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Reasons for business clients disliking or being suspicious of attorneys are legion. First, some clients (including business clients) are disserved by the lawyer they have retained. "Unfortunately," observes Richard Abel, "most people view lawyers through their personal experience of the law, which is usually unhappy (always for the losing party in litigation, often for the winner too), and firmly believe lawyers produce *in*justice (clients want to win, not lose to vindicate an ideal)."[1] Just as the victims of crime may look upon the criminal defense attorney as the enemy (as much perhaps as the alleged perpetrator himself), and adversaries in a divorce or child custody proceeding may regard the lawyer for the other side with as much disdain, if not more, than they hold for their soon-to-be former spouse, business clients may see a competitor's lawyer as more of a problem than their opponent who, while temporarily on the other side of a dispute, remains nevertheless engaged in the same or similar trade.

"While business might find lawyers useful," remarks David Sugarman, in an historical commentary on the British legal profession, "they also found them expensive, technical, and time-consuming."[2] As it was, these factors often "turned litigation into a game of chess, which put a premium on tactics and the wearing down of one's opponents [and u]sually only those with sufficient resources could take on a dedicated and well-financed adversary."[3] Such observations immediately bring to mind the *New Yorker* magazine cartoon where a lawyer clasps his hands together and asks the client, sitting across the desk from him, just how much justice he can afford.[4] Business clients gain no more pleasure than any anyone else from being compelled to pay expensive, sometimes exorbitant, legal fees.

Even where business clients become convinced they are getting their money's worth, they may still feel a sense of helplessness as a result of what

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1. Richard L. Abel, *Lawyers and Legal Services*, *in* THE OXFORD HANDBOOK OF LEGAL STUDIES 814 (Peter Cane & Mark Tushnet eds., 2003).

2. David Sugarman, *Simple Images and Complex Realities: English Lawyers and Their Relationship to Business and Politics, 1750-1950*, *in* 2 LAW IN HISTORY: HISTORIES OF LAW AND SOCIETY 145, 168 (David Sugarman ed., 1996).

3. *Id.* at 169.

4. J.B. Handelsman, *Cartoon*, *in* THE NEW YORKER BOOK OF LAWYER CARTOONS 73 (1993).

they perceive to be a dependent relationship with their attorney. "Not only does the law factory serve the corporate system," wrote C. Wright Mills in his book, *White Collar,* "but the lawyers of the factory infiltrate the system. At the top, they sit on the Boards of Directors of banks and railroads, manufacturing concerns, and leading educational institutions."[5] Whatever the commercial client's business strategy may be, it is the attorney who tells the client what the law does and does not permit—it is the lawyer who seems to call the shots. Describing the emergence of trade on a world scale, Kenneth Pomeranz and Steven Topik record the following:

> In most Southeast Asian ports, traders were organized into ethnic communities, each of which had a headman who was supposed to keep order. So if, say, a Gujarati and a Dutch merchant fell out, their respective headmen would first meet to settle the dispute. This had its own perils for the merchants—they often lost the chance to speak for themselves, and might find their own case sacrificed to the broader interests of their communities, or the political ambitions of their headman.[6]

While C. Wright Mills acknowledges the Wall Street law firm's interest in national politics "is usually only a means of realizing its clients' economic interests,"[7] one still wonders how many corporate clients must nevertheless have felt that their subservience to their respective headmen was not all that different from the Dutch merchants who first penetrated the Southeast Asian market.

The commercial client's anxiety over the power of attorneys and expenses added on to the normal costs of doing business incurred when lawyers become involved is of ancient vintage. As we shall see, it was already present and given voice in the ancient world—specifically, the world of Greek maritime traders. This essay briefly examines the attitudes and commentary upon lawyers and the law's delay, characteristic of classical Greece and medieval Spain, before turning to a brief assessment of similar complaints expressed in the New World, that of colonial America. The latter represents an instructive example of law and lawyers in a commercial setting where the familiar adage that the more things change, the more they stay same, turns out not to apply. In *The Ancient Economy,* M.I. Finley states that whatever the precise definition of the term *class society*,

5. C. WRIGHT MILLS, WHITE COLLAR 126 (1951).

6. KENNETH POMERANZ & STEVEN TOPIK, THE WORLD THAT TRADE CREATED: SOCIETY, CULTURE, AND THE WORLD ECONOMY, 1400 – THE PRESENT 31 (1999).

