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THE WISDOM OF JUDGE MAYER SULZBERGER*

LIONEL TELLER SCHLESINGER**

Judge Mayer Sulzberger was a great Nisi Prius Judge. He was possessed of a rare power of accurate analysis which enabled him to take a principle of law, state it with precision, and apply it to the facts in the case in forceful, clear and simple words, sometimes with brilliant flashes of trenchant wit and humor, or with sparkling shafts of biting sarcasm. His comprehensive and vast legal learning and scholarly attainments, penetrating intellect, eloquence, wit, originality, passion for justice, devotion to public service, sagacity, intolerance of sham and deceit, intuition and insight into human motives, made him an outstanding lawyer and an incomparable judge and gave him a national reputation. When he was at the bar other lawyers feared him; when he was on the bench all were in awe of him. To the citizens of Philadelphia his personality and character made him the embodiment of legal and social justice, wisdom, and civic virtue.

None could doubt the integrity and the intellectual and moral courage of Judge Sulzberger as lawyer and judge.¹ His interruptions, during the progress of a trial to question a witness or rebuke a lawyer, were not prompted by a sense of intellectual superiority or a lack of judicial temperament, but by his conception of the duty of a judge. He once said that he was paid by the Commonwealth of Pennsylvania to hold the scales of justice, and if one lawyer, by his superior knowledge, skill and tactics, weighed down the scale too heavily, then it was his duty as judge to balance the scale on the side of the weaker or incompetent lawyer.

As lawyer and judge, he was zealous to uphold the great traditions of the Bar. In an address before the Law Academy of Philadelphia, he advised the Bar as to its duty to the court and to the client. The following excerpts from that address have been selected with the thought that they will furnish the present generation of lawyers, who had not the good fortune to know Judge Sulzberger, some light on the wisdom of our greatest Common Pleas Judge:

Fidelity to the Court: "It means—an ever present feeling of responsibility to the whole judicial function of society, of which the science of the law is the theory and its judicial administration the embodiment. The duty of the lawyer is to foster and preserve the legal institutions of his country upon the lines tradi-

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*Judge of Common Pleas Court No. 2, Philadelphia County, 1895 to 1902; President Judge, 1902 to 1916.

**LL.B., University of Pennsylvania Law School, 1904; member of the Philadelphia County Bar; member of the Philadelphia and American Bar Associations; member of the Committee on Biography and History of the Philadelphia Bar Association; member of the Law Academy of Philadelphia.

¹For some of his opinions, see: Woodrow v. Duff, 42 C.C. 641; Foster's Application, 23 Dist. 536, 564; Boner's Application, 24 Dist. 1068, 1070; Com. v. Satinsky, 21 Dist. 329; In Re Tony Tuttendario, 21 Dist. 561, 563.
tionally laid down as they may from time to time be modified according to the public necessities. No individual, whatever his talent or rank, should be above the law, and therefore no advocate should endeavor by any use of his talents or knowledge to nullify the law. It is not for him to say that where the law enjoins acquittal, a higher morality would ensure conviction. It is not for him to say that where the law enjoins conviction, a wiser policy would demand acquittal. It is not for him to say that where the law holds a man bound, he should be released, nor where the law releases, that he should be bound. In his quality of advocate the lawyer must simply adhere to the law, although in his quality of citizen, he is at liberty to advocate its alteration or amendment.\(^2\)

*Fidelity to the Client:* "Cases are not usually gained by brilliancy alone. I know of no method so successful as the complete mastery of all the facts down to the very smallest. It is true in many cases that an accurate study by counsel of his case would compel him to advise against bringing an action. It is to this aspect of the subject that I call your attention—the necessity of possessing intellectual and moral courage, to face the situation as it is and to advise accordingly. It may well be said that a young man waiting for business, either for the purpose of making known his abilities to the world, or for earning a livelihood, or for the mere love of practising his profession, has every incentive to hold on to all the business that may present itself. It is just here that the highest interpretation of the duty of a lawyer to be faithful to his client is required. Fidelity to his client requires him to prevent litigation if litigation is wrong in a legal sense. Unpalatable as this advice may be to some I may here add the material and vulgar consolation that the successful men I have known at the Bar were those who stifled more litigation than at which the unscrupulous ever had a chance. A certain inferior and showy kind of success has been and may be achieved by fighting anything, but all the men who have permanently taken high positions at the bar within my knowledge have steadfastly discountenanced and refused all litigation that was not under the law justifiable."\(^3\)

*The Lawyer as Adviser and Advocate:* "The practicing lawyer holds a position of great delicacy and difficulty. On the one hand he is the adviser, on the other the advocate. As adviser there is always presented to him the consideration of the question whether his client's cause is just, whether the end to be attained is right. As advocate it is his duty by all honest means to present acceptably all that may be arrayed in favor of his client's cause. When, therefore, the problem is presented to him whether his client should go to law, he may well be restrained from advising such a course by the conviction that the end to be attained is unworthy; but if he accepts a retainer to act in a cause, it becomes his duty to array on the side of that cause all the facts validly proved, all the inferences reasonably derivable therefrom.

