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Racing Was Built Here, Racing Lawyers Belong Here

BY CORBY ANDERSON

NASCAR means racin', and racin' means business. NASCAR estimates the industry's current annual statewide economic impact to be \$5 billion. And there's more to come. Last year, NASCAR announced that Charlotte will be the site for the NASCAR Hall of Fame and for NASCAR Plaza, a new office tower where NASCAR Licensing and NASCAR Images, among other businesses, will be headquartered. What kinds of work does the sport spin off for lawyers? Read below to find out what lawyers involved in many different aspects of the sport have to say, including Tracy Nipp, at NASCAR; Lauri Wilks, at Speedway Motorsports; Tommy Warlick, at Motorsports Authentics; Christopher Traeger, at Bank of America; Arthur Kalos, at Team Red Bull; and three lawyers in private practice -- Tom Grady, of Hartsell & Williams; Robert Muckenfuss, of Helms Mulliss & Wicker; and Stokely Caldwell, of Robinson Bradshaw & Hinson.



Photo courtesy of Lowe's Motor Speedway

Tracy Nipp: NASCAR is “an IP lawyer’s dream.”

Tracy Nipp has always loved sports, but she didn’t grow up wanting to be a NASCAR lawyer. Her first visit to a speedway was to flip burgers at a concession booth as a fundraiser for her brother’s soccer team.

Nipp, a Mecklenburg County native, got her undergraduate degree in international studies and political science, with a minor in business administration, from Rhodes College in Memphis. She worked as a marketing intern for the Buffalo Sabers, an NHL hockey team, doing “typical grunt work.” After college, she took a year-long paid internship as a management analyst in the White House. From there, she went to law school at the University of North Carolina (UNC). While in Chapel Hill, she worked as practice hostess for the UNC football team—a job that called for her to “chit chat with the big donors” during the closed practice sessions and “politely ask people to leave if they weren’t supposed to be there.” Although Nipp was not sure she wanted to practice law, she answered a blind ad for a manager of business affairs. The ad, as it turns out, was placed by NASCAR. The company hired her in 1996. From there, it was off to the races. Nipp was the first lawyer NASCAR had hired, other than its general counsel at its Daytona Beach headquarters. Nipp’s office, then in Huntersville, had six or seven people. But NASCAR had just taken its brand licensing in house and decided to concentrate that work in Charlotte because so many of the racing teams are there.

Nipp started out as a “jack of all trades.” She was in charge of the budget for the licensing group. She did the office build out when her office moved to Charlotte. She did HR work. One of her first big deals was the NASCAR SpeedPark.

Over time, as NASCAR grew and jobs became more specialized, Nipp gravitated toward the legal side. Now 60 of NASCAR’s 900 employees are in its Charlotte office, including three attorneys (all of whom, by the way, are women). A patent attorney works out of the Concord office, where NASCAR’s research and development is focused.

Today, NASCAR has more than \$2 billion in licensed sales and more Fortune 500 company sponsors than any other sport. Nipp says the licensing department includes an automotive aftermarket program, which

licenses “anything you put on the car after it leaves the plant,” from tires to intake manifolds to belts and hoses, and a traditional licensing program, which licenses toys, games, hats, and t-shirts, among other items, and handles the NASCAR Café, the NASCAR SpeedParks, and now the NASCAR Hall of Fame. One of NASCAR’s latest licensing ventures, aimed at its 30 million female racing fans, is a deal with Harlequin for romance novels. The first racetrack romance, *In the Groove*, hit the market in February 2006.

What does Nipp like most about her job? “The excitement of it... It’s sexy, if you will, in the sense that it’s sports and entertainment. You get to see a product in the marketplace. Had I gone to a firm, I probably wouldn’t have been put on the front lines like I have been in NASCAR. It’s great to have that opportunity when you’re in-house, working on such high-profile deals.”

Nipp has three children, ages five, three, and brand new. “When they see NASCAR on TV, they know that that’s what Mommy does. But who knows? They could think I drive the car.”

“NASCAR is a sport that depends on sponsorship. That’s how we were built,” Nipp explains. For that reason, intellectual property is key. “NASCAR is an IP lawyer’s dream,” she says, because the IP rights are so fragmented. “People think we own more or control more than we do.... The reality is... there is not a drivers’ association. So there are no collective rights.” For example, although Coca-Cola is NASCAR’s official soft drink, Jeff Gordon can wear his Pepsi uniform and use the NASCAR mark in a cross-license fashion with Pepsi. “Someone who doesn’t understand our sport might say: ‘Why can’t you stop your drivers from doing it?’ But we’re not like that.... If you want exclusivity in NASCAR, you have to go to the teams, you have to go to the drivers, and you also have to go to the track and to NASCAR,” she explains. “That’s probably, from a legal perspective, what’s most fascinating.”

What does Nipp like least about her job? Being a referee for IP rights between the different entities in NASCAR. “Sometimes it can be challenging because they are all trying to sell the same thing,” she says. “When you’re in-house, you don’t want to be seen as ‘the no department,’ but at the same time you want to protect your client. You always

try to come up with alternatives to offer them instead of saying no.”

Nipp does not have contact with the drivers in her job, although the business units are in constant contact with them. NASCAR lawyers operate “behind the scenes,” she says, in part because of NASCAR’s culture. “You do a contract and, if there are any respectful disagreements, we’re not ones to quickly go to court over them.... We work with people.”

Working in a family-run business is also “unique in and of itself,” Nipp says. “You’re not representing just a corporation and a bunch of shareholders, you’re actually representing a family’s integrity. It’s more personal.” The company is coming up on its 60th anniversary and is now in its third generation of management.

Like the races, the legal work at NASCAR is fast-paced. “You’re always moving. I’ve never been caught up in the ten years I’ve been here. At any given time, we have at least 80 agreements in our queue. And it never goes down.”

Lauri Wilks: “I love being here every day.”

Lauri Wilks grew up in Jackson, MI, near the Michigan International Speedway. Her dad is a race fan, and she was six years old when she went to her first race. She worked part time at the Michigan speedway in public relations through high school and during summers while she earned a degree in history and political science from Cedarcrest College. When she went to law school at Wake Forest, she knew she wanted to end up working in NASCAR. Her contacts in Michigan put her in touch with Humpy Wheeler, and she started work for Charlotte Motor Speedway fresh out of law school in 1993.

Wilks soon got involved in investor relations and helping the company through an IPO. In 1995, the company made its debut on Wall Street as Speedway Motorsports, Inc., the first motorsports company publicly traded on the New York Stock Exchange. In 1997, she was promoted to general counsel. Today, her Concord-based company has six speedways scattered from here to the California wine country, nearly 1,000 employees, and more than \$544 million in annual revenue.

Last year, Wilks was promoted to senior vice-president for administration and is

“back on the track side” in an operational role. She now oversees the legal department, the finance department, the private Speedway Club, and all the logistics of putting on events. She is ultimately responsible for everything from parking to camping to emergency medical service to helicopter traffic. She oversees the event staff. She coordinates with the firefighters, the highway patrol, and the police and sheriff’s departments.

The biggest surprise about her job? “That I’m doing it.” Wilks says she deals with the same kinds of legal issues—employment, security, real estate, government relations—that lawyers for other businesses do, but “they just happen at the speedway.” The company’s 2005 annual report summarized its most significant legal proceedings: the last of 48 lawsuits filed after the May 2000 collapse of a pedestrian bridge at Lowe’s Motor Speedway, environmental monitoring of solid waste landfills at Lowe’s, and claims that a subsidiary misappropriated an “interactive storybook.”

The most frustrating part of her job? “We’re a cost center for the company, not a profit center,” Wilks says. “Our challenge is to be proactive and show the business people why we’re valuable.” She sees herself as a “bridge” between outside lawyers, who tend to be risk avoiders, and inside business people, who tend to be risk takers.

The most fun part of her job? “Being at the track, talking to the fans—they’re the best people in the world,” Wilks says. “I love being here everyday.”

Tommy Warlick of Motorsports Authentics: “We’ve bitten off a lot. We’re trying to chew it now.”

Tommy Warlick became interested in IP law when he worked as an entertainer to pay for college and law school, doing everything from dinner theater to voiceovers. Now IP is his bread and butter. According to NASCAR, motorsports accounts for more than \$2 billion in licensed sales each year, and Warlick, as general counsel for Motorsports Authentics, wants to take that figure even higher. Two of motorsports’ leading promoters, International Speedway Corporation (ISC) and Speedway Motorsports, Inc., created Motorsports Authentics in 2005 as a joint venture to make, market, and sell NASCAR-related merchandise. Since September 2005,

Motorsports Authentics has acquired two major producers of racing collectibles, die casts, and apparel: Team Caliber (formerly owned by Roush Racing) and Action Performance Companies, Inc. “We’ve bitten off a lot, and we’re trying to chew it now,” Warlick says. With the IP rights it acquired from those two companies, Motorsports Authentics now has licenses for the leading teams and competitors in NASCAR. “We could be one of the largest revenue generators in our sport,” he says.

After recruiting Warlick to be its new lawyer, Motorsports Authentics recruited Ruth Crowley from Harley-Davidson to be its new president. Crowley understands branding, Warlick says, and “will help us take souvenirs to a whole new level.” The company will focus on developing a “coherent, well-thought-out branding strategy” that offers a full array of products, from small-ticket to big-ticket items. In the past, he says, “we’ve dictated what consumers want. Now, we want to do the reverse.”

