

**A GOOD LAWYER
Secrets
Good Lawyers
[And Their Best Clients]
Already Know**

Second Edition

Stephen W. Comiskey

A Good Lawyer®
Just the Country's Lawyer ®
Chaos, Ltd.
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Lawyer may likewise be best read, reread, and considered by practicing lawyers wanting to learn those crafts of the law, their value to those prospective craftsmen, and their obligations to those crafts that Professor Llewellyn regretted was missing from his law student primer. It would be my greatest legal legacy if, as Professor Pound and Professor Llewellyn's little books are among the books that all good law students have at the ready, my little book is among the books that all good lawyers have at the ready.

Peace be with you.

STEPHEN W. COMISKEY
Washington, D.C.
Winter 2010

It is also a book for clients, potential clients and everyone curious about our legal system and legal processes. As we've seen in the last few years already, the conversation in America includes lawyers and lawyering more and more. I've tried here to speak to and about lawyers in useful practical terms that all who read it, whether or not they are lawyers, can understand and immediately use either to reinforce or reconsider their own beliefs or to discuss with their own lawyers.

The reader I always had in mind as I wrote it was a lawyer, of course, but looking over that lawyer's shoulder and also reading it was that lawyer's client. I hope it generates discussions between and among lawyers and our clients about what we should expect from each other.

Finally, I have included a complete copy of The Constitution of the United States of America as an Appendix. It's our Constitution that makes America so different from everywhere else in our world and every American should remember that it's our American lawyers who guarantee that our Constitutional rights of the citizens and

responsibilities of the government are honored.
That's what all American lawyers do for all of us,
every day.

Peace be with you.

STEPHEN W. COMISKEY
Washington, D.C.
Summer, 1997

But diligence comes with a price: legal fees. But lack of diligence often comes with a higher price: failure. Therein lies just one of the good lawyer's consistent dilemmas: How do you know when you have done enough to be certain of winning? When should you stop preparing? It cannot be put any simpler than Benjamin Franklin did in "Advice to a Young Tradesman, Written by an Old One:" "Time is money." Lincoln's lament that "A lawyer's time and advice are his stock in trade," only serves to underscore the good lawyer's problem.

Clients want cost-effective success and they are not usually concerned with the niceties or nuances of lawyering. Clients hope their lawyers are spending every waking moment only thinking and working on their case, but only charging them for ultimate success, or at least only charging them for substantial progress towards ultimate success. From a client's perspective it's a buyer's market. The sooner all lawyers recognize that we are in a service business and, therefore, the sooner all

35. Impress upon your clients who are buying or selling real property, especially homeowners, that it's the *contract* that's important, not the closing. You should at least be reviewing, if not drafting, any offer they are considering signing.
36. The law doesn't provide a remedy for every person's problems. But that doesn't mean that you shouldn't try to help them. Use your talents and your creativity to help people see and take advantage of opportunities for improvement.
37. Develop your *theory of the case* as soon as possible. Before trial keep fine tuning it so that everything you know about the case is compatible with your theory of the case.
38. Tailor your theory of the case to fit the *facts*, not the reverse.
39. There are no *facts* until the finder of facts rests.

6. Be patient with those who don't have your knowledge, education, or good fortune.
7. Proofread everything you write as if it were going to be on the front page of tomorrow's newspapers.

They prosper who burn in the morning
The letters they wrote overnight.

The Laws of the Navy,
Admiral Ronald A. Hopwood

8. Be overprepared.
9. Don't always do what you always do.
10. As often as possible: KISS
Keep
It
Short and
Simple
11. Don't dip your pen in the company inkwell.

20. There is no such thing as *off the record* when dealing with the media.
21. For most people most of the time, unless you can provide them with a reason why it's in their own best interests to do something, they will prefer to maintain the status quo.
22. No record was ever set on a full stomach.
23. Know your weaknesses. Work hard either to make them your strengths or to minimize their chance of affecting your success.
24. Before you begin writing anything, determine who your reader is. Write only for that reader.
25. Keep rewriting until you get it right.
26. As soon as you realize that you will be late for any meeting or appointment, call the office where you are scheduled to meet, tell them you will be late, and give them an expected time of arrival.

of their own lawyer's successes concerning that particular matter. But just as in any tournament, the top-seeded player or team might not actually win that tournament. Likewise, a good lawyer will not always prevail. But if they don't prevail, it won't be for lack of preparation or for lack of trying. There may be another good lawyer on the other side of that case, for example, and they both can't achieve their separate client's conflicting goals. There's also the small matter of the facts at hand. Sometimes you just don't have good facts. There's only so much even a good lawyer can do with bad facts.

So for you readers who have been clients, who are now clients, or who may someday (perhaps sooner than you'd wish) become a lawyer's client, here are 50 ways to find out how high you would rank your lawyer on basic good lawyering skills. Before you start, however, remember two universal truths: things are not usually as simple as they first seem to be; and, nobody's perfect.

