

Chapter 27B: Me and the Law (Part Two)

SERAFINA: You ought to be more respectful.
ALVARO: What have I got to respect? . . .
SERAFINA: Yourself at least! Don't you work for a living?
ALVARO: If I *don't* work for a living I would respect myself *more*.

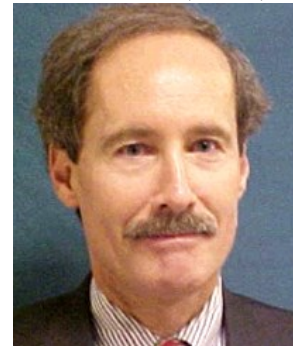
Tennessee Williams, *The Rose Tattoo* (1951)

1. Capital cases

Chapter 15 brought the story of my law career up to the point in July 1989 when I again needed a job. I called Jeff Newman (left), an old friend from Farella, Braun & Martel, where I had been the librarian for five years (see Chapter 24.B).¹ Then as now (2010), he



was a powerful partner there, and I asked if they had a part-time gig for me. In about a week he found me work with Douglas R. Young (right), one of our most distinguished and talented partners, who had started as a lawyer at Farella the same week in 1977 I began there as librarian. The job was to help him represent a condemned prisoner on habeas corpus, and



on August 2, 1989, I folded my private appellate practice (see Chapter 15.C) before actually doing any work for anyone and went back to Farella as a part-time lawyer. No one else imagined at the time that I would still be there more than 18 years later. But I wrote in my diary two days into the job: *This seems like a good niche for me. I'm staying!* It was very weird to sit in the library where I had once been librarian and not be librarian – I had had dreams about that.

I note in passing that when I was considering whether to launch the free-lance appeals project, I listed (in Notebook 66) the pros and cons of doing that rather than staying with George Buffington's pension practice (see Chapter 15.C) under a new system we had discussed. The pros for the free-lance project were:

¹ When I first worked there there was an ampersand in the name, and as I remember it a comma too. The name went through some minor permutations, and ended up Farella Braun + Martel LLP – no comma, a plus sign instead of an ampersand, and LLP at the end standing for *limited liability partnership*. Variations in this memoir are keyed approximately to period, without becoming too anal about it.

- no overhead (because I would use a free law library at the University of San Francisco – the Westlaw legal research database was not yet part of my research routine),
- no capital investment needed,
- adequate money (I hoped – adequate billing rate anyway),
- flexible hours,
- ability to work at home,
- already knowing how to do the work,
- near certainty of being paid,
- billing close to 100% of hours spent,
- no direct representation of clients,
- severable issues to deal with rather than having to give comprehensive advice, and
- not dependent on a single office for work.

It is remarkable that I achieved *all* of these (except the last one) at Farella. The cons were:

- little or no court time,
- uncertain supply of work,
- no benefits, and
- low hourly rate compared to private practice as a litigator.

All these were also present at Farella, except my hourly rate eventually became considerably higher than it was when I started, and I was not much bothered by uncertainty as it averaged out on an annual basis.

The habeas corpus project involved representing a California state prisoner who had already lost his trial and his appeal before we even entered the case. He had been sentenced to death, and our job was to represent him on state and later on federal habeas corpus. Habeas corpus is the name of a writ. Originally, in medieval times, it was directed from one of the king's justices to the sheriff. It said, in Latin, "You have the body (*habeas corpus*) of John Smith – you are commanded to bring him to our judgment seat and justify why you are holding him." If the sheriff couldn't justify to the king's representative why he was holding the prisoner, he had to release him. Because it was a

way to challenge the authority of those in power to restrain the freedom of an individual, it was called the Great Writ.²

- Habeas corpus is of cardinal importance in any system of liberty, which is why it is mentioned by name in the Constitution. We have seen its importance recently when President Bush 43 held people in a special prison in Guantánamo Bay, without charge or trial, arguably forever, because he thought he could avoid the reach of the writ out there in Cuba. But see *Boumediene v. Bush*, 553 U.S. 723 (2008).
- Habeas corpus is different from a criminal appeal. An appeal attacks errors on the record, while habeas corpus attacks errors that are not explicitly on the record, such as ineffective assistance of counsel. State habeas corpus focuses on those extra-record errors, and then federal habeas corpus (for a state prisoner) addresses all the *federal* constitutional errors raised below, either on state appeal or state habeas, provided they have been “exhausted” first in the state court. The procedure is different for federal prisoners. Is that all clear, now? It will be on the quiz.

Preparing a habeas corpus petition in a capital case is a hugely complex task. Unlike the practice in ordinary criminal cases, there was a tradition that a capital habeas petition had to assert every conceivable claim, whether viable or not – we had about 30 claims in our petition. I didn’t agree with this strategy as a matter of advocacy, but it wasn’t my decision. The California Appellate Project lent us a specialist lawyer to guide us in the arcana of capital litigation. I did the bulk of the analysis of the multi-volume record, the legal research and the writing.³ The petition came to something like 150 pages (just as in Kennedy & Rhine days). Doug Young said it was the longest document he had ever signed, but it was not considered excessive under the professional standards of the time.

- California capital cases have three phases. First there is a *guilt phase* trial – did he do (or was he at least legally responsible for) the homicide, *and* did it satisfy all the elements of *murder in the first degree*? If so, there is a second trial (before the same jurors), on the question: was at least one of the 22 *special circumstances* defined by California Penal Code § 190.2 present in the case? If so, the murderer becomes *death-eligible*, which he wouldn’t be otherwise, although his actual penalty is yet to be determined. Examples of special circumstances are: murder in the course of one of 13 specified felonies, multiple murder, murder with torture, murder of a peace officer, murder with a bomb, murdering a witness, prosecutor or judge. If there are special circumstances, only then is there a *penalty phase*, with a

² “The writ of habeas corpus is the water of life to revive from the death of imprisonment.” Rollin C. Hurd, *A Treatise on the Right of Personal Liberty* (1858).

³ The trial transcript alone ran ten volumes.

third trial (still with the same jurors) focusing not on the crime but on the defendant, to determine whether death is the appropriate punishment for *him personally*. The crime alone cannot be the *only* determining factor, as *everyone* who gets to this stage has committed special circumstances murder. There must now be an *individualized assessment*, during which the jury must consider mitigating as well as aggravating factors, to provide a “meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”⁴ If the jury does not find death to be appropriate, the sentence will be life without possibility of parole.⁵

I worked with our investigator to find and develop witnesses – not mainly to the crime, although we did some of that and visited the scene, but to our client’s background and character – the penalty phase was the most vulnerable part of the record. I ended up going down to San Jose and to Tulare to meet with our client’s (disadvantaged black) family, and developed about 28 heart-breaking declarations about his character.⁶ And I did a lot of other things to manage the finances of the project and keep in on course.

- Taking horrible life stories and turning them into dramatic, gut-wrenching, pity-inducing declarations became a specialty of mine – I did it for sentencing, immigration, and bar proceedings as well as for habeas petitions. Usually I made a list of topics to cover, and then called the witness on the phone or visited him. I took notes (on the computer if it was a phone interview) on whatever the witness said. (Later I took to wearing a headset when interviewing a witness by phone, to keep my hands free to type.) I explored issues freely with the witness and probed wherever an opening appeared. I always finished my list of topics, but didn’t stick *only* to the list during the conversation. If the witness said something useful or interesting, I often asked why s/he felt that way – that question can open up lots of unsuspected but convincing detail. I didn’t hesitate to make suggestions if I thought the witness might agree, but I never argued or tried to get a witness to say something s/he was not comfortable with. A witness has to feel completely at ease with the views and recollections in the declaration. Then *immediately* after

⁴ *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (concurring opinion of Justice White).

⁵ Called in the trade LWOP, pronounced EL-wop.

⁶ As I got to know him over the years I concluded that he really *was* as good a person as these declarations said he was. He was a green 19 at the time of the crime, a botched robbery, which was planned and led by his older brother-in-law, a serious criminal who did all the shooting (which I later got him to admit in writing). The robbery provided the special circumstance. Of course he should not have been involved at all, and a stiff prison sentence would not have been unjust. But the death penalty really was out of line for this teen-aged accomplice non-triggerman first offender.

finishing the interview, if possible, before I forgot the tenor of the conversation, I moved my notes around on the screen, wrote up a clear and coherent declaration mainly in the witness' own words, and submitted it to the witness for review. I was happy to incorporate any changes s/he suggested and never argued about any suggestion. I did this for dozens of declarations in many cases and got very good at it.

The original crime (murder, of course – as a practical matter that's the only crime that gets the death penalty in California) was committed back in 1979.⁷ Doug Young wouldn't be appointed counsel in the case until 1989, ten years later, after the trial and appeal and state habeas had long ago been lost by incompetent counsel – there were reasons for this delay which I will not recount here. Twenty-one years after that, in 2010, the case is still in the courts, with a long way to go. Every day the resolution is delayed is one day more of life for our client – delay always works to the advantage of a condemned prisoner. We don't delay for delay's sake, which would be unethical, but we don't try to hurry things up either. May the case last until my client dies of old age.⁸ In fact as recently as February 2010 we won the right to an evidentiary hearing on several important claims. A path of hearings and appeals runs reassuringly far into the future.

Within a year of taking this habeas case we took another one.⁹ This meant a new record, a new set of factual circumstances and legal issues, a new family background to document (Filipino and abusive), and new witnesses to investigate and develop declarations from. The crime in this case took place in 1978. As with the other case, the trial and appeal had been mishandled and lost many years before we were appointed counsel, and again the penalty phase was the most vulnerable part of the record.

As some of our claims in the second case focused on post-traumatic stress disorder from combat in Vietnam, I researched that angle too. I went to Texas, Michigan, Florida and Maryland to interview veterans who had served with our client, and did some research in military archives in Maryland. I learned a lot about the war from this exercise. We actually won this one on federal habeas – after twelve years of representation, the death penalty and special circumstances verdicts were both vacated by the U. S. Court of Appeals.¹⁰ As I write this in March 2010, almost eight years later, our second capital

⁷ Because the case is still in litigation, and because a lot of what I know about it was derived from client-confidential communications, I will not discuss its substance. The California state opinion on appeal can be found at *People v. Walker*, 47 Cal.3d 605 (1989) (this opinion superseded an earlier one).

⁸ Unless we win. And, of course, may I live that long too – I am 15 years older than he is.

⁹ The state appeal opinion for that one can be found at *People v. Ghent*, 43 Cal.3d 739 (1987).

¹⁰ See *Ghent v. Woodford*, 279 F.3d 1121 (9th Cir. 2002).

client is still awaiting a retrial of the penalty phase (unless the case settles). After that, if he goes to trial and loses, there will be another appeal and perhaps another habeas petition. If so, may that one too last until my client dies of natural causes.

I learned a great deal from all this about how to do an investigation. I also got used to going into prisons and talking with prisoners, not only our clients but witnesses also. I worked, about half time, mostly on these two cases, close to 25 hours a week (when I was not traveling) for several years.

Sometime in the mid-1990s I began to burn out on the death penalty cases, not an uncommon occurrence in capital litigation. Part of it was the cumulative pollution, as my Hindu teacher taught me to see it, of swimming in the sewer of our clients' crimes and trials and horrible backgrounds. Part of it was going over and over these endless claims, all of which had to be backed up with authority from exceptionally long and complex appellate cases. Plus there was Vietnam. By the time the eighth year came around I had a touch of post-traumatic stress disorder myself from involvement in these cases – stress, sleep problems, nearly weeping at the thought of having to do more.

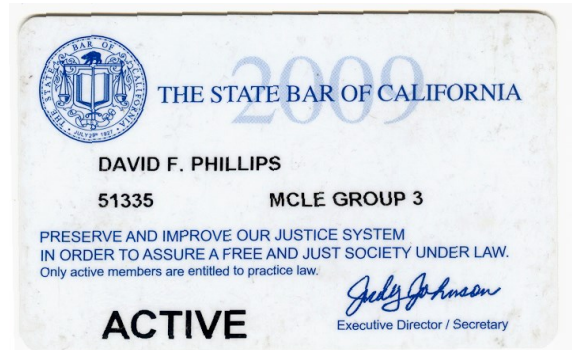
Finally it dragged me down enough, and I had enough other work, that I pulled the plug and asked Doug if I could be relieved from the capital cases. There were other lawyers in place by then who had helped with the evidentiary hearings (which required trial skills), so I wasn't leaving him in the lurch with no help. Burnout was a recognized risk in capital litigation, and there were no hard feelings about it. I never went back to it, although I am still (2010) the institutional memory for both these cases.