7. MILLS, *supra* note 5, at 126.

> [F]or the ancient historian there is an obvious difficulty: the slave and the free wage labourer would then be members of the same class, on a mechanical interpretation, as would the richest senator and the non-working owner of a small pottery. That does not seem a very sensible way to analyse ancient society. [8]

While G.E.M. de Ste. Croix, in his landmark book, *The Class Struggle in the Ancient Greek World,* clearly disagrees with Finley on the applicability of this category to the analysis of ancient society,[9] both historians readily agree that if the world of the Greek maritime traders was a full-blown commercial society, it was not a capitalist one.[10] On the contrary, the emergence of capitalism in Western Europe was still two thousand years away.

"Litigants who faced Athenian juries did so with minimal professional help," observes Steven Johnstone, and "[t]here were no legal experts, no lawyers, in Athens."[11] But if ancient Athens was without a legal profession, it was not without litigation. Not only was Athenian law procedurally complex[12] but "even without specialized personnel, Athenian litigation gave rise to insular traditions of legal practice."[13] For Johnstone, these "practices of litigation mark the autonomy of courts."[14] The autonomy of Greek courts, the insular traditions of legal practice, and the procedural complexity of Greek law all contributed to growing problems of delay in Greek justice. An important exception to one side, according to Edward Cohen, "[t]he Athenian courts otherwise were subject to long delays."[15] Cohen cites one case which "came to trial some seven years after initiation of the prosecution" and adds that "[w]hile the statutory time limitation . . . appears normally to have been five years" another case did not come to court until "fourteen years after the relevant agreement had been made."[16]

What was that single exception to the typical delay litigants suffered in Athenian courts? It was the separate system of maritime law and adjudication. "Thus Athenian commercial maritime law," says Cohen, "was in accord with various modern systems that in practice offer procedural time-

8. M.I. FINLEY, THE ANCIENT ECONOMY 49 (updated ed., 1999) (1973).
9. G.E.M. DE STE. CROIX, THE CLASS STRUGGLE IN THE ANCIENT GREEK WORLD FROM THE ARCHAIC AGE TO THE ARAB CONQUESTS 58 (1981).
10. *Compare generally* FINLEY, *supra* note 8 *with* DE STE. CROIX, *supra* note 9.
11. STEVEN JOHNSTONE, DISPUTES AND DEMOCRACY: THE CONSEQUENCES OF LITIGATION IN ANCIENT ATHENS 18 (1999).
12. *See id.* at 130.
13. *Id.* at 44.
14. *Id.*
15. EDWARD E. COHEN, ANCIENT ATHENIAN MARITIME COURTS 10 (1973).
16. *Id.*

preference for certain commercial actions."[17] It is this commercial fast-track which Cohen takes as the primary subject of his research and he argues that "[t]he peculiar procedural characteristics of empiric cases developed in a legal system that had attained considerable sophistication in its commercial maritime regulations."[18] Cohen discusses the remarkable supranationality of Greek maritime courts, their openness to traders of all nationalities, and concludes that "[w]ith commerce so vital to Athens, with the state interest in trade accordingly high, the autonomy of commercial procedure at Athens is understandable."[19] At least it is understandable that in a commercial society, commerce may be valued sufficiently that a relatively autonomous system of commercial litigation might be created for the purpose of avoiding many of those typical complaints business clients routinely lodge against lawyers and the legal system.

