a problem of distribution.[49]

In defense of Brandeis it might be argued that we are witnessing a kind of foreshadowing: Brandeis acted as a judge before he was a judge. The impulse to consider every interest, the impulse to take charge are both judicial instincts. But even a judge cannot be blind to the human aspects of the case he is addressing. Lennox was a careless, slovenly, deceitful businessman. Brandeis was a careful and thorough lawyer. But when Brandeis told Stroock and Lennox that they would now decide whether he would be counsel for Lennox, when Brandeis then told Lennox that he was acting "not altogether as your counsel,"[50] and when Brandeis advised Lennox to make the fatal assignment, Brandeis was not doing very well as a lawyer.

Why is this incident—this misunderstanding, if one likes—of over eighty years ago still of interest to us? Because it illustrates in the case of a lawyer of extraordinary ability how a lawyer must empathize with the person who comes to his office to get the lawyer's advice, who says, "I shall certainly do whatever you say—that is why I came to you." No lawyer is counsel to a situation. Underidentification with a client is as bad as overidentification.

Underidentification is here, no doubt, carried to the point of caricature. The lawyer does not remember that he took the client as a client. The lawyer does not give the client the most elementary advice about the consequences of the act the lawyer is advising him to perform. The lawyer represents another client and, acting for that client, puts his unremembered client into bankruptcy. At the heart of the situation is the lawyer's desire to abstract himself from the needs and pressures of a particular individual in order to go on and straighten out a mess. In some other world, law could be practiced in that fashion. It is not the way law has been generally practiced in ours.

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49 *Id.* at 299.

50 *See id.* at 288–89.

I turn from underidentification to overidentification. My case again comes from the area of bankruptcy—an area where, perhaps because of the feeble condition of the bankrupt, lawyers loom particularly large. The lawyer involved is not as famous as Brandeis, but nonetheless is very famous because of the firm of which he was a member and which since 1943 has borne his name, Cravath, Swaine & Moore.[51] Hoyt Augustus Moore was born in Ellsworth, Maine in 1870.[52] He graduated from Bowdoin, Phi Beta Kappa, in 1895 and then taught school, becoming principal of the Ellsworth High School and then principal of the Putnam, Connecticut High School.[53] Late bloomers in the law, while rare, are not unknown.[54] At thirty-one, Moore entered Harvard Law School.[55] He was on the law review and, on receiving his degree in 1904, entered Paul Cravath's office in New York.[56] Two years later, he married the daughter of a banker from his home town.[57]

Moore's reputation for "hard, driving work" was legendary.[58] When a partner objected that the office was under such pressure as to need more associates, Moore is said to have replied: "That's silly. No one is under pressure. There wasn't a light on when I left at two o'clock this morning."[59] William O. Douglas, who was a Cravath associate in the late 1920s, recalls being with Moore when Moore got a telephone call from his wife that his house was on fire.[60] Moore's reply was, "Why in hell bother me? Call the fire department."[61] This single-minded devotion to his work was manifested in Moore's meticulousness in drafting documents. An associate who copied a recent document approved by him was denounced for his shoddy work, and when he said that he had merely followed Moore, Moore replied, "Ha-

51 *See* 2 ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS 1819–1948, at 718 (1948).

52 *See* 2 *id.* at 141.

53 *See* 2 *id.* at 142–43.

54 E.g., Raoul Berger, associate concertmaster of the Cincinnati Symphony Orchestra, who was later a law teacher. *See Deaths Elsewhere*, DAYTON DAILY NEWS, Sept. 3, 2000, at 7B.

55 *See* 2 SWAINE, *supra* note 51, at 143.

56 *See* 2 *id.*

57 *See* 2 *id.*

58 *See* 2 *id.*

59 2 *id.*

60 WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS; THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 151 (1974).

61 *See id.*

ven't you been here long enough to know that what was good yesterday isn't good enough today?"[62]

Moore's big client was the Bethlehem Steel Corporation, the second largest steel company in the country.[63] He had other clients and, at any one time, would be handling one hundred or more cases for them and Bethlehem, but Bethlehem came first.[64] His partner, Robert Swaine, wrote of him, "No lawyer ever unreservedly gave more of himself to a client than Hoyt Moore has given to Bethlehem."[65] It is in the case I am about to describe that Moore made the most unreserved effort.