I used to get considerable respect in liberal quarters for working on death penalty cases. But the truth was that I didn't do it out of idealism, although it did eventually move me from neutrality to opposition on the death penalty issue. I did it because I needed a job, and this was the job that came along. It could just as easily have been a construction case or a patent case, although a case like that would probably not have lasted long enough, or had a high enough profile in the firm, for me to build a lasting career there, and I wouldn't have learned as much.

- My opposition to the death penalty is pragmatic rather than ideological. I accept that in some circumstances a person can act so horribly as to forfeit his right to life and justify the state's executing him (although that could not have been truly said of either of my clients). But as a practical matter proving this, and separating the "genuinely" death-deserving from the others, is so difficult, and so costly, and so subject to error, and is so corrosive both to the justice system and to society, that any arguable benefit to the difference in severity between life imprisonment and execution is not worth the social cost. Plus, of course, the death penalty forecloses the possibility of release after exoneration, which is happening increasingly often. And it is sobering to realize that long years in prison have so purified both my clients that they are now highly moral people, completely harmless, and could and

should both be released immediately. If they had been executed in a timely way, these redemptions could not have happened.

Even though I am now retired, and withdrew from active participation in the capital cases many years ago, I am still the firm's primary liaison with both of our clients. I'm the one they call for stamps, or books, or writing paper, or typewriter ribbons, and I visit them in San Quentin from time to time. If there is a need to work with a prison regulation, I take the responsibility of doing that. Or if there's a problem with the authorities, I sometimes suggest ways to deal with it within the prison system, and occasionally intervene there if I think it could be helpful. Once a client had a persistent rash and the pathetic prison health service (now in federal receivership) was ignoring him, so I arranged for an outside physician to come into San Quentin to examine him. This was not easy to do, even though the regulations specifically provide for it, and eventually I had to threaten to sue the warden before they backed down. I got a veterans' compensation settlement for one of them.



Our clients call with news also, which I pass on to the legal teams, and if there are developments in their cases I go up and explain to them what has happened, and what is coming next. Mostly when they call they just want someone to talk to – I am always willing to talk about the events of the day (one client's favorite topic), or even about Jesus (the other client's favorite topic – I quote scripture to him, which he enjoys).¹¹

I keep up these relationships, and continue to visit and attend to welfare issues, partly because it is a corporal work of mercy toward people I have known for more than 20 years,¹² and partly so they don't feel neglected and become uncooperative. I don't know how I could stop talking with them and visiting them and helping them now, even if I wanted to.

- Visiting San Quentin (for an attorney visit) involves driving about 25 miles from San Francisco to the prison at Point San Quentin just above the Marin County side of the Richmond Bridge. I park in a crowded visitor parking lot, pass through a metal detector, walk a substantial distance to an old red brick building in the main prison structure, pass through a double electronic gate in a sally port, and wait for my client. He is brought out in handcuffs and I ask him what he wants from the

¹¹ I am also now helping our team in a very peripheral way with a second investigation in one case, now that we have an evidentiary hearing.

¹² "I was in prison, and ye came unto me." Matthew 15:36.

vending machines – this is an invariable part of the ritual. They put him, arms still handcuffed behind him, into a kind of cyclone-fence cage lined with Plexiglas for relative privacy of conversation, while I buy the food and microwave the awful vending-machine burrito or whatever it is he wants. There are about ten of these cages, most full of lawyers meeting with



their clients. I enter my cage, my client presents his wrists to a slot in the door to have his handcuffs removed, and we get to talk for up to 90 minutes. Then I leave through the same gates. San Quentin is an unrelievedly awful place, with the strutting guards, the grime and shabbiness, the institutional paint job, the relentlessly industrial environment, and the pervasive atmosphere of sorrow and heartbreak which I can feel – indeed almost *hear* – from a mile away. No wonder the Hindus regard a prison as a pollution, and won't allow a temple to be built within sight of one. Here's a picture – the arrow shows the attorney visiting room.

2. Research and writing

When the capital habeas cases were active I was busy, but when they were inactive I was not. As I was not a salaried associate but worked by the hour, I was not paid when I didn't work, so I needed to find more work. I put in some hours on other matters for Doug Young – some of these were practice development projects, like writing and researching hypotheticals for seminar exercises, and others were for actual cases, like preparing a sentencing memorandum for a client whom Doug had pleaded guilty to a federal drug charge (another prison, another witness declaration). In fact even before starting the habeas work, my first task for Doug was to write teaching materials for a trip he was taking to Uruguay, which I did with no difficulty. (About halfway through I briefed him on what I had done and what I had left to do. He asked me if I had questions, and was surprised when I didn't have any.) With Doug's help I made my availability known among the litigation partners, many of whom knew me from my years as the firm's librarian (see Chapter 24.B), and developed a clientèle for legal research and writing. I did this deliberately, because not only did I need the money during off-peak times, but I was also looking ahead to the day when the habeas cases would be over and I would still need a job.

My plan was to make myself useful and gain a reputation among the partners for high quality, dependable work, done on time and without supervision, and written well enough to be filed in court or sent to the client without revision. This was important because they had to pay me by the hour, while associates were already paid (with a yearly salary). To justify the extra expense of my compensation I had to be able to give the partners something they could not count on getting from an associate. My years as a law librarian had made me an expert researcher, and I was already a pretty good writer and advocate and capable of faster, more penetrating legal analysis than most associates, so I did well with this. My skills in legal research (and later also Internet research), legal analysis and writing improved over the years, and 18 years later I still had essentially the same job.

I was a research and writing specialist. My title was Special Assignment Attorney, which communicated to the initiated that I was not a partner, not an associate, and not on a partnership track. It fit perfectly what I did, which was to complete special assignments.

Most of my legal research I did on a database called Westlaw (a product of the successor conglomerate to the West Publishing Company, the premier indexer and publisher of American legal materials). Westlaw worked on Boolean searching principles, in which the user defines sets of criteria and limits the search to the sum or the intersection of the sets. Thus I could select a database of mid-level federal appellate opinions in a given appellate circuit, and then restrict that universe further to a range of dates, and then look for cases which contained a given word pattern (for example, w within 20 words of x or y within a certain area of the text, but not also containing the “exact phrase z”) and at the same time use as a triangulation device one or more subsets of digest numbers within the West Key System (a masterpiece of indexing, refined since 1872, containing almost 100,000 exquisitely divided categories). Document 27B-1 shows a sample Digest page, Key Number index, Reporter page, and list of Key System Topics.¹³

The permutations were endless, and part of the art lay in constructing searches that yielded enough results so you could know you had seen all you needed to see, without yielding so much you couldn’t review it all. Knowing when to stop took even more skill than knowing where to start.

And this was only for appellate cases. Westlaw could also search in trial level opinions, statutes, regulations, pending legislation, journals and treatises, secondary literature, the

¹³ For an excellent introduction to these techniques and many others, I recommend *Legal Research in a Nutshell*, by Morris Cohen and Kent Olson, published by West and now in its 9th edition (2007). Morris Cohen was Biddle Law Librarian when I was at Penn and taught Law Librarianship when I was at the Columbia Library School. I have used earlier editions of his book to train law librarians. It helpfully reproduces actual pages of the reference books, or did when I used it – it may be slanted more toward computers now than it was way back in the day.

general, specialized and legal press, court-filed pleadings and orders (broken down by court), and countless other databases including my own firm's work product. I became a champion user of Westlaw and a crackerjack researcher, I'm pretty sure the fastest and most accomplished at both legal research and Internet research in my firm of 125 lawyers. I had also not forgotten the nearly lost art of doing research among the actual books and microforms at a legal research library, such as the one at Hastings College of the Law on McAllister Street. If anyone needed (as I have done on company business) to find the legislative history of a law from before 1948, or dig out a proclamation by President Roosevelt or a statute of James II, I was the person to go to.

a. Litigation writing

A major part of my work-product consisted of memoranda of legal research and analysis. Often but not always these were for active cases on the litigation side of my firm. Typically the lawyers working on a case would encounter a problem and ask me: What's the law? Can we do this? Can they do this to us? We know the law on this subject in California, but what's the law in West Virginia? What options do we have here? Is there a way around this? Are they right about that (we hope not)? And so on. I looked up the law, figured out the answer, and wrote it up, often with suggestions for a new approach, sometimes on very short notice indeed.

To give a flavor of my work, here are the titles of 10 memoranda on client matters, plucked from a random point in an alphabetical list.¹⁴

1. Can Publication of Information in the Trade Press Make Information "Non-Public" for Insider Trading Purposes?
2. Circumstantial Proof of Antitrust Conspiracy or Group Boycott
3. Class Action Incentive Award
4. Collateral Estoppel Issues re Investors' Action
5. Conspiracy: Withdrawal and Limitations Issues
6. Constitutionality of Local Ban on Sale of Malt Liquor
7. Contractual "Best Efforts" Clause
8. Covenant of Good Faith and Fair Dealing

¹⁴ The full list, containing 256 titles representing well below half my output, is included in the Supplement. Words which could identify individual clients have been redacted from the list. I feel fulfilled, I wrote to someone in 2004 about my work, although I will not specify just what I feel filled full of.

9. Damages and Standard of Performance

10. Denying Attorney Fees Where Action Was Avoidable

Here, taken from an e-mail of mine, is a description of a problem typical of the litigation issues I worked on – I reproduce it here not for its intrinsic interest, which is slight to the point of invisibility, but as with the list, to give the flavor.

In our case a huge bank made a written commitment to lend a huge real estate investment trust 20 million smackers to start an Internet company, took the fees and exercised the stock warrants, but never signed the documents. Now they want to give us our money back and “unwind” everything, leaving us unable in this new financial environment to find equivalent (or any) financing. It’s hard to see any way around the statute – we must *avoid* the statute by showing grounds for equitable estoppel of some kind. Detrimental reliance in passing up other opportunities is OK in some cases and not in others, no case having been decided under Civil Code § 1624(a)(7). Do we have a remedy at law (or equity) or not? Unjust enrichment, certainly, but does that count if you can be made whole again with a check? If we can avoid the statute, is specific performance available for this deal – in other words, can we force them to lend us the money, and if so are the dates to be reformed to give us the same length of time for repayment we would have had? I’ll know the answers by Sunday night.

Here are a few others, taken either from my summaries or from the query notes of the partners who commissioned research from me. Could they possibly have been any more boring?

- What is the time synergy between our forthcoming demurrer to their answer to our first amended complaint, and our attempt to amend with a second amended complaint? When is the hearing on our motion for leave to amend? Because if the judge grants leave to amend, our FAC which they have answered will be superseded by a new complaint, requiring a new answer, and the old answer will become a dead letter with no need to demur to it. Perhaps ask the court (or opposing counsel to stipulate) to extend our time to demur to the answer until after the decision on amendment, so as to avoid the wasted effort of demurring to a superseded pleading?
- If the contract were voided at the option of either party as a result of breach or even anticipatory breach, would that affect the question of the instrument’s governing the obligation of the parties for purposes of choosing under Alaska law between recovery under the terms of the contract and recovery under a hypothetical substituted quasi-contract?¹⁵

¹⁵ As I explained at the time: Quasi-contract (also known as *quantum meruit*, unjust enrichment, implied contract) is an equitable (as opposed to legal) doctrine under which if you render useful services to someone not under an express contract and he accepts

(footnote continues →)

- Party X and party Z are both members of a general partnership. Party X secretly enters into an agreement with third-party Y which purports to require Z to pay Y. When Y demands payment and Z refuses to pay, Y sues Z and Z has to spend \$ on attorneys' fees, etc., to defend against Y's suit. In a subsequent action, Z is suing X for many bad acts, including entering into the unauthorized agreement with Y, and is seeking, among other things, its costs in defending against Y's action. Focusing on the issue of causation (not, for example, the issue of actual or ostensible authority of GPs to enter into contracts with third-parties), does Z recover the fees and costs it incurred in Y's underlying lawsuit from X, even though it was Y and not X who decided to sue Z? It was, however, X's promise/agreement that Z would pay Y that arguably led to Y suing Z.

Examples could be sickeningly multiplied. You see how thrilling all this was, and why it was difficult to maintain any interest in the subjects. I did not enjoy the process.

I can't seem to stop quoting my old e-mails as I page through them for this memoir – written at the time the sensations were fresh, they give the feeling much better than anything I could write long after the fact. Here's one:

I plan to spend this beautiful weekend day researching ways to get around the language of a perfectly clear insurance policy so a business set up to exploit stolen source code can pay a securities fraud class action settlement from insurance money despite an exclusion for dishonest acts, even though the executives of the company have already been convicted criminally for the theft. So it's not as if my work, fascinating though it is for its own sake, doesn't also have a worthwhile purpose and genuine ethical value. Not that I'm complaining or anything.

And here's another.