Warlick earned his undergraduate degree from UNC-Chapel Hill in English and political science and his law degree from Emory in 1990. He clerked for US District Judge Richard Voorhees in Asheville, worked as a staff attorney on the US Court of Appeals for the Fourth Circuit, and then clerked for Fourth Circuit Judge Karen Williams in South Carolina. He practiced at a firm in Nashville before moving to Chicago. There, he joined a small firm representing Barney (the dinosaur) while he worked on a master of laws (LLM) in intellectual property at John Marshall Law School. He finished his LLM in 1998, while working at Kilpatrick Stockton.

Warlick says his grandfather was “a huge fan” of NASCAR who insisted on listening to the races on the radio from his easy chair. But growing up, Warlick never expected to be involved in racing. He dropped his résumé with NASCAR “completely as a fluke.” The job he applied for went to Karen Leetow, a colleague at Kilpatrick Stockton who had five years’ experience with the US Patent & Trademark Office to her credit. A year later, when another job opened up, she asked him to join her. He did, in March 2000.

In Daytona Beach, Warlick split his time between ISC and NASCAR. For ISC, he was associate general counsel, and for NASCAR, he was one of three assistant gen-

eral counsel. Among his projects were the movies *Herbie Fully Loaded*, starring Lindsay Lohan, and *Talladega Nights*, starring Will Ferrell, as well as a multibillion-dollar, eight-year deal for domestic broadcast rights contracts for the NEXTEL Cup, Busch and Craftsman Truck series, and other related programming with FOX, ABC, ESPN, TNT, and Speed Channel.

Moving to Charlotte to join Motorsports Authentics was an easy decision for Warlick. “I grew up here. This was my chance to come home.” He still gets to work with motorsports’ founding families, the Frances and Smiths—contacts he enjoys. “They are good people. They care about the sport and the people in it,” he says.

The most fun thing about his current job? “Being a problem solver. We’ve got more problems than I can say grace over right now,” Warlick says cheerfully. He also loves “seeing what I did,” whether it’s the *Herbie* movie at the video store or a race on television on a Sunday afternoon. “It’s tangible,” he explains.

The most frustrating part of his job? “I don’t get to do as much lawyering as I expected, with all the business issues on my plate. Being a general counsel means you do everything.”

Christopher Traeger of Bank of America: Advocating the needs of the sponsor

Chris Traeger has worked in sports-related legal jobs ever since he networked his way into an internship with the Detroit Pistons during law school. In his current job, he is responsible for sponsorships and brand marketing for Bank of America.

Traeger joined the company just as it was deciding to make motorsports a central part of its marketing strategy. NASCAR claims 75 million adults as fans—one-third of the United States’ adult population—so that decision seems only natural. In February, Bank of America announced a five-year sponsorship agreement with International Speedway Corporation that makes it the “official sponsor” of four ISC tracks in California, Kansas, Arizona, and New York. The company has plans for racing-themed mass-market promotions and for client hospitality, displays, and ATMs at the raceways. It has also become the title sponsor of the Bank of America 500 (formerly the UAW-GM Quality 500) and a sponsor of the

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Traeger did not have his eye on racing during his years at the University of Mississippi, where he earned his undergraduate degree in history in 1994 and his law degree in 1997. But he did have his eye on sports. As a student, he joined the Sports Lawyers Association, made up mostly of sports agents. He thought of becoming an agent, but other agents talked him out of it. Instead, he decided to focus on representing major brands because “there will always be a need for someone to advocate the needs of a sponsor.”

A New Jersey native, Traeger worked in Atlanta and New York before settling in Charlotte. He started out with Championship Group in Atlanta, a small sports marketing company. He represented sponsors in negotiations with teams, athletes, leagues, and sporting events. After negotiating the deals, he helped implement them. Part of his job was “activating” the relationship—“You’ve bought the rights to affiliate your brand with an athlete, now how do you let people know?”—and managing legal and reputational risks.

In 2000, Traeger took a job in New York with Octagon, which owns sporting events in golf and skateboarding. He then worked for a Charlotte-based business unit of the company, Octagon Racing, helping launch NEXTEL’s sponsorship of NASCAR. After five years with Octagon, Traeger moved to Bank of America, an Octagon client.

The biggest difference between his past jobs with marketing agencies and his current job representing a major sponsor, Traeger says, is “the dynamic of looking at the brand as a whole, the entire portfolio of things going on and how they interact, and what risks are presented.”

Along with one paralegal, Traeger supports more than 100 people in Bank of America’s sponsorships and regional marketing group (which handles NASCAR) and its enterprise media group (which handles advertising, creative design, and distribution). “We’re very lean here,” he says, noting that one of his former clients has eight attorneys to his one. The biggest surprise about working with NASCAR? “How complex it is,” Traeger says. NASCAR is a family business, it has no players’ union, and it relies on

common understandings rather than written rules, he explains. Those factors all combine to make it even more complex than the Professional Golfers Association, Major League Baseball, the National Hockey League, or the National Football League.

The most fun part of his job? “Being able to see the fruits of your labor. You work on an ad, and you see it on TV.”

Arthur Kalos of Team Red Bull: “We’re all in the sandbox together.”

Growing up in Boston, Arthur Kalos never attended a race and never even watched one on TV. While earning his undergraduate degree in American studies from Trinity College and his law degree from Suffolk Law School, he never studied intellectual property or sports and entertainment law. “I thought: Everybody wants to be in that. Why waste my time? It’s too much of a long shot.”

Instead, during law school Kalos worked at a small firm known for its high-profile criminal defense work (for clients such as Patty Hearst). “It was definitely a different world,” he says.



Photo courtesy of Lowe's Motor Speedway

Yet by March 2000, less than a year after graduating from law school, Kalos had moved to Charlotte to take a job at NASCAR. "I was in the right place at the right time," he says. A childhood friend's sister, who worked at NASCAR, suggested that he send his résumé.

Kalos worked in licensing and sponsorship for NASCAR until July 2002, when he became the first in-house lawyer for Dale Earnhardt, Inc. (DEI). Kalos had met folks at DEI through a neighbor and through races and other events. "They knew me personally and knew I had a good level of experience in the business," he says.

Kalos was able to "ease into" his job at DEI, because his colleagues, early on, weren't used to looking in-house for help with "normal, everyday" legal issues. But soon "the floodgates opened," he says, and he began handling matters that ranged from employment advice to real estate leases. He particularly enjoyed securing sponsorships. He negotiated arrangements for everything from decals and signage to drivers' personal appearances to production days for shooting video and audio spots.

One of Kalos's challenges at DEI was stopping counterfeiters who wanted to turn a profit from Dale Earnhardt's death in 2001 during the Daytona 500 race. They seized

that opportunity to sell a host of unauthorized merchandise, from decals to clocks to clothing. As Kalos told the press, DEI did not authorize anything with dates, halos, wings, or the words "in memory of." DEI teamed with Action Performance, which licensed Earnhardt merchandise, to hunt down and confiscate those counterfeit goods.

This spring, Kalos left DEI to become general counsel of Team Red Bull, Inc., a new racing team. "It's a great opportunity to work with a team just starting out, backed by new sponsors in the sport," he says. Red Bull is a sponsor and an owner, Kalos points out, "so we don't have the normal challenges of getting sponsors." Instead, he spends his days "helping the race team get off the ground," doing deals with product suppliers for everything from gearboxes to chassis, and hiring new people. Red Bull has just worked out a deal with Bill Elliott to drive three races this fall and is working on deals with other drivers for the next full season.

The most surprising part of motorsports? It's configured differently than any other sport. It's disjointed, not centralized, so "when you deal with NASCAR, you must deal with a bunch of entities," he says. For sponsorships to be effective, everyone must realize that "we're all in the sandbox togeth-

er. Sponsors are in the same sandbox with other sponsors as well." Thus, for example, it's not at all unusual to find a Home Depot car racing at Lowe's Motor Speedway.

The most frustrating part of his job? "There really isn't much that's frustrating," he insists. But when pressed, he concedes it can be challenging "being the legal person in a sport that grew so fast from a wink-and-a-handshake culture." Slowly but surely, he says, the sport is moving away from "the whole napkin deal world."

Kalos's advice to lawyers who want to break into motorsports? The opportunities are broader than they might expect. "It's not just teams," he says. There are many kinds of work to be done.

Tom Grady of Hartsell & Williams:
"Among the best friends I've ever had."

Tom Grady got his first look inside the world of NASCAR in 1980, when his law partner asked him to step in and try a case for a plaintiff in a landscaping dispute. The defendant was a crew chief for a racing team. "While the jury was out, we started talking. He wore a gold presidential Rolex with diamonds, and I asked him about it. We hit it off."

Grady got to know the crew chief and his wife, whose seven siblings were almost all involved in racing. The crew chief and his wife invited Grady and his wife to a race at Daytona. There, they introduced Grady to the driver and others on the team. When the driver left for another team, he introduced Grady to the other team's owners. "It's a close-knit community," Grady says. "If they trust you, they'll refer other people to you."

Grady was in high school when he attended his first race. Sitting at the track on that May day, he never thought he would be a lawyer working in NASCAR. He earned his undergraduate degree from Pfeiffer College in 1963 and his law degree from Wake Forest in 1966. He is a partner at Hartsell & Williams, a firm with a dozen or so lawyers and offices in Concord and Kannapolis.

When Grady did his first work in NASCAR, "nobody had contracts," he says. Today, everyone has them. He notes that teams are getting drivers under contract at younger and younger ages. "They recognize talent in these kids when they're 12 years old. Many come from families who've been involved with racing for a long, long time."

