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Ready or Not, A Gay Client May Be Waiting to See You

BY SHARON THOMPSON

Your staff has scheduled an estate planning appointment for you. When you meet the client you discover that he is gay, that he has substantial individual and joint assets with a partner, and that he is raising two children who were adopted by his partner. Are you prepared to advise him about the legal and financial aspects of his property ownership? Are you able to prepare the appropriate estate planning documents? What advice should you give about his possible parental rights and how to protect them?

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When I entered the legal profession 30 years ago, most new lawyers kept their sexual orientation a well-guarded secret, fearing the negative scrutiny of the local bar "character interview" and the possible denial of admission to the bar. Today, it is estimated that over 50% of law schools have gay and lesbian student groups (including most of the law schools in North Carolina), over 30% have courses on sexual orientation, and over 60% have openly gay faculty members.[1]

Being gay has now even become an advantage in the job market as major firms seek to support and enhance diversity among their attorneys and staff in order to remain competitive in today's job market.[2] Further evidence of increasing LGBT[3] recognition among law firms is found in the number of firms which provide domestic partner benefits. One estimate is that such benefits are provided by over 800 law offices, including at least nine large North Carolina law firms and probably many smaller, unreported firms.[4]

Not only have law schools and law firms changed, but so have many of our professional organizations. The American Bar Association has been very active in supporting legal issues that impact LGBT clients[5] and in providing resources so that attorneys can become knowledgeable and competent and offer quality representation to LGBT clients.[6] On the state level, North Carolina has had a statewide association of LGBT

attorneys and supporters since 1995 which has been very active in providing a network of support for attorneys practicing in this area and in presenting CLE seminars with national and state leaders to educate attorneys about legal issues affecting LGBT clients in our state.[7]

Thirty years ago, fear of the consequences of acknowledging one's sexual orientation led many individuals to never admit it—even to their lawyers and even if it was crucial information for an attorney to know in order to provide proper representation. Instead, parents gave up custody or agreed to limited visitation rather than face totally losing custody of their children in court; men arrested for the felony of a crime against nature faced the loss of their jobs, their families, and public humiliation. And life partners who could not face going to a lawyer to ask for a will leaving their estate to each other, lost everything when their partner died without a will and distant relatives inherited everything, including the right to evict the surviving partner from his or her home.

Today, with a gay character on TV most every night, with the growing awareness by gay couples of the need to legally protect themselves, and with the increased number of children being raised by LGBT parents, it's inevitable that soon you might find a gay or lesbian individual, couple, or family sitting in your conference room waiting for your legal advice. The numbers are telling. According to the 2000 census, there are 16,198 same-sex households in North Carolina, a 720% increase from 1990.[8] Applying the conclusion of one study which determined that even these figures underestimated the number of LGBT individuals in this country by at least 62%, there may be more than 26,000 same-sex households in North Carolina. [9] It is also estimated that one-third of lesbian couples and one-fifth of gay male couples are raising children, between one to nine million children have LGBT parents, the highest percentage of same-sex couples with children live in the South, and there are between 4,000 to 10,000 same-sex households with children in North Carolina.[10]

Contrast this burgeoning number of same-sex households with the number of families often assumed to be the typical American family—two parents and children living in the same household. According to a

recent study commissioned by LexisNexis and *Redbook* magazine, only one-half of all US adults live with a spouse or opposite-sex partner and of that number, only 36% currently live with their biological children.[11] That translates into only 18% of all adults living with their spouse and children. In North Carolina, it is estimated that 144,000 unmarried couples live together.[12] Given these statistics about American families, with both same and opposite sex parents, perhaps we all need to adjust our thinking about what might be our typical family law client.

As lawyers in today's changing world, you will probably come in contact with someone who is gay in your professional life, either as a client or opposing party, a colleague, court personnel, law enforcement officer, or elected official. It is time to address our own feelings, our professional obligations, and our desire and ability to represent such clients. If you are comfortable and want to represent LGBT clients, then it is incumbent upon you to provide competent, knowledgeable,

and sensitive representation.

Professional Responsibilities

Unlike at least 16 other states which have language in their professional ethics codes prohibiting bias, prejudice, harassment, or discrimination based on sexual orientation,[13] North Carolina has no such provisions. In fact, North Carolina's rules have no such prohibition regarding discrimination in any form. Furthermore, North Carolina has no provision like those found in the Codes of Judicial Conduct of at least 32 other states which mention "sexual orientation," usually regarding a prohibition against acting with bias.[14] But, our first rule of professional conduct does state that a lawyer shall not handle a matter unless he or she is competent to do so and that competent representation requires "legal knowledge, skill, thoroughness, and preparation."[15] Before undertaking to represent LGBT clients in accordance with the level of competence required by this rule, attorneys need to examine their own feelings and level of comfort in dealing with such clients, look at the type of representation their firm is providing, and ascertain their level of knowledge about issues facing LGBT clients.

The language we use is one way to look at our own feelings and what we convey to others. As lawyers, we know the power language can have and its impact on a listener. We spend a great deal of time crafting language in documents, bringing lawsuits disputing language in deeds, wills, and contracts, and fine-tuning our trial arguments for a judge or jury. So, if speaking to a gay person or discussing a gay issue is something new to you, then learning about what is or isn't appropriate language is important. Consider the difference between saying "our firm *tolerates* gay clients" versus "our firm *supports* gay clients."[16] Learn not only what language your potential clients might find offensive, but also why. For example, "gay lifestyle" is seen as a derogatory term because gay people are as diverse as the rest of the population.[17] There are many websites and publications which provide useful definitions and explanations.[18] If you're not sure how to address someone or how to talk about an issue, just ask. People appreciate your honesty and your desire to understand and use correct terminology. Demonstrating respect by the language you use will go a long way towards making your clients or colleagues who may be LGBT, or anyone else who believes in LGBT equality, to feel comfortable and willing to open up to you. Three words that you should learn to use comfortably are the words that gays and lesbians use to describe themselves and their relationship: gay, lesbian, and partner.

It is also important to explore your own attitudes. If you are not comfortable relating to or working with gay individuals, or if you have religious or personal beliefs that prevent you from treating such clients with the same respect and dignity you would accord any other clients, then don't do it. If you find yourself as opposing counsel to a gay client, examine whether you can treat that person fairly and respectfully and not harass the other side or use exposure of a person's sexual orientation as a threat or intimidation to gain an advantage in the case.[19] It is also helpful to look at your understanding of what it is like to be gay, what it is like for a gay person on a day-to-day basis, and what privileges you might take for granted as a non-gay person. What would it feel like not to be able to put a picture of your loved ones on your desk, not to have access in a hospital to whom you consider family, or to hide who you are for fear of losing your job or your home?

If you undertake to represent LGBT clients, educate yourself thoroughly so that you will provide competent representation. Mistakes are easy to make if you are not well-versed in all the ramifications of an issue. For example, simply copying a form sperm donor agreement you have obtained would be poor representation if you do not know the answers to questions such as: whether our law recognizes any parental rights for a donor, whether the biological mother can sue the donor for child support, and how have such agreements been treated in other states.

Beyond your own individual representation of LGBT clients, look at your firm and its procedures. Imagine yourself as a lesbian or gay client coming to your firm's office. How welcome would you feel? Does your office intake form only ask if a client is married or single? Do all your forms repeatedly use the term spouse and not other options such as partner? How does your staff treat new clients? Review your office forms and procedures and train your staff if necessary to insure that your firm has a reputation of being respectful and sensitive to the needs of LGBT clients.

As one author noted, "If we are to fulfill our ethical duties, we must create a safe environment in which clients can disclose confidential information, protect our clients from our bias or that of others, be knowledgeable in substantive areas of the law, and treat our clients with dignity and respect."[20]

Specific Areas of Law

Whether unique legal treatment is warranted when representing unmarried same-sex or opposite-sex clients[21] must be considered in almost any area of law—from family law, estate planning, and transactional matters to housing, employment, and criminal law. In most instances, there is no specific North Carolina law that addresses unmarried couples, and in order to provide adequate and helpful advice, an attorney needs to be familiar with the laws in other states, the national trend in a specific area, or proposed uniform codes which might be helpful.

There are a few areas of law which impact most LGBT clients. The sidebar on page 10 provides basic information and suggestions so you will be prepared to advise your first LGBT client.

Conclusion

As statistics and social history are demonstrating, the number of people who are in unmarried relationships or creating different forms of family will continue to significantly grow. In order to provide these individuals with the best legal representation, attorneys need to be knowledgeable about the relevant law, creative in pursuing new legal approaches, and personally comfortable with representing same-sex clients. If you are such an attorney, you will find it extremely rewarding to assist such potential clients, not only in protecting their property interests and their estates at death, but most importantly, in helping them and their children stay together in their chosen families. Your support will be welcomed by the LGBT community in this state. ■

Sharon Thompson has been practicing in North Carolina for over 30 years in the areas of family law and estate planning. She particularly enjoys working with LGBT clients. In 1978, she co-founded the NC Association of Women Attorneys, and in 1995 she co-founded the NC Gay and Lesbian Attorneys Association. Ms.

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Thompson also served in the North Carolina General Assembly from 1987 through 1991.

For links to LGBT legal resources, see the website of NC GALA, www.ncgala.org/ Sites_of _Interest.htm.

Endnotes

1. "A Lawyer Class: Views on Marriage and Sexual Orientation in the Legal Profession," William C. Duncan, BYU Journal of Public Law, 15 BYU 137, 164-177 (2001).
2. See, for example, the website for National Lesbian and Gay Lawyers Association, an affiliate of the American Bar Association, which sponsors a national conference each year for LGBT attorneys and law students that includes a job fair with well over 60 law firms, www.nlgla.org.
3. Many terms are used to describe persons who express sexual or gender identities that differ from male/female heterosexuality. In this article, the terms "lesbian or gay" or "LGBT" (lesbian, gay, bisexual, and transgendered) will be used to include all such persons.
4. See the National Association of Legal Career Professionals Directory of Legal Employers at www.nalpdirectory.com.
5. The ABA has approved resolutions in support of adoptions by unmarried persons who are functioning as a parent, opposed restrictions on foster care placement on the basis of sexual orientation, opposed amending the federal constitution to restrict states' ability to define marriage, and urged the federal and state governments to enact legislation prohibiting discrimination based on gender identity or expression in employment, housing, and public accommodations. See American Bar Association, Policies Adopted by the ABA House of Delegates, Chapter 13, www.abanet.org/policy/policies_adopted _ABAhouse_of_delegates06-07.pdf.
6. ABA divisions, such as the General Practice, Solo & Small Firm, Family Law, and Estate Planning, have sponsored several CLEs, put articles on their website, and published books on subjects related to representing same-sex couples. See www.abanet.org, Estate Planning for Same-Sex Couples, www.ababooks.org.
7. NC Gay and Lesbian Attorneys Association (NC GALA). See their website at www.ncgala.org. There is also a nonprofit organization, the NC GALA Institute for Equal Rights, which works with law students and volunteer attorneys to provide education, information, and resources to the state's LGBT community.
8. David M. Smith and Gary J. Gates, Ph.D., *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households, A Preliminary Analysis of 2000 United States Census Data*, a Human Rights Campaign Report 4, (2001).
9. *Id.* at 3.
10. Married—Couple and Unmarried—Partner Households: 2000, Census 2000 Special Reports, US Census Bureau, February 2003.
11. http://research.lawyers.com/common/content/ print_content.php?articleid=1039364&
12. www.wral.com/print/9549145/detail.html.
13. Duncan, supra at 159-163.
14. Duncan, supra at 148.
15. Rule 1.1, NC Rules of Professional Conduct.
16. Susan Ann Koenig, "Fulfilling Our Ethical Duties—Regardless of Client Sexual Orientation: Considerations in Meeting the Needs of Our Gay and Lesbian Clients," The Nebraska Lawyer, April, 1999.
17. Media Reference Guide—Offensive Terminology to Avoid, Gay & Lesbian Alliance Against Defamation (GLAAD), www.glaad.org/media/ guide.
18. See Stylebook Supplement on Lesbian, Gay, Bisexual, & Transgender Terminology, www.nlgja. org/resources/stylebook_english.html; Gay, Lesbian, and Bisexual Issues, www.healthyminds.org/glbissues.cfm; Responsible Representation of Your First Transgendered Client, www.texasbar.com/ Content/ContentGroups/Publications3/Journal/ 2003/July.
19. The preamble to our Rules of Professional Conduct states that a lawyer should not use the law "to harass or intimidate others" and a lawyer "should demonstrate respect for the legal system and for those who serve it."
20. Koenig, supra. See also, Amy Miller, "Professionalism and Sexual Orientation," The Nebraska Lawyer, January, 2004.
21. In most instances, the same legal issues apply to all unmarried couples, regardless of whether they are opposite or same sex. The major differences are that only opposite-sex couples can marry in this state and a male opposite-sex partner can establish biological and legal paternity, while a same-sex partner has limited options in establishing parentage of his or her partner's child.

What You Can Do to Provide Legal Protections for LGBT Clients

Ownership of Property

Create joint ownership if appropriate: after explaining the pros and cons of joint ownership (such as access, liability, right of survivorship if specifically stated), put both names on property the clients want to jointly own such as bank and investment accounts; beware of gift tax issues, valuation at death, and how property would be divided upon separation of the parties. Another option is to create "payable on death" accounts for bank and brokerage accounts.

Carefully consider how automobiles should be titled: sometimes individually is best in order to avoid joint liability or joint debt, and there are fewer problems if the parties separate.

Real property ownership: explain differences between tenants in common and joint tenants with right of survivorship, including tax and inheritance consequences, and rights and options if parties separate; select ownership form that best meets clients' financial needs or possible family challenges if property passes through will rather than survivorship; suggest purchase money deed of trust with possible annual gifting if one partner wants to add the other to a deed and one-half the equity is more than yearly gift tax exemption.