With those final words of caution I invite you to compare your lawyer with these objective

4. Knows who the client is, remembers who the client is, only represents the client, and doesn't surprise the client.
5. Keeps the client aware of developments in a timely manner.
6. Returns the client's phone calls and inquiries promptly.
7. Proposes legitimate and sound alternatives to get the client to the desired end result and argues for their adoption. Makes deals, doesn't break them. A good lawyer is a *closer*.
8. Asks the client what the client wants and why. After hearing that answer, a good lawyer then tells the client whether that lawyer believes they can help the client achieve those goals.

14. Has a good reputation with their fellow lawyers and in the local community in general.
15. Doesn't wait for things to happen, but has a flexible plan and begins executing that plan as soon as reasonably possible.
16. Is unique, but not flamboyant or outrageous.
17. Before beginning any work, makes sure the client understands and agrees with the fee arrangements and the billing procedures. A good lawyer uses simple and easily understood written legal representation and fee agreements, tailored to each client, bills understandably based upon those fee agreements and then stands behind those bills.
18. Sets and meets deadlines or explains why they're not being met.

37. Is always alert for potential conflicts of interest and investigates and resolves all potential conflicts issues before undertaking any representation.
38. Understands that good lawyering does not require or condone any distraction from their own high personal, professional, moral, and ethical standards.
39. Is thankful that they are in a profession with unlimited possibilities to help individuals and society.
40. Is a responsible steward of their talents and uses their persuasive skills appropriately.
41. Leaves their mark.
42. Continuously monitors the appropriate proximity to maintain with each client to balance the objectivity that distance provides with the subjectivity that closeness provides and understands that that distance is different for each client.

- 43. Maintains their objectivity about the client's case. Good lawyers may be passionate about their cases, but they remain objective.
- 44. Takes a break from their legal practice, as much and as often as they can.
- 45. Leaves something on the table at settlement, but takes no prisoners at trial.
- 46. Knows when to move on.
- 47. Has faith in the legal system, but remembers that it's a hands-on operation whose best results occur when that lawyer's hands control it.
- 48. Doesn't let the possibility or probability of future appearances, either before the same judge or against the same opposing counsel, affect their zealous representation of their current client.
- 49. Encourages the client to continue to trust the client's own instincts and to question the lawyer when the client is unsure of what or why things are or are not happening.

50. Knows that our democratic society and our justice system within our democracy will only last as long as we all continue to recognize that the personal dignity of each individual, even of the meekest or the vilest amongst us, requires our equal treatment of every one of us under our laws. This is the good lawyer's gospel. American lawyers are prepared to fight and to die for it.

* * *

The inescapable conclusion about a good lawyer is that the more a client knows about and works with that lawyer the more comfortable and confident that client becomes with that lawyer and especially with that lawyer's competence to handle that matter for that client.

* * *

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at

shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been

increased during such time: and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of

United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;--And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand

Account of Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: and no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such

Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of

Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the

Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of

such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such

Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.]]¹⁰

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the

Legislature cannot be convened) against domestic Violence.

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a

Qualification to any Office or public Trust under the United States.

Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth

In Witness whereof We have hereunto subscribed our Names,

George Washington--President and deputy from Virginia

New Hampshire: John Langdon, Nicholas Gilman

CONGRESS OF THE UNITED STATES

begun and held at the City of New York
on Wednesday the fourth of March,
one thousand seven hundred and eighty nine¹¹

THE Conventions of a number of the States,
having at the time of their adopting the
Constitution, expressed a desire, in order to
prevent misconstruction or abuse of its powers, that
further declaratory and restrictive clauses should
be added: And as extending the ground of public
confidence in the Government, will best ensure the
beneficent ends of its institution:

RESOLVED by the Senate and House of
Representatives of the United States of America, in
Congress assembled, two thirds of both Houses
concurring, that the following Articles be proposed
to the Legislatures of the several States, as
amendments to the Constitution of the United
States, all or any of which Articles, when ratified
by three fourths of the said Legislatures, to be valid

to all intents and purposes, as part of the said Constitution; viz.

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution . . .

FREDERICK AUGUSTUS MUHLENBERG,
Speaker of the House of Representatives.

JOHN ADAMS,
Vice-President of the United States, and
President of the Senate

ATTEST,
JOHN BECKLEY,
Clerk of the House of Representatives.

SAM. A. OTIS Secretary of the Senate.

**AMENDMENTS
TO THE CONSTITUTION
OF THE
UNITED STATES OF AMERICA
AMENDMENT I¹²**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

AMENDMENT XIV

(Ratified July 9, 1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male

10. Changed by the Thirteenth Amendment.
11. On September 25, 1789, Congress transmitted to the State legislatures twelve proposed Amendments, two of which, having to do with Congressional representation and Congressional pay, were not adopted. The remaining ten Amendments became known as the Bill of Rights.
12. The first ten Amendments (Bill of Rights) were ratified effective December 15, 1791.
13. Superseded by section 3 of the Twentieth Amendment.

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