

Indelible Ink — The Trial of John Peter Zenger

and the Birth of America's Free Press

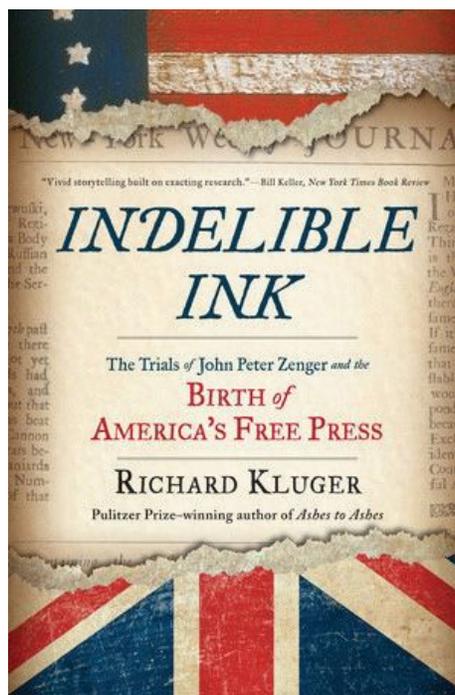
Richard Kluger won the Pulitzer Prize for his masterful expose of the cigarette industry in *Ashes to Ashes* in 1996, and his study of school desegregation, *Simple Justice* (1975), is a classic. His latest, equally excellent if less controversial should be of interest to every Philadelphia Lawyer.

Indelible Ink is the most thoughtful, comprehensive and well-researched study of the 1735 criminal trial in New York City of newspaper publisher John Peter Zenger on charges of seditious libel. While you may know that Zenger was acquitted, that he was defended by a Philadelphia lawyer Andrew Hamilton, and that his victory was based upon the defense of truth, Kluger sets forth so much more. And, it is not all what you might expect.

Kluger lays the groundwork for the trial with a lively, detailed review of colonial New York politics, some of which makes modern politics appear rather tame in comparison. But the story often turns and returns to Philadelphia, which was then larger than New York City.

A young German-American, John Peter Zenger, began his eight-year apprenticeship in 1710 with printer William Bradford in New York, but moved to Philadelphia in 1718 to work with Bradford's son, Andrew, also a printer. There, he married Mary White, moved to Maryland, and had a son. Mary died in 1722, so Zenger returned to New York to work again with the elder Bradford. In 1725, together they launched New York's first newspaper, *New-York Gazette*.

At the time, two rival political factions battled for power in New York, the Morrisites under lawyer Lewis Morris and his protégé lawyer, James Alexander, and the Cosbyites under



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By Richard Kluger

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Governor William Cosby.

By 1726, a restless Zenger split from Bradford and set up a competing printing shop across from the Morrisite haunt, the Black Horse Tavern. Zenger was soon printing tracts written by Morris and Alexander. Bradford's paper was the house organ for Cosby and crew, so Morris and Alexander turned to Zenger to help get their anti-Cosby message out.

The result, the brainchild of Morrisite James Alexander, the unquestioned best lawyer in New York, was the Zenger-published "New-York Weekly Journal"

in late 1733. Alexander and Morris intended to use it as a vehicle to make Cosby and his royal administration accountable to the people. As the most prominent and wealthy lawyer in New York, Alexander had a lot to lose and thus concealed his involvement, lest he be charged with seditious libel or worse.

Zenger was a businessman without any particular political leanings, but he knew this was risky business. So he made a deal. He would print, and Morris and Alexander would write, but Alexander would pay for everything and defend him for free if he was charged. And Zenger would not betray his backer's identity.

The newspaper was a hit as each issue turned up the heat on Cosby. After only 11 issues, Cosby could take it no more—he had Zenger charged with seditious libel. But a grand jury refused to indict. Morris and Alexander were emboldened and hit harder at Cosby's clumsy attempt to silence the free press.

Although many suspected Alexander and Morris to be the authors of the allegedly offending articles, they remained silent, as did Zenger. And Cosby seemed content to charge only the hapless, apolitical printer.

After Issue #49, Cosby tried again, but a second grand jury also refused to indict. Undeterred, Cosby had the Governor's Council issue a warrant for Zenger's arrest. The printer was thrown into a cell in City Hall and the lawyer, Alexander, donned his barrister's wig and headed for court. The battle lines were drawn.

Zenger had a net worth of only 40 pounds. But bail was set at 10 times that. His wealthy patrons could have bailed him out, but instead let him languish in jail, because their willing pawn was more useful as a martyr.