Bethlehem had had, for some time, its eye on the Williamsport Wire Rope Company, the manufacturer of ten percent of the wire rope in the nation.[66] Bethlehem was its major supplier of steel.[67] Williamsport was a town of about 40,000 in Lycoming County, Pennsylvania, to the north of Harrisburg and to the east of Scranton, within that bleak hardscrabble area that John O'Hara has often invoked. The wire company's common and preferred stock was locally owned.[68] In biblical terms, the company was the community's ewe lamb and Bethlehem was the covetous rich man. In 1926, the wire company had been in business about forty years.[69] In that year, Bethlehem helped it expand by arranging a bond issue for it and, showing more than a healthy interest, lent its president, Robert Gilmore, $133,000.[70] In 1932, as a consequence of the Great Depression, Williamsport Wire Rope Company entered into a receivership.[71] The receivership was administered by the federal district judge in Scranton.[72]

The federal district judge in Scranton, Albert Johnson, had been appointed by President Coolidge and was a veteran of the bench.[73] He was a peculiar judge, indeed the kind of judge who, because of gross defects, is no judge at all but a kind of imposter set up to wear the robe and mouth the words of a judge while behaving like an ordinary highwayman. Judge Johnson exploited everyone he could safely exploit. He forced his secretary and the deputy clerk of court to rent

62 2 SWAINE, *supra* note 51, at 144.
63 2 *id.* at 574 n.1.
64 *See generally* 2 *id.* (describing Moore's extensive work for Bethlehem).
65 2 *id.*
66 *See* H.R. REP. No. 79-1639, at 26 (1946).
67 *See id.* at 27.
68 *See id.* at 26.
69 *See id.*
70 *See id.*
71 *See id.* at 26–27.
72 *See id.*
73 *See id.* at 1.

from him, at higher than usual rents.[74] He directed these federal employees to work as servants in his home, cleaning the house, washing the floors, and cleaning his car.[75] He set up an association called the Tea Springs Lodge, where he and his family hunted and fished, which was financed by the $500 initiation fees of lawyers who did not hunt or fish but who did practice before his court and who wanted patronage appointments from him.[76] He saw bankruptcies, reorganizations, and receiverships as opportunities to collect payoffs from the trustees or receivers he appointed and from the parties interested in his approval of their plans.[77] Judge Johnson was finally investigated by a Department of Justice lawyer, Max Goldschein, and the House of Representatives and, to avoid impeachment, resigned his office and his pension.[78] But that was 1945. In 1932, Judge Johnson presided over the receivership of the Williamsport Wire Rope Company, whose largest creditor, in the amount of $700,000, was Bethlehem.[79]

Here, then, are the ingredients for what happened: a potentially valuable but presently helpless small company in receivership; a big company that wanted it and had legitimate claims to be paid by it; a corrupt judge; and a very experienced lawyer, thorough, efficient, and meticulous, whose major client's interests he was charged with protecting.

The receivership began with Judge Johnson appointing the receivers—Gilmore, the former president, and Ballard, the former sales manager.[80] Johnson then proposed a third receiver, Carl Schug, his son-in-law; but he instructed counsel to have that appointment made by J. Warren Davis, a Third Circuit judge, who sat in New Jersey.[81] Davis, as other evidence shows, was a corrupt judge, too, and Johnson's confederate.[82] Hoyt Moore began his collaboration with Judge Johnson by looking into the question whether a Third Circuit judge,

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74 *See id.* at 43–44.

75 *See id.* at 44.

76 *See id.* at 40.

77 *See id.* at 40–41.

78 *See* H.R. REP. No. 79-1640 (1946) ("Accepting the Renunciation by Albert W. Johnson of Pension under Section 260 of the Judicial Code.").

