

Remembering Geoff Hazard

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During my first year of law school, my Civil Procedure teacher suggested that we read Geoffrey Hazard's article on indispensable parties.¹ Like most of his work, combined historical perspective with incisive analysis that showed just what the procedural problem was and how courts had confused it. It helped to replace previous attempts to sort parties into fixed categories with a functional approach focused on the practical consequences of joining absent parties to civil litigation or proceeding without them. And it was typically influential. Only a few years later, the rulemakers amended Federal Rule of Civil Procedure 19 along the lines of Geoff's approach.² After Geoff and others had done their scholarly work, it was no longer possible to think along the old lines.

The law of indispensable parties was not the only law that Geoff helped to envision. He served as Reporter for the Restatement Second of Judgments, which shaped both the law and the terminology of what we now (thanks to it) call claim and issue preclusion.³ He wrote (among a myriad other illuminating publications) a seminal article on personal jurisdiction.⁴ And when it came to Professional Responsibility, he himself became virtually an indispensable party in the reshaping of legal ethics into the law of lawyering and the inclusion in that law of much civil and criminal law that other scholars had tended to overlook.⁵ He was the main Reporter for the original ABA Model Rules of Professional

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1. Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961) [hereinafter Hazard, *Indispensable Party*].

2. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 366–71 (1967) (describing the history and rationale of the amendment). Both Geoff and the rulemakers also relied on John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327 (1957).

3. RESTATEMENT (SECOND) OF JUDGMENTS §§ 13–29 (1982). Hazard succeeded Benjamin Kaplan and David Shapiro, who got the Restatement under way as its original Reporters but withdrew early in the project. Herbert Wechsler, *Preface*, 66 CORNELL L. REV. 401, 401 (1981).

4. Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241.

5. On this trend, see Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991). On the applicability to lawyers of criminal and civil law, see, for example, Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 675 (1981); Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701, 720 (1993) [hereinafter Hazard, *Lawyers and Client Fraud*]; Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987).

Conduct of 1983,⁶ as well as one of their main revisers and commentators.⁷ He was also the Reporter for the original ABA Model Code of Judicial Conduct of 1972. Having been an Associate Reporter for the Restatement of the Law Governing Lawyers, I can attest to his very active and influential participation in that project as Director of the American Law Institute. Scarcely a meeting—and there were innumerable meetings—took place without him.

My selection as Associate Reporter was only one of many ways in which Geoff helped me.⁸ Soon after I started teaching, he sent a note welcoming my second article. And soon after I started work on the Restatement, he pressed me to join him as co-author of what had started as Fleming James on Civil Procedure and then become James and Hazard.⁹ For no very good reasons, I resisted at first, but he persisted and prevailed. No doubt he hoped to share the burdens of revision with me but, typically for him, when an illness in my family prevented me from contributing much, he immediately volunteered to do almost all the work himself. He helped and mentored many others as well, as witness the many articles he co-authored with younger scholars.¹⁰

Geoff's great kindness was usually masked by a gruff exterior. He was the only person I ever heard inject profanity into the exalted proceedings of the American Law Institute, freely referring to "the damn conflict" or "the damn confidence." I was not surprised when, after I learned that he was seriously ill and sent him a note, he replied that he was fine.

In legal matters too, his hardboiled approach sometimes covered other aims, typically ethical ones. Commenting on mass tort class action, in some of which he had testified for defendants, he nevertheless concluded as a scholar that "[t]he proper issue is not whether defendants might go bankrupt, but whether they deserve to do so."¹¹ And during his long struggle to induce the American Bar Association to authorize lawyers to disclose their clients' ongoing fraud, he preferred to stress that any other rule would expose lawyers to suits by the victims of the fraud: "[A] rule allowing disclosure of client fraud was

6. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 60–62, 61 n.72 (1986) (describing the history of the Model Rules and noting Geoff's rule).

7. GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* (4th ed. 2017); Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 *GEO. J. LEGAL ETHICS* 441, 441 n.1 (2002) (noting Geoff's membership on the "Ethics 2000" Commission).

8. I do not know whether Geoff or Chuck Wolfram, the Restatement's Reporter, first mentioned me as a possible Associate Reporter, but I could not have been chosen without Geoff's involvement.

9. FLEMING JAMES, JR., *CIVIL PROCEDURE* (1965). The second (1977) and third (1985) editions were revised by Geoff. I joined for the fourth (1992) and fifth (2001) editions, and Debra Bassett joined us for the sixth (2011) edition.

10. See, for example, Susan Koniak's reference to him as "my dearest friend, colleague, and coauthor" in Susan Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 *CORNELL L. REV.* 1045, 1045 n.† (1995), an article in which she took issue with his testimony, and the reminiscences in Symposium, *In Honor of Geoffrey C. Hazard, Jr.*, 158 *U. PA. L. REV.* 1283, 1283–1327 (2010).