Retirement and life insurance: discuss importance of naming desired beneficiaries, both primary and secondary, and the pitfalls of naming the estate; know the options available at the death of partner for the surviving partner who is named as the retirement account beneficiary, including the significant changes in the Pension Protection Act of 2006 which for the first time allows non-spouses to roll over retirement accounts to their own IRA.[1]

Carefully consider gift and capital gains tax consequences in any property transfer between partners: remember that any gifts between partners may be subject to federal and state gift taxes and NC is one of only a few remaining states which make distinctions between donees based on family relationship and imposes the highest tax on gifts to Class C donees (distant family members and persons unrelated by blood).[2] Also consider the future capital gains tax possibilities of any gift transfer and whether there are other options which will create a step-up in basis.

Domestic partnership agreement:[3] clarifies how property is owned between partners, how property would be divided if relationship ends, and how to determine value and what legal principles shall be applied in determining division of property, possible waiver of right to partition, whether parties have any other claims for support, and alternative dispute resolution options.

Division of property upon separation: know possible remedies available such as contract and equity principles, consulting and resulting trust, quantum meruit, estoppel theories, and how to value each partner's interest in property;[4] consider and suggest best options for out-of-court resolution of dispute.

Estate Planning[5]

Health care power of attorney and living will: allows individual to designate partner as agent to make medical decisions; add provision stating that agent shall have first priority to visit in hospital; add HIPPA releases; use state regulations which prohibit discrimination against patients based on sexual orientation if any problems arise.[6]

Power of attorney: make sure there are no references in office forms to "spouse," nor limitations of powers to only spouses; provide that agent, not family, be consulted by medical provider in any determination of incapacity.

Last will and testament: specifically provide that partner is to make funeral arrangements;[7] detail family relationships, including relationship with partner's children if partner is appointed guardian of children; acknowledge joint ownership or personal property, forgive any outstanding loans between partners, and acknowledge that testator or testatrix is fully aware of what he or she is doing and desires to leave estate to partner or friends and not family.

Revocable living trust: helpful mechanism to take property out of client's estate and avoid possible challenges to will; also provides privacy and is useful for more complex distribution of assets such as to partner first, then family of client.

Minimizing estate challenges: explore with client whether there might be any family challenges to will and how best to protect surviving partner; if challenge is serious possibility, do not represent both partners, but if you do represent both, have them sign a joint representation letter.

Tax issues: without the marital deduction option and taxable gift transfers, it is difficult to do tax planning for the deaths of unmarried couples; explain limited options, pros and cons of credit shelter trusts especially if no children who would benefit, and possible need for a life insurance policy to cover cost of any inheritance taxes.

Establishing Parentage[8]

Donor insemination and surrogacy agreements:[9] establishes rights between the parties and clarifies that donor or surrogate has no parental rights or responsibilities and prospective parents shall have all legal rights to any child; useful in any future dispute regarding custody and supports argument donor or surrogate knowingly and fully relinquished parental rights.

Parenting agreement: clarifies rights and responsibilities of both parents, the biological or initial adoptive parent and co-parent who otherwise has no legal parental rights, both while in a relationship and to provide for custody and support if relationship ends; include provisions waiving legal parent's paramount rights and requiring nonlegal parent to provide child support; although court not bound by agreement, it is helpful as

evidence of parties' intent regarding raising a child together and effect on child if access to nonlegal parent were denied.

Minor's health care power of attorney:[10] is signed by legal parent and authorizes parent without legal parental rights to make medical decisions for his or her child.

Guardianship in will: important to not only appoint nonlegal parent as guardian but also, since clerk of court has discretion regarding who is actually appointed, add provisions explaining relationship to child, how partner has been raising child from birth, etc. and why it would be in best interests of child for partner to be guardian.[11]

Securing additional rights for nonlegal parent: consult with knowledgeable family law attorneys about other possible documents and legal procedures for establishing rights for partner who has no existing legal ties to his or her partner's child.

Resolving Custody Disputes

Disputes between formerly married parents: know latest case law, argue that nexus must be shown between parent's sexual orientation and effect, if any, on child;[12] find out about similar cases that might have been decided in your local area; remember no appellate case has been decided since *Lawrence v. Texas*[13] and a superior court ruling that our cohabitation statute is unconstitutional.[14]

Disputes between same-sex parents:

National trends: know what theories are being used in other states to establish legal parentage for a partner who did not adopt or who is not genetically related to child he or she has been raising, including equitable parenthood,[15] "intended parenthood" concept under the Uniform Parentage Act, and the definitions of parent and the factors to consider by a court in determining parentage contained in the American Law Institute (ALI) Principles of the Law of Family Dissolution: Analysis and Recommendations (2000).

North Carolina:[16] if representing nonlegal parent and court does not find client to be a legal parent based on above theories, then argue client has standing based on *Ellison v. Ramos*,[17] that legal parent has acted inconsistent with his or her paramount parental rights citing *Price v. Howard*,[18] and that it is not necessary to show unfitness on the part of the legal parent pursuant to *David N. v. Jason N.*[19]

Child support: nonlegal parent may be secondarily liable for child support pursuant to N.C. Gen. Stat. §50-13.4(b) as a person "standing in loco parentis..."

Endnotes

1. Pension Protection Act of 2006 (P. L. 109-280).
2. N.C. Gen. Stat. §105-188.
3. Although there is scant N. C. law on this subject, it can be inferred that our state stands with the majority of other states regarding property rights and remedies for unmarried couples. *See Lee's North Carolina Family Law,* Chapter 4, Nonmarital Living Arrangements (S. Reynolds 5th ed. 2002). No rights are established simply by cohabiting and the courts will not apply our domestic laws upon dissolution of an unmarried relationship (although the parties could agree that a mediator or arbitrator do so). No court has directly recognized a contract based solely on the relationship between the parties and, of course, any contractual agreements that appear to be based on sexual services would be void as against public policy. *See also* William A. Reppy Jr., *Cohabiting Couple's Property Rights and Conflicts of Laws*, and T. Michael Godley, *Co-ownership and Domestic Partnership Agreements*, both in *Emerging Legal Issues: Non-Traditional Families*, (NC Bar Foundation Continuing Legal Education, April, 2004).
4. *Suggs v. Norris*, 88 N.C. App. 539, 364 S.E.2d 159, *cert. denied*, 322 N.C. 486, 370 S.E.2d 236 (1988); *Patterson v. Strickland*, 515 S.E.2d 915 (N.C. App. 1999), 2003 N.C.App LEXIS 429 (2003), unpublished opinion; *Wike v. Wike*, 115 N.C. App. 139, 445 S.E.2d 406 (1994); *Thomas v. Thomas*,102 N.C.App. 124, 401 S.E.2d 396 (1991).
5. See the website of the Elder Law Clinic at Wake Forest University School of Law for a resource list about estate planning for same-sex couples, http:// www.law.wfu.edu/x5468.xml.
6. N.C. Admin. Code 13B.3302.
7. *Dumouchelle v. Duke University*, 317 S.E.2d 100 (1984), testamentary provisions directing disposition of testator's body prevail over conflicting wishes of next of kin and are valid prior to probate of will.
8. When a married woman gives birth, her husband is legally presumed to be the father of her child. When an unmarried heterosexual woman gives birth, paternity of the father can be established through DNA testing and a paternity order thereby establishing the father as a legal parent. When same-sex couples decide to have children, either through adoption or assisted reproduction, establishing parentage of the child becomes a complex maze of medical and legal procedures. Whatever method is used by a same-sex couple to create their family, only one partner is initially able to be a legal parent.
9. There is no NC statute or case law specifically addressing unmarried couples or single women who bear children through donor insemination, nor is there a statute that defines the parental rights or obligations of a sperm or egg donor, nor any statute, civil or criminal, mandating the supervision of donor insemination by licensed physicians and no statute prohibiting surrogacy or surrogacy contracts.
10. N.C. Gen. Stat. §32A-28.
11. N.C. Gen. Stat. §35A-1225 provides for such a testamentary appointment and "*...such recommendation shall be a strong guide for the clerk in appointing a guardian, but the clerk is not bound by the recommendation if the clerk finds that a different appointment is in the minor's best interest.*"
12. *Pulliam v. Smith*, 476 S.E.2d 446 (1996); rev'd 501 S.E.2d 898 (1998); *Marshall v. Sizemore*, 493 S.E.2d 89 (1997); *Epperson v. Epperson,* 536 S.E.2d 366 (2000); *Shipman v. Shipman*, 586 S.E.2d 250 (2003), case does not involve gay parents, but our Supreme Court held that the effects of a change in circumstances, including a change in a parent's sexual orientation, on a child's welfare "...are not self-evident and therefore necessitate a showing of evidence directly linking the change to the welfare of the child." *Id.* at 256.
13. US Supreme Court case invalidating application of sodomy statutes to private consensual sex, 123 S.Ct. 2472 (2003).
14. *Hobbs v. Smith*, 05 CVS 267, Pender County; unpublished opinion decided Aug. 25, 2006.
15. T. Fowler & I. Nelson, *Navigating Custody Waters Without A Polar Star: Third-Party Custody Proceedings After Petersen v. Rogers and Price v. Howard*, 76 N.C.L. Rev. 2145, at 2206 (1998).
16. To date, there are only a few cases which have been decided at the trial court level in North Carolina, one of which is now on appeal. In at least three cases, the co-parent was found to be a legal parent and a best interests standard was applied in awarding custody to both parents. In one of these cases, the trial court ruled, based on *Price v. Howard*, that the biological mom had relinquished her paramount rights by consenting to the partner's adoption of the child in another state. In only one known case has a court ruled that the co-parent was not a legal parent and did not show that the legal parent had relinquished her paramount rights.
17. "Where a third party and a child have an established relationship in the nature of a parent-child relationship, the third party does have standing as an 'other person'...to seek custody." 502 S.E.2d 891, 895.
18. *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997).
19. *David N. v. Jason N.*, 608 S.E.2d 751 (2005).

Some Thoughts on Lying, Cheating, and Stealing

By John Winn and G.S. Crihfield

The Anglo American tradition created three professions: the clergy, the law, and the military. In the 19th century, the medical profession joined the three traditional professions to constitute the professional world we know today. Persons engaged in the learned professions were expected to conduct themselves in an honest and honorable manner and exercise sound and impartial judgment even in very critical situations. As with most theories concerning standards of conduct, there are circumstances where members of professions stray from their strict obligations of candor and honesty to their constituents.

Steve Dininno/SIS

The North Carolina Rules of Professional Conduct in Rule 8.4(c) state it is "professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[1] Lawyers hold a place of privilege, special trust, and confidence in society. Violations of the Model Rules of Professional Conduct that involve culpable deception, dishonesty, or theft which occur within the course and scope of professional duties cause disproportionate injury to public confidence and overall respect for the legal profession.

At a less dramatic level the issues we raise in this article continue to diminish public respect for lawyers. A recent Columbia Law School poll found that four in ten Americans viewed lawyers as "essentially dishonest."[2] Lawyer jokes, many deeply contemptible, reflect poorly on an honorable profession. At best, the public sometimes views us as no more than a "necessary evil." At worst, we are considered devious, mercenary, arrogant, and money-grubbing. A recent letter to the editor of the *Greensboro News and Record* even described us as "blood suckers."

Thankfully, the vast majority of lawyers act with honesty and candor. Good lawyers remain unencumbered by fear of sanctions and embrace the rules of professional conduct as being essential to preserve the public's trust. Michael Josephson noted that "though the adversary system promotes the

vigorous pursuit of victory, it does not give the lawyer any moral dispensation for use of dishonorable, dishonest, or disrespectful tactics simply because they are permitted."[3]

Unfortunately, some believe the North Carolina State Bar has not done enough over the years to effectively remove bad apples from the profession. (Since 2001, the DHC has disbarred 42 lawyers, and 33 lawyers have surrendered their license.) Generally, North Carolina has a good record in disciplining its attorneys. A recent article in *Lawyer's Weekly* raised the issue of whether stealing from a trust account was a "death sentence" for being able to practice law again.[4] Most disbarred lawyers in North Carolina have considerable difficulty in receiving their licenses anew after being disbarred. (Since 2001, the DHC has not granted reinstatement to any of the eight lawyers who have petitioned.) On the other hand, the State Bar has worked hard to suspend lawyers from practice and stay the suspension on conditions the lawyer cure those specific shortcomings leading to the grievance.

The Grievance Committee, however, also occasionally receives responses from lawyers with respect to complaints filed against them under the Rules of Professional Conduct which, of themselves, appear to be, or are, false or seriously misleading. Arguably, the Grievance Committee should respond vigorously in such circumstances. Dishonesty of this nature casts an immediate pall on both the grievance process and the legal profession at large. Often enough, the seriousness of these deceptions exceed *in gravamen* the underlying grievance to which the lawyer is responding. The State Bar has a rule which can trigger a grievance, *sua-sponte*, should a lawyer submit potentially false or misleading information in a response to an initial inquiry by the Grievance Committee as a part of any State Bar disciplinary proceeding.[5]

Another area of concern is the number of attorneys disbarred for misconduct who seek reinstatement. In some jurisdictions, reinstatement has become a virtual "revolving door."[6] Nationwide, nearly half of suspended and disbarred attorneys who apply nationwide gain readmission to the bar.[7] Not surprisingly, these "bad apples" subsequently tend to accumulate additional sanctions despite previous disbarment.[8]

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To address these concerns, at least in part, an additional proposal might include a requirement in North Carolina that all disbarred or attorneys suspended for violations of 8.4(c) seeking reinstatement retake and pass the Model Professional Responsibility Exam (MPRE) prior to readmission. This constitutes a demonstration of minimal acquaintance with those standards which may have led to disbarment or suspension. Retaking an ethics examination, however, should be only one component of a process coupled with other conditions that the Disciplinary Hearing Commission often imposes.