Just finished a *tour de force* here. Desperate associate, her supervising partner away, set me nine research problems, mostly in support of her losing theories of the case she is arguing next week. I sent her back five memos, totaling 26 exhaustively researched single-spaced pages complete with citations and potted passages for her to make a brief out of, demolishing her losing theories but substituting three new reasonable theories which I thought up on the spot, on which she might actually win. Did this in four days – average one hour per finished page including research, from a

(footnote continues ...)

their benefit he has to pay what they're worth. But in Alaska anyway, you can't recover in quasi-contract if there is an *express* contract covering those services. So what happens if there is a contract defining the services, but it becomes void because of breach or some other reason? Even though no longer binding, is it still effective for the purpose of defining what the services were, so that the payment for them is what is defined in the contract rather than what might be determined by a quasi-contractual calculus?

standing start including reading two 19-page contracts. It is somewhat reassuring to know that, even if my work is *completely* boring and of *no* social or artistic value, at least I am at the top of my form. They don't pay me nearly enough.

One positive factor, at least, was that the partners for whom I worked accepted my conclusions, and did not press me to make them come out the way they wanted. As I wrote to a friend:

I must return now to the dreary task of documenting why a senior partner cannot do what he wants to do. "Clever theory," I'll have to say, "but the case law is against you; what you have actually done does not meet the statutory requirements for what you should have done, so your client cannot recover \$100K+ in legal fees, and don't waste more of their money trying, because you'll lose." Just the message everyone likes to write (and read).

But more often than not, I figured out a way at least to try, warning if necessary of the possibility and risks of failure.

They actually take my advice here, which is gratifying, and also good business – it would be dumb for them to pay extra for my advice and then not take it. The corollary is that I make damned sure I know what I'm talking about before I give any advice, and firmly refuse to commit to advice until I'm really sure. Then what are they going to do? These busy partners don't have the time to do the actual research themselves, so they refer that to specialists, and that's me again. So when I say they can or can't do this or that because the law is for them or against them, they believe me. And when I offer a path through the obstacles, they realize that path may actually be there.

The following passage gives a good idea of how I was consulted and how I was accustomed to respond, and sheds a favorable light on the culture of our firm.

I have spent the week deciding that one of our partners, who has just been retained for a large sum by a midwestern company to give an opinion whether they have a viable RICO claim,¹⁶ will have to say they don't. Or will, anyway, unless they can come up with evidence proving facts by which the dirty, underhanded, faithless, unethical conduct they think they've been exposed to meets the statutory definition of federal wire fraud. I don't think they can do it. The only scenario which matches both the law and the facts is so far-fetched I don't think it's likely to have happened, much less be provable. Rule 9¹⁷ says fraud must be pleaded with particularity, and Rule 11 says we must have a factual basis for what we allege, or a good faith reasonable ground for believing we'd find that basis through discovery. We can't just allege whatever we need and hope for the best. It is the custom just to plead

¹⁶ Racketeer Influenced and Corrupt Organizations Act.

¹⁷ Of the Federal Rules of Civil Procedure.

RICO at the drop of a hat, all four kinds, never mind the facts, just to intimidate your opponent and get extra discovery. But it is unethical to do that, not to mention dangerous under Rule 11, and it pleases me that our firm takes our ethical responsibilities very very seriously.

So the client will be bummed, steaming mad that they won't get triple damages, and think we aren't aggressive enough to help them. They probably won't stop to think how much more bummed they would be after they spent a million dollars to litigate this claim, and lost, and had to pay fees and costs and maybe sanctions too, all of which we're saving them from. I think I have given the advice *forget it* significantly more often than I have given the advice *go for it*. How good that the partners are rigorously ethical, not interested in skirting honorable practice, and want to hear it like it is. I am not encouraged to shade my advice to what they want to hear – they really want to hear what I really think, that's why they asked me. No one said to me: make this RICO. Instead they said: look at this and tell us if it's RICO or not, and don't pull any punches, either. And it's nice to have my opinion valued and acted upon and then sought again.

Unfortunately it wasn't *always* as smooth as that.

Pinned by the horns of a mad partner, I keep researching stuff and he keeps changing the rules, and now he demands I "find" the blockbuster case he "knows" is out there establishing a rule of law which is opposed to the rule there actually is. He was a happy, respectful patron before; now he is a mad thing. I hate this job with such a black steaming passion – I loathe every horrible second of it – I really hate the law and its endlessness and its obsessive need to document everything in the words of dead judges.

But usually my patrons accepted what I told them the law was, as they knew I wouldn't say what it was until I was sure. And I never compromised on this.

I made a kind of sub-specialty out of the Federal Sentencing Guidelines, a thick and needlessly complex manual that controlled sentencing discretion by federal judges.

Just heard today that one of our white-collar criminal clients, a distinguished lawyer who destroyed his career by a bit of insider trading for an insignificant gain, got probation instead of prison. This surprised everyone due to the requirements of the Federal Sentencing Guidelines. The key element in the judge's decision was a theory about a way to avoid a particular sentencing enhancement which I completely made up. I didn't make up cases or cite bogus authority – just an original analysis the court found persuasive. So that felt good, anyway. This made four criminals in a row whose sentencings I worked on, who walked to the general amazement of the bar.¹⁸ I provided ideas and research, associates wrote the briefing based on my

¹⁸ *Walked* means *not sentenced to prison time*.

memos, partners controlled high strategy and appeared in court and schmoozed the personalities (probation officer, US attorney, judge), and the clients looked contrite (and really were) and paid our huge legal bills (except for those which we did on Criminal Justice Act appointments, and to my firm's great credit we gave those exactly the same deluxe treatment we gave our high-paying clients). I came to disenjoy Sentencing Guidelines practice least of all the subjects I worked on. Perhaps that was because I knew something about it, and didn't have to learn it from scratch every time, as I did for example in writing an article about electricity regulation.

Sometimes I was asked to write all or part of a motion, or brief, or other pleading, or the "Memorandum of Points and Authorities" (so called in the trade) supporting a motion. These documents, filed in court, required the same research and analysis skills as an internal memo for the partners or the client, but also advocacy and a lot more discipline because of the conventions of the form and the court's usually strict limits on length. Advocacy writing, of course, is *expected* to favor one side's position, but I didn't mind this. It was part of the art. Another part was to do this without undermining our credibility, or overlooking (and so failing to meet) the other side's strong arguments, or failing to recognize contrary authority (unethical).

b. Practice development writing

The other major part of my work at Farella was writing practice development materials. Many of these were technical articles for the legal press, including law reviews, legal newspapers, and mid-level journals (for example *Judicature*, *Idea*, and *IP Litigator*).¹⁹ I placed a number of these articles in West's *Federal Rules Decisions*, a very prestigious publication. Others were seminar materials or presentations to professional gatherings of lawyers (or of other professionals who might need lawyers) – partners used these to get their names out in hope of attracting business from potential clients or sources of referrals. Treatise chapters served this function also.

I adapted well in this area, as (if I do say so myself) I was among the swiftest and most fluent writers, and best stylists, in my firm. But while the litigation work probably was useful in a very limited way, the practice development work probably was not. I have seen no evidence that the dozens of articles and treatise chapters and seminar materials I wrote and published under partners' names actually brought in any business at all. Of course I didn't stress this point – if they wanted to keep commissioning them from me it would have been pretty stupid for me to insist that there was nothing in it for them.

¹⁹ *IP* means *intellectual property* – patents, copyrights, trademarks and trade secrets.

I had to re-invent my practice more than once. I went from being a part-timer working on capital habeas petitions to a sort of utility infielder available to the partners for litigation matters and special projects. This lasted until the recession at the end of the 1990s. Then the firm's workload fell off, but like many other firms in our position we had to keep hiring associates at about the same level, because if we didn't the word would get out that our firm had stopped hiring, so we must be on the skids. Although we weren't on the skids, a perception like that could put us there, so we kept bringing in associates without having quite enough for them to do. Since the firm had fully-paid associates not working, it became harder to justify giving work to me rather than to them, and my practice began to dry up.

Anticipating that litigation assignments might be variable, I had made practice development writing into a sort of subspecialty, looking ahead to the day when I would need another stream of work. So when the time came that litigation matters became scarce, I was well positioned. Not only did I not mind it, I actually preferred it to litigation writing. As I wrote in an e-mail in 1999:

At the moment I am not doing litigation work, but only writing articles and seminar materials. So I no longer have to look for support for our chosen position, but can just state what the law really is (or if it is uncertain, what the competing positions are) and report without advocating. It is a lot easier that way – it is hard enough to find out what the law really is, without having to make it be a certain way. So for the Federal Rules treatise project, for example, I was able just to analyze a Rule for each chapter and write a commentary on the Rule, and list issues, and then give examples and point out relevant cases so our readers had a guide to the Rule and help on what to do when dealing with what it governed. And then the next day, on to the next Rule.

Even when litigation work had to be reserved for associates, I was still sent practice development projects, perhaps because working on litigation matters helped prepare associates to be partners, but practice development writing was just a chore. But this chore provided a symbiotic niche for me, as for those little fish that make a living by helpfully scouring the skin and teeth of bigger fish.

By the winter of 2006-2007, we had a shortage of associates again, and I began getting more litigation business, and was busy enough that I had to turn things down so I didn't overwork myself and crowd my deadlines. Document 27B-2 is an e-mail introducing myself to a new Workload Coordinator and explaining my working arrangement.

Here's a sample of my practice development projects – like the earlier list of litigation memos, they are a random portion of a larger alphabetical list. Some ran only a few pages; others were more than 100 pages long.

1. Due Diligence in Acquiring American Patent Portfolios

2. Eighth Circuit Decision Intensifies Debate Over Publication and Citation of Appellate Opinions
3. Employee Misuse of Employer's Technology
4. Excellence in Intellectual Property Litigation
5. Expansion of the Ninth Circuit's Limited *En Banc* Panel
6. Federal Circuit Establishes Mediation Pilot Program
7. Fiduciary Issues in Federal Criminal Prosecutions
8. Foreign Exposure to American Antitrust Laws: The Patent Context
9. Harmless Error
10. Increasing SLAPP Protection: Unburdening the Right of Petition in California²⁰

I sometimes wrote seminar materials in a special outline form I devised. For this I used the Harvard outline format, except the elements were not telegraphic but complete sentences and paragraphs and quotations. This had the advantage that I could state the law in quotations from court opinions or technical literature rather than having to paraphrase it in my own words. The result was more authoritative and useful for the specialized reader who was the end user of this kind of material, and it relieved me of the need to make categorical statements or encyclopedic assertions.

Here from my e-mail archive are some passages showing the type of work I did on these projects. One thing they show is how often I was asked to produce authoritative statements of the law in an area I knew absolutely nothing about. I grew quite good at going from zero to *apparent* mastery in almost no time at all. I had lots of ways to bring myself up to speed, not all of them on Westlaw, and developed substantial expertise in many areas from trademarks to employment to sentencing. It depended on what the partners who employed me were interested in, or what our practice happened to concern. The partners were my only clients – I became what used to be called a *lawyers' lawyer*.

- I am now working on a speech on new developments in American corporate governance, for delivery this summer to a convention of European *machers* in

²⁰ SLAPP suits (Strategic Litigation Against Public Participation) retaliate for exercise of First Amendment and other rights, notably petitioning the government for redress of grievances, by imposing litigation costs in the hope of inducing withdrawal. Thus if an environmental group files a zoning objection to a proposed development, it might be forced to drop its opposition by a retaliatory lawsuit that could bankrupt the group. The filers of the lawsuit don't care if they ultimately lose – the aim is not to win but to overwhelm their opponents. California has a statute allowing relief from these tactics, which stifle opposition and discourage public use of government processes.

Budapest.²¹ As usual I don't know the first thing about it, which did not stop me from writing about 1500 words this morning on the theory of the American corporation, which I churned out just to get started. I will proceed through Enron and Worldcom to Sarbanes/Oxley, seasoning to taste with comparisons with European practice as I find them in the literature on Westlaw.²² The Europeans will lap it up and regard my patron as a great sage and give him millions of dollars to protect their interests in America. Do you think exchange listing rules should impose an increased requirement on corporate audit committees to have independent directors? I sure do!