79 *See Conduct of Albert W. Johnson and Albert L. Watson, United States District Judges, Middle District of Pennsylvania, Hearings Before the House Committee on the Judiciary*, 79th Cong. 789 (1945) [hereinafter *Johnson Hearings*] (testimony of Harry W. Mumford).

80 *See id.* at 27.

81 *See id.* at 218–19 (testimony of Hoyt A. Moore) (discussing the appointment of receivers); JOSEPH BORKIN, THE CORRUPT JUDGE: AN INQUIRY INTO BRIBERY AND OTHER HIGH CRIMES AND MISDEMEANORS IN THE FEDERAL COURTS 169 (1962).

82 *See* Root Refining Co. v. Universal Oil Prods. Co., 169 F.2d 514, 517 (3d Cir. 1948).

sitting in New Jersey, had the power to appoint a receiver in a case in the Middle District of Pennsylvania. Satisfied that this power existed, Moore made no objection to the propriety of its exercise.[83] It was the kind of collaboration that was tactical, required no bad action on Moore's part, and yet made him from the start aware of the crafty cupidity of the judge whom his client faced.

The wire rope company's problem had been a shortage of ready cash; when it entered the receivership, its total assets exceeded its liabilities by about $5 million.[84] Four years into the receivership, a substantial amount of cash had accumulated. Judge Johnson announced in open court that he was proud of this accomplishment. He was delighted that "this very valuable industry," which had "furnished employment to so many members of this community" could be "saved to serve this community."[85]

Meanwhile, other plans were afoot. In July 1936, Harry W. Mumford, a Scranton lawyer who was doing the local work for Bethlehem at Moore's direction, was contacted by another Scranton lawyer, John Memolo, counsel for the receivers.[86] Memolo indicated that he had a proposition to make to Bethlehem and that he was in touch with those who thought the receivership was an occasion for "a killing."[87] Mumford checked out what he should do with Hoyt Moore and then arranged for Memolo to see Robert McMath, the secretary of Bethlehem and a former associate at the Cravath firm.[88] Mumford and McMath asked each other if Memolo was Judge Johnson's bagman. Mumford reported to Moore that $200,000 was "in the air."[89]

After these initial maneuvers and vague hints, Harry Mumford and John Memolo came to see Hoyt Moore at the Cravath office in New York.[90] Mumford left the room.[91] Memolo asked if there was anything he could do to help Bethlehem.[92] Moore was noncommittal, but after some talk about how the wire company operations were going, Moore asked him if he had any idea what the costs of administering the receivership would be.[93] Memolo said, all things considered,

83 *See Johnson Hearings, supra* note 79, at 220 (testimony of Hoyt A. Moore).
84 *See* H.R. REP. No. 79-1639, at 27 (1946).
85 *Id.* at 30.
86 *See id.* at 31–33.
87 *Johnson Hearings, supra* note 79, at 781–83 (testimony of Harry W. Mumford).
88 *See id.* at 782.
89 *Id.* at 784.
90 *Id.* at 783.
91 *Id.*
92 *Id.* at 784.
93 *Id.*

"in the neighborhood of $250,000."[94] Moore said he himself had estimated between $150,000 and $200,000, but that $250,000 was "not excessive."[95] In this way, without ever using an ugly word, the upper limit of the bribe was fixed. What Bethlehem was to get for its money was not spelled out.

What Bethlehem did get made the payoff a lucrative investment. The wire rope company had been in a position to emerge in a solvent state from the receivership. But Bethlehem, which had bought up the company's bonds at seventy cents on the dollar, now moved to foreclose the mortgage securing the bonds.[96] The tame receivers did not oppose the bill of foreclosure.[97] The objections of stockholders were overruled by Judge Johnson.[98] At the foreclosure sale, which took place in May 1937, Bethlehem bid $3.3 million, which it met by putting up the bonds acquired at seventy; the debt of $700,000 owed by the wire rope company to it; and debts owed other creditors, acquired by Bethlehem at forty-four cents on the dollar.[99] Bethlehem had to put up in hard cash $89,000, plus administrative costs, and it took over a going enterprise that now had cash on hand of over $1 million.[100] Bethlehem had a bargain that gave the word "Steel" in its name a new meaning. Years later, when the corruption of Judge Johnson had become public, the wire rope company stockholders were to sue Bethlehem and get a settlement of $6 million.[101] In 1937, they were wiped out.