Yet, a third grand jury refused to indict. So, now, Cosby's attorney general charged Zenger by information for "false, scandalous, malicious and seditious" content in Issues #13 and #23.

Although the trial judge was a loyal Cosby man, public opinion was decidedly with Zenger. Alexander honored his secret bargain with Zenger and mounted a vigorous defense, filing exceptions challenging the Court itself. Not amused, the Court barred both Alexander and his associate William Smith from practicing law in the colony—an extraordinary turn of events evidencing the bitter partisanship afoot.

The Court then appointed a young John Chambers to represent Zenger. Alexander and Smith quickly determined that Chambers was not up to this task. So Alexander did what he did best: he ghostwrote a lengthy statement for Zenger to make to the Court and another for Chambers.

And, he did one more thing: he secretly engaged "the most accomplished barrister in the American colonies," Philadelphia lawyer Andrew Hamilton.

Curiously, Hamilton actually had a reputation for opposing a free press,

having twice, as a member of the Pennsylvania Governor's Council, voted to censure, prosecute, and punish printer Andrew Bradford for seditious libel.

But Hamilton knew the value to a lawyer of a cause célèbre and agreed to defend Zenger for no fee. Alexander had offered him a starring role in the case of the century—an offer he could not refuse.

What Hamilton probably did not appreciate until he made his surprise appearance in Court was that Alexander had masterminded, orchestrated, and scripted almost every detail of this affair from the beginning, all behind the scenes, including virtually every aspect of Zenger's defense. Although eloquent and brilliant in his own right, Hamilton would be playing a part written by another. Yet, only he would get the credit and the glory, while the real hero remained in relative historical obscurity.

The defense that Hamilton mounted had been devised in great detail in Alexander's notes written before his disbarment. Alexander shared them and his experience and wisdom, which Hamilton used to achieve victory. The defense was simple, albeit illegal—

the matter published by Zenger was true and that which is true cannot be seditious libel. While we take this point as axiomatic, it was not so then. In fact, truth was clearly then not a defense, so what Hamilton (channeling Alexander) sought and secured was jury nullification.

Since Zenger admitted the publications, no witnesses were called. The jury of 12 men deliberated for only 10 minutes, voting, as Hamilton asked them, to "their conscience!"

Zenger had spent nine months in prison. He became a martyr and Hamilton a revered hero. Alexander remained in the shadows, smiling but, unheralded.

If he had chosen the limelight, today we might be telling stories of the first "New York Lawyer" James Alexander, instead of Andrew Hamilton, the first "Philadelphia Lawyer." ■

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Ethics

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a pig about money; second, my spouse had great jobs and, eventually, tenure. Those both made the task of being ethical and professional easier; the potential personal consequence of tough decisions or advice now are not so dire.² But still, there were tensions between the profession and the business. Now, after 40-some years, those potentially "career-ending" or "job-ending" decisions don't mean the same as they did when I was a 30-something lawyer. I'm not looking at more decades of lawyering; who knows? So whatever the economic and personal risks are of doing the right thing and not bending to expediency, those risks now carry less personal consequence. It has nothing to do with being "older and wiser;" just older. The children are grown, mortgages are paid, and we are learning about RMDs.

That profession/business dichotomy referenced at the beginning of this paper just doesn't loom as large now. And that,

by itself, makes the ethical decisions easier, just because they have less consequence for me personally, economically, and career-wise. A friend put it this way: "it's no biggie if there's a problem." And that's something we all need to keep in mind, both when evaluating our own responsibilities and adherence to rules and norms, and particularly when critiquing the actions of others. I am no braver than I was years ago. But there is less consequence for me. Period. Sure, I can still lose a client or a job, but not a career, because of where I am in life. I will not be betting the "ranch" (actually, in my case, apartment) with my choices, because the economics are, for me, pretty well set. I might lose some income or piece of economic security, but I am no longer in danger of having to start over.

So, what does that mean, day-to-day? It seems less threatening to speak my mind, though I feel like I always did. In a light-hearted way I was always telling lawyers who asked that it was easy for me to follow my notion of the "right thing to do"

because: 1) I wasn't greedy; 2) I had no student loans; and 3) my spouse had tenure. The only thing that's changed is that she is emerita. I still speak my mind, and—mostly—give the advice the client needs rather than what they want. I hope there has been a slight reduction in my callowness and incivility. But I know that I have clients, partners, judges, and friends who say otherwise. But I am no longer quite as frightened when they do, and that makes all the difference. ■

¹"*Obstreperosity*," 33 *ABA Litigation*, No. 1, Fall 2006

²*Gilbert and Sullivan*, "I am the Captain of the Pinafore" (1878)

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