Truth and honesty in their greatest perfection can occasionally be difficult. While minor lapses and shortcomings are not uncommon, they should not be condoned. Nevertheless, some misconduct, while clearly wrong, may not rise to a level which merits the drastic remedy of disbarment. For these reasons, exceptions should be made for defined minor violations of Rule under Rule 8.4(c), especially when there has been prompt remediation and candor by the lawyer as appropriate.

The North Carolina Chief Justice's Commission on Professionalism together with the State Bar and the North Carolina Bar Association has taken the lead nationally to promote professionalism and keep these issues before the members of the Bar on a regular basis. Likewise, the State Bar requires a one hour CLE program on mental health and substance abuse issues, frequently found to be an underlying cause for misconduct on the part of attorneys.

Justice Tom Clark noted almost 30 years ago that unless the Bar embraces "a spirit of honesty and decency and unless it is inspired to insist upon the exercise of the highest ideals in the practice of law, then no disciplinary system can be effective and no code of professional conduct will be anything more than a hypocritical farce."[9] As a profession, we must all keep before us our sacred obligations to the public to meet those requirements of conduct. To these ends, it is our hope that this article will generate discussion among members of the profession and the members of the State Bar Council to consider these issues. ■

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Lessons in Disaster Planning

BY CARL YOUNGER

For many residents of Louisiana and Mississippi, August 29, 2005, is bitterly carved into their memories. Hurricane Katrina came ashore with rain, winds, and a storm surge that destroyed entire towns and severely weakened the levee system that protected New Orleans. The eventual breaches of the levees allowed a majority of the city of New Orleans to flood. Damages to the region have been estimated to be $84 billion. Those estimates do not include the disruption of oil and natural gas supplies or shipping interruptions for movements of products through the port of New Orleans. No estimates exist for the individual losses and the impacts of dislocations for entire communities and almost half of the population of New Orleans. Over 1,883 people died. Over 700 are still missing. Louisiana and Mississippi know how to define disaster in a single word—Katrina.[1]

Paul Anderson/SIS

North Carolina also knows a single word for disaster—Floyd. During the late summer and early fall of 1999, a series of Hurricanes—Dennis, Floyd, and Irene—dumped almost 40 inches of rain over parts of Eastern North Carolina. The Tar River flooded parts of Rocky Mount, Tarboro, and Greenville. The proud town of Princeville was largely destroyed. Over 7,000 homes were destroyed, over 17,000 were rendered uninhabitable, and over 56,000 were damaged. Total losses for North Carolina were estimated to exceed $4 billion, with 35 people losing their lives.[2]

A New Awareness—Disaster Planning

The impact of Katrina and other major storms, such as Floyd, has produced a new awareness among businesses, including lawyers and law firms: the need to create plans on how best to respond to disasters. However, lawyers have recognized that disasters occur in many different forms and affect attorneys who are not in areas potentially impacted by hurricanes, tornados, earthquakes, or other natural disasters. Disasters for law firms occur when a major disruption occurs in the normal operation of the firm. Would you consider the following to be a "disaster?"[3]

- A firm laptop with sensitive client information is lost or stolen, or the entire firm computer system "crashes" and cannot be restarted.
- A key firm assistant departs without warning (perhaps having won the North

Carolina education lottery).

- A lawyer in the firm unexpectedly becomes severely ill or disabled.
- The law firm's offices are destroyed by fire, a hurricane, or some other natural disaster.

While all of these events are disasters, each has unique responses and solutions. The adverse impacts of various types of disasters can be lessened or even eliminated IF certain precautions are taken.

Become a "Smart" User of Data Processing Services

The most common disaster for a law firm is not a flood or hurricane but a disruption of its data processing systems. Systems can break down. Computers can become "inoperable" or worse, they can be stolen. However, if care is taken, and a minimal investment made in the protection of equipment and the data stored on a system, most major disruptions— the disasters—can be avoided.

1. Make Prudent Investments in Your System. Changes in electric currents can either "fry" your equipment or delete unsaved data or programs. Put surge protectors on all computers, servers, and printers. Have battery backup for all equipment (except for laser printers—they require too great a battery load).[4]

Recognize that computers and software "age." Unlike attorneys, they do not acquire wisdom as they age; they only increase in their potential to produce an outage or crash. Remember to replace hard drives every three to four years and maintain all media used to store data in a cool and dry location.[5] Purchase updates for all software systems that you use. Locate, in advance, a specialist who can help you with hardware and software problems.

2. Create a Plan and Procedures that Protects Firm Information. At least weekly a story is found in the news about a lost or stolen computer containing large amounts of confidential information. The loss of a laptop containing information on over 25 million veterans from the Veterans Administration was one of the most shocking stories of this type.[6] What can be done to help protect information on your computer and computer system?

a. Limit the amount of information, especially sensitive information, that is stored on any portable device, whether a laptop or a PDA.

b. Install anti-theft software that "locks" the computer after a set number of attempts to access the system.

c. Create "strong" passwords—eight digit passwords using lower case, capitals, numbers, and symbols.

d. Periodically "back up" all data on a computer or computer system.[7]

Many firms will "copy" their system at the end of each day and remove the copy to an off-site location. In situations where the volume of information is extremely large, a firm might hire an on-line service to provide "back-up." For single computer back-ups, technology has evolved so as to allow storage of significant amounts of information on a "thumb drive." Whatever system is used, have a set schedule for copying the information, obey the timing of the schedule, and store the data in a cool, dry place "off-site." The ability to recreate one's systems and the data on those systems will greatly accelerate a firm's ability to recover quickly from any disaster.

Contemplate Life Without Your Assistant

No good attorney or law firm can function effectively without a competent staff. Many attorneys are able to expand their practice by having staff perform needed administrative functions. However, the long term success of a lawyer is dependent on flavoring staff dependency with the salt of effective oversight. Too often an assistant or paralegal leaves a firm and carries their information monopoly with them. How can the prudent attorney or firm prepare for such departures?[8]

1. Create a Firm Manual. Each firm, even a solo, should have a manual that describes how the firm operates, from the opening of mail and the answering of phones, to how bills are prepared and financial accounts are handled. In larger firms, the manual should show the names of individual attorneys, their location in the firm offices, and their assistants or paralegals. General administrative staff should be shown separately with a general description of their responsibilities. While the chief administrative assistant in a large firm will most likely maintain the "firm manual," parts of the manual should be made available to all attorneys and staff.

2. Have Multiple Holders of Computer Passwords. Certain processes call for general secrecy, such as separate, unique passwords held by different individuals for a two password system to initiate financial transactions (e.g. wire transfers). However, general computer access passwords for most firm computers should be held by more than one person. The absence of a key employee should not prevent an attorney, or a firm, from access to a key document, whether a pleading, a contract, or a schedule. While limiting the number of individuals holding passwords is good, limiting computer access to a single person simply guarantees that a problem will occur.

3. Create Multiple Levels of Review for All Financial Systems. Attorneys have special obligations to maintain the financial integrity of their trust accounts. Attorneys also have an obligation to themselves and their firms to insure that their internal accounting systems are operating properly. Even in a solo practice, there can be checks and balances: if an assistant prepares all checks, the attorney should physically sign all checks. Do not allow use of a signature stamp. Have all accounts of the firm audited at least once a year, particularly in connection with the preparation of tax returns for the firm. Do not tempt that trusted employee with the opportunity of spending the rest of their life on the sunny beaches of the Caribbean with your money or client funds.

4. Create and Maintain a Firm Wide Calendar. With PDA's and calendars on our software systems, the days of scheduling problems and missed deadlines would seem solved. The days when an assistant kept a calendar of needed hearings and pleadings "in their head" would seem to be a historical curiosity. Unfortunately, even good systems must be used and must be available for all to see. If an attorney and his or her assistant are absent, the firm needs to know what matters require immediate attention. The information monopoly of individual calendars must be eliminated in the same way that mentally retained calendars have been superseded by computer based systems.

Value your employees. Be thankful for the wonderful support staff that you have. However, do not be a prisoner of their knowledge or expertise. Create an environment that is not dependent on any single person.

When an Attorney Departs—Unexpectedly

As noted above in reference to staff departures, no single person—including an attorney—should have a monopoly on firm information. The protections that apply to employee departures likewise apply to attorney departures. However, unique professional responsibilities are placed on each of us as attorneys: we need to create a plan to address how our practice will be handled if we are unable to provide competent service to our clients. Furthermore, such a plan should consider impacts to one's

firm—including staff, to one's family, and to the profession.

Within a multi-attorney firm, plans should exist regarding how matters are to be reassigned within the firm if an attorney cannot practice for any extended period of time. Special attention should be given to the competence and practice burden of any replacement attorney as well as the wishes of affected clients. Engagement letters should advise clients of the right of a firm, or even an individual lawyer, to designate a replacement attorney to handle matters in the event of death, disability, or incapacity. Furthermore, if substitution of counsel must be made, the firm or the replacement attorney should advise the affected clients of such replacement and include any publicly available information as to the circumstances that required the use of the new attorney.

1. A Special Issue for Sole Practitioners. The American Bar Association has indicated that a sole practitioner should have a plan for addressing a personal absence from practice.[9] *See* ABA Formal Opinion 92-369. Both the ABA and various bar associations (e.g. Arizona State Bar Opinion 04-05 (2005)) have procedures for protecting clients through the introduction of a replacement attorney. What should that replacement process consider?

a. Designate and empower an attorney who is competent in the same areas of practice.

b. Execute an agreement that provides the scope of the replacement attorney's authority, designates the procedures to be followed if the replacement must act (including having an audit of all trust and firm accounts before the other attorney begins handling matters for the firm), and provides for the confidential treatment of firm and client information.

c. If substitution of counsel is formally required for any pending matters, attach a copy of the "Replacement" agreement to show the condition under which the attorney has been called to act and the agreement of the other attorney to the actions in question. Also attach and highlight the provisions of the engagement letter approving the substitution of counsel provision.

A replacement attorney needs to understand that any "clients" of the other attorney become clients of the substitute attorney once he or she begins to work on their cases. Thus, as soon as the replacement attorney receives a clean bill of health on the trust and firm accounts, he or she should review the files to see if the substitute attorney is free of conflicts on these matters and can competently perform the work required.

2. Remember that Others Are Affected. The impact on clients, and the need to keep clients informed, is certainly important. However, attorneys should also be aware of the impacts of any dislocation in their lives on their family and their staff. Each group should be informed of the plans being made by the attorney (or firm for the attorney). In particular, a spouse may need access to individuals with the various bar associations, information regarding applicable insurance carriers and their policies (including the professional liability carrier), a summary of how one's office and practice are to be maintained—both practically and economically, and how one might "wind-up" one's practice if required by death or extreme disability. Members of one's staff are especially affected by any "wind-up" discussions or desires and should understand the arrangements that are proposed for everyone associated with the practice.

As a professional, one needs to address how matters affecting one's clients are to be handled. As the owner, or part owner, of a business, one needs to focus on the economics affecting one's firm. As a member of a family, as a wife or husband, special attention needs to be given to providing as much advanced planning as possible to make any unexpected departure from practice less traumatic to those who are closest to you.

What Happens When the Wind Blows and the Creeks Rise

A new awareness of the need for disaster planning is a direct result of the personal experiences of many on the Gulf Coast—both good and bad—as a result of Katrina. Actions can be taken to eliminate many computer based problems. Plans can be created to lessen the impact produced when staff or attorneys are absent. However, you cannot prevent a hurricane from destroying your office or town, if one strikes, or a flood from inundating your office. Disaster planning for significant natural disasters involves creating a process that allows for the most rapid and complete recovery possible.

1. Have All Members of Your Firm Create a Personal Plan. Based on their experience with Katrina, Gulf Coast businesses discovered the operations that recovered most rapidly were ones staffed by employees who had their "own house" in order. As a result, encourage each person in the firm to create their own disaster plan by assembling needed information and documentation for emergency survival. Create a personal data listing of all phone numbers, social security numbers, insurance policies and contacts (including home, automobile, and professional liability), emergency response locations and phone numbers, and the addresses and phone numbers of close relatives in other locations or states.[10] The more individuals do for themselves in advance, the greater their ability to solve their own personal problems rapidly and to focus their attention on helping the firm recover.

2. Counting Sheep—Inventory Firm Assets. Before you can file an insurance claim for property damage, you must be able to describe your property. Take pictures or make a video: this provides a visual record from which an inventory listing can be developed. Keep the pictures and the physical listing in a safe place outside your office. You may want to consider having a copy of these materials stored on an exchange basis with another attorney in a different town or city. If you have the capability, scan your inventory listing and place that list on your computer (laptop if possible).

3. Water and Documents Don't Mix. Most law offices continue to depend on paper. Paper does not like water. If your office experiences problems with water (and this can even be from your office sprinkler system), contact your property insurance carrier and obtain their recommendation on the firm you should contact to help with document restoration. Remember that you want to have special protections for certain documents— originals of contacts or other special client documents and your insurance policies.[11] As with the listing of firm assets, scanning these documents into your computer system (and being able to take that system with you in your laptop or in a "thumb drive") will save you substantial heart and headaches later.