Grady has represented drivers, owners, and sponsors in the NEXTEL Cup, Busch Grand National, Craftsman Truck, ARCA, and Hooters Pro Cup series. He has represented suppliers as well, including, among others, BSR Products (which makes after-market products), Richardson Racing (seats), Racing Electronics (two-way radios for cars), and Irvin Smith (pit boxes). He also negotiated a contract with Fox TV for an announcer.

Grady's work for racing clients extends beyond racing. "It's a breeder of other work," he says. He has handled wills, loan closings, real estate transactions, and traffic violations. "They seem to have a lot of those," he notes.

What would people be surprised to know? "How accessible these people are. Drivers, crew chiefs, teams—they're community-oriented. They participate. They're givers, not takers. You see them at restaurants, at churches, at charity events, at youth programs. They don't hide from you."

When Grady was introduced to NASCAR, there were only six to eight lawyers who did this kind of work. As NASCAR has grown, the number of lawyers and the size of their firms have grown. "Now it's a business more than a sport," he says.

The greatest reward of working as a lawyer in NASCAR? "The people you meet and the friendships that come from those meetings," Grady says. "Some of those people are among the best friends I've ever had."

Robert Muckenfuss of Helms Mulliss & Wicker: "Drivers have virtually unlimited freedom."

Robert Muckenfuss started his NASCAR practice on Thanksgiving Day 1999. While eating a turkey dinner, he asked his brother-in-law if he needed a lawyer. The answer? "Sure." With that, Muckenfuss became Jeff Burton's first counsel in racing, and Burton became his first client in the sport. "Jeff was talking about his new team, Roush Racing. I was just a few years out of law school. I knew nothing about motorsports law, but I was amazed at the level of sophistication in the sport."

Muckenfuss negotiated Burton's driver contracts with Roush Racing and with Richard Childress Racing. He handles all of Burton's personal service contracts and licensing issues. He negotiates sponsorship agreements related to Burton and his obligations with the sponsors and the team. He also represents

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"NASCAR is an incredibly close-knit community," Muckenfuss says, adding that his practice has expanded to other drivers and team owners because of his work for Burton. He now represents NASCAR drivers in the Truck, Busch, and NEXTEL Cup series. He has also represented MBV Motorsports, Mark Martin crew chief Patrick Tryson, drivers Mike Bliss and John Andretti, and a local

company, Pro Sports Management & Marketing.

Muckenfuss grew up in South Boston, Virginia, a small town known for textiles, tobacco, and racing. As a kid, he attended races at the South Boston Speedway. His small town produced several well-known names in racing, including the Burton brothers, drivers Jeff and Ward, and crew chief Robin ("Bootie") Barker, a high school classmate of Muckenfuss. Today, although



Muckenfuss drives a station wagon, he is “a huge NASCAR fan” and attends races every year in Las Vegas, Richmond, and Daytona, as well as here in Charlotte.

Muckenfuss’s father, grandfather, and great-grandfather worked in the textile industry. His first job, in the summer of 1987, was breaking down looms in a textile warehouse. He says that summer taught him a new respect for the hard labor of the mill workers and a strong desire to do something different for his own life’s work. He earned an undergraduate degree in history from the University of Virginia in 1993 and a law degree from the University of South Carolina in 1997.

“The good and bad thing about being a lawyer in this sport is that the contracts are completely unregulated by a sanctioning body,” Muckenfuss says. “Unlike football players in the NFL, NASCAR drivers don’t have a traditional agent-oriented system and don’t have standard contracts. That means drivers have virtually unlimited freedom to customize their driver and endorsement contracts to their liking. Some drivers fall victim to one-sided contracts or unscrupulous team owners and agents.”

“From a legal perspective, there’s always a lot going on for the drivers,” Muckenfuss says, from contract negotiations to litigation to sophisticated corporate work.

His next big client? He predicts that may well be nephew Harrison Burton, who, at

age five, is already driving in a souped-up go-kart series.

Stokely Caldwell Jr. of Robinson Bradshaw: Race teams “literally hire rocket scientists.”

Stokely Caldwell was introduced to NASCAR through a piece of routine corporate work. In 1990, while an associate at Robinson Bradshaw & Hinson, he was called upon to help firm client Ken Barbee buy Hendrick Sportswear, a company that made t-shirts, bumper stickers, key chains, and other souvenirs of racing.

Other work flowed from that, including negotiating license agreements for drivers whose images were used on the souvenirs. Through Barbee, Caldwell met a young driver just moving to town from Indianapolis who needed a local lawyer. That driver was Jeff Gordon.

“My NASCAR practice has grown out of those acquaintances,” Caldwell says. There’s a lot of movement in NASCAR, he explains. People stay in the sport, but they switch teams. Then, when they call you, they introduce you to new people in the sport. Caldwell makes “house calls” at the race shops. He used to do business at the tracks, but now he goes more for fun.

Today, Caldwell represents drivers, teams, sponsors, agents, and crews, among others. His clients include Gordon, Dale Earnhardt Jr., Roush Racing, Evernham Motorsports,

Kevin Harvick Racing, and Michael Waltrip Racing. He represented Texas Instruments in becoming the primary sponsor of the new Hall of Fame Racing team.

Growing up in Roanoke, Virginia, Caldwell collected Matchbox cars, but he never attended stockcar races. He earned an undergraduate degree in economics from Hampden-Sydney College in 1978. After spending more than five years in banking, he earned a law degree from Washington and Lee in 1986. He is now a director at Robinson Bradshaw and has headed both its banking and capital markets as well as its sports law groups.

The biggest myth about working in NASCAR? “That it’s unsophisticated. Southern. Redneck. Country bumpkin. Once you meet the people, you know that it’s anything but that,” Caldwell says. Speaking of the technical side of racing, he adds, “these race teams literally hire rocket scientists. You’d be amazed at how small the tweaks are to make a difference in performance.”

As for the business side of the sport, Caldwell says: “These are astute business people.” When he started out in NASCAR, “the handshake was more the rule than the exception.” That’s no longer the case. Now sophisticated deals are the norm.

The most frustrating thing about being a NASCAR lawyer? More than any other sport, NASCAR is like a spider web. “You have to do things that might seem silly or strange just because of the intricacies of the NASCAR IP world.” Parties with no experience in NASCAR, who don’t understand that, can make negotiations difficult.

The thing Caldwell enjoys most about NASCAR? Working with “genuinely nice” people, he says, and being able to see the results of his work on driver and sponsorship agreements—in the paper, on the television, in magazines, and at the track.

Caldwell estimates that on average about half his work is NASCAR-related, although the mix can vary. “Right now,” he says, “everything on my desk is racing.” ■

Corby Anderson is a partner in the Charlotte office of Helms Mullis & Wicker, PLLC. Her practice focuses on intellectual property and media law and commercial litigation.

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Do North Carolina's New DWI Laws Violate the Constitutional Rights of Defendants?

BY JOHN GEHRING, AN INTERVIEW WITH DAVID FREEDMAN

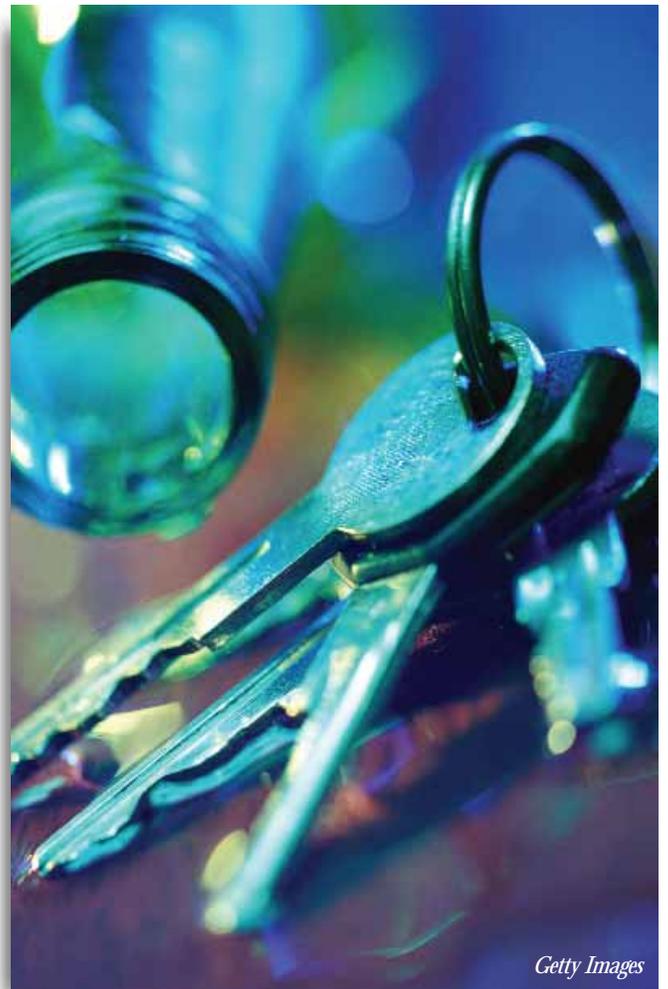
The new DWI law which took effect as of December 1, 2006, purported to make numerous changes in the old law. These changes were touted as a protection to the citizens of our state and the travelers on our highways from drunk drivers. A further look into the law shows that the stated purpose may be achieved but at what expense to the constitutional rights of the defendants. I asked David Freedman, a criminal law expert from Winston-Salem, to talk about the new law. Our interview follows.