Cohen points out that it was not only the maritime courts of Athens, in the fourth century B.C., which were open to traders from all throughout the maritime world.[20] At both Syracuse and Rhodes, "nationals of foreign states could also litigate freely in the local commercial courts"[21] and it was at Rhodes that both substance and procedure adopted by the Greek maritime courts began to be codified.[22] "The Rhodian Code," according to A. Pearce Higgins and C. John Colombos, "which dates from the third or second century B.C., was evidently of great authority in the Mediterranean for its principles were accepted by both Greeks and Romans and its memory lasted for a thousand years."[23] The *Rhodian Code* helped to shape maritime law up through the French *Laws of Oleron* and the British *Black Book of the Admiralty.*[24] "All of these attempts at codification," asserts Stanley Jados, "are best exemplified by the codification, publication, and general acceptance in the fifteenth century of the *Consulate of the Sea.* Azuni referred to the *Consulate*, as a document 'whose authority is above all others.'"[25]

17. *Id.* at 10 (footnote omitted).
18. *Id.* at 63.
19. *Id.* at 69.
20. COHEN, *supra* note 15, at 70.
21. *Id.* at 69.
22. *See generally* A. PEARCE HIGGINS & C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 24 (1943) (stating the Romans adopted the Sea Laws of the Rhodians).
23. *Id.*
24. *See id.* at 24–28.
25. STANLEY S. JADOS, *Preface to the* CONSULATE OF THE SEA AND RELATED DOCUMENTS, at xiii (1975).

Edgar Gold, who also refers to the *Consulate* as the "law of Barcelona,"[26] records that the first version of this codification was written in the Catalan language about 1300 and became "immensely popular"[27] because it managed to appear "at the right time—the time of the expansion of truly international trade and commerce."[28] In the main English language monograph on the *Consulate of the Sea* (or *Consulado del Mar*), Robert Sydney Smith's *The Spanish Guild Merchant,* the author observes:

> Innumerable records furnish evidence that a fundamental motive of the Spanish Consulado was to secure the expeditious, economical, and equitable adjudication of disputes concerning maritime and mercantile contracts. An early privilege (1325) granted to the councilors of Majorca reveals their determination to circumvent the legalism and obstructions encountered in the ordinary courts through the institution of the Consulado (citation omitted). The sea consulate of Barcelona was established "in order to do away with the expenses of lawsuits and the strife of judicial proceedings among merchants and navigators" (citation omitted).[29]

Here Smith tills the very same soil as the historians discussed above in mapping various pitfalls that await the business litigant in conventional courts and routine legal process. Just as Sugarman's British commercial interests often found recourse to lawyers expensive, technical, and time-consuming, and just as Cohen's ordinary Athenian courts were subject to long delays, the *Consulado del Mar* provided maritime traders with an attractive alternative to the legalism and obstruction encountered in medieval Barcelona's regular courts.[30] Smith continues:

> Pointing to the procedure of the consular court in Perpignan as a model for the sea-consuls of Montpellier, the king declared that the trammels of ordinary justices had reduced many merchants to poverty (citation omitted) . . . .
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> Pleading for consular privileges, the merchants of Burgos represented that in ordinary courts mercantile cases were "never terminated," because lawyers found ways to prolong litigation, no matter how unjust the claim.[31]

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26. EDGAR GOLD, MARITIME TRANSPORT: THE EVOLUTION OF INTERNATIONAL MARINE POLICY AND SHIPPING LAW 27 (1981).

27. *Id.*

28. *Id.*

29. ROBERT SYDNEY SMITH, THE SPANISH GUILD MERCHANT: A HISTORY OF THE CONSULADO, 1250-1700, at 6 (Octagon Books 1972) (1940).

30. *Id.*

31. *Id.* at 6–7.