4. Have Alternative Supplies and Equipment. If your office is completely or partial destroyed or damaged, you may have lost all or most of your supplies and may not be able to use your computers or computer system. Have an offsite "treasure chest" of firm forms, stationery, billing records, and invoices. Consider having a small number of checks stored with these materials. If checks are placed with these materials, insure that the materials not only are in a safe place, but also are secure

from theft. Know where you can quickly locate replacement phones, computers, and support equipment (such as a printer). The fastest way to obtain substitute equipment is often to ask members of the firm to bring home computing systems to the office. Depending on the scope of the disaster, you may be able to quickly obtain substitute equipment from an online vendor (such as Dell). Remember, while insurance might pay for a portion of the replacement costs, you may want the option of using older equipment for a short period of time and applying funds from damaged equipment to an upgrade in your system or even to create a new system (such as substituting a laptop for a desktop computer). If possible, make arrangements within your current system to have fax transmissions appear as emails on your computer and have the capability of sending a fax directly from your computer.

5. Alternative Offices. You cannot predict all of the office space that may or may not be available following a disaster. However, as part of your plan, consider if any client would be willing to have you work from their offices for a short period of time or if any attorneys in your town or a nearby city would be willing to allow you to relocate to their offices. Reciprocal arrangements regarding substitute office space are often a reasonable way to insure that space, even if limited, will be available.[12]

6. Ready, Set, Implement. One of the primary reasons for undertaking detailed planning is to allow a firm to begin operating as quickly as possible after a major disaster. Attorneys know that time is money. Thus, reopening the firm often slows the adverse financial impact associated with the disaster. The Disaster Plan itself should designate a "person in charge" and his or her "backup." The plan should also provide where the firm is to "assemble" following the disaster and who is responsible for various tasks in the reestablishment of the firm (e.g. supplies, offices, equipment, office, etc.).[13] As soon as offices are located and equipment is in place, members of the firm should contact the post office, the courts, opposing counsel, and one's clients. As a general method of informing others, many Gulf Coast law firms carried daily updates of their progress of relocating and reopening, including details of their new location and phone numbers—all on their website. Use your website as a general way to inform as many people as possible as quickly as possible regarding activities within the firm.

Leonard T. Jernigan, Jr., attorney and adjunct professor of law, is pleased to announce that his supplement to *North Carolina Workers' Compensation - Law and Practice* (4th edition) is now available from Thomson West Publishing (1-800-328-4880).

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Are You Ready

Disasters can occur in many forms. The focus on disaster planning is a reminder that bad things happen—even to good lawyers. The key to the process is to anticipate the problems that might occur and to take reasonable steps to eliminate those potential difficulties or reduce their impacts. Advance planning is critical. Remember, however, that creativity and flexibility are also needed—every firm disaster is unique in many ways.

Creativity and flexibility can only go so far. Those who have "straw or stick" systems must often rely on the charity and protection of others who had the foresight to build with bricks. Create your own solid disaster plans for all types of disasters—and be willing to help your fellow attorneys who have less secure systems. In these types of situations, it is truly much better to be able to give help than be required to receive it. ■

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Five Ways to Find Your Purpose after Fifty

BY DAVID CORBETT

Most people can now expect to live longer. Those extra years are a great gift. But they can be an albatross if you don't know what to do with them. A minority of people like to stay the course, whatever it is. But most people find they need to dig down to their core selves and find new goals and purposes that touch something deep inside—the kind of goals that get them out of bed in the morning.

But how does one find a new mission at age 50 or 60 or 80? A growing array of books, courses, programs, and now websites exist to provide suggestions, and many of them offer valuable detailed guidance, worksheets, and resources. Working your way through them all can be a chore. But identifying your new purpose doesn't have to be so major an undertaking that you never do it. There are core ideas and principles you can use to find your purpose after 50. Here are five tools.

1 **Get into neutral.** This is crucial when you leave a career. Resist the temptation to leap into the next phase of your life. Sit still. Take a timeout. Give yourself permission to decompress. The neutral zone is kind of a moratorium on old habits and thoughts. Experiencing such a "white space" can be scary. If we submit to it, however, new thoughts and fresh possibilities will emerge. It will help you redefine who you are now, not what you were. Neutral also helps give you closure on the end of your primary career, and the purposes and relationships it held for you.

2 **Retell your life story.** Stories reveal things your rational mind (and resumes) can miss. If writing is hard for you, imagine you're writing a letter to a friend or speak into a recording device. Recap in brief, or in outline style, the story of your life. As you organize the "facts" of your life, hundreds of images, thoughts, recollections, and memories will begin to cross your mind. Sift and distill these for central themes, interests, activities, and relationships that matter most and express who you are. Use old photos or letters. Pull out your report cards. Read what your teacher wrote about you, and not just your grades. Don't judge. Generate data. There are clues in your past.

3 **Use your verbs.** This technique works throughout the assessment process. The pressures of social status make you think about yourself in nouns—the titles, labels, roles, and affiliations, usually of your career. But nouns close doors. They peg people. Strip them away and get to your verbs. The challenge now is to dream not about what you want to be but what you want to do. Verbs are active and dynamic. What were you doing when you felt excited or fulfilled? Find several examples and then look for patterns in your skills and experience. That will help you redefine what you want to do now.

4 **Write a personal "mission statement."** Companies and organizations have these. Why not individuals? Consider writing a statement reflecting your life vision or mission. Skip tangible goals or specific projects and make a list of the values, beliefs, and interests you care about the most—the motivators that guide you, fire you up, and draw out your best contribution. Only when you have a strong interior sense of these broader life goals can you find the real-time contexts, life opportunities, and markets in which to apply them.

5 **Involve others.** A trusted circle of advisors can be of immense help as you seek new paths. Put friends, present or former work colleagues, and family members on these personal sounding boards. Those who know you well and who are stakeholders in your success can

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From Forsyth to Pender: Reflections from a Thirty-Two Year Judicial Odyssey

By Douglas Albright

When I retired from the superior court bench on December 31, 2005, it ended a public career that had lasted nearly 40 years (almost as long as Moses sojourned in the wilderness). Almost 32 of those years were as a judge of the superior court. At 29 I had been elected as solicitor (now district attorney) for the old 12th Solicitorial District, and later, at the ripe old age of 35, I was duly elected as one of the resident superior court judges for the 18th Judicial District (Guilford) to succeed the Honorable James G. Exum Jr. who had vacated his seat to run for the North Carolina Supreme Court. Eventually my public career would spread over parts of five decades and would bridge two centuries.

The people of North Carolina bestowed upon me the high honor and distinct privilege to serve as a superior court judge, an office which I firmly believe is the best judicial job our state has to offer. My respect for the superior court as an institution has only grown deeper and stronger with each succeeding term and each passing year. It is with a deep sense of humility and quiet pride that I look back over my years of service in this office. Do I second guess my decision years ago to leave the active practice of law and enter into public service first as a prosecutor, then as a judge? I can honestly say that I have only the fondest memories and absolutely no regrets over what unfolded during the intervening years.

It became my extraordinary privilege to become one of only six superior court judges in over 200 years of the history of the superior court to hold court in all 100 counties of this great state.

I held my first term of superior court in Forsyth County in January 1975. Almost 28 years later I reached the 100 county milestone when I held a criminal term of superior court in Pender County on December 16, 2002.

Chief Justice I. Beverly Lake Jr. and assistant director of the Administrative Office of the Courts, David Hoke, came all the way to Burgaw to present a commemorative plaque and certificate to mark the occasion. Chief Justice Lake made some kind and gracious remarks in my behalf. I was deeply touched by the gesture and will always be grateful to them for taking the time and trouble from busy schedules to come down and mark the moment with me. The fact that my wife and members of my family were on hand to witness the event meant more to me than I can say.

In between my first term in Forsyth and this very remarkable term in Pender I was able to have some very grand and unforgettable moments and to encounter some of the finest people one could ever hope to

imagine.

It may be quite a while before another superior court judge will be able to complete the whole 100 county circuit. He or she would have to get started at a very early career stage. North Carolina is a very long state east to west. To make the circuit requires leaving home on many a Sunday afternoon or evening in order to reach far and distant counties in time to be able to convene court on Monday morning. Motel living becomes a way of life for such an undertaking. Such long stretches away from hearth and home will become, at times, a real test of patience and endurance. It is the loneliness that accompanies being away from your spouse and children which is toughest to handle. Absence from chambers for weeks at a time plays havoc with the paperwork and other local responsibilities. In my case, I was on the bench long enough to be able to space out the extreme travel destinations and maintain reasonably close contact with my home base in Guilford County. For my part, it was worth the effort to get it done, and I am very glad that I was able to hold court in every county, even though it took me nearly 28 years to do so.

A number of other obstacles make the prospects rather dim for another superior court judge to reach the judicial milestone any time soon. For one, the legislature has split the judicial divisions in half—where there were four there are now eight. This action reduced the number of counties embraced in the regular rotation. Moreover, considerations of containing travel costs and holding down other expenses have resulted in mounting pressure not to send superior court judges too far from home. It has become a rare thing indeed in these days for a superior court judge to be sent from one end of the state to the other. Furthermore, a number of judicial districts have so few regularly scheduled terms of court that it becomes very difficult for an out of county, out of district judge to obtain a commission to hold court in such a district.

There also remain some additional, practical reasons which mitigate against a judge in this day and age getting around to all 100 counties. Younger judges with families frankly are less apt to be willing, or to have enough interest, to take on the "away from home" time required in traveling across the state. Judges who are regularly assigned to the popular coastal counties in warm weather or to the beautiful mountain counties in the fall cannot really be blamed if they are less than thrilled about swapping out such desirable venues in order to come into the urban, high case load district where the long calendars and contentious trials simply grind a judge down over time. It's a tall order to accommodate a fellow judge who needs to pick up a county west of Asheville or east of Raleigh in order to fill out the "100" list. Frankly stated, it is less than an even swap (although many of my colleagues were absolutely gracious and accommodating.

As I gradually made the circuit traveling along the highways and by ways to some county where I had never held court before, I must say I thoroughly enjoyed each new court experience and looked forward to going to every one of them. I met and worked with some of the finest public servants our state has produced. North Carolina is a wonderful state, and its people are basically good and honorable with deep purpose and an abiding sense of public responsibility. The quality of my professional life was enriched beyond measure by rubbing shoulders with many able attorneys, fine sheriffs and their deputies, outstanding clerks of court (and their hardworking deputy and assistant clerks), ever faithful official court reporters, dedicated probation/parole officers, and a host of truly professional law officers at all levels that I have encountered along the way. I would be remiss in failing to mention my esteemed colleagues on the superior court bench whose friendship and collegiality made my time so meaningful and produced so many of the grandest moments I experienced. It is these dedicated people that I will miss the most. I will remain forever grateful for having had the experience and opportunity of working with them in the pursuit of public justice and in keeping of the rule of law unsullied and unsoiled.

Having lived and worked under the "rotation principle" for superior court judges for almost 32 years, as one might expect, I have developed some rather pronounced notions about the practice, a few of which I wish to share.

Article IV, section 11, of the North Carolina Constitution mandates the rotation of superior court judges and provides in pertinent part as follows:

> The principle of rotating superior court judges is a salutary one and shall be observed.

We have observed this provision in practice and theory for over 200 years with what I believe to be good results. After all my years on the superior court bench, I come away with profound respect for the wisdom and foresight of the framers of our state constitution and a very considered judgment favoring retention of the rotation principle. I do believe, arguments of administrative inefficiency notwithstanding, that it best serves to insure a high quality of justice and minimizes opportunities for scandal and improper influence in the conduct of the court's business.

Based upon my hands-on experience in the trenches and my term on the Judicial Standards Commission, I have come to the compelling conclusion that the rotation system serves as a bulwark against "home cooking" or "cronyism" in important judicial decisions. As I see it, it is the best (albeit not perfect) system devised to curb undue influence of local lawyers on local judges, and it serves in great measure to minimize bias by local judges from spilling over into the judicial business before the court. No better way exists to keep perceptions of favoritism or improper influence away from the courthouse steps and out of the courthouse. It very much reduces the opportunities for extrajudicial influence in the form of authority, money, social position, or other subtle local pressures to tip the judicial balance scales. It also goes beyond any other conceivable measure to prevent a judge from becoming jaded after facing the same lawyers making the same arguments and using the same tactics day after day. When that "same old, same old" feeling moves in and takes over, judge "burn out" is soon to follow. Rotation serves to inject new energy and pump life into a judge who has had enough of the local scene. New judicial blood brings with it at least the perception of a judge with a clean slate and energizes the local bar, while it also creates a fresh feeling around the courthouse.

It also seems to me that the local lawyers, for some reason I don't fully understand, show a bit more respect to an out of town judge and accept more gracefully the rulings made. They are less prone to trade on friendship or exert other leverage to take advantage of a visiting judge. I also believe they are less apt to take adverse rulings as a personal affront when handed down by a

visiting judge.

Plainly stated, it is simply not healthy for the justice system when a judge is at home too long or too often. Perceptions of bias and/or favoritism inevitably creep into the courthouse culture even when reality is otherwise. Perception of bias is just as corrosive as actual bias is to the justice system. Inevitably, personal animus between a judge and a lawyer may flare up which, in addition to having a adverse effect on judicial decision making, leads also to unnecessary hostility and ill will. The resulting tension is outright harmful to the bench/bar relationship. As I see it, the best way to minimize all these hurtful aspects is to keep the judges moving in and out of the district. It insures a better quality of "arms length" justice.

One does not hold court in every courthouse in the state and come away without developing some observations, perceptions, and recollections about them. The age of the grand old courthouses, stately and awe-inspiring as temples where justice dwells, has given way to a more modern era characterized by a concept of efficient, low frills, bottom line conscious courthouse construction which unfortunately has led all too often to courthouses which lack the ageless grandeur and quiet dignity of their earlier counterparts. Concerns of security and economy have changed altogether the notion of what a courthouse or courtroom ought to look like. Convenience of access and/or cost of land have led to many new courthouses being moved away from the town center. At the risk of being labeled unduly nostalgic, I do confess a deep preference for that earlier era.