By the terms of the foreclosure decree signed by Judge Johnson, the buyer had to pay the costs of the administration of the receivership.[102] This neat drafting, done under Moore's supervision, had two functions: (1) it discouraged other bidders at the sale because they could not be certain what these costs might be; and (2) it let the judge approve his own bribe—that is, the costs of administration were largely to be a payoff distributed to Judge Johnson's henchmen, and Judge Johnson now ordered the bribegiver, Bethlehem, to pay these costs. Dexterity in drafting could not go much farther, nor could effrontery.

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94 *Id.* at 804 (testimony of John Memolo).

95 *Id.*

96 *See* H.R. REP. No. 79-1639, at 31 (1946).

97 *See id.*

98 *See id.* at 32.

99 *See id.* at 31.

100 *See id.* at 31–32.

101 *See* BORKIN, *supra* note 81, at 181.

102 *See* H.R. REP. No. 79-1639, at 35 (1946).

Considerable care was taken as to how the payoff was actually made. Memolo at one point passed on to Moore the suggestion that Bethlehem put up some of the money in advance in cash and have it placed in a safe deposit box with Memolo having one key, Moore the other.[103] It was the kind of indication of good faith on the part of a briber that Judge Johnson was evidently accustomed to. Moore was indignant. "Well," he said, "I'll be damned if I would listen to a thing like that. No one can put a gun to my temple."[104] He could not tolerate such crudity. He added, "[T]hese country judges [are] always trying to hold someone up . . . ."[105] The bribe was to be delivered not covertly and in cash, but publicly to the bagmen and by check. The country judge's old-fashioned mechanism was to be replaced by the city lawyer's drafting.

What was done was that a number of straws of Memolo were given jobs that seemed plausible in the administration of a receivership; they were paid by Bethlehem with the court's approval; and they then turned over the bulk of what they got to Memolo to be passed on to the judge after Memolo took his cut. To give three examples, Memolo's brother Martin, the business agent of the union, was given by the court the title of "Agent and Appointee of the Court to Supervise and Oversee Operation of Properties" in the final phase of the court's supervision of the wire rope company.[106] Martin never came to the plant or did any visible work. Bethlehem gave him a check for $66,990.[107] E.J. Maloney, an accountant friend of Memolo, performed an audit of the books worth in Maloney's own view $900; he was paid $31,075 by Bethlehem.[108] J.W. Crolly, a lawyer who shared office space with Memolo, was entitled by the court "Special Master and Auditor" and got a Bethlehem check for $30,850.01.[109] The bills from Martin Memolo, Maloney, and Crolly were sent by them to Moore for his approval before payment.[110] Moore then checked with John Memolo to be sure the amounts were right.[111] After getting John Memolo's approval, Moore recorded the approval with the nota-

103 *See id.* at 32.

104 *Johnson Hearings, supra* note 79, at 808 (testimony of John Memolo).

105 *Id.*

106 *See id.* at 622 (testimony of Robert E. McMath, Financial Vice President and Secretary of Bethlehem).

107 *See id.* at 621.

108 *See id.* at 623; *id.* at 776 (testimony of Edward J. Maloney) (stating that Bethlehem paid Maloney $31,075).

109 *See id.* at 622 (testimony of Robert E. McMath).

110 *See id.* at 819 (testimony of John Memolo).

111 *See id.* at 820.

tion "O.K. J.M."[112] In his careful, meticulous way, Moore retained in his files (to be discovered by the F.B.I.) this evidence of John Memolo's role in the camouflaging of the distribution of the loot.