Question: Impaired Driving has come to have expanded meaning with the addition of Schedule 1 controlled substances, or its metabolites. A *per se* violation of the DWI statute appears to be mandated when Schedule 1 items are present. What drugs are included in Schedule 1 and what are metabolites? How long do Schedule 1 drugs stay in the body after ingestion? Is the driver automatically (presumed) guilty if any of the

Schedule 1 drugs are found in his body at any reasonable time after driving? Is the presumption of innocence gone forever?

Answer: Under N.C.G.S. §90-89, there are a number of drugs that are classified as Schedule 1. Opiates, opium derivatives, hallucinogenics, certain depressants, and certain

stimulants are the majority of those drugs. Metabolites are organic compounds that are either starting material in, an intermediate in, or an end product of metabolism. Depending upon the drug, a metabolite may stay in your



Getty Images

bloodstream a number of days. The statute makes no distinction between an active metabolite, which would indicate that you are under the influence of the drug, or an inactive metabolite, which can remain in your system for days after ingestion of the drug. Obviously, the problem with failing to delineate between the active and inactive metabolite is that you may be presumed guilty of impaired driving when you are not impaired.

Question: Habitual Impaired Driving now extends the time period for prior convictions from seven to ten years. How many prior offenses are now required for the driver to fall into the Habitual Impaired Driving status? Do both in-state and out-of-state convictions count?

Answer: I believe that three prior offenses in ten years would be the prerequisite of application of the statutes and that out-of-state convictions do count.

Question: The new offenses of Felony Serious Injury by Vehicle, Aggravated Serious Injury by Vehicle, Aggravated Felony Death by Vehicle, and Repeat Felony Death by Vehicle have been created. With the exception of the Repeat Felony Death by Vehicle, are all offenders treated the same even if some have many years of safe driving? Please give an overview of these new felony laws.

Answer: The new felony laws essentially ratify what has been developed through case law over the past 10-15 years. Before these new statutes were implemented, if you were impaired and involved in an accident in which someone was seriously injured, you could be charged with the Class E felony of Assault with a Deadly Weapon Inflicting Serious Injury, with the impairment serving as the intent requirement to the offense. Now, under N.C.G.S. §141.4, you can be charged with either Felony Serious Injury by Vehicle, a Class F felony, or Aggravated Felony Serious Injury by Vehicle, an Class E felony. The distinction in the two charges are whether the defendant has a prior DWI in the past seven years.

As to the change in Felony Death by Vehicle, the charge remains the same as before, which just requires a victim dying as a result of the defendant being impaired and being the proximate cause of the accident. The new felony created, Aggravated Felony Death by Vehicle, occurs when there is impaired driving and the defendant has a prior conviction of DWI in the past seven

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years. The level for the felony is Class D, which is interesting because most prosecutors around the state have been treating that fact pattern as Second Degree Murder, or a B2 Felony. Perhaps this new classification will allow for some plea bargainings because in the past, there was no middle ground between Second Degree Murder and Involuntary Manslaughter, a Class F Felony. The last amendment, Repeat Felony Death by Vehicle, states that if you have been convicted of a prior felony death, the punishment will be the same as Second Degree Murder.

Question: How have the laws concerning the consumption of alcohol by underage persons been changed?

Answer: The main change I can detect for consumption of alcohol by an underage person comes from the admissibility of alco-sensors in the trial for possession of alcohol by a person less than 21 years old. N.C.G.S. §20-16.3 allows the admissibility of the alcohol screening device to prove the driver of a vehicle had consumed alcohol. Further, §18B-302 allows any screening device which has been approved to be admissible to prove consumption.

Question: The new law apparently allows any law enforcement officer, investigating an offense in his jurisdiction, to make an arrest anywhere in the state of North Carolina. It further appears that the officer may take a suspect to any chemical test location in the state for testing. Do you anticipate that this extended jurisdiction will cause problems? Can a Walnut Cove officer make an arrest in Dare County or transport from Walnut Cove to Manteo for a chemical test?

Answer: I do not anticipate this new law to create problems. My guess is that it would

be rare that an out-of-county law enforcement officer is going to make an arrest without the assistance of a local police officer, sheriff's deputy, or state trooper. From my experience, most officers do not enjoy having to attend court in their home county, much less have to travel several hours to testify for a single DWI. As for Walnut Cove's finest driving to Manteo for a chemical test, that just will not happen. In that the defendant's blood alcohol is not a constant, and delaying a chemical analysis only benefits the defendant. As a result, I believe intoxilyzers or blood tests will be done at the nearest possible location.

Question: Please talk about the new requirements placed upon magistrates, chief district court judges, district attorneys, and local sheriffs to accommodate witnesses to the administration of the breathalyzer or blood test. Does the failure of the above officials to follow the new rules mandate a dismissal of the DWI charges against the defendant?

Answer: At the risk of ignoring this question, let me develop two areas of concern:

a) Traditionally, a doctor-patient privilege applies in cases where a physician treats a patient. Under §90-21.20B, if an individual is involved in a vehicle crash, a health care provider shall disclose information to a law enforcement officer including location of patient and whether he appears to be impaired. While the statute precludes the prosecutor from disseminating this information, it is admissible in court.

b) Traditionally, when a prosecutor dismisses a criminal charge, he or she signs a form, briefly giving reasons for the dismissal, and places it in the file. No longer will that be the case in DWI cases. N.C.G.S. §20-138.4

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requires that in the rare event a prosecutor files a voluntary dismissal for a DWI, he or she must list on the AOC form:

- 1) the blood alcohol concentration or if the driver refused;
- 2) all of the defendant's prior DWI convictions;
- 3) status of defendant's license;
- 4) whether there are pending charges;
- 5) elements that the prosecutor feels can be proved and those which cannot be proved;
- 6) home and agency of charging officer and whether officer is available;
- 7) reasons why the charges are dismissed.

After the dismissal is filed, a copy is then sent to the elected DA and to the police chief or sheriff employing the charging officer. There is no similar scrutiny for the dismissal of any other charge, even murder.

Question: And, speaking of testing, please comment on the rights of the accused who refuses to take the breathalyzer. Can the charging officer force the suspect to submit to a blood test? And does such force violate the right of the suspect against self-incrimination?

Answer: A person who is requested to take an intoxilyzer or blood test can be required to give a blood test even after refusing to do so. Under N.C.G.S. §20-139.1(d1), if a person refuses to submit to tests, an officer with probable cause may compel the person to submit, if the officer reasonably believes any delay would result in dissipation of the percentage of alcohol in the person's blood or urine. While this may seem to be a drastic change in the law, it again is a ratification of recent case law. In a case I tried several years ago, my client ran a red light and struck a vehicle being driven by the elected DA's wife. Upon the defendant's refusal to

give a blood test, a search warrant based upon probable cause was issued to obtain a blood test. In *State v. Davis*, the NC Court of Appeals ruled that blood tests can be obtained upon showing of probable cause, citing the U.S.S.C. case of *Schmerber v. California*, saying that a blood test is not a violation of the 5th Amendment's right against self-incrimination.

Question: Trial procedures have been changed to require all motions to be written and filed before trial and all decisions by the judge to be in writing. How much of a backlog will this create and will "blanket" forms be allowed both before trial and in making decisions? Should such motions be filed in each case, both as a protective measure for the defendant and also for the defense attorney (post conviction matters, etc.)? Do responses to the pre-trial motions have to be in writing?

Answer: The requirement of Pretrial Motions in DWI cases, under G.S. §20-38.6, distinguishing it from all other misdemeanors tried in district court, could prove to be a logistical nightmare for the day-to-day operations of district court. In a number of DWI's that I have handled over the years, I go to court with my client without having seen the police report, in that there are no discovery mechanisms for obtaining one in district court. I review the report and determine at that point what, if any, legal issues should be raised at trial. Now, it may be that I have to file a motion in every DWI case pretrial, to make sure my client's interests are protected. I am hoping that the legislature is intending to increase the number of district court judges in the state, for I believe that will be required to handle the increased workload.

Question: The new law sets forth certain guidelines for the withdrawal of an appeal or

a remand and specifically states that the trial judge must delay sentencing in the remand cases until all pending or new cases against the defendant have been resolved. Please talk about these guidelines and can "justice delayed be justice denied?"

Answer: The legislature, throughout their amendments, clearly indicate that DWI's are to be treated differently than all other misdemeanors. Nowhere is the distinction more pronounced than in the rules which apply upon appeal of a DWI to superior court upon conviction in district court. Under N.C.G.S. §20-38.7, when a DWI conviction is appealed to superior court, it can only be remanded to district court with the consent of the prosecutor and superior court judge. In addition, a new sentencing will be conducted to determine if there are new convictions for impaired driving, or if there are pending charges, requiring a delay in the resentencing. This provision of the statute may be a violation of the defendant's constitutional right not to be subject to double jeopardy, in that the legislature seems to be saying a final conviction is not really a final conviction.

Question: Any further thoughts on the new act?

Answer: I wish to point out one last area of concern. Under N.C.G.S. §20-16.3(A), the requirements for procedures dictating how roadblocks are to be established almost become nonexistent. Perhaps my favorite line is (20) which states checking stations must "operate under a written policy that provides guidelines for the pattern, which need not be in writing." In other words, there is a certain carte blanche to law enforcement agencies about how they are to perform roadblocks. In subsection (d), the legislature decides they will fulfill the role of the judiciary as well, when they say a violation of this section "shall not be grounds for a motion to suppress." I believe this section is ripe for an attack based upon the separation of powers. ■

John E. Gehring is a State Bar Councilor and member of the Publications Committee.