I do not mean to imply, however, that every courthouse project results in "motel modern baroque" design or ambience. Frankly there are some very nice, impressive new courthouses. Some of the newer courthouses, such as those in Currituck, Wilkes, Surry, Ashe, Randolph, and Harnett, are really first class insofar as function and interior design go, and it is a pleasure to hold court in them. The new addition in Union ought to be added to this group (to mention just a few but with no slight intended to other equally worthy of mention structures). Buncombe County may well have done the best courtroom renovation of any. The main courtroom has been quite richly restored and is one of the finest courtrooms anywhere. You know you are in a courtroom when you enter.

I fondly recall the old courthouse in Jackson County set high upon the hill where justice ought to dwell. The grand courthouse in Northhampton County, even if on flatter land, is so beautifully maintained and awe inspiring in appearance that it just stands out and dominates its surroundings. What courthouse can top the historical importance of the old courthouse in Caswell County with the judge's bench so high in the courtroom that one felt he was looking just a few feet below Almighty God when the judge entered? It's original wide plank floors still remain an amazing feature to me. The courthouse drips with history and political intrigue form the Civil War era. Senator "Chicken" Stevens was murdered in the courthouse basement during reconstruction days.

Probably my favorite view is from the courtroom in the old courthouse in Chowan County. When the main doors open the view from the bench is straight out into

Albemarle Sound. It is just as spectacular today as it was during the reign of the Lord's Proprietors. It is easy to understand why this particular spot was chosen for the courthouse.

An unusual recollection comes to mind from the old courthouse in Stokes County. In the upper balcony the windows had pull down shades. When the afternoon sun shown through the windows, the pull cord hanging down was silhouetted in such a way as to cast a noticeable shadow across the courtroom floor which eventually reached the foot of the bench as the sun dropped. It gave every appearance of a rope with a noose at the end. It was, to say the least, a most unwelcome backdrop for a murder trial in progress.

The old Surry County Courthouse affords a particularly special memory for me. It was here in January 1979 that Chief Justice Susie Sharp and retired Chief Justice William Bobbitt traveled up from Raleigh for the swearing-in ceremonies for Franklin Freeman Jr., the new district attorney. Outgoing District Attorney Allan D. Ivie Jr., a nineteenth century figure, resplendent in his bat-wing collar and tails, gave forth with the forensic oratory of an earlier, by-gone era. Seemingly he made one speech, took a deep breath, and then made another. It was long but eloquent. Justice Bobbitt and Sharp made appropriate remarks. After the speech making was over and the oath administered, they joined me on the bench as court convened in regular session. It was a tight fit on a narrow bench. Was I ever edgy! For a young judge, this high ceremonial occasion was quite an undertaking. I was surrounded by two of the finest chief justices who ever served, and I didn't dare mess up. My palms were very sweaty. Things worked out, and it was overall a splendid occasion. I cannot remember another time when two chief justices joined the presiding judge and actually sat on the bench with him during court.

A very special "perk" for judges who ride the circuit is the opportunity to sample the local cuisine. While judges have a limited budget for expenses which doesn't permit them to eat of the fatted calf or sip the nectar of the gods, they do have a way of sniffing out the finest barbeque in eastern North Carolina. With due deference to the plethora of great burger joints situated strategically all over the place, eastern barbeque houses are king of the hill. How do you top Wilber's in Wayne County? Go to Wilson County, I suppose. But there are some great ones in Johnston County as well as a host of other places. When you get down to it, the woods of eastern North Carolina are just thick with really good barbeque emporiums. In reality the fact of the matter is that virtually every county has some special, hidden jewel of an eating establishment that puts out outstanding country cooking and is known to the bailiffs, court personnel, and highway patrol. They will readily lead the judge to the Promised Land. Most likely the local attorneys are already there. Most judges, if not restrained, will soon eat themselves into a food coma.

I can recall some really legendary feasts in Rowan County at Wink's. When the courthouse gang showed up the food came out. Fresh flounder and juicy ribs were brought in by the plateful, piled high. It was delicious. The mother of all buffets, however, has to be at Shatley Springs in Ashe County where the tables are never empty and the food rolls on like an ever rolling stream. It takes about two hours to do this thing right. So plenty of time has to be allowed to leave the courthouse in Jefferson, eat, and get back. Mountain vegetables and a variety of meats will put judges down for the count by afternoon recess. Don't let me overlook the famous pork chop sandwich served up at Snappy Lunch in Mt. Airy (only 7-8 miles from the courthouse in Dobson). Snappy Lunch was made legendary by the Andy Griffith show and is still going strong. Favorable mention needs to be given to those out of the world banana fritters at Cobb's Corner Restaurant in Williamston. Judge William Griffin, my dear friend, put me on to these. There is nothing like them. I could go on. I haven't even touched the great places just about anywhere in the 30th District, but I think you get my drift. No judge will ever starve while out on the circuit.

A visiting judge can generally count on being taken under the wing of the great courthouse cooks worry that he is underfed and undernourished. Someone is always baking a cake or fixing a delicious casserole or some other tasty dish. It would be so rude for a judge to turn down a food offering from his court reporter or courtroom clerk. No judge wants to hurt the proud cook's feelings. If you don't believe this to be the case, then come with me to Surry County and see for yourself. It is no accident that I always gained a lot of weigh when I went to Dobson. There's just no way to pass up such courtesy.

By far the best dessert could at one time be found in Forsyth County, at the jail of all places. It seems that during World War II one of the cooks on the USS Missouri was renowned for his secret recipe for buttermilk pie. President Truman happened to be on board one time, the story goes, and sampled a serving of this famous pie. He liked it so much that he talked the cook into coming to the White House especially to make that pie for the president. After his retirement, that cook eventually turned up in Winston-Salem and came to the attention of head jailer, Harvey Wood, who talked him into doing some cooking at the jail. Of course his buttermilk specialty was served on special occasions. Those occasions occurred when the judge, the district attorney, the high sheriff, defense attorneys, and other selected courthouse dignitaries were invited over to the jail for lunch in order to inspect the quality of the jail food. To make a long story short, I was able, on more than one occasion, to sample the buttermilk pie Harry Truman discovered and made famous.

Judges are also frequently invited to attend civil functions where great food is served. I recall holding my first term of court in Allegheny County where I was extended an invitation to come to a special occasion in the evening. It seems that this was an annual affair, and all the courthouse dignitaries were in attendance. Some of the local ladies were cooking. There were many skillets and much smoke. You could smell and hear the meat cooking. The cooks were laughing and having the best time while the grease sizzled and popped. Out of curiosity, I inquired of one of the deputies nearby what was being cooked and served. He answered something to the effect that this was the annual "mountain oyster" roast. It began to dawn on me that I was in over my head here and was really backed into a corner. Rather than hurt anyone's feeling when mountain oysters were offered to me, I simply picked out the smallest one and quickly swallowed it whole.

Speaking of jail food again, no meals served in any local jail could top that offered by Sheriff E. Ponder in Madison County. Once he sized up a visiting judge (did he

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have sense enough to know water ran downhill) and if he approved the way he was holding court and the judgments that he was entering (was he listening to Sheriff Ponder's recommendation regarding punishment, was the case coming out the way the local folks thought it ought to?), on Wednesday he would invite him to the sheriff's table back in the jail. Now this was a high honor. It was his way of saying that you were doing all right. Mrs. Ponder was doing the jail cooking and she was outstanding. It was mountain style cooking at its best, especially when fresh mountain vegetables were in season.

In addition to holding court in the fine courthouses about the state, I have also held court in some of the darnedest places. In Carteret County during courthouse renovations, court was held in a nearby old warehouse which had been fitted out for the occasion. The acoustics weren't great and the amenities were sparse, but we did OK. Similarly in Rutherford County, during courthouse renovations, court was held in an empty factory building. It was fixed up as best as can be done, although things were scattered a bit. Again we made it through and hopefully justice was done.

The most unusual out-of-courthouse session I recall was in Montgomery County, where court sessions were held during the reworking of the courthouse in Troy. We went over to the Torch Restaurant. The bench was set up on the bandstand. The jury deliberated in the kitchen. Serving tables were moved around to create tables for counsel, and chairs were set up for lawyers and witnesses. At the end of the session after all the business of the court was conducted, we were served an outstanding steak lunch right where we had finished holding court. There we were (judge, district attorney, defense counsel, probation officers, court reporters, sheriff and deputies, courtroom clerks). We had a great meal and enjoyed much fellowship even after all the contending and contesting during the week. The fellowship characterized the way everyone seemed to be able to get along in those days even though they were at times on opposite sides of hotly contested issues and represented competing interests. All that is gone out the window now. Things like that rarely, if ever, happen any more. Things are so acrimonious and adversarial these days.

The world of practicing law has turned over many times since I took my first oath of professional office in the grand courtroom of the old Guilford County Courthouse. The face of the bar has changed drastically. The nature of litigation, especially civil, is all but unrecognizable when compared to that of an earlier, more civil time. Everyday practice of law hardly resembles what I recall it was when I was a young lawyer. The world of technology has transformed virtually every area of practice. Computers, fax machines, and e-mail have speeded up the delivery of documents and information and have intensified the discovery wars beyond all comprehension. Cell phones provide instant communication without regard to location. Yet, I wonder, are we better off today because of this technology? Probably so in some respects, but the potential for wearing out an opponent by a sudden deluge of paper is very high.

I am sad to say, however, that some very observable negative developments have crept into the practice. I see tangible evidence demonstrated all too frequently that there is an insidious, perceptible decline in respectful professionalism (noticed by just about every objective observer of the scene). Professional civility, common courtesy, polite cordiality, and mutual respect between lawyers too often gives way to open rancor, bitter acrimony, adversarial hostility, and abrasive gamesmanship. Lawyer relations at times become contentions and sometimes just plain rude. The old days when most, if not all, problems in litigation could be cleared up by a single five minute telephone call are long gone, to put it mildly. Harsh allegations and abusive epithets can fly about with reckless abandon. There is a rush to take technical advantage of one's opponent and openly question his or her ethics. Suspicion of motives hovers over the length and breadth of professional actions. Have I overstated the case? Would that it were so. This sort of thing just poisons the well and makes trying cases too unpleasant to bear. I for one have become sick of it. Relations between lawyers shouldn't be like that.

Depositions on occasion degenerate into open warfare. Why should a lawyer knowingly schedule a deposition so that it conflicts with the opposing lawyer's stated vacation plans? Why would a lawyer purposely fail to inform opposing counsel that a case high on the calendar will be dismissed on Monday at calendar call and leave the opponent to work all weekend to get ready for a trial counsel knows will not take place? Why would a lawyer casually, purposely, or habitually ignore discovery deadlines, thereby forcing totally unnecessary hearings on sanction motions? What would possess a lawyer to hurl a profanity-laced tirade at opposing counsel during a deposition and to belittle and insult opposing counsel in front of his client? Sadly, I have dealt with each one of these spiteful, unprofessional behaviors. They have no place in the practice. Once upon a time these behaviors simply didn't exist. Such create a corrosive influence on the profession and are detrimental beyond measure to the reputation of lawyers in the eyes of the public. Some lawyers have lost any sense of professional good manners. I am proud of, and openly support, the efforts by the bar to self correct these gross abuses. I further wish to praise the great work and efforts of the Chief Justice's Commission on Professionalism and its director, Mel Wright, to meet this problem head-on and to undertake initiatives to reverse this pervasive and unaccept-

able misbehavior. The problem is severe but not mainstream. There is much hope on the horizon.

Probably no area of practice has become more unrecognizable to an oldster in courthouse circles than the nature of trial lawyers themselves. The sense of the actor on stage that characterized the great courtroom lawyers of yesteryear has vanished and is no more. Where have all the trial lawyers gone? The giants seem to no longer exit, save for a precious few. Trial lawyers of the classical mold as we fondly remember them are a dying breed, soon to be extinct. In their place have come the "litigators." They are bright and very able. They are adept at motion making, untiring in the taking of depositions, and relentless in the delivery of pounds of paper in discovery. They believe earnestly in summary judgment as the ultimate desired end of a lawsuit. Yet, somewhere along the way, such bedrock, necessary skills as crisp direct examination, penetrating and aggressive cross examination, eye contact with the witness at all times during questioning, effective presentation of important exhibits (not treating a crucial document as one would a piece of scrap paper). Too often it appears counsel totally forgets that the jury is looking on, taking it all in. Great forensic oratory in jury argument is as rare as an ivory billed woodpecker. What in the world has happened? When did the "technocrats" get loose in the courtroom? How do we account for this sea of change in the nature of trial lawyers? I have seen too many "A" students in law school who ought not come within a hundred yards of a jury of 12 ordinary citizens. Brilliance unconnected can be a liability.