As for the morality of the matter, Jake Greenes, a beer salesman who did odd jobs for Judge Johnson and picked up some of the cash after the checks were cashed by the bagmen, declared, "I felt there might probably be a question of ethics involved, but I certainly had no idea there was anything too terrible about it."[113] Harry Mumford, Bethlehem's local Scranton lawyer, testified, "I had no absolute knowledge of anything wrong."[114] And again, "Having had some suspicions, I thought the less I knew about it, the better."[115] And finally, "[O]ne argument that appeals to my mind, and appealed at that time, was that perhaps if a deal were made, it was the only way in which Bethlehem could secure their rights."[116]

No comment on the morality or legality of the operation is recorded on the part of Hoyt Moore. Undoubtedly when the receivership started, Mumford's thought would have occurred to him: Bethlehem was going to be held up. It had $700,000 at stake. But after Moore's mind got to work on the problem, certainly after Memolo had made his overtures, Moore knew that a deal with Judge Johnson could do much better for Bethlehem than merely securing its rights; a deal could let Bethlehem steal the wire rope company.

Why did Hoyt Moore engineer such a deal for Bethlehem? I do not believe his motives were merely mercenary. The Cravath firm was paid $125,209 for its services in the acquisition of the company (the figure was just half the amount of the bribe).[117] In 1937, $125,209 was a very substantial amount of money. But it represented only a portion of the Cravath firm's billings to Bethlehem.[118] Moore could have foregone his share of the fee without discomfort. The motivation of this driven man was not money—certainly not money only.

He had, I suggest, identified with the client—an identification easier, rather than harder, when the client was not a single flesh and blood individual, but a corporation, which no one individual encapsulated. For many purposes, Moore was Bethlehem. It became his alter ego.

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112 *Id.* at 576–78 (testimony of Hoyt A. Moore).

113 *Id.* at 770 (testimony of Jacob Greenes).

114 *Id.* at 793 (testimony of Harry W. Mumford).

115 *Id.* at 797.

116 *Id.* at 800.

117 *See id.* at 580 (testimony of Hoyt A. Moore).

118 *See id.* at 602–03 (grand jury testimony of Hoyt A. Moore).

At the same time that he identified with the client, he wanted to prove to its officers, the men with whom he dealt, that he was the master of the situation, that there was nothing his client wanted that he could not bring off. He, Hoyt Moore, was indispensable to Bethlehem. He would demonstrate his indispensability by the exercise of his most polished skill: his draftmanship would be the means by which Bethlehem would reap the harvest it desired.

It may be objected that Moore's kind of identification with a client is a caricature. Of course if a lawyer bribes a federal judge to achieve his client's end, he is going too far, he has overidentified. His case is ruled by the criminal law. The case does not speak to less extreme situations. But the advantage of the caricature is that it underlines essential features. Hoyt Moore, a very well-educated, intelligent, prosperous, secure partner in an established Wall Street firm, was led to criminal conduct to serve his client. His case permits us to see how powerful the impulse to identify is, how subversive the instinct to secure the client's goals may be.

I have presented two illustrations, both extreme, but both involving lawyers of uncommon ability. Could I not give you a third case where just the right degree of distance was maintained, the right degree of friendly identification achieved? When a lawyer-client relation does not go wrong, it is hard to find the facts of the relation published. The right relation I believe is struck most of the time. It was by the lawyers with whom I practiced in Boston and is by the lawyers I see now before the court of appeals. It is a relation that is not that of judge of the situation nor that of manipulator serving one's other self. It is that of a friend who is a professional.

A professional, as Plato put it in *The Republic*, is a person who serves another principally for the other's good.[119] Plato's illustrations were a physician, who serves the health of the physician's patient, and a ship's captain, who sails the ship to port.[120] Plato's examples are disarmingly simple: it appears obvious that a doctor must seek health, and a captain must steer for port. A lawyer's task is typically more complex. He or she must attend to a plurality of goods—the good of the client, the good of the courts, the good of the lawyer's partners, and even in degree the good of the other parties. The law as a system is multi-purposed; the lawyer must be multi-purposed. To serve professionally the persons embodying these purposes, a lawyer cannot serve the situation nor contract his or her identity to the client's.

119 *See* PLATO, THE REPUBLIC bk. I, §§ 341–346, at 16–22 (A.D. Lindsay trans., 1992).

120 *See id.* § 341, at 16–17.