David B. Freedman is a partner in the Winston-Salem firm of Crumpler Freedman Parker & Witt. He received his undergraduate degree in 1979 and his JD in 1982 from UNC-Chapel Hill. He is an adjunct professor at Wake Forest University School of Law and clinic supervisor. Mr. Freedman is certified as a specialist in state and federal criminal law.

The Light Within: A Lawyer's Journey through Grief, India

BY JOSEPH L. ANDERSON

The Gardens of Bangalore Oberoi

I am lost
In the Gardens of Bangalore Oberoi
So beautiful these flowers, but
Calcutta is all I can see
I cannot smell the honeysuckle;
only rotting trash fills my nose
and the koi pond, waterfall, and colorful saris
are mere transparencies
layered over beggars' eyes.

I want to shake it off
The way a dog shakes off water
I tried to scrub it off, black water running away
I'm going to walk it off, sleep it off—
and carry it with me to my grave.

*Joseph Anderson
January 3, 2005*



An avid yogi, in 2004 it was my dream to travel to India to study with one of the living masters of the art, Yogiraj Bikram Choudhury. Near the time set for my departure, my father died suddenly.

The death of a man's father calls to mind his own mortality, of course, but also raises searing questions about what is really important in life. It seems strange, looking back, that I proceeded to India during the spasm of our family's grief. But my mother wanted me to go, not just in spite of our loss, but somehow because of it. Within a month I would find myself grieving my father's death amid the almost unimaginable slums of poorest Calcutta—an experience that would change my life forever.

Touchdown in Delhi

Nothing in my experience prepared me

for what awaited. As I wrote about my first day out in Delhi in my weblog (which recently was published as a book):

"Within minutes of leaving the hotel I was genuinely shocked, not by the teeming throngs of foreign-looking people, but of the poverty, the filth, and the duality of it all: nearly naked children picked for food atop a garbage heap just feet from the protected enclave of my hotel, literally competing with pigs.

"And the *smells*. I was unprepared to deal with them. Feces lay everywhere, absurdly abundant. Piles of it melted in the streets and on the sidewalks. And urinating in public is so commonplace that large puddles of acrid, bitter excrement must frequently be jumped over, gone around, or intrepidly crossed.

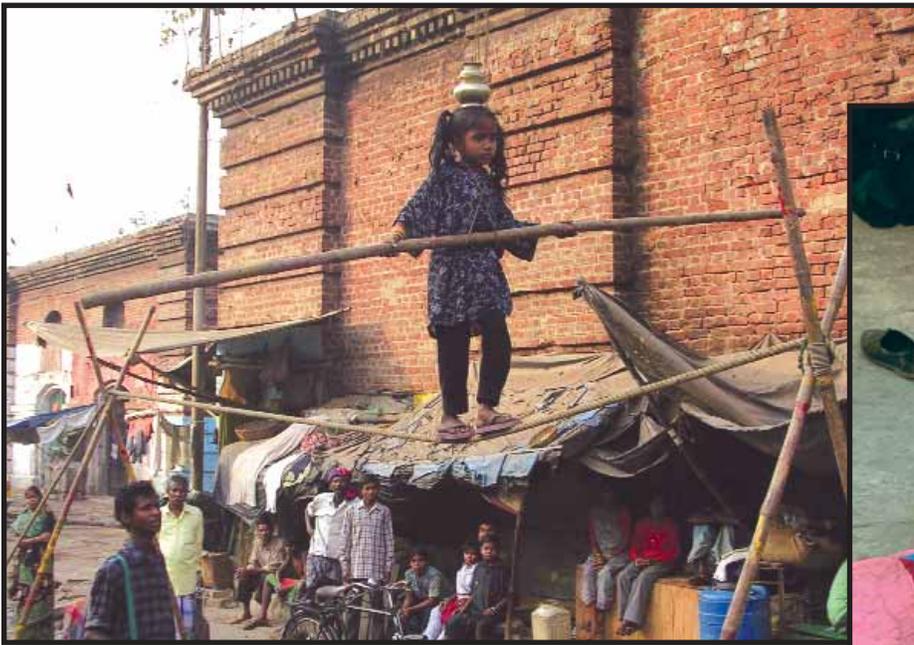
"Dwellings made of plastic, scrap wood, and bailing wire were perched atop mounds

of rubbish, their wall-rags flapping dustily in a feverous wind. Women bent themselves beneath impossible loads of firewood and water, their eyes sunken. Naked babies plundered haphazardly in the arid soil, their knees calloused, their mouths black with flies.

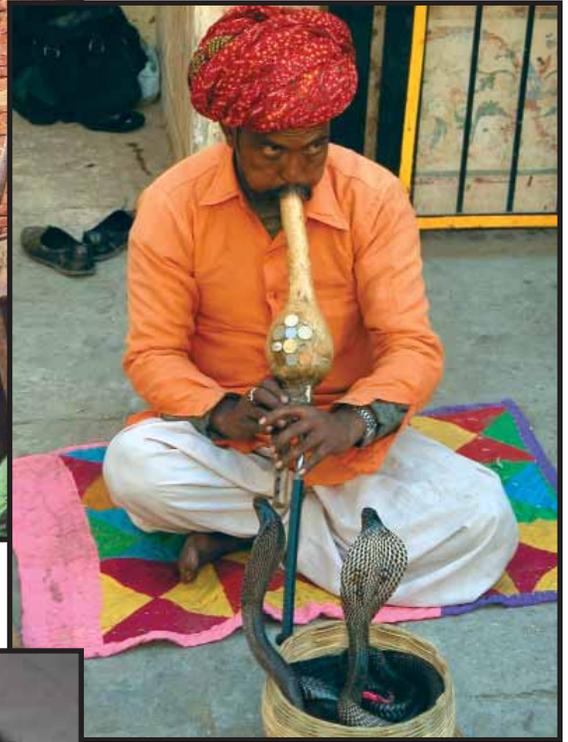
"The squalor was such that I wanted to photograph it, but part of me was deeply ashamed to record the suffering and poverty of others using a camera costing more than they would earn in their entire lives."

Calcutta

I moved across India by a variety of conveyances: busses, trains, planes—even on the back of an elephant. By the time I reached Calcutta a month later, I was a changed man. I wanted to see it all. I would explore the slums of poorest Calcutta alone, and on foot.



Child tightrope-walker, Calcutta



Snake charmer, Jaipur



Children, Fatehpur Sikri

More than 30,000 people occupy every square kilometer of ground in Calcutta. Dwell on that: we're talking about 30,000 souls crammed into approximately half a square mile. Two-thirds of Calcutta's population of 14 million lives in the officially rec-

ognized slums, the so-called Bustees, in primitive huts made out of clay, corrugated iron, and old wooden boxes. These, however, are the *privileged* ones. Less fortunate still are the squatters, who live in "houses" made of cloth and plastic, anywhere they can. But

the worst of all is reserved for the million or so who possess only a bent tin bowl and a dirt-encrusted mat.

I wrote: "Their existence is played out on the pavement, in the doorways of houses, under ox-pulled carriages, in garbage dumps and in competition with rats and dogs.

"These were my hosts today.

"I was confronted by souls who never left here, people whose lives, from birth to death, were played out amid the garbage heaps. I saw a child fighting a pig over a piece of trash. I saw three children struggling ferociously, bodies mired in the gooey mounds of rotting detritus, faces black with grime. They were competing over the contents of a newly emptied garbage pail.

"Just down a narrow alleyway, I came upon a sideshow that could have been a metaphor for all of life, and perhaps was: a child tightrope walker. She was a girl of maybe seven, balancing with all the concentration of a dying monk above the hard-packed ground and watchful crowd. She crossed a loosely slung rope, first on bare feet, then astride a bicycle wheel's rim, and finally shuffling along atop her bent food



Siblings, Bangalore (above); infant on bus, Cochin (right)



pan. As if that weren't enough, she also balanced stacks of brass cups on her head. She was doing whatever it took to eke out a survival. Despite all this, she didn't look well-fed.

"I moved on, pushing through a tightly packed throng of beggars, now all but oblivious to the hundreds of hands that reached out to touch my shoulders, arms, and face, somehow at peace with the sea of eyes that poured their vision into me—as though I were a bottomless vessel able to receive the infinite torrent of their dreams. They were eyes that somehow made one face, the way fishes make one school, the way snowflakes make one storm. Eyes as indecipherable and countless as the raindrops of the monsoon.

"There have been times in the course of these notes when I have been tempted to simply throw up my hands and say that words cannot communicate what I beheld. I have resisted the impulse, not wanting to concede the failure. But here I must come dangerously close, for it is true: some things simply must be experienced to be believed.

"I struggle to convey the barbarous hues of even their dwellings, gray as the color of soot, smeared by random violence with the blackened streaks of tallow grease, founded on rotting trash.

"These were, quite frankly, places you would not consent to enter for a second; it is

all but impossible to conceive that millions of our fellow human beings are consigned to live in such conditions their entire lives. And this is to say nothing at all of the people themselves.

"It was the looks on their faces—the awe at seeing blue-eyed, Western me, the weariness of the weight of their existences, the resignation to raw destiny—that grabbed my spine and shook me to my core.