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\(^2\)From the address on *Special Issues and General Issues* before the Law Academy of Philadelphia, April 28, 1898.

\(^3\)Ibid.
and all the principles of law fairly applicable thereto. When this is done his whole duty is performed and the decision rests with the court. These affirmative duties imply negative duties. In the ascertainment of facts on the witness stand a man may not in any wise create the presumption that facts whose existence he has no reason to suspect, or that facts of whose non-existence he is aware, are real facts, and though the zeal of contest and the eagerness for triumph have sometimes misled men into doing some things, and even achieving victories thereby, nothing can make such conduct respectable or even profitable. The limits of an advocate's assistance to his client are reached when he has given all the lawful assistance that he may. When he goes beyond he becomes an associate in the wrongdoing of his client."\(^4\)

The Facts of the Case: "The worst quality that a practising lawyer can have is an indisposition to face the actual facts of his case. Many minds are so constructed that they arrange all their knowledge of a science under a certain small number of categories and endeavor to bring under one of them every case presented. The result of this tendency is to slight the actual facts, to give prominence to those only that favor preconceived views, to ignore those which disturb those views, and altogether to give a false air to the whole presentation. The root of this defect is intellectual or moral cowardice or both. If, on the law and the facts a case must be lost, then it is not the business of the advocate to gain it. If a case may be won by the exercise of knowledge, ability and industry, then it should be every lawyer's effort to win."\(^5\)

The Jury System: "No tribunal has yet been devised which, upon the whole, is more honest and more efficient than our jury system. That popular prejudices inflame the minds of jurors may well be granted. But then it must also be admitted that no order of men, however high, is totally inaccessible to the mental and moral atmosphere of its surroundings. To eliminate from the jury the existence of prejudice is to hope for that which is impossible; to endeavor to combat prejudice by prejudice is to invite disintegration of the system. To displace prejudice by judgment is the true problem. The great bar to the exercise of unprejudiced judgment is the confusion in the mind between law and fact. The true function of the jury is to ascertain the facts. The true function of the court is to apply the law to ascertained facts."\(^6\)

The Relation of the Lawyer to the Jury: "Upon the advocate's influence with the jury very much of professional success depends. In my judgment, the first quality that impresses a jury is the union of sincerity with candor. A cowardly avoidance of a point of testimony that seems superficially to make against your case is generally exposed and inevitably hurts. Nothing is so forcible before

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\(^5\) From the address on *Special Issues and General Issues* before the Philadelphia Law Academy of Philadelphia, April 28, 1898.

\(^6\) Ibid.
a jury as the candid presentation of the facts of your case compared with the facts of your adversary's, and the demonstration, more or less successful, that upon the whole the preponderance lies with you. If this process is conducted fairly it tends not only to establish a favorable impression in the jury's minds, but it weakens the other side either by carrying complete or partial persuasion to the hostile advocate, or by driving him to methods inferior in simplicity and persuasiveness. In opening to a jury promise no more than you can perform. Do not say that you will prove anything that you are not confident of being able to prove. Do not over-examine your witnesses and above all do not over-cross-examine your adversary's. Never call an expert except to communicate something within his professional sphere."

*The Relations of the Bench and Bar:* "Of late years there has grown up an irreverent tone in certain social gatherings which authorizes, in jest, the use of flip-pant expressions concerning the integrity of the magistrates, and indeed of all men. Merriment is good, and in the happy hours of unrestraint men may be allowed to speak freely, and there is a certain joy even in speaking foolishly, but there is a limit which ought not at any time to be transcended. Reputations should never be stabbed in jest; contempt of gravity and authority should not be cultivated in jest. As lawyers, we should not even in jest look with despairing and pathetic compassion upon the intellectual inferiority of the Upper Courts nor bewail the good old times before any judge now on the bench of the Common Pleas or Orphans' Court was born. All men of our days have their faults as had the men of an earlier time. Do not accustom yourselves to a view of life that perceives merely sores and blotches. Judgment of men, of institutions, of countries, must be based finally on the predominance of good or evil in them. Not by this or by that work, but by all their works must men be judged."\(^8\)


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\(^7\)Ibid.  
\(^8\)Ibid.