- I finished the insurance thing, and now I have to write seminar materials on arbitration clauses in intellectual property contracts – how to devise them, and how to select an arbitration forum. As practice I will now tell you everything I know about the subject: []. But I'll figure it out. I have two or three previous articles by the same partner about the same subject, along with instructions to say the same things without repeating what was said earlier. (How's that again?) And then my patron left town, and will only be back, between now and the deadline, during the time I'm away. But I'll get an extension from the publisher so the partner can review the text, and as for content I have a trick or two up my sleeve, and will dispatch this project in the next couple of weeks.
- Really getting into the Foreign Corrupt Practices Act as a professional problem: how to understand just enough of the law to write these seminar materials, and then how best to write them. The FCPA forbids bribing foreign officials. The seminar people want something rather unusual – instead of explain-the-law, they want case examples where FCPA violations, or domestic bribes if I can't find enough foreign ones, figure in the facts of a commercial dispute between private parties. I have learned the statutes; tomorrow I hit the cases (all so easy with Westlaw on the computer, instead of pushing the books around in a downtown library). This afternoon, stoned in the garden, kumquat juice dripping into my whiskers, I figured out the format the materials will take – I will spin scenarios, which will allow me to substitute my own hypotheticals when I can't find actual cases, more efficient for me. I will start out research by skipping criminal cases – I may find enough in the civil cases that I won't have to read the crims at all – more efficient for me. I am surprising myself by allowing myself to sort of enjoy the process of putting this together.
- I am writing a seminar presentation on insider trading. As a special birthday treat here's a summary.

²¹ *Machers* – Yiddish for *big operators*.

²² Future researchers: Enron and Worldcom were corporations which blew up due to corporate financial shenanigans; Sarbanes-Oxley was a law passed by Congress to try to control these kinds of shenanigans; Westlaw as noted was my legal research database.

1. Insider trading is illegal.
2. So don't do it.

That's really all a body needs to know on the subject.

I wrote all these practice development materials under the name of whatever partner commissioned the project. Some of my friends thought I should be irate about this, as if evil partners were plagiarists cheating me out of my glory. I didn't feel that way at all.

It is not plagiarism – it is *staff work*. You don't think the President writes his inaugural address, do you, or the State of the Union? People expect this in the legal field, although maybe not in articles by professors. I used to advise my patrons not to include the little line in their bio footnote acknowledging my help – I thought it gave the game away – but they insisted, probably so they could avoid charges of using unattributed material. So now I include a standard line thanking myself for helping *prepare* the article *for publication*, so it sounds like I just spruced up the punctuation and retyped it. The purpose is *nachis* for the partner – why detract from the aim of the work?²³

For myself I absolutely do not care, have not the faintest wish to share credit for writing this stuff. I could not possibly be less interested. One of my patrons suggested I write something under my own name and it took a moment before I even understood the concept – write a law review article *without being paid for it*? Whatever for?

And why should anyone object? My articles are useful to their readers, and my work product belongs to the firm. I used to hope they would list my name at the top of briefs with the other lawyers – then when it began to appear there I started deleting it. It makes it so much easier if I don't have to sign it – then I don't care what they say in it, or what they do (or ask me to do) to the text. The fun is not in the doing – there is *no fun at all* connected with the enterprise – only the satisfaction of being paid and (lately) an unexpected pride in swift, clean, skillful professional workmanship.

Sometimes practice development materials were more substantial – for example bringing into being an entire book, with chapters by different authors, under the nominal editorship of one of our partners. I did this kind of job a number of times, and it was usually fairly rough sledding because the writers of the chapters either wouldn't do the work they promised, or if they did produced such awful stuff I had to rewrite it, which they sometimes resisted.

²³ *Nachis* – Yiddish meaning in this sense *gratification from recognition of achievement*.

- At the moment I am almost drowned in bad writing. I take “within which contracting out does encounter many substantially similar issues in this regard” and replace it with “where contracting out involves similar issues” and the stupid authors *put the old text back in again!* That means I have to take it out again (there is something similar on every page of a 73-page document) and write a soothing e-mail explaining why. How about this: “One sometimes sees this issue being addressed by contract terms that impose an obligation on the independent contractor to...” I substitute “Sometimes contract terms oblige independent contractors to...” They put it back the way it was. Or how about “Even as we begin this section of our commentary it is worth noting with some emphasis that the rhetoric of the heated debate over correctional privatization often finds critics of the concept pointing the finger of blame at...” That’s the champion so far – I substituted “Critics of correctional privatization often blame ...” Six words for 38! Accept it, bozos! I don’t want to hear any more about it!
- Editing a horrible book on mass tort litigation and writing materials on secret taping. For example, 3/4 of the states permit secret taping if one party to the conversation consents. So there a person can tape his phone calls because he consents, even if the other people don’t know about it. But in other states, including Pennsylvania, all parties must consent. As you would expect, this makes for jolly litigation. For example, what if someone wants to use a Pennsylvania tape in federal court? In federal court procedural questions follow the federal rule (one party consent) but substantive questions use state law as a “rule of decision.” Is this procedural or substantive? Courts disagree. In the Ninth Circuit (California) it is substantive, but in the Third Circuit (Pennsylvania) it is procedural. Suppose you tape a conversation in Pennsylvania, where it is illegal, but use it in court in West Virginia, where it is legal? Why should the WV state courts suppress evidence to enforce a policy their state does not support? Can you imagine my delight as I figure all this out?

I also wrote or revised chapters in other books where the chapter authors were partners in our firm. I helped put 20 issues of *The Appellate Advocate* through the press, usually writing substantial portions of it myself and supervising the design and proof process. I prepared bibliographies and binders of materials from Westlaw and the Internet on various subjects for partners who needed them. I wrote entries for our firm’s legal blog. And lots more. People sometimes sent documents to me to have the English repaired.

Our founding partner Jerry Braun (right) came to use me quite a lot for projects of his own – writing articles and working on law reform issues, and resisting efforts to split the Ninth Judicial Circuit (we worked on that for almost ten years – the reactionaries in Congress ganged up on our relatively liberal circuit every year). He was the editor of *The Appellate Advocate*, the newsletter of the American Academy of Appellate Lawyers,



of which as noted I helped put together issues three times a year for six years (it looked a whole lot better at the end than it did when we started working on it). I did about a third of my work for Jerry, and he became the partner with whom I had the closest working relationship during my career at the firm.

3. How I worked

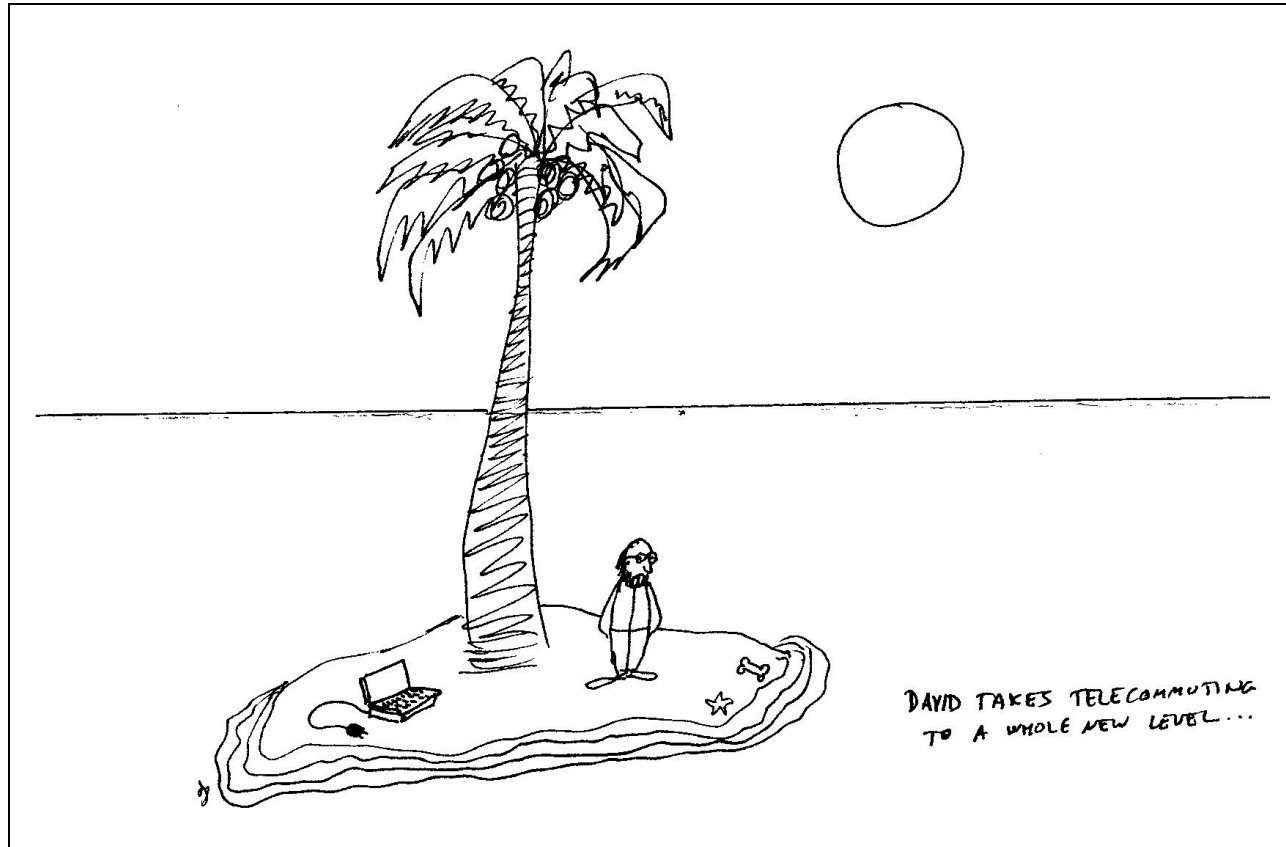
My working conditions were probably better than those of any other lawyer in the state. I worked at home – my commute to work took about five seconds. I did almost everything from my home computer, which was networked into my office's computer system, with free access to Westlaw, Internet, e-mail, and all the firm's files. Sometimes I spent all day in my bathrobe. But the firm provided a downtown office for me, and secretarial support, both of which I found helpful. They also paid my bar fees, and I came under the firm's malpractice insurance. I came into the office once every few weeks for meetings, or a continuing legal education program (I needed a certain number of hours of CLE to keep my license), or to show the flag so the partners didn't forget me. I didn't have to hunt for clients, and I didn't have to represent anyone.

I worked whenever I felt like it – well, I never really *felt* like it, but it was an easy matter for me to work for an hour or so in the morning, another few hours in the afternoon, and then another few late at night. One hour at each of those times every day would have worked out to 21 hours a week, roughly my self-chosen quota. Of course I often worked longer at a time because of deadlines, but then lots of days I didn't work at all. Office hours and the Monday-Friday work week meant little to me. This was an advantage not only for me but for the firm, because they could call me with a short-fuse project and usually it didn't matter if it was after business hours or on a weekend.

I could get a lot more done at home, or more accurately get everything done in much less time than it would have taken at the office, because when I was working I was really *working*, and when I was on break I was really on break. I found working at the downtown office not only inconvenient but incredibly inefficient – I kept track of my time with a stopwatch because I billed in six-minute segments, and could tell what was inefficient. In six hours at the office maybe 2½ was concentrated work; the rest was corridors and chats with secretaries and going downstairs to get another Red Bull.²⁴ At home I could work for a couple of hours, then read a book or take a nap or even (occasionally) walk around the block, off the clock. It might still take me 6 hours to get through 2½ hours of work, but the time off was really *off*, not just floating around

²⁴ Red Bull is a powerfully caffeinated carbonated drink not made from coffee – I cannot drink coffee because it antidotes homeopathic remedies. I later switched to Sugar Free Rock Star, a better product – see the picture in Chapter 17.G.

restlessly in a work situation, and so the time *on* was not so tiring, which made it more efficient. Plus: no commute. At the start, in the early 90s, I did most of my work at the office, but by the end I wouldn't have lasted a month doing that. Even working at home, though, I still hated having to do it – even a few hours' work puts a hole in the day.



I had control over my workload in the sense that I never had to take an assignment I didn't agree to – people called and asked if I had time, and I could say no if I wanted to. I said yes to most requests, though, because I needed the work and it would have been bad business not to, but when I said no that was OK, as it would not have been if I were an associate. If I accepted a task, then I did it by the deadline and usually well before. In college I almost never met a deadline, but in all my years at Farella I never missed one.

Originally my plan was to work about 20 hours a week on an annual basis – that meant about 25 hours a week when I was not traveling, which I was perhaps 12 weeks a year. My notebooks (see Chapter 28), which will become part of the Phillips Family Papers, contain all my time records and also weekly cumulative records. My annualized weekly average, for many years *exactly* the 20 hours a week I aimed for, began to fall well below that goal. In 2005 it was down to 15 hours, and in 2006 it was around 13. But I noticed when it fell from 20 to 15 that this dip in income didn't affect my lifestyle very much, and in January 2006 I paid off my mortgage two years early, which reduced by five hours a week the amount of time I needed to work to keep things going. So while my practice

kept shrinking, I managed to stay comfortably afloat. Since I loathed working, and had grown very very tired of it after so many years on the job, I didn't agitate for more work. Instead I concentrated on using the leisure I had pined for – studying, traveling, seeing my friends, enjoying my reference books, lolling about, and writing something of my own (for instance this memoir).