"Splintered, pale light weighed down by dense contaminants like smoke from burning garbage was what outwardly lighted their expressions; yet here and there I glimpsed the inward fire of life, life on the thinnest edge of being, life against all odds. And here, I tell you from my innermost soul, was the cuttingest thing of all: that inward fire was so beautiful to see. It was breathtaking, impossible. It was an orchid blooming in Antarctica, and I knew I was among gods.

"How do you at once recoil in horror and yet weep tears of joy? How do you shudder at the wretched stench of putrid waste while in the same breath beholding with absolute clarity the purest beauty you have ever seen? I tell you it is wrenching, a duality that drives you deeper into your

questions even as you instinctively retreat."

Conclusion

I encourage lawyers to take time away from their practices to explore the broader world. The experiences of this adventure have reshaped me, given me perspective on my father's death, and, I hope, made me a more humane and better lawyer. ■

Joseph L. Anderson is a board certified civil trial specialist and graduate of Harvard Law School. He is the founder of Anderson Weber & Pangia, PLLC, with offices in Washington, DC, and Greensboro, where he concentrates his practice in representing victims of aviation disasters, catastrophic medical negligence, and nursing home abuse.

*Following his return from India, Mr. Anderson established a permanent fund which provides nutritional and medicinal support to Calcutta's poorest children. For more information, visit www.CalcuttaFund.org. His weblog, excerpted above, was published in 2006 by Press 53 under the title, *The Light Within: A Travel Log of India*. It is available online at Amazon.com, and at bookstores everywhere.*

Ten Steps to Staying Sane While Practicing Law

BY LYNNE TOWNSEND ALBERT

Lawyers strive to balance numerous and conflicting personal and professional obligations. It's easy to get caught up in the daily grind of "must dos" and emergencies while neglecting to focus on those things that matter most in life: family and friends. There just aren't enough hours in the day (week or year) to complete all the tasks that motivated attorneys try to accomplish.

As busy as lawyers are, we mustn't lose sight of the fact that life is tenuous and fleeting. We need to live our lives with no regrets or "should-have-dones"—especially regarding the people we hold most dear. So, how do you balance a stressful, demanding career with the needs of your personal life?

Here are ten steps to help you stay sane while practicing law:

1 **It's ok to say "no" to extra work or social opportunities.** No one can do it all! Learn to say "no" to new clients if you don't have extra time in your schedule. Earning the additional fees isn't worth it if you are exhausted by the additional work. The same rule goes regarding social opportunities—only attend the events that bring you fulfillment. Lawyers have enough obligations as it is.

2 **Don't work with clients or lawyers you don't like!** Working with difficult clients or lawyers you dislike is physically and emotionally draining. Find ways to avoid both. Whether it requires "firing" clients, changing the focus of your practice, or possibly changing jobs, having peace of mind is worth it.

3 **Take vacations and afternoons off whenever you can.** Lawyers drive themselves relentlessly—billing and working hour upon hour. Schedule lengthy periods of time off for yourself at least three times a year and "play hooky" from work on slow afternoons. Recharging and renewing yourself makes you a better lawyer.

4 **Take care of your own health—eat and drink well and exercise regularly.** Practicing law is stressful by nature. Eating and drinking in a healthy manner and exercising regularly can help you combat this stress. And make your exercise fun! Walk your dog, bike with your kids, play racquetball or tennis with your buddies. You'll enjoy yourself and stick to your routine.

5 **Get at least eight hours of sleep a night.** Too many lawyers work daily in a perpetual state of exhaustion. This leaves them cranky and with lowered immune systems. Try to get at least eight hours of sleep a night. Being rested will give you greater energy and stamina to face the workweek.

6 **Fight stress in whatever healthy manner works best for you.** The stress of legal practice leads many lawyers to alcohol or drug addictions, binge eating, or other unhealthy practices. Find healthy ways to fight the stress in your life—whether it's meditation, exercise, religion, playing or listening to music, or enjoying nature. Find activities that bring you peace and pleasure and do them daily.

7 **Hire good people to help you personally and professionally.** Everyone needs help. At work, hire competent paralegals,

administrative assistants, and associates and don't be afraid to delegate work to them. At home, hire housekeepers or other household workers to make your life easier. Good employees are worth every penny.

8 **Hug and kiss your family at every opportunity.** No matter how exhausted or stressed you are, make time every day to tell your family you love them. Kiss and hug your kids and spouse every chance you get. These are the moments that matter in life.

9 **Find time for hobbies and activities that bring you joy.** Find a hobby or activity you enjoy and do it regularly. Whether it's dancing, reading mysteries, bird watching, or fishing, find something you love to do besides work and do it. You'll be a happier and more interesting person for it.

10 **Most importantly—remember that you don't have to be perfect!** Lawyers are perfectionists by nature. We all want a successful career, meaningful community/volunteer work, and a happy personal life. But no one is perfect and you shouldn't strive to be. Just do the best you can, make the best choices you can, and forgive yourself (and others) when things go wrong. That is good enough.

Here's wishing you both a fulfilling career and a personal life filled with meaning and joy! ■

Lynne Albert of Chapel Hill has practiced law for over 20 years. She is the immediate past-president of the North Carolina Association of Women Attorneys. Most days, she retains her sanity.

Tony and Me—And Other Encounters with the Rich and Famous

BY GARY R. GOVERT

I read in *The New Yorker* a while back that unlike Bill Clinton, who the magazine described as “a serial moocher of private jets,” Jimmy Carter usually flies commercial. Carter and his security detail get on the plane first and he sits by the window in one of the front rows. When everybody else has boarded, Carter gets up and walks to the rear of the aircraft, communing with the hoi polloi until time for takeoff. “It saves me from having them come up to see me during the flight,” he told *The New Yorker*.

Some might say it's kind of sad—pathetic, even—that a former president can't use public transportation without his fellow passengers thinking that their accidental encounter with a famous person entitles them to a personal audience. Actually, I might say that—but not without a rather sheepish look on my face.

Sometime back in the late 80s, I got on a plane at National Airport in Washington, DC, on my way home to Raleigh. As I passed through first class, I noticed that Antonin Scalia was on board. Justice Scalia was then just a couple of years into his now-lengthy tenure on the United States Supreme Court; I was a relatively new

lawyer working at a large law firm in Raleigh. From my aisle seat in coach, I could see that the spot next to my eminent fellow passenger was unoccupied. Sitting here today, I can't imagine what possessed me, but at some point during the flight I got up, walked forward, and plopped myself down in that seat for a little chat.

Now, lest it be thought that I am a *total* idiot, I secured permission for this intrusion through a flight attendant before making my move. My mistake, it turned out, was thinking that permission to approach was anything more than just that. I had clerked at the North Carolina Supreme Court and had always found its members to be quite affable,

so I wasn't particularly worried about engaging a judge in conversation. (That came later, when I had become more familiar with the difference between working for a judge and appearing before one.) I suppose I thought I could talk to anybody. Besides, I think I had heard by then that Justice Scalia was a witty and engaging conversationalist, despite his emerging reputation as a sharp questioner during oral arguments.

In my case, he obviously wasn't interested in much more than hello and goodbye, with an emphasis on the latter. I should have left it at that, but in an apparent effort to salvage some portion of the ego I had invested in this seat change, I geeked out completely and asked him about an opinion he had authored in a recent administrative law case. He told me he wasn't inclined to say any more about it. I told him I happened to know that he was on his way to North Carolina to give a speech at Duke Law School. He allowed as how that was correct.

I thought better of asking him about his cufflinks. Justice Scalia's cufflinks, I couldn't help but notice, bore the seal of the president of the United States. I assumed they were a gift from President Reagan, who had appointed him to the Supreme Court. I remember thinking, as I belatedly made my way back to my seat in coach, that those cufflinks could have been a good jumping off point for a conversation about separation of powers, particularly between the executive and judicial branches. But as I said, I didn't go there. Some might say that was one of the better decisions I made that day.

Reflecting on my chat with Justice Scalia

has reminded me of some of my other encounters with celebrities, or whom I thought of as celebrities. The earliest generally involved baseball players. My first autograph was collected sometime in the early 60s from one Dizzy Trout, who had a long and more or less satisfactory pitching career with the Detroit Tigers and who for some reason was attending a Little League game in the small Indiana town where I grew up. Trout, I recently learned, gave up a home run to Ted Williams in Williams' last at-bat before going off to the Korean War, just two days after I was born. Williams, at the time, was the favorite player of the Georgia teenager who later would become my father-in-law. I think that means there are less than six degrees of separation between Trout and my wife. Small world, eh?

Not long after garnering my Trout autograph, I met Ernie Banks, the longtime Chicago Cubs shortstop and first baseman. I was in what amounted to a receiving line on the infield grass at Wrigley Field before a weekend day game—they were all day games at Wrigley back then—along with at least a hundred other Little Leaguers. After the legendary Mr. Cub shook my hand and passed by, I broke from my place in line, ran to the end, and managed to shake hands with him again. “Let’s play two!” Ernie used to say. I guess I figured one doubleheader was as good as another.

After a brief military career proximately caused by a certain lack of attention to high school, I went to college and eventually tried my hand at journalism. I was in Pennsylvania by then, and one of my first assignments was a magazine profile of Elsie Hillman—purportedly the richest woman in Pittsburgh, definitely a cousin of Barbara Bush, and a behind-the-scenes powerhouse among Pennsylvania Republicans. This was 1979, when the first George Bush was still running against Ronald Reagan for the GOP presidential nomination and before he settled for vice-president. My first meeting with Elsie was over dinner at the Madison Hotel in Washington, where she ordered steak tartare. I had never seen anyone eat raw hamburger before and was immediately smitten. When we had finished several interview sessions, she gave me a George Bush for President bumper sticker inscribed with the words, “Gary—I’m not afraid of you anymore. Good luck, Elsie Hillman.” Somehow, this token of affection from the subject of a

political profile did not feel like my finest moment as a journalist. I felt better, though, when I heard that Elsie didn’t much like the article I wrote, which prominently featured her woodshedding of a local republican official who had gotten himself entangled in a sex scandal. I still have the bumper sticker, which I keep in a closet.