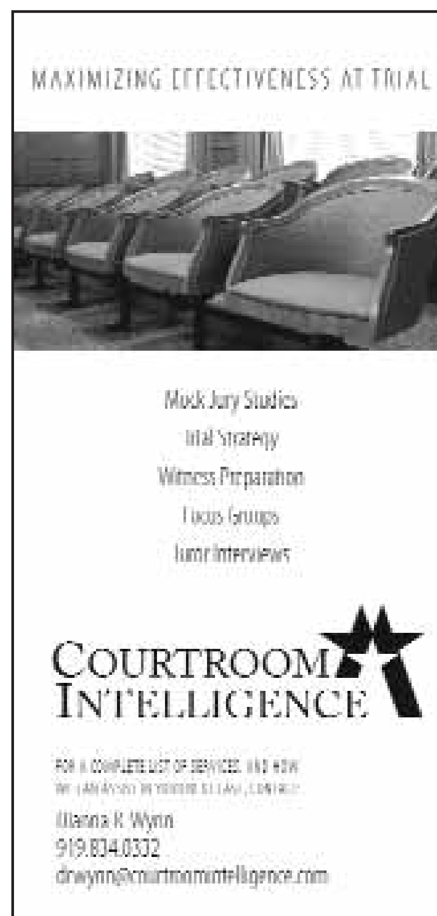
Perhaps the era of technology has increasingly transformed trial lawyers into "technocrats," skilled but low key, bland and essentially colorless. They are about as exciting to watch as a dead mackerel on the beach. No one puts a jury to sleep quicker. Perhaps there is a glaring lack of mentoring in the art of skillful, effective trial advocacy. The gradual disappearance of trial lawyers cut from the old cloth, lawyers who tried a lot of cases and were battle hardened veterans of countless contested cases which went to verdict, has reduced the role models for young, aspiring trial lawyers. Flare in style has given way to monotone delivery of written-out questions from a legal pad. Perhaps the press of billable hours keeps young lawyers from hanging around the courthouse like they use to do—you could pick up a lot that way. Perhaps the decline in the number of cases actually going to verdict (less than 10% of civil cases) has simply squeezed or dried up the opportunities for a young lawyer to take the case all the way and develop from the experience. Only actual experience in trial can forge the capability of a lawyer to take the heat of a hotly contested case, to keep the jury's attention as the trial develops, and to build a host of other necessary skills that only going the distance can nurture. You learn to try cases by doing them. I am convinced that the declining number of trials has had a debilitating effect on the development of the next generation of true trial lawyers. The result has been too many cases where defeat was snatched from the jaws of victory simply from lack of experience. I have seen too many good cases messed up, or settled too cheaply because a lawyer simply lacked what was necessary to bring the verdict home. You don't believe me? Stick your head in a courtroom. Listen and observe. It is often a sobering experience.

While trying a case with able lawyers who are fully prepared and know what they are doing is a genuine delight to any trial judge, and while conversely, struggling along with lawyers who are ill prepared and lacking in the necessary skills and/or experience to be effective in a hotly contested case is enough to try the patience of Job, a trial judge comes to learn how important it is not to discourage or disparage a lawyer who is absolutely doing the best he or she can. Not every one who goes to court can be a Clarence Darrow. In the end, it is the cause that is paramount, not the lawyers.

What should be remembered is that you are the lawyers. You directly safeguard all we love and cherish as American citizens. You bring the law alive. You are the guardians of the rights and privileges our Constitution guarantees us as a free people.

Into your hands is committed the keeping of the rule of law beyond political upheaval, safe and secure above partisan clamor, as supreme in our way of life and our country. It falls upon your shoulders to keep burning the beacon lights of freedom.

See to it that those same sacred rights to which you yourselves were born are transmitted down entire—undiluted, untarnished, and undiminished—to those who come behind. The rights and liberties of generations yet to be born are in your hands to preserve. This is a sacred calling. It calls for the highest order of your devotion. Drain deep the chalice of courage as you rise to this great challenge.



My dear lawyer friends, the practice of law is a wonderful calling. There is a magnificence, a certain nobility, in what you do.

As for me, my professional way of life is finished. It is done. Although the final curtain has come down on my public career, I want you to know and be assured that whenever a lawyer rises to speak for the accused, wherever there is a cause well founded and well pleaded, wherever there is a cry for justice, wherever the meek seek to be heard in the face of the mighty, wherever one earnestly seeks a verdict that speaks the truth, wherever one seeks redress of just grievances, there my heart will always be. Let justice be done though the heavens fall.

Thanks for the memories. ■

Douglas Albright is a former senior resident superior court judge from the 18th judicial district.

Paying Tribute to Those Who Raised the Bar

BY CATHARINE BIGGS ARROWOOD

As I pondered the best use of this space, it occurred to me that we do not often talk enough about the individual lawyers who, on a daily basis, exemplify the nobility of our profession when it is practiced as it should be—with compassion, courage, and integrity.

Dave Cutler/SIS

So I begin this year with a profile of the sort of lawyer who defends the rule of law under the shadow of those who launch accusations of disloyalty because of the people he or she defends. These lawyers, who do their job in the midst of unpopular issues, set the bar for all of us through their everyday work which reflects their respect for the judicial system and the rule of law. I hope that this profile will inspire you and make you think of others who should be similarly profiled.

Kenneth Royall raised the bar for us all 65 years ago when, as Colonel Royall of the US Army, he was assigned to represent seven of eight suspected Nazi saboteurs who put ashore on Long Island and Florida with plans to disrupt America's war effort and spread terror and confusion throughout the land.

Historical accounts suggest that the plot was probably less fearsome than the American public was led to believe in June 1942. The suspects were civilians, not military personnel. And in fact, the plot unraveled before any sabotage occurred because one of the would-be saboteurs, claiming anti-Nazi sympathies, went to Washington and betrayed the group to the FBI. Various accounts of the incident refer to the plotters as "hapless saboteurs" and even "Keystone Kommandos."

But it was wartime—just seven months after Pearl Harbor—and President Franklin D. Roosevelt responded to the public clamor for rough justice by issuing a Proclamation and Order denying the defendants access to the civil courts and ordering that they be tried by a military commission in secret. The government made it clear that it would seek the death penalty against the suspects, hapless though they might be, for violating the laws of war by crossing military lines in civilian dress to commit hostile acts. Many Americans would have been more than happy at the time to dispense with the trial altogether and go straight to the executions of the accused.

Royall, already a prominent trial attorney in North Carolina by the time the US entered the war, initially sought to have the defense duties transferred to civilian lawyers to avoid perceived conflicts of interest. But once that idea was rejected, Royall threw himself into vigorously defending his clients and did not hesitate to buck the orders of his commander-in-chief. Royall and his co-

counsel, Colonel Dassius Dowell, instituted *habeas corpus* proceedings to test the constitutionality of Roosevelt's order, despite the president's clear disapproval.

Royall attempted to stop the proceedings of the military commission before they could begin, arguing that the tribunal lacked jurisdiction. But his argument was rejected, and the trial commenced in July 1942. Undeterred, Royall persuaded the Supreme Court to convene a special session in late July to consider the habeas petitions even while the military trial continued. At the special session, Royall argued that military courts could not be used unless martial law had been imposed or the civil courts shut down. During two days of argument, Royall often cited *Ex parte Milligan*, a Civil War era case, which stood for the principle that "the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

The Supreme Court ultimately rejected Royall's arguments, the military commission completed the trial, and the commission's secret recommendation was sent to Roosevelt. One week later, on August 8, 1942, the government announced that six of the eight saboteurs had been executed. Two were spared for cooperating with the government and were imprisoned until the end of the war, then deported to Germany.

Royall not only lost the legal battle, but in the process earned the disdain of many of his countrymen for taking up such an unpopular cause. As one North Carolinian wrote, "I would suggest you remain in Washington when the war is over."

But at least one member of the Supreme Court took the time to support Royall. In a letter to Royall, Justice Jackson lauded Royall's "impressive demonstration that the right to counsel in our democracy is neither a fiction nor a formality." The highest praise came from his clients, who, while facing execution, wrote a letter stating that they had received a fair trial and that defense counsel "has represented our case as American officers unbiased, better than we could expect and probably risking the indignation of public opinion."

Royall's actions resonate today because we are once again faced with similar issues as people are excluded from the protections of the Geneva Conventions upon being given the label "enemy combatants." Lawyers across the nation, including lawyers practicing in North Carolina, have volunteered to provide a defense to these people. And, in a case with striking similarities to that of the Nazi saboteurs, one of those lawyers, Navy Lieutenant Commander Charles Swift, fought successfully for the right of a terrorism suspect to challenge—in court—the legality of his detention at Guantanamo rather than face a military tribunal with no right of *habeas corpus*. Like Royall's clients, Salim Ahmed Hamdan had not been shown to have actually committed any acts of terrorism—he was a former driver for Osama bin Laden, but was fleeing Afghanistan when he was captured.

Last June, Swift's argument that the current administration overstepped its constitutional bounds by setting up military tribunals without congressional authorization found favor with a 5-3 majority of the Supreme Court which declared the military tribunals illegal. Like Royall, Swift vigorously represented his client and questioned the legal authority of his president to circumvent the constitutionally required protections of the civil courts. Like Royall, Swift defied marching orders, which have been described elsewhere as to represent Hamdan "for the purposes of obtaining a guilty plea."

Unlike Royall, however, Swift's aggressive defense of a suspected enemy combatant, it has been reported, cost him a promotion and ultimately his career in the navy's "up-or-out" system. Royall, on the other hand, went on to be promoted to brigadier general and later served as undersecretary of war, secretary of war, and finally the first secretary of the army. He followed his public service with a successful career in private practice, and died in 1971 at the age of 77.

Swift told a reporter for a Seattle newspaper that the rule of law, not smart bombs, will make our country safe from terrorism. His comment echoes the sentiment expressed by Royall in his argument before the Supreme Court, recently noted in a column by Jack Betts of *The Charlotte Observer*: "It is trite but still true to say that the soundness of any system of government proves itself in the hard cases where there is an element of public clamor. Such circumstances test the real ability of a government and its judicial system to protect the rights of an unpopular minority."

Two of Royall's law partners, William R. Glendon and Richard N. Winfield, wrote in a 2002 magazine article that Royall "set a fine example of an American lawyer doing his job. He gave our tradition of the right to counsel new meaning, depth, and reality."

One final note: In all of the news stories about Swift and *Hamdan v. Rumsfeld*, one little detail is missing. Like Royall, Swift too is a North Carolina native, hailing from Franklin.

Regardless of personal political views, we should praise those members of our profession who act to help the most unpopular of the accused, because through their acts and words, they make real the principles to which we all give lip service. Makes you proud to be a lawyer, doesn't it? ■

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Find Your Purpose (cont.)

hold up mirrors to reflect back things about you that you can't see yourself. Such groups know collectively of more possibilities than any one person could summon. It can be a formal or highly informal group. To get a sense of how a personal board can help, gather three to four friends for personal brainstorming sessions. Open the floor to insights and possibilities with no judgments allowed. The goal is simply to turn up opportunities and use the feedback to improve your exploration of new directions in your life.

These steps are only a beginning. But they may put you on a path to a post-career life purpose that can dramatically reduce the chance of being bored in retirement. ■

David Corbett is the founder of New Directions, Inc., in Boston, and author of Portfolio Life: the New Path to Work, Purpose, and Passion After 50*, published by Jossey Bass. Visit him online at www.portfoliolifebook.com and www. newdirections.com.*

Fugitive Conscience

BY MARK P. FOSTER

Kevin Brady hated to lose, whether it was checkers, ping pong, or arm wrestling. He was naturally competitive, much to the irritation of his little brother during their childhood. Now, as a middle-aged, married father, he was no different. He didn't even let his kids beat him at board games.

That is what drew Brady to criminal trial work. It was high stakes virtual combat-winner-take-all. He was a warrior in the arena, battling his opponent one-on-one. However, that is also why being a criminal defense attorney was so frustrating to him. Criminal defense attorneys usually lose. The presumption of innocence applied only on TV shows. But Kevin Brady never gave up. He believed the system was fair and that justice usually prevailed. He won more than his share of trials, but not enough to satisfy him.

Brady also carried a good deal of Catholic guilt with him. He was raised in a small town in upstate New York where he had been taught by strict nuns who trained him to feel guilt for his sins. Meanwhile, Brady's father imbued him with a fierce sense of individual responsibility. Dr. Brady had been the only general practice physician in their town. Dr. Brady cared for his patients as though they were his children—they were his responsibility. Whenever one of his patients was disabled by a disease, or God forbid, died, Dr. Brady would be devastated for weeks, torturing himself by second-guessing his medical decisions that led to his patient's fate. His son Kevin witnessed this and inherited this abiding personal responsibility for the lives of others.

Thus, whenever criminal defense attorney Kevin Brady pled a client guilty to a serious crime, he would experience periods of anxiety where he would question whether he had done the right thing for the client or had merely "sold him out." Whenever he contested a case before a jury, he carried tremendous stress in feeling that he was truly the only thing separating his client from a lengthy prison sentence or worse.

A former second-string running back at Boston College, Kevin Brady ended up in Charlotte, North Carolina, after graduating from law school at UNC-Chapel Hill. His wife was a financial analyst for one of the mega-banks headquartered in Charlotte. Their two sons were in elementary school. They lived in a small but quaint house on a quiet, tree-shaded street in the quaint Dilworth neighborhood of Charlotte. Brady practiced criminal defense as a solo practitioner in a one-room office he rented in an old Victorian house three blocks from home.

On this particular Thursday evening in June, Brady was at Connolly's Pub on Fifth Street "uptown." He was seriously contemplating getting drunk. He had just lost an ugly and emotional rape trial. After the jury had announced its verdict, the trial judge had quickly sentenced the defendant to 25 years. Just as quickly, Brady headed to Connolly's. His two drinking companions this particular evening were Nick Taylor, a private investigator, and Rod Gorman, a fellow criminal defense attorney.

Taylor and Gorman tried to console Brady by complimenting his trial work in this case. However, Brady wasn't letting himself off the hook so easy. He kicked himself for not going after the alleged victim harder during cross-examination and for leaving key points out of his closing argument. The case had been one in which Brady had recommended that his client take the plea offer, but the client was convinced that God would save him from conviction. Despite the fact that the client had rejected Brady's advice, Brady put forth maximum effort at trial. Nevertheless, Brady felt responsible for the man's plight. Even as he sat at the bar drinking beer, he kept replaying his closing argument.

> **The Results Are In!**
>
> **In 2006 the Publications Committee of the State Bar sponsored its Fourth Annual Fiction Writing Competition. Eight submissions were received and judged by a panel of five committee members. A submission that earned second prize is published in this edition of the *Journal*. The first place story will appear in the next edition of the *Journal*.**

After they finished three rounds of beer, the three friends went their separate ways. As Brady got into his old black Volvo sedan, he realized he was getting a headache. He wished the next day was a weekend so he could relax and decompress from this trial, but he knew he had an evidence suppression hearing the next morning. Thus, he had no time to lick his wounds and recover from this big loss. He realized he was not well prepared for the next day's hearing, but was in no mood to go back to the office and work on it. Instead, he would rise the next morning and get into the office an hour earlier than normal to prepare for the hearing.