I used to worry when I didn't have a project going. How will I make a living, there'll be no work for marginal old me, I'll have to walk down Montgomery Street wearing a sign saying WILL RESEARCH THE LAW FOR FOOD. But my longtime secretary and *consigliere* Kathy Small (right), sensible as usual, talked me out of thinking this way, as if I were struggling amid scarcity, pointing out that they always *did* call me, it averaged out every year, and when they did give me work I complained about *that*. So I stopped worrying and found it easier to enjoy my fallow periods, since not working was what I preferred anyway.



At the end (2008) they paid me \$95 an hour, when I worked, without benefits (for example health insurance).²⁵ This was good money for an hourly researcher but poor money for a lawyer, although unlike most lawyers I had no overhead. My billing rate at the end was \$545 an hour, when they actually billed my time to a client, which was rare.

The firm had practice groups, and on the litigation side (that is, not the transactional side) I was a member of four of them: business litigation, white collar crime, intellectual property, and employment law. But as a generalist, I also worked from time to time for the construction group, and the insurance coverage group, and the firm's professional standards committee, and even the environmental group, and Jerry Braun's law reform projects formed a sort of special group of its own.²⁶

Here are some work-related e-mails, which show how I felt at the time this was happening.

- My work is going very well this week. I stopped accepting more for the time being and have been going through my five projects with great discipline and efficiency. A lot of it comes down to just churning out the words, which is so easy

²⁵ I had private health insurance, which I paid for myself.

²⁶ Eventually I stopped accepting projects from the environmental group – I hated working in that area because it was based on complicated regulations rather than statutes, all unfamiliar to me – I didn't understand the field well enough to feel comfortable. It was like trying to work with George Buffington's pension plans (Chapter 15.C).

by this time that my burden stays relatively light. The more confident we get at our work, whatever it is, the faster it goes, not just because we're experienced, although that helps, but because we don't have to take the time to worry if we're doing it right. We *know* we're doing it right, we can squeeze that air right out of the cake, to use a vividly ridiculous metaphor but you know what I mean. Hack chop slice slice there's an outline, takes no time at all. Fill it in block by block, no need to procrastinate or get the vapors like in college, chop chop, drill chop, tap drill tap, that one's done, on to the next. If you knew how much anxiety I had when I first started doing this work in 1970, how much Virgo perfectionism, *oy vei iz mir!* And now, slice it up, figure five days for this job, and so it turns out without storm or stress. Who says things don't get better?

- I got another project today – preparing materials for a partner who is going to have to participate in a panel discussion and needs to swot up six topics. I did the first one today, from the Internet and Westlaw, and produced 38 pages of materials for her (mostly articles reproduced from Westlaw or the Internet) in about four hours, appetizingly arranged with an annotated contents page, and notes and sidebars. At the start I had no idea what the subject was even about. Now I am an expert, and ready to go on to the second one tomorrow. I plan to do one a day. I saw a bunch of guys today struggling to pull a rolled-up carpet out of a rusty van. My job is at least marginally better than that.
- Another project starts Monday, and another one backed up behind that. I will probably meet my self-imposed average of 20 hours a week this year after all. A lot of worry for nothing – well, almost nothing – I got a lot more business after I began making some noise, which I wouldn't have done if I hadn't been concerned. Just a few more years to go! Who would have thought at the start of my brilliant career that I would be clock-watching at the end of it, without even a pension to look forward to? Who knew?
- I have just finished the project with the most urgency, and while I have several more stacked up I can do them at a more relaxed pace. It amazes me now that I can plan ahead how long something will take me, then keep at it at a steady pace and get it done ahead of schedule without pulling all-nighters or shaving a deadline or panicking or getting stuck. Why couldn't I do this in college? Maybe it was because I was pickled in speed. But then I took the speed in order to work more efficiently. Anyway, whatever else I may or may not have learned in my not all that checkered career (more a foulard or a paisley, really), I have learned how to work. All right, not a 40-hour week. But at a steady efficient pace without drama. That's something, anyway. It would have been something more if I'd learned to do something I didn't dislike so much. But a person should take what satisfactions he can get, I guess.
- My tasks on my main case are multiplying uncontrollably. I am getting a very small taste of what full-time attorneys go through all the time, with constant demands in piles of cases all going on at once. Fortunately I can manage (just) what I am being asked to do, and don't have to decide *what* response to make to

a given pleading, just write the response the partners in charge want me to write. Still it is unpleasant even to get that close to the evil throbbing heart of an active lawsuit.

- Another gig – a paper on investigative subpoenas – *subpoenaed* is the only English word I know of with both an ae and oe, even though the ae is not a ligature, so sue me. It sounds pretty horrible, but at least criminal is better than intellectual property arbitration. It is due Jan 15, and I leave Jan 16 for Louisiana, and when I come back I have to do the patent thing which I have been putting off because it is not due for months, but things which are not due for months when you first think about them have a way of inching up, so I am booked into February. I may have to start saying no, which is bad for business, except if business is so bad how come I am booked into February? Discuss, using examples.

Despite my rule against it, I did occasionally represent people. Once one of the most senior partners at Farella had a personal copyright and agency problem, and for various reasons it was decided I should work for him directly and bill him privately instead of working through the firm. I also advised a neighbor on his partnership situation, drafted a partnership agreement for him and agreed to be available to him and his partners to give them advice as needed; in return, as a fee, he provided me with free DSL Internet access, which I kept for many years. For a while I represented the trust which held Timothy Leary's papers, although I never got paid – see Chapter 19.A. And I still help people every now and then with their private legal problems, but always *pro bono*, and not on any serious scale. When I wrote a will for a dying friend, for example, I did not charge her for it; nor did I charge other friends for setting up non-profit corporations.²⁷

4. Vignettes

Here are a few more extracts from e-mails, selected because they were written at the time and so illustrate the flavor of my work life with more immediacy than a narrative written years later. Reader, if this seems like too many e-mails, skip ahead. I am writing for the ages here.

- I write a paper for a patron. Another patron on the project waits a week to review the materials, then bucks them to a substitute who waits another week, then says she wants the materials reorganized and revised from what the first patron said he wanted. But am I pissed? No, I'll just get paid twice for the same paper. I have gotten pretty good at not being angry – not at office problems, not at

²⁷ To protect against conflicts, I promised the firm I would always clear outside work with them in advance, and run a conflicts check before accepting it. And I always did this.

George W. Bush (although he deserves it), not at most of the stupidity and beastliness I see around me. As the old joke runs, is this ignorance or apathy? I don't know and I don't care. But I call it progress as I cruise into my 60s. Now if I could just get rid of the molten inner core of undirected rage seething inside, I'd really have something.

- Beautiful day here too. I spent it all in examining old authority from Boards of Contract Appeals and musty court decisions, to make sure *our* huge corporation gets the advantage over *their* huge corporation in a dispute about recovering the costs of constructing a horrible greedy monster of a building it gives me the creeps even to enter. But no preferences, right? I particularly enjoy it when I start a project by rereading my earlier memos on a related subject – they are *paying me to read my own writing!* For a solipsist it doesn't get any better than that.
- That's one thing about legal research and writing, you always have something to say. "Creative writing" – maybe not. A daily column – you can come up dry. But when someone poses a legal question, you have to answer it, and there always is an answer. Sometimes the answer, after thorough research, is that the law is uncertain and a decision could go either way, here are the arguments and authorities on both sides, here's what we'd argue to make it come out the way we want, but don't count on winning. But there's always *something* to say.
- My pay is low as a lawyer but high as a writer, so I think of myself as a writer.
- I completed two articles last week. One was called "Insurance Aspects of the Global Warming Crisis: A View from the United States." Talk about taking the short view! But you gotta give the folks what they want. Now my patron, having a perfectly balanced article for a publication no one will read anyway, is busy rearranging the sections. But I of course don't care what he does with it – this shows the wisdom of not signing these things.
- Recently finished an article proposing a model rule for juror questioning of witnesses, and now the partner for whom I wrote it says it is great, fantastic, but could I take out the model rule? I am such a pro I said sure, you're signing it not me, so whatever you're comfortable with. I am such a pro I could *plotz*.²⁸
- My article on mechanics' liens will be done today except for cite-checking by a paralegal, and writing 11 forms. I have already planned my *dramatis personae* for the forms, which will concern an unpaid-for widow's walk – Sturdy Carpentry, Inc. of Upright Avenue, against the Deadbeat Construction Co. and their corporate parent Furtive Enterprises, both of the same address on Weasel

²⁸ Yiddish for *explode*.

Street, in the City of Nirvana, County of Paradise, California. I feel like John Bunyan.

- Wrote chapters on eight civil writs for the Civil Procedure project – *mandamus* and *certiorari* and *supersedeas* and *habeas corpus*, and of course the twins *coram nobis* and *coram vobis*. And *quo warranto* – how odd to have a Latin name with a *w* in it, all the other writs must have teased it in the schoolyard – and of course poor *prohibition*, which had to get along with a name in English. How cruel some people can be. These eight brave little writs, huddled together for protection – I think of them as the *Writs Brothers*.
- I would be great as a hard-boiled litigator on any single day, but not on every single day. A trial lasting two weeks would wreck me; a trial lasting two months would kill me dead. But a single day would be fine – that’s why I ask them in my annual reviews to let me argue a motion (even though they reserve that for training genuine litigators). A trial is too much to keep in mind all at once. For complex litigation the way we do it, it is better that I figure out the legal position and spin off ideas and analysis and then let the litigators use what I’ve given them to litigate with. I successfully handled a change of name once – that’s more my speed really.
- Now I am back to work, writing huge quantities of words. Fortunately I have written so many millions of words by now that I can always find some I have written before that will do just as well as fresh ones for practice development purposes. So I have plagiarized myself (and one of our partners, which is OK) to the tune of 6000 words today alone. They pay me for this, which is why I do it. Two days ago: the *eBay* case.²⁹ Yesterday: patent pooling. Today: electronic discovery. Tomorrow: something else. It is boring but at least not painful, or even difficult any longer. Last week I even answered some litigation questions. It still seems odd that they turn to *me* to instruct the bar on topics I have to work up from scratch, and depend on *me* for answers in nine-figure litigation, but *c’est la guerre*, or something.
- Glorious victory on the 22d, when Jerry Braun and I convinced an immigration judge to turn off a deportation proceeding against a now-reformed druggie for a meth offense in 1987!!! This proceeding had been going on for 13 years – we had been to the Appeals Board twice (and won both times). They wanted to deport her to Germany, where she has not been since her family emigrated here when she was nine – she’s now 49. I did some of the best work of my career in writing 12 heartbreaking declarations which sounded like the declarants and not

²⁹ That was *eBay Inc v. MercExchange, LLC*, 547 U.S. 388 (2006). I wrote three sets of materials in various formats about this case, which held that the right to an injunction on a finding of patent infringement was not as absolute as had been thought.

like a lawyer, and which no one so far has been able to read without misting over. So that's some satisfaction, anyway, even if I'd rather not have done any of it.

Around 2000 I managed to get into the associates' annual review process, in order to get regular raises. After that I wrote a summary of my year's work every year for my review. An example is included with the Supplements. I sent a copy to a friend and he thought it was beneath my dignity to participate in such a thing. I did not agree.

- You are looking at the evaluation form the wrong way. First, the form was written for associates, not for me. My position is *sui generis* and it took a while even to get into the annual review process, where I'm glad to be as it makes regular raises more likely. Second, they *don't* all know what I've been doing – there is a committee which decides on raises, and some of the members have no idea what I do. Third, I don't regard it as groveling – with direct compensation and overhead and office space and part of a secretary (not the best part of course, but still) I cost them *at least* \$140,000 a year and probably a lot more. They are entitled to know just what they are getting for \$140K. Fourth, what you look on as an imposition, I look on as a showcase – observe how smoothly I have reworked a tangle of unruly facts taken from primary sources into a sleek advocacy document, pointing up as you noticed how well my work meshes with that of the firm. Reading my doc, and comparing it to what I imagine are somewhat rougher ones they get from associates, they think (I hope) that Phillips is a talented guy worth keeping around and maybe even paying a tiny bit more. I don't mind a bit encouraging this perception in the minds of the people with the money.

And this, some years later.

- Annual performance review yesterday. Partner in charge says my review is always easy because everyone consulted (21 partners this time) all love my work, nothing but exclamation points, he says, never a dissenting voice in the chorus of praise about me me me. That's always nice to hear – we'll see soon if they come up with any more MONEY since I'm so damned good at my job. But it is nice to know that my job seems secure – even if I don't like working, it's good to be appreciated, and good not to have to worry about being laid off and know I can probably keep this job as long as I need it, and good to know that they remain happy (they said so explicitly) with the curious accommodation the firm has made to my eccentric work habits. I am happy too – next to not working, this really is the best deal imaginable, and I'm proud to be associated with this firm with its humane culture and reputation for excellence.