I think my interview with Fred Rogers—*Mister Rogers* to most people—was before the Hillman profile. Either that, or my editor decided I really wasn’t cut out for political reporting. In any event, my most vivid memory of the Rogers interview was his observation that little kids have a deep-seated fear of being sucked down the bathtub drain, which he had deduced from watching them try to stuff dolls, army men and other items down there. Now that I’ve had kids of my own and the plumbing issues that go with them, I know where he was coming from. And yes, he really did talk that way in real life.

Doc Watson, the blind flat-picker from Deep Gap, North Carolina, told me he liked to mess with electrical equipment when he was a kid and could tell the different colored wires apart by feel. Do not try this at home.

Gerald Ford called on me at a news conference in Wilmington, Delaware, a few years after he left office. I wanted to tell him that I had played a few pick-up basketball games with his son Mike when I was in college, but I figured that would be unprofessional. Instead, I asked him some lame question about foreign policy. Now it’s too late to make that personal connection.

I once asked Jerry Falwell if he was a pre-millennialist or a postmillennialist. He was.

Law school opened up a whole new world of celebrity encounters. One of my summer jobs, between my second and third years, was at what was then Tharrington Smith & Hargrove, the Raleigh firm at which future senator and current presidential candidate John Edwards was starting to build his reputation. I didn’t have much to do with John that summer, but years later, as a partner in that large firm I mentioned earlier, I co-signed a check made out to him, which to this day is the most money I have ever held in my hands at one time.

Twenty-some years of law practice have, of course, thrust me into the company of various other legal luminaries. I locked Mike Easley out of a car one time. (This was a

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while ago, before his current employment, so there were no troopers around to assist or arrest me.) Then there was that incident involving the launch of my shoe in the direction of Jim Exum’s backside. But I’d just as soon we didn’t get into all that. Forgive and forget, I always say. Most of the lawyers I’ve encountered over the years have been willing to do that, and I’m grateful for it.

I suppose my only real worry after all this is that one day I’ll get the chance to argue a case before the United States Supreme Court, and halfway through my answer to Justice Kennedy’s question about the applicability of foreign law, Justice Scalia will interrupt and say, “Hey, aren’t you the guy who” ■

Gary Govert clerked at the North Carolina Supreme Court for Chief Justice Jim Exum, was with the law firm formerly known as Smith Helms Mulliss & Moore for 14 years, and claims to have worked in the Consumer Protection Division of the Attorney General’s Office since 2001, although no one there will admit to knowing him.

The Smith File

BY JAY REEVES

I spent much of that summer searching for the Smith file.

Looking back now, I question whether there even *was* a Smith file. If so, I wonder if it was ever lost. But I was young then, a brand new law clerk at the blue-chip firm of Winchester Gimble, and I believed what everybody said.

One thing everybody said was that if you were lucky enough to land a clerkship at Winchester Gimble, you should go with the flow. If one of your superiors—which for a summer clerk meant pretty much everyone except the runners and mail clerks—said jump, you jumped.

So it was that on my second day, a senior associate in the Bankruptcy Division showed up at my cubicle all wide-eyed and anxious.

“The Smith file!” he said. “Do you have the Smith file?”

“No, sir,” I said, nervously.

“Are you sure?”

“Yes sir,” I said. “I’ve never worked on the Smith file. I’ve never even seen it.”

“Really?” he said.

“Really,” I said.

Maybe I was just paranoid, but he seemed suspicious, like he didn’t fully believe me, as he hurried off to the next cubicle. I soon learned not to be so quick with the truth.

“Hmmm,” I’d say instead, pondering the query. “Come to think of it, I believe I overheard some of the clerks in Litigation talking about the Smith file this morning. Or no, it was in the library. I think I saw it in the library.”

Such a response, though completely bogus, made me appear interesting and engaged, plus it had the added benefit of making the Smith file-seekers happy.

“Great,” they’d say. “Could you follow up on that?”

Off I’d scurry to the cool spacious library, or perhaps the break room to follow up on a story I’d concocted out of thin air.

I wasn’t the only one. Other clerks were searching for the elusive grail as well, only for them it might have been the Davis file or the Kilkenny file or whatever. Once, my cubicle mate, a deeply religious 1L from the University of South Carolina named Mitchum, was dispatched to Central Prison in search of the Petty file. Later he told me that he’d been sent to the hospital as well.

“They thought somebody might have inadvertently left the file there after a doctor’s deposition,” said Mitchum. “No such luck.”

The weird part was that, invariably, whenever you’d run into the person who had been so frantically in pursuit of the mysterious file not long before, they’d be all cheery and acting like nothing had ever happened. Of course, you’d never bring it up yourself, because at Winchester Gimble, it was best to not make waves.

In the second week of that summer, Winchester Gimble hosted its annual Field Day. All the lawyers got to leave early. We changed into shorts and t-shirts and drove over to the local park for an afternoon of beer, hotdogs, and fun. Field Day turned out to be somewhat falsely advertised. Although they called it Field Day, it was really tryouts for the firm’s softball, tennis, and volleyball teams. Apparently, Winchester Gimble had a proud history of domination in the city recreational leagues. Field Day was how the firm recruited new talent.

After a little socializing, all of us Field Day participants were asked to choose softball, tennis, or volleyball, and were then led to our selected area. There, junior partners with Ray-Bans and clipboards roamed the fields evaluating the new meat. Both

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. The submission that earned first prize is published in this edition of the *Journal*.

Mitchum and I selected softball. The supervisor was a jerk named Barfill, who happened to have been the one who’d sent Mitchum on the Petty file goose chase. Barfill was a real jock type, with the sleeves to his Winchester Gimble t-shirt cut off to reveal tanned arms bulging with muscles.

“First,” Barfill said, positioning himself at shortstop, “let’s have a little batting practice.”

He assigned players to fill the other defensive slots, then told everyone else to grab a bat and get ready to hit. Another junior partner took the pitching mound. First batter up was a girl, a 2L from Alabama who was quiet and shy but swung a mean stick as she sprayed shots across the diamond.

Mitchum then took a turn. He was awful, flailing helplessly with his thin pasty arms, occasionally nicking a dribbler or foul ball.

“Okay,” Barfill hollered after Mitchum had swung and missed yet again. Barfill had removed his glove and was writing on his clipboard. “Next batter.”

I stepped up. It had been awhile since I’d played softball. The first pitch sailed outside, and the next one was too high. The bat never left my shoulder.

“Come on,” Barfill yelled, kicking the

dirt. "Swing the bat."

I watched the third pitch bounce off the plate.

"Move up closer," Barfill said to the pitcher.

The pitcher stepped forward a few feet, to where he'd pitched to the girl. His next one was also outside, but just to break the monotony I reached out with the bat and tapped the ball back to the mound.

"Closer, closer," said Barfill, and the pitcher moved a few paces nearer.

Now, I had nothing against Barfill. I didn't really know him, but there was something in his tone that day, something about his Ray-Ban smirk, that made me pull off the plate as the next pitch came in high and inside and whip the bat around fast to rope the ball humming to short where it buzzed inches past Barfill's ear so quickly he never had a chance to raise his glove.

"Whoa," the pitcher said, and whistled thoughtfully. He backed up to his regular spot on the rubber. I whacked the next one so far over the fence in right field that everyone froze and craned and watched it bounce into the parking lot. I jacked the next one to dead center and sent the next four or five in a row over the fence either on the fly or first bounce. Then they ran out of balls and had to take a break.

That was how I made the Winchester Gimble softball team. Poor Mitchum, by contrast, was relegated to volleyball.

First game I batted cleanup and, with three homers and a half-dozen ribbies, I was pleased at how quickly my stroke returned. We won our first three games by lopsided margins. From there on out, I was the golden boy at work.

This was, for me, an object lesson in the unfairness of life at a silk-stocking firm. Because while I got all the plum assignments and the backslaps in the break room, it was Mitchum who was the truly outstanding law clerk. He stayed up late writing briefs, digested cases like a demon, and billed time like a beaver. Yet no recognition came his way. Meanwhile, more often than not I'd be napping under my cubicle. I was showing up for work exhausted, because games sometimes ended late, and of course I would have to attend the obligatory post-game beer and wings celebration at Applebee's.

But nobody cared. So long as I kept belting home runs, I was Clerk of the Year. Barfill, the team captain, plainly didn't like



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me. He was the sort of player who needed to be the star, and I'd stolen his spotlight. But he certainly liked the fact that I was helping his team win ballgames and giving him bragging rights over peers at rival firms. So I just gave him his space and did my thing.

One day, Barfill barged up to my cubicle with his cheeks flushed and hair sticking up.

"What's your schedule like for the rest of the day?" he asked, fidgety.

"Well," I said, "at two I'm supposed to report for shredding duty."

"Tell you what," he said, eyes darting. "What if I could get you out of shredding duty? Could you help me out on the Smith File?"

"Sure," I said. "Anything to get out of shredding duty."

We drove across town to a neighborhood of identical ranch homes. Barfill parked his Beemer by the curb but left the engine idling.