Thus, Spanish mercantile traders seeking enforcement or interpretation of maritime contracts, were presented with the same kind of commercial fast-track or procedural time-preference, as Cohen put it, as were early Greek traders.[32] And just as the Athenian maritime courts had pioneered a very forward-looking supranational jurisdiction, treating litigants equally regardless of nationality, the *Consulado del Mar* provided a direct response to those medieval merchants, described by Smith, who railed against the "inability of foreign traders to secure fair treatment at moderate cost in the ordinary courts of [Marseilles]."[33] So it can be said that when confronted with a contradiction between the "inherent nature of commerce,"[34] the equally inherent nature of law, and the almost inescapable expense and technical complexity encountered in seemingly endless legal process, a range of societies sufficiently sympathetic to the business client's woes (and the stake of society as a whole, after all, in an expeditious as well as efficient public support for commerce) simply created an alternative social process to that of traditional litigation for the handling of mercantile disputes.

It was just these elements of flexibility and attention to the existing practices of maritime traders which declined when Spain's role as a dominant force in international trade and commerce itself began to decline.[35] Eventually, as John Lynch argues, the Spanish government in 1690

> appointed a junta to advise on the promotion of American trade, and subsequently asked [Manuel de] Lira to comment on its report, which simply recommended rigid prohibition of trade with foreigners. Lira reacted sharply against the growing xenophobia . . . . He argued that it was precisely the ban on trade with foreigners that induced the English, the Dutch and the French to establish settlements in the Indies.... In addition to reviving and expanding American trade, which in turn would stimulate Spanish manufactures and merchant marine, Lira believed that his proposals would convert England and the United Provinces into firm allies, for they would have a stake in a vital sector of the Spanish economy . . . .[36]

Sadly for Spain, as Lynch points out, Manuel de Lira was pessimistic about the chance of his proposals being adopted and "in fact they were not. Many of them would have simply legalised existing practice, and the government could not bring itself to do this."[37] Thus the very things that had

32. COHEN, *supra* note 15, at 10.
33. SMITH, *supra* note 29, at 6 (citation omitted).
34. COHEN, *supra* note 15, at 63.
35. *See generally* 2 JOHN LYNCH, SPAIN UNDER THE HABSBURGS: SPAIN AND AMERICA 1598–1700 (1969).
36. *Id.* at 279.
37. *Id.*

removed the law's delay and the trammels of conventional litigation from the commercial arena—that had lifted these legal burdens from the merchant's shoulders—lost favor, and precisely in that part of the world where the *Consulado del Mar* had been born and proved so effective. It was the existing practice of merchants, not lawyers and government bureaucrats, on which the international system of commerce had seemed to thrive. And it was the "establishment of an exceptional commercial jurisdiction,"[38] in ancient Greece as well as medieval Spain, which had given rise to such successful (and unobtrusive or counterproductive) commercial regulation. But the wheel of power and prestige in the world of global trade was simply making another turn—this time in the direction of the New World.

If maritime traders in the sixteenth century complained of the plethora of suits among merchants trading with America, and government policy two centuries later failed to recognize the link between an open system, *comercio libre*, and American trade and development, the colonists who had settled in the sometimes bitter environment across the Atlantic were themselves initially hostile to the kind of entrepreneurial values which animated economic traders and helped relationships of commercial exchange to multiply rapidly.[39]

The story about how the early resistance of New England's European settler communities gradually gave way, by the end of the eighteenth century, to an emerging agrarian capitalist society is by now not only familiar but the most widely accepted description of just what happened within the New World economy during this period. Equally credited by historians is the once-controversial narrative of how lawyers and courts reshaped early American common law and institutions to serve the dominant interests of commercial enterprise: "Real values pushed aside by exchange values, declining employment of equitable remedies, and the rise of *caveat emptor*, judges subordinating common law to the market—these were the hallmarks of an entrepreneurial revolution which took the nineteenth-century legal system by storm."[40]

On the event of this transformation, however, the most conventional sort of diatribe was directed at attorneys by the merchant class and Republican pamphleteers. Charles Warren, in *A History of the American Bar,* records that "the most powerful attacks on the 'dangerous' and 'pernicious' 'order' of lawyers and their 'malpractices, delays and extravagant fees' were the letters of Benjamin Austin, an able pamphleteer and Anti-Federalist poli-