As long as I'm smiling, here is my picture from the firm's website, where I am still perversely listed as an associate even

though I never was one.

After responding to a claim by a feckless correspondent that our firm did *pro bono* work for the publicity or for a tax advantage, which was not true, I added this.

- And as far as singing the company song goes, I am loyal to our firm and proud to be associated with it, not because I am a company man (you know me better than that) but because it is a fine outfit, very well respected in the legal community for our exceptionally high standards of practice, exceptionally high intellectual level of lawyers and work-product, and the humane, honorable and scrupulously ethical conduct our firm's culture deliberately promotes. I personally have always been treated with courtesy and respect, both professionally and personally. I once worked as a free-lance librarian at a firm which did not have such high standards, and I know the difference. That is one of the main reasons I have stayed so long, even though as you say they don't pay me enough.

5. Discontented and conflicted

a. Discontented

It should be clear by now that I did not enjoy working at the law. It should also be clear that (as with Kennedy & Rhine years ago, see Chapter 15.A) there was nothing wrong with my job *as a job* – few lawyers, or writers as I came to think of myself instead, had as soft a gig as I had, working half-time from home in my pajamas, not having to scramble for clients or represent anyone, doing what had become for me fairly easy work. The problem was that I didn't want to work *at all* and resented what I felt was wasting my very limited time on earth.

Now, after two years of retirement have dulled the edge of that resentment, I see two sources of this attitude, which seemed very strange to my peers and professional colleagues who enjoyed their work. First, as explained in Chapter 15.B, the dramatic refocusing of my perspective by LSD made it difficult for me to take seriously the terrestrial games of property and advantage which the law is mostly about. When even justice did not seem worth spending all day fighting about, it became very painful to spend weeks composing complex arguments and procedural motions about, for example, how some rich guys sleazily euchred some other rich guys out of a lot of money. From e-mails of the time:

- My job is not at all interesting (to me anyway) because I couldn't care less about any of it. I figure all these things out but I have no interest in the subject or in who wins, and being able to figure them out, and express ideas by quoting dead judges, is no novelty or pleasure. And as for a *challenge*, who wants to be challenged when you could pass unchallenged? There are such people, but all

that is not worth a nickel to me. So yes, I can read a contract, and even understand it, if someone pays me to do it. But if not, then no way. I don't even read my own. When I am at the rental car counter I just sign where they tell me – I tell them they taught me in law school never to read something before signing it.

- Immediately plunged into mountains of work. Why can't I be one of those people who get off on having lots of work to do, who are made to feel whole and fulfilled and validated and so on by it?³⁰ Is it my fault I feel those things already, without work, and so work just eats up my time?
- Work although boring is easy and I can do it quickly. This comes from finding my area of competence and sticking with it, rather than continually trying for new challenges. Most people work for a living because they did not inherit enough to stop. There is hardly any other sensible reason.

The other part of it stemmed, I see now, from a basically aristocratic viewpoint through which I saw myself as standing apart from the interests and concerns of most other people. What interested them did not interest me – their motivations did not apply to me – and that included not only the rough day-to-day concerns of the business world, but also the deeper motivations of wealth, reputation, ambition, and mastery of craft. The distancing perspective of LSD helped this attitude but was not alone in forming it.

As I was not interested in the subject of my work, and I was not interested in the rewards either, it became acutely unpleasant to have to spend my time and talents on it anyway. Here's what I wrote somewhat bitterly to a friend in September 2007:

I agree that idleness is not particularly good for the soul, but work is something else – usually (unless we are exceptionally fortunate) work means spending our life energy on other people's business. In my case that means either figuring out solutions to other people's legal problems, or writing articles whose main purpose is to impress potential clients with how smart the people are they mistakenly think wrote the articles, so they will give business to our firm. If I could get out of doing this I would do so without any regrets – I see no value in it whatever. It is nothing but a wasteful drain on my energy, which I sell for money – no different from prostitution when you come right down to it.

Instead I would prefer to spend my life in study, as generations of rabbis have done before me, although I would study in a wider field. That is not idleness, but neither is it work, in the sense you mean anyway. Travel (the way I do it, in palaces and museums, as opposed to surfing or skiing or lying on the beach) counts as a subset of study. That's what I am mostly interested in – study and Dharma. Work for the

³⁰ As indeed I was in my early 20s, in my political and draft work – see Chapters 12 and 13.

sake of working has no appeal to me, and I don't buy into the ideology that it is good for a person, or builds character, or anything like that. My character is already built.

The truth is that I am what used to be called a *dilettante* – I like to learn and absorb and enjoy as the spirit moves me and as my interests flow, rather than according to someone else's imperatives. The classic *dilettante* was an aristocrat, a man of means who could retire to his estates and spend his time in his library and not work for a living. I have aristocratic tastes without aristocratic means, although I have managed to gain a lot more leisure and independence than most people ever get. But work was never a path to satisfaction for me.

I see now, *and indeed I saw then*, that all this was a textbook example of desire causing suffering, the very delusion the Buddha taught us not to fall for (see Chapter 18.E). It affected me despite the Buddha's warning, but at least through Buddhism I had the means to recognize and resist the delusion. So a lot of the story of my life as a lawyer was about struggling with a not very creditable resentment at having to work for a living. I got better at detaching from it, but I never got entirely free from it, and it made my career a lot more unpleasant than it needed to be.

- No time to talk further – must open another vein so my life energy can be poured down the drain EVEN FASTER. Did I mention how much I hate this? How bitterly? How totally? How enormously?
- When contracts are discussed I glaze over and fall asleep. This is considered OK for the client, but poor form in the lawyer. Fortunately I am not in the office where they can see me glaze, and then I wake up and work far into the night. I hate this kind of work almost (but not quite) as much as I hate pain, which it resembles in its distracting and monotonous relentlessness. I haven't got all that much longer to live, compared to how long I have lived – to close the blinds and waste my remaining days on such stupid boring worthless pettifogging nonsense is a *crime against life*. I'm not sure that expresses quite how strongly I feel, but it will do to give you a flavor.
- I am now bowed down with writing about investigative subpoenas. The weight of these never-ending term papers gets heavier and heavier with the passage of time. You'd think they would get easier and from a technical standpoint they have, but my weariness at having to do them, one after another until who knows when, is nearly crippling.
- How did I get stuck in a job I loathe, without getting rich from it? When I was coming up the deal was: money or self-fulfillment, choose one. How come I got neither? Could I dial back to, say, 1966 and reprogram my choices? Short answer: no.
- Your argument that if I didn't do my work someone else less competent would screw it up founders on the point that I don't care if that happens or not.

Similarly, I could take pride in my work only if I cared about it enough to bother. I would prefer to be able to fix motors – but in my formative years no one ever suggested that such a thing was possible, and there was nowhere on Park Avenue I could have gone to learn to fix them even if I had wanted to. I grew up in a narrowly professional environment, and the thought of my actually doing something *tangible* (other than being a doctor) never occurred to me or anyone around me.³¹ As a result of that, and of not inheriting enough wealth while the getting was good, I now have to keep on manipulating words and symbols in which I have no interest whatever. It isn't gibberish, as you call it (it only seems that way to the uninitiated), but it is stupefyingly boring.

- Being needed and respected by society for one's ability is better than being rejected, despised and discarded, but I do not give a single damn either way. The respect of the world is not worth 15 minutes of legal research as far as I am concerned, and losing it would be no sacrifice at all. I am in it strictly for the money, and not all that much money at that. I like going to Europe every year and buying theatre tickets and heraldry books – I suppose I could stop working and still survive, but it would make me nervous as hell. Anxiety is worse than work, for me anyway – I really wish it were not.
- I am just emerging from my long tunnel of work, like a turd from a colon.

b. Conflicted

But there were parts of my job that I did enjoy – mastery of research methods, easy grasp of legal issues, fluent writing to specifications, a local reputation for scholarship and professionalism. So there was a definite conflict in my mind about even such enjoyment as I could get out of my work. I loathed having to spend time on it as I didn't care, for example, whether a certain person's entitlement to stock options in his employment agreement violated the statute of frauds or not. On the other hand I felt a craftsman's satisfaction in my ability to analyze a legal question, find the applicable law, and write a thorough, accurate and coherent answer in elegant English on a tight deadline. This notebook entry from 1991 indicates the conflict and confusion – it is perhaps significant that I felt the need to write it down.

Resentment at having to pay attention to legal stuff of no intrinsic interest. But since I have to do it anyway, it is kosher to be interested in the interesting aspects.

³¹ I did think of becoming a doctor, like my father. Then one day in the late 1950s my Uncle Roy was at our house and injured his finger in an air-conditioning fan. My father washed and dressed the bleeding wound, and I got a good look at it. That one look was all it took to put me off a medical career forever.

I attach as Document 27B-3 an acerbic e-mail I sent in July 1997 to Peter Miller, who kept telling me that “there is much satisfaction in the craft of doing what you do, providing a unique resource,” etc. It shows what I really thought about all this – I wasn’t conflicted about the work, but I was conflicted about the conflict.

This conflict persisted for the whole of my career. Here are extracts from e-mails from four or five years later.

- Just completed another project, the one I knew nothing about, in close to no time flat. I still don’t know anything about it, but I managed a breezy 1500-word article on the subject anyway, for the ABA Energy Litigation journal. Can I admit I find it satisfying to be able to do this, without waiving my claim that the whole process is fundamentally unsatisfying? Even to pose a question in such terms suggests that I am by now a lawyer down to my toenails. As the appellate courts put it, we do not need to reach the question whether this is a good thing, or not.
- Exhausted from batting my head against the rules for decertifying a defendant class in an antitrust class action. Must prepare partner for engagement interview – Fortune 500 company would be our client – why he turns to me I’m not sure, as I know nothing about it, but he definitely wanted my thoughts, whatever they might be. Am flattered and disgusted at the same time – flattered because he is a great antitrust maven and knows I know nothing and wants me to prepare him anyway, and disgusted because now I have to do it and it makes me ill. When I say I know nothing about it, I mean that two days ago I knew nothing about it. Now I do.



At left is a 16th century woodcut of a craftsman I kept attached to my computer monitor, to remind me, when I grew restive, that I was just a craftsman making a living. Tarot fans will recognize the same attitude in the Eight of Pentacles in the Rider Deck (right). There is the artisan at his



workbench, turning out pentacles one by one – he’s working on one as we watch, six more hang nearby, and another lies by his feet. When I had the right attitude, my legal memos and articles were like those pentacles, and I was like the smith who made them. Sure, I’m not interested in pentacles – but is the shoemaker interested in shoes? Does the bus driver love the bus?

A friend wrote to me in 2002, suggesting I change jobs if I was discontented – she had been at her job ten years and was up for another ten. I replied:

Change jobs? At my time of life [58]? To what? No one wants a heraldist, and librarians get paid next to nothing, and it's too late to become an art historian. The only way I can make a decent living is as a lawyer, and as a lawyer I have the softest gig available, as I sit here in an old T-shirt at 10 AM on a weekday writing to you. No, it's just a difference in attitudes, and yours is much healthier than mine. My great-uncle Morris took his Van Heusen dividends and spent his life in New Jersey playing polo. He had the right idea and the money to back it up. I just have the right idea. To me another ten years sounds like a new sentence (actually of course it is only a sentence fragment).

Here's what I wrote to another friend.

There are so many ways to suffer. For example (1) I hate doing this [supply black cloud to hover overhead]; (2) O mom, do I have to? (3) I am wasting my time and skills on stupid commercial disputes when I could be [fill in blank]; (4) why O why didn't I become an art historian [on even-numbered day substitute: sea captain] when I had the chance? (5) why O why didn't I go to Wall Street right out of college and make enough to quit work? (6) why O why didn't I inherit more money while I was at it, like my friend who's in Europe right now? (7) A and B enjoy their work, how come I don't have what they have, it's not fair! (8) I wish I were in Paris! (9) [Keep going until you reach #20, then start again at #1]. As I say, there are so many ways to suffer. It took years of Buddhism for me finally to realize that the suffering came not from the work *but from my self-conditioned reaction to it*. Writing law review articles was not the problem, *minding doing it* was the problem. As a Buddhist sage put it: "setting up what you like against what you don't like is disease of mind."

But here's another e-mail at about the same time, when I was in a better mood.