At home, his wife Karen gave him a look of anticipation as he walked into the kitchen, where she was just making dinner for their two sons, Sean, age 9, and Michael, age 7.

"Well?" Karen said.

Kevin just shook his head slowly back and forth. They embraced and kissed briefly.

"Sorry. . . . How did your client take it?" They spoke in low tones so that the boys would not hear this adult discussion.

Brady let out a heavy sigh, and then said, "He seemed less surprised at the verdict than

I was. But the 25-year sentence definitely got his attention—although I had warned him he could get that much if we lost the trial."

"So, how are you taking it?"

"I don't know. . . . I'm just . . . tired. I feel like I'm just a piece of meat going through the grinder. There's no end in sight."

Karen came over and started rubbing his shoulders. "Why don't you take some time off? We could both take a week off and get away. Mom and Dad could stay with the boys."

Kevin sat down on a kitchen chair as his wife massaged his tight shoulder and neck muscles. "That sounds great right now. Unfortunately, I'm starting the Culbert trial the week after next. I'm going to be cramming all next week for that trial and then the trial itself should take at least a week. Maybe we could go after that."

Karen expected that sort of answer, as her husband rarely allowed himself to take more than a few days off at a time. But lately he seemed to be working more and enjoying it less. She was worried that he was approaching burn-out. "Honey, don't you think you need a break? Can't you get the Culbert trial continued?"

Kevin laughed. "This is a Judge Strombeck case. No continuances for the defense allowed."

"Well," Karen said, "you need to take some time off after that trial is over. I'm worried about you. Will you promise me that you'll do that?"

"Okay, you're right."

"Good. Let's have dinner. Do you want to go get the boys? They're in the backyard."

Brady headed out to the backyard and saw his two sons taking turns zooming between two trees on the "zip-line" that he had recently installed back there. They were having a ball.

"Hi, boys!"

"Dad!", they both boomed out at the same time. They both came running up to him and hugged him and started talking to him at the same time, each one telling his father of the events at school that day. "How come you're home so early, Dad?" asked Sean.

Kevin looked at his watch and then said, "Well, it's already 7:00. That's not early."

Michael shouted, "But it's not dark out yet. You don't get home 'til after dark, Dad."

"Sure I do. Now let's go have some dinner. Go wash your hands and then help me set the table."

* * *

That night, Kevin Brady, although exhausted, couldn't sleep. He kept seeing his client, in ankle shackles and handcuffs, being led away to serve 25 years in prison. He felt as if he himself had committed a crime in allowing this result to occur. He got out of bed, took a sleeping pill, and read a magazine for a while before feeling drowsy and going back to bed.

As he started to drift off to sleep, the upcoming Shawn Culbert trial entered his mind. Brady had been appointed by the court to represent Shawn Culbert, a 24 year old black man. He was single and had no criminal record. He had a steady job as a warehouse manager for a trucking company. However, Culbert and several codefendants were charged in federal court with conspiracy to distribute over 50 grams of crack cocaine and using firearms in drug trafficking crimes, thereby causing the death of a victim during those crimes. If convicted of the latter, Culbert faced life imprisonment without parole under federal law. Even if convicted only of the first offense, conspiracy to distribute over 50 grams of crack, Culbert faced a mandatory ten year prison sentence despite having no criminal record.

This was a "historical conspiracy" case, meaning that the government's evidence was almost entirely the testimony of convicted drug dealers and robbers who would claim that Brady's client had sold drugs with them and been part of the group that committed home invasion drug robberies where one of the victims had been shot and killed. The police reports and other discovery claimed that Culbert and his codefendants peddled cocaine for a five-year period of time and that they had conducted several armed home invasions of other drug dealers during which they not only stole their drugs and money, but also coldly executed one of them with a shot to the head. There were many issues to think about.

Brady sat up in bed. He couldn't sleep now, sleeping pill or not. It was 2:40 a.m. He got up, got dressed, and went into the kitchen. He made himself a cup of hot chocolate. He pulled out a legal pad and sat down at the kitchen table. He wrote "Culbert—Things to Do" across the top of the page. Then, for the next half hour, he made a list of crucial trial preparation tasks he needed to perform in the next ten days to be ready for trial. When he felt that he had listed every necessary task, he finally started relaxing a little bit and felt that he could go back to bed. He turned out the lights and headed back to the bedroom. He got into bed, looked at the digital clock that told him there were just over two hours until his alarm went off, and closed his eyes.

* * *

A week later, Kevin Brady felt ready. He had completed every task on his "Things to Do" list. It was a Friday with no court appearances. His only appointment was with Shawn Culbert. It was unusual that a client charged in such a serious case was out on pretrial release rather than being in jail. But, as Brady had to admit, he had done a good job of convincing the federal magistrate that Culbert should be released pending trial based on his lack of criminal record, his positive employment history, and the lack of strong evidence against him on this case.

Culbert came in and sat down opposite Brady in his office.

"Well, Shawn, we're as ready for trial as we can be. How do you feel?" Brady asked.

"Scared, Mr. Brady. I mean, I don't know, my mom and I been talkin', you know, and, well, is it too late to take a plea?"

"Shawn, we've been through this before. The best plea offer the government ever made was ten years and that would require you to testify against the codefendants at trial. Based on what you've told me all along, your testimony wouldn't help the government because you say you weren't involved. Why are you bringing this up now?"

"Mr. Brady, I can't do no life term. I'll say what the government wants me to say."

Brady shook his head slowly side to side. "You can't do that, not as long as I'm your attorney. You can't testify falsely against other people just to get your own sentence reduced."

"I'd tell the truth, Mr. Brady! My mom just wants me to put this case behind me and move on with my life. I'd be out in eight-and-a-half years with good time."

Brady got very worked up. He started biting his lower lip, a nervous habit of his. "Shawn, you have told me all along that you are innocent."

"I am!" said Shawn Culbert.

"Then you can't do this deal. Look, the government has a questionable case against you. It's all snitches. Every last one of them

has something to gain by testifying against you. The government has no credible witnesses against you and no physical evidence putting you at the scene of any of the home invasion robberies, including the one where the victim was killed. Why are you suddenly doubting your decision? Is it your mom? She's not the one who has to do the time, Shawn."

"What chance does a black man have against the US government? I can't beat them!" Shawn exclaimed, throwing up his hands.

"Yes you can. I can. *We can*," Brady said.

"Can you guarantee it?"

"No, Shawn, you know that. But if I were you, I would fight this. Ten years is a long time in prison for something you didn't do."

Culbert slumped down into his chair, putting his face in his hands. Brady thought he was crying, but he wasn't sure. Three minutes of silence passed before Culbert looked up again. He looked like a doomed man, resigned to his fate.

"All right, Mr. Brady, let's go to trial."

"Are you sure?"

Culbert let out a long sigh and gave Brady a long, steady stare. "I'm going to follow your advice. Yes, I'm sure."

"You do understand it's your decision, not mine?"

"Yes, Mr. Brady."

"Okay," said Brady. "I think you're making the right decision. I'll see you Monday morning in the courthouse to begin jury selection."

* * *

Two weeks later, Brady was spent. The trial had taken twice as long as expected. The government had called 12 cooperating drug dealers and robbers to testify that Culbert and his codefendants had sold drugs in a certain neighborhood of Charlotte for over five years and had committed several armed home invasion robberies. Brady, and the attorneys representing the two codefendants who were tried with Culbert, had done a professional job of impeaching each of the 12 witnesses with prior inconsistent statements and thoroughly establishing their incentive to provide testimony helpful to the government. The defense had emphasized that there were no neutral civilian or law enforcement eyewitnesses to any of the charged conduct. Most importantly, the defense had clearly established that there was no physical evidence putting any of the three defendants at the scene of the fatal home invasion robbery.

Brady felt exhausted but satisfied by his thorough closing argument. For once, he felt that he had not left out any important points. He really believed he had crafted a closing argument that accounted for all the evidence against his client and provided a more compelling explanation than that submitted by the government. The jury seemed to be with him during his argument. He had good eye contact with most of the jurors and there were a few jurors who nodded in agreement with his points throughout his argument.

Brady was sitting on the bench behind the counsel table and chairs, doing a crossword puzzle. His client and his client's family were out in the hallway, sitting on a bench, hand in hand, saying prayers that God would show the jury the truth. The two codefendants were not in the courtroom, as they were in custody. Their lawyers were milling around the courtroom, talking with courtroom staff. The jury had been deliberating for over four hours and it was just a few minutes before 5:00 p.m.

The quietness of the courtroom was broken by a loud knocking. Brady sat upright. The courtroom staff and lawyers exchanged glances. One of the marshals came into the courtroom moments later and announced that the jury had a verdict. Brady got up and went out into the hallway. He went over to his client and his family and told them there was a verdict. They all gasped and looked at each other. Culbert's mother started crying. Culbert hugged her and told her it would be all right.

Once everyone was assembled in their places in the courtroom, Judge Stromberg instructed the marshal to bring the jurors in.

The jurors filed in with inscrutable expressions. Brady felt his heart beating in his throat. The verdicts would be read in order corresponding to the order of the charges in the indictment. Count One was the charge alleging the use of a firearm in a drug trafficking crime which caused a death. This charge carried a sentence of life imprisonment without parole. Because Culbert was listed as the first defendant of the three, his verdict would be announced first.

Judge Stromberg addressed the jurors: "Ladies and gentlemen, have you reached unanimous verdicts as to each charge?"

"Yes we have, your honor," said a bank executive who was the jury foreman.

"Please hand the verdict forms to the marshal," ordered the judge. "Madame Clerk, please take the verdicts."

"We, the jury in the above-entitled case, as to Count One, do find Defendant Shawn Culbert guilty as charged . . ." Culbert put his head down on the table and started moaning. His family a few rows back could be heard sobbing and saying "No, no, no." Brady looked straight up at the ceiling and prayed that this was not really happening. He wanted to die. He wanted to disappear.

As the jury continued to read the rest of the verdicts, Brady sat frozen. He couldn't move. He finally turned his head to look at the jury. There was little indication of what the jury was thinking or how they felt about their verdicts. The prosecutor, however, was beaming. As she always did, she harbored no doubts about the guilt of whoever she was prosecuting. To her, criminal prosecution was a matter of black and white, truth and lies, cops and bad guys. There were no gray areas, no shades of truth. Hers was the only truth.

When the jury finished reading the verdicts, Culbert sat up and turned to look at Brady. The look he gave Brady was one Brady had never seen before. It was at once the face of a condemned man and of a bitter man. It was the coldest look Brady had ever received.

* * *

Two months later, it was time for Culbert's sentencing hearing. In an unusual decision, Judge Stromberg had allowed Culbert to stay out on pretrial release after the verdict was entered. Although the federal sentencing guidelines called for a life sentence for Culbert because of the death of a victim, Judge Stromberg had turned down the government's request to revoke bond. Brady thought Stromberg had done this just to spite the prosecutor, whom he was believed to despise.

Brady had filed a lengthy sentencing brief, giving the judge a multitude of legal and factual reasons why he should not impose a life sentence in this case. The government had naturally responded with its own brief, citing case law in support of its position that the life sentence called for by the guidelines was presumptively reasonable and appropriate and should therefore be imposed. Brady did not have a good feel for which way Stromberg was going to go, but he knew that the lowest sentence he could hope for under the circumstances was about 20 years, double what Culbert would have received if he had accept-

ed the government's plea agreement.

Despite the fact that Brady had explained to his client his hope for a reasonable sentence, Culbert was dejected. He dwelled on the trial itself and how Brady had advised him to pass up the plea offer. At their last meeting before the sentencing hearing, Culbert actually accused Brady of forcing him to go to trial so he could earn a larger fee. The attorney-client relationship was no longer characterized by trust. Culbert had convinced himself that the jury's verdict was Brady's fault. Inside, Brady did not feel much differently.

Nevertheless, Brady had rounded up a large cast of character witnesses to speak on Culbert's behalf at the sentencing hearing. He was going to try to create an emotional groundswell that might cause the judge to sentence Culbert to a term of imprisonment far less than what he otherwise would do.

* * *

It was a hot, steamy Monday afternoon in August. Culbert's sentencing hearing was scheduled for 3:00 p.m. Brady had arranged to meet Culbert at 2:00 p.m. in the courthouse to make final preparations for the hearing and for Brady to meet all of Culbert's family members who wanted to speak on his behalf.

Brady was delayed in state court and arrived in the federal courthouse at 2:15 p.m. He found a large group of nicely dressed African-American people at one end of the courthouse lobby. As he got closer, he confirmed that it was indeed Culbert's extended family members, including his mother.

"Where's Shawn?" Brady asked.

"He went back out to the car to get the statement he is going to read to the judge," said his mother.

"Okay. Well, I need to meet each of you who I haven't met before and get your names and relationship to Shawn. Then, I want to briefly talk to each of you who want to address the court on Shawn's behalf."

Brady spent the next 15 minutes accomplishing this task. It was now 2:30 p.m. and Shawn had not returned yet. Brady knew that Judge Stromberg wanted attorneys and their clients in the courtroom 15 minutes before the scheduled sentencing time so that they were ready to go in the event that the case in front of them finished earlier than expected or was continued.

Brady asked Shawn's mother what was taking him so long. "I don't know—he should have been back by now. The car's only a block away."

Brady looked at his watch. "Well, could somebody go check on him and get him in here real fast? We're running out of time."

Culbert's brother Jermaine volunteered to go get Shawn. He walked quickly out the courthouse door.