11. Geoffrey C. Hazard, Jr., *Class Certification Based on the Merits of the Claims*, 69 *TENN. L. REV.* 1, 11 (2001).

necessary for self-protection.”¹² That was not necessarily his own main concern.

Not that his toughness was wholly a mask—he was criticized for his somewhat adversarial approach in his role as expert witness and consultant.¹³ In the cases in which we both gave opinions, mine was almost always contrary to his, so I obviously disagreed with him, though that never impaired our friendly relations. Nor would I defend his having signed an opinion in the *Kaye, Scholer* case drafted by lawyers at the accused firm.¹⁴ Yet to some extent this is an occupational risk. When leading Professional Responsibility experts have spoken with me, I have noted their willingness to charge any absent expert with venality, causing me to wonder what might be said about me in my own absence. Since experts have testified for pay, they have aroused suspicion, which will no doubt continue until we change the paid expert system.

Geoff had unusual skill in rendering opinions that would support the party retaining him while avoiding issues on which that party’s position was untenable, as indeed his critic Bill Simon has noted and condemned.¹⁵ In *Georgine v. Amchem Products, Inc.*, for example, Geoff opined that the would-be class lawyers had not violated any professional rules, but said nothing about whether their various involvements made them appropriate representatives within the meaning of the class action rule—something I did not notice until well after the case was decided when he mentioned it to me.¹⁶ Geoff undoubtedly made a good deal of money through his consulting and expert witness work, but it is less well known that he repeatedly testified without charge, typically on behalf of agencies seeking to discipline a lawyer or judge. And his testimony for a party did not prevent him from later taking a more dispassionate view.¹⁷

A master of legal analysis, both doctrinal and policy, and an accomplished legal historian,¹⁸ Geoff sought to broaden his perspectives. He explored foreign

12. Hazard, *Lawyers and Client Fraud*, *supra* note 5, at 720. For more on this controversy, see Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271 (1984) [hereinafter Hazard, *Rectification of Client Fraud*]; Michael Ariens, “Playing Chicken”: *An Instant History of the Battle Over Exceptions to Client Confidences*, 33 J. LEGAL PROF. 239 (2009).

13. William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1572–74, 1583–95 (2008).

14. Steve France, *Just Deserts: Don’t Cry for Kaye, Scholer*, LEGAL TIMES, Apr. 6, 1992, at 28.

15. Simon, *supra* note 13, at 1573, 1587, 1590, 1592. Simon’s article also criticized two other well-known experts.

16. *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 297–98, 302 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff’d*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). I did not testify in this case, but wrote an amicus brief for a group of Professional Responsibility teachers on the side opposing Hazard’s. Later, we clashed in another important asbestos class action case. *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995), *rev’d sub nom. Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

17. In the case of class actions, see Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901 (2000); Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257 (1995); Hazard, *Rectification of Client Fraud*, *supra* note 12.

18. Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978); Harold Chesnin & Geoffrey C. Hazard, Jr., *Chancery Procedure and the Seventh*

legal systems,¹⁹ wrestled with moral philosophy,²⁰ and even touched on law and economics.²¹ It was he who added a chapter on the social and economic aspects of litigation to the Fleming James Civil Procedure text.²² Always, his ultimate concern was pragmatic and functional: to develop rules that would make the law work better. Theory was to serve practice. That orientation enabled him to reach practitioners and judges as well as academics.

Geoff was a scholarly giant both in Civil Procedure and in Professional Responsibility. He somehow was able to be an incredibly productive author and a great teacher and colleague, while also taking on the administration of the American Law Institute and the American Bar Foundation, serving as Reporter for any number of touchy and time-consuming projects, and practicing law as a consultant and expert. And he was a kind man. His influence will be with me to the end of my own career as it has been from the beginning.

Amendment: Jury Trial of Issues in Equity Cases Before 1791, 83 YALE L.J. 999 (1974); Geoffrey C. Hazard, Jr. & Myron Moskovitz, *An Historical and Critical Analysis of Interpleader*, 52 CALIF. L. REV. 706 (1964); Hazard, *Indispensable Party*, *supra* note 1; sources cited *supra* note 5. These articles alone would have more than sufficed to make the reputation of any legal scholar.

19. GEOFFREY C. HAZARD, JR. & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY* (2004); ALI/UNIDROIT *PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE* (2006), <https://www.unidroit.org/instruments/transnational-civil-procedure> (for which Geoff served as Reporter).

20. GEOFFREY C. HAZARD, JR. & DOUGLAS W. PINTO, JR., *MORAL FOUNDATIONS OF AMERICAN LAW: FAITH, VIRTUE AND MORES* (2013); Geoffrey C. Hazard, Jr., *Equality and Affiliation as Bases of Ethical Responsibility*, 61 LA. L. REV. 173 (2000).

21. Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983).

22. FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* 279–99 (3d ed. 1985).