Now a partner has asked me to write an epitome of California mechanic's lien law to post on an Internet site – the content provider asked one of our construction partners if she would do it, and so I'll do it for her under her name – a piece of cake. Writing out of an adversary context is much easier. I will go in to my office tomorrow (so I can use the treatises in the library), call the content provider and find out how many yards they want, and just weave that many yards. Boring, but not horrible. In fact, there is by now a certain craftsman's pleasure in sizing up a task, cutting my cloth, using this trick of the trade or that to make it come out just the way and size and shape it is supposed to be, having confidence in the fitness of the final product for its purpose.³² It has been a sort of dumb conflict in my mind for years now – if I admit to these satisfactions, I'm admitting to enjoying my work at least at some level, and

³² *Fitness for its purpose* is a technical term in warranty law. That it flowed out as I was writing this passage, where I didn't even notice it until I read it over much later, shows how much I have internalized *thinking like a lawyer*, as my law professors called the intellectual method they were trying to teach us. Looks like I learned it!

yet how can I do that when the subject bores me, is unworthy of the attention of *terrific wonderful me*, who has so many better things to think about? To my credit I'm coming to realize how very extremely stupid this is.

It is perhaps a romantic notion that a person should love his work. That's great if you can get it, although that too has its pitfalls, such as absorption in work to the exclusion of other things, and too firm a belief in the reality of the structures you work with. But most people don't love their work, and yet they have to do it anyway. By the end I *mostly* didn't let it bother me *that much*. But I find it kind of ironic that someone brought up with that romantic attitude toward work (my father told me to choose a profession I would enjoy doing even if no one paid me), and with a completely free choice of education and occupation, all expenses paid, should have ended up doing work he didn't like, and doing only because he needed the money.

If I'd applied my talents I suppose I could have made a notable career in the law, except I really couldn't have because while I had the talent I didn't have the temperament. I could have made a lot more money on my own, but I would have had a hefty overhead for an office and malpractice insurance and Westlaw, and I would have had to work much harder, which was exactly what I didn't want to do. As a partner in a firm like Farella I could have made *much* more money, but there would have been more work than I could have handled, and committee work and bar functions and practice development and client maintenance as well. I was actually very fortunate that my work as a marginal character in a serious firm paid me well enough that I didn't have to do very much of it to make ends meet. That is a kind of negative assessment – what I valued most about my work was the part where I didn't have to do it – but there it is.

6. Second retirement

As noted, during the slump in the mid-2000s, following the dot-com crash a while earlier, my billable hours had declined steeply in order to keep the associates working.³³ I began to think of myself as being gradually, incrementally laid off, and started contemplating retirement.

My job continues to evaporate, but instead of panicking or resisting I am regarding this as providential – I don't like it anyway and this is solving my problem about

³³ The *dot-com crash* was a dramatic fall in the value of technology start-up companies – they had been wildly overvalued, creating a classic market bubble. At the beginning of the new century there was a market correction which drove a lot of them abruptly out of business. This had a ripple effect throughout the economy, and affected law firms like ours which did a lot of business in this area. For more on this boom and subsequent bust, see http://en.wikipedia.org/wiki/Dotcom_boom.

whether to quit or not. My job will soon quit me, just about when my mortgage is paid off (almost there – I could easily do it now from capital). The older I get and the more pickled in Buddhism I become, the easier it is just to let everything that's coming, come. Which is good, because it's coming anyway.

A brief but intense illness in 2005 reminded me that the sands were running out, and that I had better reserve some of my remaining time for my own purposes.

I am very tired indeed. Is it so obvious you could tell it from my e-mail? As I enter my golden years I have even less energy than usual for the things people spend energy on. I still have plenty of energy for looking things up in Bible dictionaries and reading about ancient Rome, but writing about patent-infringing imports has become almost painful. I am not even as sure as I once was of my ability to do it to my standards – my skills have not atrophied (indeed all these years of practice has strengthened them) but my reserves of will, always low for this kind of thing, are now lower than ever.

So I am transitioning to retirement, aided by the rapid evaporation of my job as the hours I bill continue to decline. I am actually using the books I spent so much money and effort to collect. I am prying myself up from the computer when I am not working, and insisting to myself that I actually do the things I resented working because they took time away from (is this sentence comprehensible? too tired to fix it). For one essentially being laid off at the age of 61, I am remarkably free of panic, at least so far. This reflects, perhaps, Lord Ganesha's answer to my prayer for my end days: to protect me from pain and panic. These aren't quite my last days yet, but I am settling in for the final act. The play has been amusing, even though it turned out to be inconsequential and has attracted a limited audience. This is a downbeat sort of message. Cue the cellos.

The basic problem, as noted above, was that while I didn't like working, if I *had* to work it was unlikely I could find a job nearly as good as the one I had. So I wasn't sure where I would find the courage actually to quit, which meant I would have to continue indefinitely.

I lack the courage to burn my bridges, but if someone else burned them for me I would regard it as a blessing, as I would be able to take the alternative path without the responsibility of choosing. I'm scared to jump but wouldn't really mind if I were pushed.

And that's how it turned out, abruptly and unexpectedly. I had been asked to work on a litigation project for a client who did not pay for Westlaw use. But no one told me this about the client; and the partner I was working for, who had not thought through what he wanted me to do, asked me 41 separate research questions. I did the best I could to narrow it down, but ended up spending a lot of time on Westlaw. When the bill came the client wouldn't pay it, and hell was raised down the line. Although no one had ever questioned my Westlaw use in the past 18 years, the firm's managing partner instructed

me not to use Westlaw, beginning at once, including for practice development work, but to save money by using Lexis instead. Lexis was a competing service where we had a flat-rate contract.

But Lexis was a grossly inferior product. It did not have the Key System, or digest field searching, or a whole array of other features which I needed to provide a thorough and reliable product. I tried to explain this to the managing partner, who didn't care. So I decided to retire rather than try to work with unsuitable tools and produce a product I could not have confidence in. I wrote to a friend.

You know what? I'm not going to do it. I will go on Social Security, start taking some income I have been compounding against the day when I would need it, rent out my downstairs apartment, stop buying atlases and heraldry books and traveling quite so much, and retire and enjoy the time I have left, and the thousands of heraldry books I have already. And if money gets tight, I'll deal with it. I would have preferred to wait until 66, when I would get 100% Social Security and Medicare (at 65), but I'm close enough.

This avoids the need to make a choice, which would have been hard because the work was not difficult and there was not very much of it, and it was hard to justify not doing it 15 hours a week 40 weeks a year for \$95 an hour in my bathrobe, even though I loathed it and it fractured my time. Now that the decision has been taken out of my hands I find all that Buddhism (don't cling to existing structures!) to be very useful in remaining unshaken by what amounts to an abrupt dismissal. It would have been harder if I had no other source of income (but I do) and if I took my identity and self-worth from my work (but I don't). Actually I am rather relieved, and looking forward to the next stage.

It is possible that in the next few months my firm will negotiate a flat-rate contract with Westlaw, like they now have with Lexis, and then I could use Westlaw again for the next couple of years. But the more I think about it, the more I doubt I would want to do that anyway.³⁴ I am looking on this as an opportunity to stop what I don't like and do only what I do like while I still have enough of my health to enjoy it.

The key to equanimity about this unexpected development – and it was *really* unexpected, being ordered for the first time in 18 years to work in a way I found professionally unacceptable – was that I *consciously chose* to regard this new circumstance as an opportunity rather than a calamity. Once I saw that, it was as if a door opened. I was through that door in a flash. I wouldn't go back in now for anything.

³⁴ And in fact the new Westlaw contract happened, and I was invited to start working again, but I declined. I was too pleased to be out of it to consider starting up again.

Sweet are the uses of adversity
Which, like the toad, ugly and venomous,
wears yet a precious jewel in his head.³⁵

Elated at the prospect of not working anymore. I am toasting marshmallows over the burning bridges as I tell one partner after another that I am not taking on any more projects. All this is happening now as if it had been planned for years instead of having been decided in the space of a week or so. I have been not buying historical atlases, and not eating at restaurants, and I am not going to Québec for a heraldic conference, and none of this has killed me. The bare thought of doing any more legal writing now is enough to curdle my *kishkas*.

At right I show the Tower card from the Rider Tarot deck. It fit my situation – the structure I had been relying on was destroyed by sudden violence. The solution to this situation was non-attachment – by not relying on the structure, I was spared the shock of its failure and consequent destruction.³⁶



Some of my partisans among the senior partners wanted to try to rescue the situation and see if the order could not be rescinded or worked around. But I didn't want to be rescued – I wanted to retire. Having glimpsed the exit, the thought of being rescued and put back to work I was sick of for another 2½ years was too disheartening even to consider.

- I loathe the whole thing, and am bored to death by it, and am leaping at the chance to be rid of it. If I wait until I'm 66 I could be dead by then, or have had a stroke and be unable to enjoy my leisure. Time is not endless; health does not last forever. Given a chance to stop, I would like to take it. My advisers are telling me to work to get around this, to get it waived for me, to appeal to powerful partners to intervene, and I suppose I could do that, but I don't want it waived, I want to take my chance and bail. It is not the perfect time financially for me to retire, but the perfect time for anything rarely comes, and so it is not usually a good idea to wait for it.
- The more I think about my imminent retirement the better I like it. I feel like school just let out early. It was a great gig but it is SO over. I am not doing ANY more of that stuff. Now that I have seen that green exit light glowing in the distance, I cannot bear to write one more word on business method patents or

³⁵ *As You Like It*, ii:1.

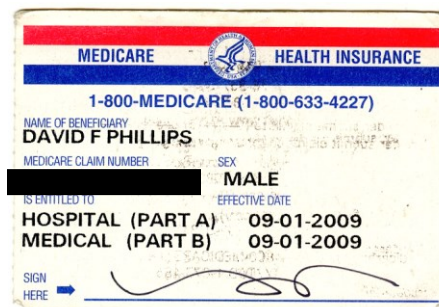
³⁶ Note the 22 golden *yods* falling like sparks – they stand, among other things, for the major arcana of the Tarot and for the Hebrew alphabet.

comparative arbitration techniques or wage and hour cases, just to name the three most recent requests. My *oeuvre* is complete. Curtain. On to the next chapter.

One of my patrons very wisely advised me not to make a formal break with the firm, but just to stop doing work which required legal research, and I did that. As a result, and because there were a few non-research tasks I stayed with on a very occasional basis until I completed them, and the two habeas clients still in San Quentin, I continue for the moment to have the help of a secretary when needed (which it rarely is) and company e-mail and paid bar fees and computer support without actually working. This is great for now, and when I have to give them up (as eventually I did with the downtown office I almost never used anyway), I will go quietly.

Retirement has been wonderful so far – it has been well over two years as I write this in July 2010. I always said that when I stopped working I would never think about the law again, and sure enough I don't. I don't miss it even a little bit. In fact I wrote to a friend that I felt as if I had had a tumor removed. What a relief, not only from having to do the work but from *kvetching* and making myself unhappy about it. I am deliberately using my time to do things like heraldic writing I couldn't really do before. It wasn't that I didn't have time, but when you write a few thousand words in a day on a boring topic, you don't then feel like writing more even on an interesting one. I wrote four heraldic articles in four months (I will send them up to the Phillips Family Papers as Supplements), and more may come. Plus of course this memoir.

Money is tighter than it was, and the world economy had not crashed quite yet when I retired (at least now I don't have to worry about losing my job!). But I am cutting back on travel [I wrote in 2008 – now not so much] and on buying books and eating in restaurants. I have found these adjustments surprisingly easy to make. I am renting out my downstairs apartment, and have started to draw Social Security, and Medicare is saving me a bundle on health insurance. I have enough stashed away that I could supplement my income with judicious drafts from capital if I absolutely had to, although the crash has slashed my stash to some extent. I have a few investments which are even making money, so I take profits when I can. I think it will work out OK, *inch'Allah*, in the sense that I will probably not end up on the street with a tin cup.³⁷ And if it doesn't work out, I'll deal with it. But my career as a lawyer is over, *again*, and I could not be



³⁷ *Inch'Allah* is Arabic for *God willing*. As Tennessee Williams wrote in *Cat on a Hot Tin Roof* (1955): "You can be young without money, but you can't be old without it."

more delighted. I was very tired of it by the end, after 18 years on the job. And it could have been worse – I could have been working on a paving gang, spreading asphalt on the roads in the broiling sun. I could have been bond counsel.

7. Golden Gate University

One more thing. Since about 1989 I have worked with my former law teacher and longtime mentor Professor Bernard L. Segal as a judge in his mock trial class at Golden Gate University Law School. For a few years I was even a paid adjunct instructor (see Document 15-7), but I still do it *pro bono publico*. We teach advocacy and evidence and performance and trialcraft – by teaching these subjects to class after class of Bernie's students I have become reasonably good at them without ever having had to do any trial work myself.