38. SMITH, *supra* note 29, at 7.
39. *Id.* at 73–76.
40. *Id.* at 111.

tician of Boston, who wrote, in 1786, under the name of 'Honestus,' and whose letters had a widespread influence."[41] While less familiar and harder to find, Austin's essays and broadsides, published in *The Independent Chronicle* under the name "Old-South," pack such a punch and contain such a fine vitriolic wit that they remain worth reading.[42] In his discussion of the judiciary, for example, Austin asks, "is there a man in the United States who wishes to extend this department of our government? Where is the man who candidly thinks that the bench and the bar, (though respectable as men) have not already their full preponderancy of weight in the community?"[43] After a stinging attack on Theophilus Parsons, Esq., for not appearing in court promptly at ten o'clock in the morning on a day when an argument by him had been scheduled, Austin extended his frustration to the whole of the profession, "[a] particular body of men, [who] of late have placed themselves in an attitude which appears calculated to *stop the wheels of government.* They assume an arrogance of deportment to which no free government ought to submit."[44]

One way of looking at the American case is simply to argue that, as in antiquity and medieval Spain (up to a point), experience eventually taught the professions of law and commerce, as well as those who managed the judicial and legislative apparatus, that the substance and procedure of law needed to be streamlined if business was to be carried on efficiently and profitably. But such an argument would actually miss the point—overlooking the most important aspect of New World law and economy. While an independent body of maritime law was preserved and developed in early America, it was not simply the legal universe of merchants and traders that was redesigned to serve specific economic goals. The entire legal and political system, in fact, was refashioned in order to serve not just businessmen but capitalism itself as a mode of production.

Even after the 'great transformation' of American law in the years prior to the Civil War, such a revolutionary project would not and could not eliminate all the concerns and frustrations of the merchant class in any particular division or sector of the economy. That was not its purpose. As Ellen Meiksins Wood puts it:

41. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 219 (1990).

42. BENJAMIN AUSTIN, JR., CONSTITUTIONAL REPUBLICANISM, IN OPPOSITION TO FALLACIOUS FEDERALISM; AS PUBLISHED OCCASIONALLY IN THE INDEPENDENT CHRONICLE, UNDER THE SIGNATURE OF OLD-SOUTH (1803).

43. *Id.* at 251.

44. *Id.* at 297.

> The economic imperatives of capitalism are always in need of support by extra-economic powers of regulation and coercion, to create and sustain the conditions of accumulation and maintain the system of capitalist property. The transfer of certain 'political' powers to capital can never eliminate the need to retain others in a formally separate political 'sphere'....
>
> To stabilize its constitutive social relations—between capital and labour or capital and other capitals—capitalism is especially reliant on legally defined and politically authorized regularities. Business transactions at every level require consistency and reliable enforcement, in contractual relations, monetary standards, exchanges of property.[45]

Consequently, contemporary conflicts between the economic interests of different professions (law, medicine) or industries (health care, insurance) or social groups (consumer advocates, tort reform) may at times produce both animosity and sharp opposition. These conflicts may be mitigated, resolved, heightened, or exploited by politicians and the mass media. A corporation, downsizing, may decide to bring its legal representation in house in order to save money on legal expenses. Government may impose labor or ecological regulations on private industry which cut into profits or encourage relocation abroad. IRS lawyers may try to prove in court that a company has not paid its fair share of taxes, and so on. But none of that means that lawyers—or the legal system—are fundamentally hostile to business. On the contrary, within capitalism alone do businessmen and women find themselves operating in a legal environment where the entire system has been designed to serve the main aims of capital. In what alternative economy would the fortunes of business share a brighter prospect?

45. ELLEN MEIKSINS WOOD, THE ORIGIN OF CAPITALISM: A LONGER VIEW 178–79 (Verso 2002) (1999).