Jermaine returned ten minutes later. He was perplexed. "I didn't see him. He wasn't at the car. I could see his statement sitting on the front seat. He was nowhere in sight."

Brady was overcome by a sense of dread. Any chance he had of getting the judge to give Culbert a lenient sentence was quickly dissipating. Judge Stromberg would not be in a forgiving mood when sentencing a defendant who was late for his sentencing hearing.

However, Culbert was not just late. He never came back to the courthouse. Judge Stromberg waited until 4:00 p.m., and then issued a warrant for Culbert's arrest.

Brady walked out of the cool subdued light of the courthouse into the bright heat of a hot August afternoon. As he walked to his car, he saw Culbert's family gathered around Shawn's car, talking and gesturing quietly, still in disbelief over what had happened that day. As Brady walked the two remaining blocks to his car, he could not help but wonder where Shawn Culbert had gone and what he was doing. He wondered how long it would be before federal marshals arrested him.

* * *

A week had gone by since Shawn Culbert had failed to appear for his sentencing hearing. Brady had not heard from Culbert or any of his family members. Brady had tried to convince himself that the jury was to blame, not him, and that Culbert had chosen to worsen his situation by going on the run. But Brady was hard to convince. He kept thinking about the trial and what he could have done differently to better illustrate to the jury why the government snitches should not be believed. He kept seeing Shawn's face during their last meeting when Shawn openly blamed Brady for the trial result.

Brady and his wife had not been able to get their schedules straight so as to allow a vacation. Now even Brady was recognizing that he was burned out. He was not taking pleasure in anything these days, not even his kids. He had the unshakeable feeling that he had betrayed his client by persuading him to try a case risking life imprisonment rather than take a reasonable ten-year offer.

He was not able to concentrate on his other cases at all right now as he was obsessed with Shawn Culbert's case. In fact, on this day, a muggy Monday afternoon with thunderstorms threatening, Brady found himself daydreaming about how he could have cross-examined each of the 12 snitches differently. He was in his ground-floor office in the old Victorian home, sitting at his desk, which faced a large mirror on the opposite wall. Brady's back was to the window, which looked out onto the sidewalk and a park across the street.

Gradually, Brady had the feeling he was being watched. He slowly withdrew from his daydream. He became aware of an image in the mirror. It appeared to be a dark figure standing amongst the trees across the street. The figure was not moving and appeared to be looking right into Brady's office. Oh my God, thought Brady, is that Shawn Culbert? As soon as Brady turned his head to look out the window, the figure receded back into the treeline and disappeared.

Brady suddenly felt exposed and vulnerable. Was that Culbert? What does he want? Why isn't he a thousand miles away by now? Brady stood up and pulled the blinds closed. He told his secretary he was leaving for the day. He felt very self-conscious walking to his car. Was Culbert watching him?

Brady arrived home, wondering whether he should tell his wife what he had seen. But he started doubting himself. That could not have been Culbert. The federal marshals were sure that he had left Charlotte. Culbert wouldn't be stupid enough to come near his attorney's office when the federal marshals were looking for him, would he? It was probably just someone who resembled Culbert, Brady told himself. Maybe he had been pushing himself too hard. He needed to take it easier. He decided not to bother Karen with this, now that he realized he was probably just seeing things.

* * *

Four days later, it was a Friday morning without any court appearances for Brady, so he decided to catch up on his sleep. Getting out of bed at 7:30 and feeling refreshed, he had a leisurely breakfast for a change and stayed around long enough to walk his sons

out to wait for the bus, something he rarely did. After the big yellow bus whisked his boys away, Brady went back into the house and kissed his wife good-bye. Since he had no plans to leave the office today, Brady wouldn't need his car. Therefore, he decided to walk the three blocks to his office. It was a warm, breezy day. He enjoyed taking his time for once. He realized how rarely he ever took the time to look at the houses in his neighborhood. He saw gardens and home additions that he had never noticed before.

Brady slowly became conscious of the sound of a car creeping along behind him. He turned casually and looked over his shoulder as he kept walking, but looked quickly back to the front. In the quick glimpse that he had, he saw an old, brown Oldsmobile station wagon moving slowly along the street behind him. The car had a single occupant, a young black male in the driver's seat. Chills went down Brady's spine. He stopped this time and fully turned back to look at the car. The driver was Shawn Culbert. The Oldsmobile quickly turned left up a side street and vanished. Brady tried to see the license plate number, but there was no license plate. Instead, there was a sign taped to the back window that said "License tag stolen-new one applied for."

Brady had broken out in a cold sweat. He ran to the office, bounding up the steps to the old Victorian two at a time. He was going to call 911 and summon the police. Then he thought, what am I going to tell them? That my fugitive client is driving around in an old car without a license tag? They were already looking for him due to the arrest warrant. He hadn't been attacked or threatened by Culbert, so what additional crime could he report? And then he wondered about the ethical issues in reporting one's own client to the police. But he quickly decided that the exception for an attorney's knowledge of present or future crimes being committed by his client would allow him to report to police that he had seen his fugitive client.

However, as time passed, Brady again started doubting what he had seen. Why would Culbert be shadowing him? Logically, one would expect Culbert to try to get as far away from Charlotte as possible, not to linger around town where people might recognize him.

Brady caught his breath and went into his office, sitting down behind his desk. He wondered about his sanity. Was he hallucinating? Were his feelings of guilt causing him to imagine that he was seeing the unfortunate client for whose fate he felt responsible?

He didn't know the answers and he didn't want to follow this line of inquiry any further in his mind. He took several deep breaths and tried to settle down and work on the myriad of matters on his daily "Things to Do" list.

* * *

One week later, Kevin Brady had convinced himself that he had been mistaken in his Shawn Culbert sightings. Culbert had to be many miles away with federal marshals hot on his trail.

It was a Saturday afternoon. Brady was out on the deck in his backyard, grilling steaks for Karen and him. The boys were spending the night at their grandparents' house. Karen was sitting in a glider swing on the deck, sipping a gin and tonic. It was a nice, mild, early fall afternoon. Brady could see his next-door neighbor out grilling on his deck. There was no next-door neighbor on the other side of Brady's house, as his was the end house on the block. Kevin had planted a row of bushes to create a fence-like hedge separating his yard from the street.

Kevin turned the steaks and then sat down next to Karen. He picked up his gin and tonic and motioned to Karen for a toast. They clinked glasses and Kevin said "Here's to a nice romantic evening, just the two of us."

"Amen to that," she said.

They swung for a while in the glider swing and just enjoyed the peace and quiet that only parents of young children can truly appreciate. Just then, Kevin Brady saw a face through the hedge. It was Shawn Culbert, and he was pointing one hand at Brady as if it was a pistol—he even made a shooting motion with his hand. This time, the face lingered long enough for Brady to be sure that it was Culbert. He jumped to his feet and ran towards the hedge.

"Kevin, what are you doing?" shouted Karen.

But Kevin was already through the hedge and out into the street, wildly looking around for Shawn Culbert. He was nowhere to be seen. Karen ran around the end of the hedge and found Kevin standing in the street, looking crazed.

Karen came up to Kevin and grabbed his arm. She said "Kevin, what's going on? Are you all right?"

"That man watching us—that was Shawn Culbert!"

"What man? What are you talking about?"

"The guy who was standing in our hedge looking right at us. You saw him."

Karen shook her head slightly. "I didn't see anyone."

Kevin looked at her in disbelief. "Are you kidding me? He was right there. His face was right between two of the bushes. He was watching us. I made eye contact with him."

Karen was getting frightened. "Kevin, I didn't see anyone and I was looking right at the hedge just before you got up and ran off."

"Well, he was there!" Kevin Brady was getting defensive even as he doubted his sanity. Brady took his cell phone out of its holster and dialed 911. After a few rings, the emergency operator answered and Brady reported that fugitive Shawn Culbert, who was the subject of a federal arrest warrant, had just trespassed at Brady's house and threatened to shoot him.

The police arrived five minutes later. They examined the hedge and found no signs that a prowler had been there. They interviewed Karen and some of the neighbors. Neither Karen nor any of the neighbors had seen anyone. The police became more suspicious that Brady was up to something, especially since he was a criminal defense attorney. The police not so subtly communicated their doubt that Kevin Brady had seen what he claimed to have seen.

Kevin and Karen ate their steaks with little conversation. An awkward silence hung in the air. Both wondered the same thing: Is Kevin losing his mind? As they finished dinner, Kevin was the first to address the subject head on.

"Well, I think I should get some professional help, Karen."

Karen nodded her head approvingly. "I agree, Kevin. I'm glad to hear you say that. I think this is probably caused simply by you being stressed out and fatigued. But you should see someone who can evaluate you and make sure you are okay."

The next day, Karen drove Kevin to the county Mental Health facility. He turned himself in as a self-referral. After a screening interview by a nurse, Brady was taken into a room and given paper clothes to wear. He was examined by a doctor, who also went through Kevin's medical history with him. Brady was then moved to another room. Eventually, a

staff psychiatrist entered and spent an hour interviewing Brady regarding his symptoms. He was interviewed, tested, and evaluated for three days. On day three, the same psychiatrist entered Brady's room and told him he would be discharged. The medical and psychiatric staff had concluded that Kevin Brady was sane and was not suffering from any mental disease. They concluded that Brady was suffering from post-traumatic stress disorder caused by the Shawn Culbert trial and the subsequent disappearance of Culbert. Brady was prescribed a variety of medications and then released.

Brady appreciated the psychiatric treatment and was committed to taking the medications so as not to have any more hallucinations. Karen picked him up and took him home. The boys were at their grandparents' house today. Kevin and Karen enjoyed a calm, quiet dinner where Kevin vowed to restore the proper balance between work and family in his life. They both felt that he had turned the corner on his problem and that life would return to normal.

* * *

Two weeks later, on a Friday afternoon, there was a brisk coolness in the air that signaled that fall was finally arriving. Then, rain started falling at about 4:00 p.m. Half an hour later, Brady said good-bye to the other office occupants, went out the front door of the Victorian house, and opened his umbrella. At the bottom of the steps, he looked up the street and saw what appeared to be someone bending down at the rear of his car parked on the street. Then the person stood up, glanced at Brady, ran to a brown Oldsmobile station wagon, and sped off. Brady felt a chill go down his spine as his heart started pounding. Oh no, not Shawn Culbert hallucinations again, he thought. Wait a minute, he thought to himself. Did I forget to take my medication this morning? He walked slowly through the rain towards his car. He failed to notice that his license plate was missing or that his taillights were both broken.

Brady was completely immersed in mentally evaluating the hallucination he had just experienced. He got in the car, turned the ignition, and tried to gather his composure. He finally felt in control again and pulled onto Dilworth Road to head home. After he crossed East Boulevard, he saw a police car turn in behind him. A few seconds later, the police car's light bar was activated and Brady pulled over.

After a minute or two, the police officer exited his vehicle and approached Brady's. Brady rolled down the window. Before pulling Brady over, the officer had just been forwarded an anonymous "Crime Stoppers" tip that a black Volvo with broken taillights and missing a license plate would be passing through the intersection of East Boulevard and Dilworth Road and that the car's driver was carrying two ounces of crack cocaine and a pistol. Because the officer observed obvious traffic code violations, he was legally authorized to pull the car over even though the real reason for the stop was the anonymous tip concerning two ounces of crack cocaine and the gun.

The officer came up along the driver's side of Brady's car. He asked Brady for his driver's license and vehicle registration. Brady handed the officer his driver's license and then reached across to the glove compartment to retrieve his vehicle registration. A second officer had now arrived on the scene as back-up and had positioned himself on the right side of the car. He could see the glove compartment as Brady opened it. As soon as Brady pulled open the glove compartment door, two baggies of an off-white lumpy substance came tumbling out, leaving a Beretta 9-millimeter semi-automatic pistol hanging out of the glove compartment. Brady jerked back in his seat, not believing what he was seeing. The officers both drew down on Brady and ordered him to put his hands on the steering wheel. Events slowed down and Brady felt like he was looking down on this surreal scene from above.

The officers told him that he was under arrest. They handcuffed him and put him in the back of one of the patrol cars. Brady was in danger of hyperventilating. The officers weighed the two bags of off-white lumpy substance and told Brady, "Well, Mr. Brady, you're over 50 grams of crack. The feds will take this case because you've got the gun, too. You'll get ten years for the drugs plus five for the gun. We'll see if any of your motions and loopholes will get you out of this one! See you in 15 years!"

Both officers laughed.

As the patrol vehicle pulled away to take Brady to the Mecklenburg County Jail, Brady kept trying to pinch himself awake from this nightmare. Was this really happening?

As the patrol car approached the intersection of East Boulevard and Dilworth Road, Brady suddenly noticed a brown Oldsmobile station wagon parked on the left side of the road, facing towards him. As they got closer to it, he saw Shawn Culbert behind the wheel and a banner unfurled along the side of the car. Although the rain was taking its toll on the banner, Brady could clearly see that it said, "You better hope your lawyer is better than mine was!"

Brady sat up erect and started yelling. "Hey, I've been set up! That guy in the Oldsmobile station wagon back there did it! Stop and go back! There's a banner on that car that you need to seize as evidence!"

The officers just shook their heads and exchanged glances. They took him to the jail where he was booked into custody.

* * *

As Brady lay on his wafer-thin "mattress" on the floor of his jail pod that night, he realized that Shawn Culbert had set him up perfectly. The evidence against Brady was very strong. No one would believe that the missing Shawn Culbert, widely believed by law enforcement to be outside the state, had returned to frame his former attorney. Brady felt that it was inevitable that he would be convicted and sentenced to 15 years in prison.

Brady had thought that losing the Culbert trial was the worst possible feeling he ever could have had. How wrong he was. His long nightmare was just beginning. ■

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