"See that house there?" he said.

"Yeah." The only thing that distinguished the house he was pointing at from the ones on either side were the lovely red and yellow roses exploding from the window boxes.

"A client lives there," Barfill said.

"Okay."

"See the garage?"

"Yes."

"Inside the garage is a briefcase."

"Okay."

"The briefcase belongs to me. It's my briefcase."

"Okay."

"What I need you to do is walk over there and open the little side door and get the briefcase. You won't even have to go inside the garage. See the little door? It's right inside there. Get the briefcase and bring it back here."

"Why don't you do it?"

"It's too complicated to go into right now," he said, with a little heat. "Far too many angles. But there's no problem, honestly. Nobody's home. And absolutely no illegality cause it's my briefcase."

"What about trespassing?"

"It's not trespassing. It's self-help."

His neck veins were throbbing and his face was splotchy, just like at Field Day.

"I thought we were supposed to be working on the Smith file," I said.

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"Listen," he said. "You've got to do this. You've, you've ..."

Then, inexplicably, he dissolved, right there before my eyes. He slumped behind the wheel as if all of his muscles and willpower had failed at once, and when he spoke his voice was raspy and resigned.

"Look," he said. "Here's the deal. I was here visiting this ... *client* ... earlier today. I left the briefcase by accident. It's true that nobody's home and it's also true that nobody would care if I retrieve it. In fact, the client would *want* me to, if she knew I'd left it here. But I can't just walk over and get it because you see that car up there?"

I eyed a burgundy Buick LeSabre parked on the opposite curb a few blocks up.

"The man in that car is a private detective. In his lap is a thousand dollar camera with a telephoto lens. His instructions are to photograph everybody who enters or exits those premises. Let's just say it wouldn't be good for me to be captured on film."

"And it *would* be good for me?"

"There's no risk for you. None whatsoever. I could come up with some explanation for you. I could say you're the client's

brother, or her nephew, or friend. But me, on the other hand, they'd recognize in a heartbeat, and that would be it for my legal career."

For the first time, I knew he was telling me the truth. So I got out of the car and walked across the street and over to the side door and looked inside the garage. Sure enough, there was an expensive oiled-leather briefcase. I grabbed it firmly by the handle. Crossing the street I glanced over at the LeSabre. I could just make out the driver twisted around in his seat and aiming something my way.

"Thank you," said Barfill, taking the briefcase as I slid into

the passenger seat. He looked young and old at the same time, and I felt vaguely sorry for him. "Thank you thank you thank you."

We finished the softball season with only one loss and blazed through the tournament on our way to the city championship. They ran our team photo, with Barfill holding the trophy, on page one of the sports section.

After the briefcase incident, I rarely saw Barfill except on the ballfield. Sometimes I'd pass him in the hallway, or we'd arrive at work at the same time and walk in together. On these occasions, we'd exchange a mumbled hello and avert our eyes and rush onward.

Mid-August rolled around, the dog days, and the last week for us summer clerks. We were all stressed about the upcoming exit interviews. The exit interview was a Winchester Gimble tradition so hallowed that Old Man Gimble himself, though 90 and feeble, insisted on doing them himself—quality control, he called it. The grading formula was a poorly-kept secret that used the code words "gown" and

"gavel." Gowns were good, like graduation and heavenly hosts singing. You might be awarded a gown, and a special mark on your personnel file, if you had done something especially notable during the summer or worked on a big case. Gavels were bad, like being knocked in the head or found in contempt of court.

Snag a gown or two, and you'd be invited back to the firm next year for sure. But a single rap of the gavel could spell career doom.

Mitchum came back from his exit interview with his face fallen. He sat down at his cubicle and began praying. I could almost hear the gavels banging.

Then it was my turn to take the long walk. I entered the executive conference room and was surprised to see in addition to Old Man Gimble none other than Barfill, sitting there across the table from me. I could tell from Barfill's expression that he was as surprised as I, and no happier.

"Good afternoon," said Old Man Gimble in his all-powerful Oz voice. "Mr. Barfill and I have the honor of conducting your interview today."

Old Man Gimble then proceeded to work his way through my file, peppering me with requests for explanation or clarification, until he hit upon something that lit up his face.

"So you were on the softball team?"

"Yes sir."

"You were the star?"

"I don't know about *star*. I was on the team, yes sir."

"We kicked some butt this year, didn't we?"

"It was a fun season, yes sir."

"Kicked old Duggins DeBeer's butt, didn't we?"

"Beat them twice, sir."

"Twice," roared Old Man Gimble, and swept his great gray mane back majestically. "Did you hear that, Barfill. We beat Duggins DeBeer twice. I'd say that warrants a gown for certain. What do you say, Barfill? A gown for our softball star?"

"Oh sure, absolutely," said Barfill with a sullen lack of conviction. "A gown for sure."

And it hit me again, the inequity of it all. Here was the gray eminence himself, Old Man Gimble, greatly pleased with my

CONTINUED ON PAGE 33

No Stealing

What if we did not invade our trust accounts or take money that does not belong to us. It is called a "trust account" for a reason.

What if we were simply committed to the truth - as our oath demands? There would be no lying to our clients, cheating the system, or stealing from justice.

It is obviously unreasonable to suggest that there is no need for the State Bar. Our profession and society at large has demanded protection from those few bad apples and deservedly so. That is a part of living in an orderly, just, and fair society. However, just because there is a valid need for the regulatory Bar does not mean that we need to give them reasons to work.

Professionalism is the higher standard not regulated by the Bar; but, professionalism should be informally regulated by each indi-

vidual lawyer by not being silent when you see unprofessional or unethical conduct, taking the high road of professionalism yourself, and continuing to be a zealous but honorable advocate for your clients.

The Hart Report (A Survey of Attitudes Nationwide Toward Lawyers and the Legal System), published in 1993, indicated that the legal profession has lost respect among some members of the public. There are lawyer jokes and movies and sitcoms that satirize the work of lawyers. This is nothing new - remember the now famous phrase, "First thing we do, let's kill all the lawyers" from Shakespeare's *Henry VI*. Our profession has always stood for the right thing. Defending the accused, adhering to a strict interpretation of the Constitution, representing the poor and injured is not always popular, but these are things that lawyers do which makes our

country great (and why hundreds die each year trying to illegally enter our land).

We as a profession need to keep doing what we are doing, but do it better. In talking about the attributes of the legal profession, Chief Justice Sarah Parker often quotes John W. Davis, who said: "True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures - unless as amateurs for our own principal amusement. There is little of all that we do, which the eye of man can see. But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens and by our efforts we make possible the peaceful life of men in a peaceful state." ■

Melvin F. Wright Jr. is the executive director of the Chief Justice's Commission on Professionalism.

Smith File (cont.)

pro prowess with the bat and ball. Everything was coming up roses for me: an average clerk at best, and a chronic napper and immoral briefcase retriever to boot. Meanwhile Mitchum—a lawyer's lawyer, a man of rigorous discipline and impeccable integrity—prayed at his desk, gownless, alone.

"Well," said Old Man Gimble, beaming. "I think we're done here."

"There is one more thing," I said. "For the record, I'd like to mention my involvement with the Smith file."

"Ah," Old Man Gimble said. "The Smith file."

I looked over at Barfill, who was drilling holes at me with his beady stare.

"Mr. Barfill supervised me on the Smith file. I think he can attest to how hard we worked."

"Oh yes," said Barfill, his voice suddenly higher. "We worked hard."

"And how proud we were of the outcome."

"Extremely proud," said Barfill. "A spectacular outcome."

"The Smith file was a highlight of my summer," I said. "And I just wanted to mention it. For the record and all."

"I'm glad you did," said Old Man Gimble. "Sounds like another gown is in order."

"Oh, and Mr. Gimble? I'm sure you gave Mr. Mitchum full credit for his efforts on the Smith file as well."

"Mitchum?" Old Man Gimble's bushy brows came together in a question mark.

"Yes sir," I said. "You interviewed him earlier. We share a cubicle, but he's so modest I bet he didn't even mention the Smith file. But he is really the one who should get the credit. Right, Mr. Barfill?"

Barfill said nothing. Lack of control was not a familiar place for him, and he eyed me warily, uncertain what I was up to.

Old Man Gimble was flipping through the personnel folders stacked on his desk. "Mitchum, Mitchum" he muttered. "Ah, here he is."

"For his work on the Smith file, Mr. Mitchum deserves the gown," I said. "Right, Mr. Barfill?"

"Right," said Barfill, dryly.

"Duly noted," Old Man Gimble said, as with a flourish he wrote in Mitchum's file. "A gown for Mr. Mitchum as well."

When I returned from the exit interview to my cubicle, I found that Mitchum had already cleared out his space, Bible and all, and had vanished. That was probably just as well. I don't know what I would have said to him anyway. But packing my own things I couldn't help thinking about him, as I imagined him speeding down the I-95 blacktop toward the green fields of Carolina.

When I was a baby, I'd been baptized in a gown. I don't recall wearing it, of course, but I'd seen the photographs. The gown was a family heirloom. My father wore it when he was baptized, and his father before him. It was a lacy, flowing garment, and it swallowed me up. In the pictures, I am just a head and a gown.

Walking through the grand lobby of Winchester Gimble that last day, carrying my cardboard box of personal items, I caught a whiff of something I had never smelled before. The aroma was thrilling: sweet but searing, delicate yet strong, and it made you want more. I don't think it was the law, actually, but it might well have been justice. ■

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