Teaching is an incredible high – I enjoy every second I do it, and wish sometimes I did it more (although not enough to make a commitment to *do* it more, like every week – I might be able to get an adjunct appointment, but the moment I did it would become a burden). It is sort of like the rush actors get, I guess, except I'm improvising, which is even more exhilarating.

I really enjoy being a mock trial judge and coach – I keep the trial going, I make it entertaining, and I am constantly teaching. For example, I insist that student advocates quote directly from the Rules of Evidence when they argue an evidentiary point. This is one way of teaching them that you can't just make it up – that all these rules are not just gas, but have specific purposes, and parameters set out in writing. When I rule on an evidentiary point I will sometimes take them through the provisions of the rule one by one, applying each one to our situation. Does it fit? Why, or why not? This is a way of looking at the law many of them may not have experienced. *Irrelevant*, for example, is not just a mantra – it means something specific. *Prejudicial* just means it hurts your case – that is no reason by itself to exclude it.

Moot court is different – instead of a mock trial, with witnesses and evidence and addresses to a jury, it is a mock appellate argument to a panel of judges.

Coaching four mock trial and moot court teams, twice each – I find coaching more fun than judging when it's moot court rather than mock trial. Students stand up in front of me and try to argue, and I interrupt constantly to ask questions in the *persona* of an appellate judge, or (more often) to correct defects of style, presentation, advocacy, language. Very exhilarating teaching. It is amazing how much fat I squeeze out of their statements, whole sentences that say nothing. I have been teaching them the difference between oral and written speech, how to save time at the podium, management of verbal stress, all kinds of tricks of the trade. How do I know these tricks? Best not to inquire. Grizzled prof in charge of one team told the class that we (he and I) knew all this stuff because we've done it

every day for 30 years. He turned to me and asked how long I'd been doing it – I said I was admitted in 1972.

We judge mock trial on a scale of 6-10, and a 10 is very rare. Each element – opening, direct examination, cross examination, closing – is graded separately. Tonight for the first time since I've been doing this (14 years) I gave two 10s in one night to the same student – that was a thrill, I can tell you. And also a 9½ to the same student. She just got it exactly right, far simpler than any other student's attempt – three or four important points, each with a clear and relevant purpose, established in a few short clear direct questions each, and then she stopped! Twice she did this, once on direct examination and once on cross; and a closing argument that worked on pretty much the same principle. It was a pleasure to behold, and a pleasure to be able to give her such public encouragement as the double-ten (I always announce tens). Other times I was merciless – when a student objected for irrelevance, I asked the questioning party to explain the relevance, and when his answer didn't answer I asked it again until everyone learned the difference between *relevant to the issues* and just something you want the jury to hear. But even when merciless, always in a kind way – I don't want to humiliate anyone, this is not *The Paper Chase* but real teaching, so I always try to keep it interesting and amusing and non-threatening for everyone. Wonderful fun.

With moot court it's like writing, but oral – I squeeze useless words and postures out of their diction, hammer at the basics – don't give the court a lecture on the law, tell them what you want them to do! It's enormous fun in the limited amounts I do it. Sometimes I sub for Bernie or teach his trial procedure class. I love standing up in front of a class – exhilarating is not a strong enough word – ecstatic is more like it.

The funny thing is that it doesn't seem to matter I've never done either a trial or an appellate argument in my life. I teach them good solid stuff and no one suspects I learned it all from the leprechauns. Perhaps it is the combination of the confident manner and the gray beard. And it's a time warp– all these law students so young, like I was, and the grizzled professor, respected and deferred to by the young the way I remember my professors were – is me! What a trip!

- When a student tries to get in a piece of evidence she's made up under the rule that immaterial facts can be added to the problem, and then I challenge her to explain to me, if it's immaterial, why it is relevant, and when she shows me why it's relevant I say well then, how can it be immaterial, she has probably learned that lesson better than she would have out of her casebook or even a case-based Socratic dialogue, because she was up there on her feet in "court."
- I just conducted my first mock trial of the season and that felt pretty good. Many students from past years, now graduates and participating in the program as judges, say they remember my critiques well – they say I was tough but never rough with them. It is a sort of Mr. Chips thing. My courtroom is a jolly place with

lots of learning going on, as I guide four students at a time through the fine points of trial advocacy despite never having actually done it myself.

I am always scrupulously careful not to embarrass or humiliate any students. I don't believe in the John Houseman withering retort school of teaching.³⁸ To get the most out of law school you have to take your licks – the trick is to give (and accept) licks in a friendly and cooperative spirit in which licker and lickee both see it not as an ego-trip but as part of a genuinely constructive process. I never ever forget this when I teach.



Tailpiece: Trademark of the
West Key Number System.

³⁸ John Houseman played the law professor in *The Paper Chase* (1973), based on a 1970 novel of the same name by John Jay Osborn, Jr., about Harvard Law School.

Document 27B-1: West Key Number System

A. Sample page from West Key Number Digest

Nebraska Digest 10 Neb D—222

6(5) THEATERS & SHOWS

THEATERS AND SHOWS.

Library references
C.J.S. Theaters and Shows § 1 et seq.

2. Statutory and municipal regulations.

Neb. An act prohibiting "all public exhibitions of Hypnotism, Mesmerism, Animal Magnetism, or so-called Psychical Forces, for netism, does not prohibit spiritualistic seances, gain", does not prohibit public and open for gain, unless they are public and open for gain, unless the words "psychical forces" applying to a seance conducted by a spiritualistic medium, but his act as such not violating statute unless it is public and open and for gain. Comp.St. 1929, § 28-1111.—Dill v. Hamilton, 291 N.W. 62, 137 Neb. 723, 129 A.L.R. 743.

The act prohibiting "all public exhibitions of Hypnotism, Mesmerism, Animal Magnetism, or Psychical Forces, for gain", is a valid exercise of police power, since police power to prohibit public exhibitions for money-making purposes or for gain extends to harmful, immoral or indecent performances, though conducted in the name of religion, and violators of such prohibitions are subject to statutory penalties therefor. Comp.St. 1929, § 28-1111.—Dill v. Hamilton, 291 N.W. 62, 137 Neb. 723, 129 A.L.R. 743.

A guaranty of \$15 to remunerate a medium for conducting spiritualistic seance as religious ceremony in the worship of God and creation of the fund by voluntary contributions of communicants of Spiritualistic Church do not constitute "gain" within statute forbidding public seances for gain. Comp.St. 1929, § 28-1111.—Dill v. Hamilton, 291 N.W. 62, 137 Neb. 723, 129 A.L.R. 743.

6. Liabilities for injuries to persons attending.

- (1). In general.
- (2). Duty affected by charging for admission, insuring safety or assuming special legal status.
- (3). Licensees or invitees.
- (4). — Particular invitees.
- (5). Persons liable or entitled to sue.
- (6). Limitation of liability.
- (7). Particular duties toward participants.
- (8). — Amusement devices.
- (9). — Swimming or bathing.
- (10). Particular duties toward spectators.
- (11). — Athletic events.
- (12). — Floor and ground.
- (13). — Lighting, and ushering in darkness.
- (14). — Protection against crowds, assaults and acts of others and ushering in general.
- (15). — Seats and structural defects.
- (16). — Stairs, steps and ramps.
- (17). Contributory negligence and assumption of risk.
- (18). — Athletic events.
- (19). — Participants.
- (20). Actions in general.

6(5). Persons liable or entitled to sue.

Neb. In personal injury action by spectator at wrestling match, instruction that if jury found that while two wrestlers were on ground outside ring they continued to wrestle and when referee attempted to separate them, one of the wrestlers shoved the referee into the spectator and injured spectator, there was no liability against anyone except wrestler who did the pushing, because such pushing was outside that wrestler's scope of employment, was erroneous, since such wrestler was not, as a matter of law, outside the scope of his employment.—Klaue v. Nebraska State Bd. of Agriculture, 35 N.W.2d 104, 150 Neb. 466.

Action for injuries sustained by spectator at wrestling match when referee was thrown or knocked from ring and came in contact with spectator was properly dismissed as to one who procured one of the wrestlers, where such wrestler was in nowise in such person's employ or under his control.—Id.

6(10). Particular duties toward spectators.

Neb. One who operates a place of public amusement or entertainment is held to a strict accountability for injuries to patrons than owners of private premises generally; and he is not insurer of safety of patrons but owes to them only what under the particular circumstances, amounts to ordinary and reasonable care.—Fimple v. Archer Ballroom Co., 35 N.W.2d 680, 150 Neb. 681.

6(14). — Protection against crowds, assaults and acts of others, and ushering in general.

Neb. Ordinance rendering it unlawful for operators of public dance halls to permit persons therein while under influence of liquor or engaging in boisterous conduct is for benefit of individual patrons of dances as well as public at large and could properly be made basis of civil action for damages where dance hall patron was injured by bottle thrown by second patron who was intoxicated.—Fimple v. Archer Ballroom Co., 35 N.W.2d 680, 150 Neb. 681.

6(17). Contributory negligence and assumption of risk.

Neb. Patron who attended large dance at public dance hall did not assume risk of injury from bottle thrown by second patron who was intoxicated.—Fimple v. Archer Ballroom Co., 35 N.W.2d 680, 150 Neb. 681.

6(18). — Athletic events.

Neb. A spectator at hockey game assumes risk of, and owes duty to protect himself against, such dangers incident to playing of game as are known to him or should be obvious and apparent to reasonable and prudent person in exercise of due care under circumstances. in exercise of due care under circumstances. —Tito v. Omaha Coliseum Corporation, 12 N.W.2d 90, 144 Neb. 22, 149 A.L.R. 1164.

Neb. A spectator at a wrestling match is required to exercise due care in protecting himself against known dangers or such as should be known and appreciated by a reasonable person in exercise of due care.—Klaue v. Nebraska State Bd. of Agriculture, 35 N.W.2d 104, 150 Neb. 466.

Spectator at wrestling match who was injured when referee was thrown or knocked from ring and came in contact with spectator, did not assume risk of injury because he sat in front row.—Id.

Spectator at wrestling match who was injured when referee was thrown or knocked from ring and came in contact with spectator, did not assume risk of injury because he sat in front row.—Id.

A spectator at a wrestling event assumes risk only of such dangers as are incident to such events, of which he had knowledge or

B. Sample page from a West Key Number index

- ≡ ⇒311H PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY
 - ⌘ ⇒I. IN GENERAL, k1-k49
 - ⌘ ⇒II. FAMILY PRIVILEGES, k50-k99
 - ⌘ ⇒III. ATTORNEY-CLIENT PRIVILEGE, k100-k199
 - ⌘ ⇒IV. PHYSICIAN-PATIENT PRIVILEGE, k200-k299
 - ⌘ ⇒V. COUNSELORS AND MENTAL HEALTH PROFESSIONALS, k300-k349
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 - ⇒k301 Constitutional and statutory provisions
 - ⇒k302 What law governs
 - ≡ ⇒k303 **Actions and proceedings in which privilege is applicable; exceptions and exemptions**
 - ⇒k304 --In general
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 - ⇒k306 --Child abuse or neglect
 - ⇒k307 --Child custody
 - ⇒k308 --Mental competency or sanity of criminal defendants
 - ⇒k309 --Homicide exception
 - ⇒k310 Court-ordered examinations; court-appointed professionals
 - ⇒k311 Professionals in general; therapists in general
 - ⇒k312 Psychotherapists
 - ⇒k313 Physicians; psychiatrists

C. Sample page from a West Reporter

536 Minn.
367 NORTH WESTERN REPORTER, 2d SERIES

Eleanor Louis BOOM, Respondent,
v.
Rolland David BOOM, Appellant.
No. C2-83-1956.
Court of Appeals of Minnesota.
April 23, 1985.

this does not preclude trial court from reviewing award if the appeal period has not expired and a party timely moves for amendment pursuant to rule. 48 M.S.A., Rules Civ.Proc., Rule 52.02.

4. Divorce \S 254(1)
A property distribution in a judgment and decree is not "final" until after the appeal period expires.
See publication Words and Phrases for other judicial constructions and definitions.

Syllabus by the Court.
1. A disproportionate award of marital property to the husband is justified where 13 years elapsed between service of the summons and complaint and the dissolution and the property was acquired solely by the husband during that period.
2. A court may amend its judgment anytime before the appeal time on the judgment expires.

Robert E. Van Nostrand, Wheaton, for respondent.
John E. Mack, New London, for appellant.

Heard, considered and decided by POPOVICH, Chief Judge, and SEDGWICK, and NIERENGARTEN, JJ.

OPINION

SEDGWICK, Judge.
Appellant Rolland Boom and respondent Eleanor Boom both challenge the trial court's division of property. Rolland also alleges the trial court erred: (1) in amending its judgment decree without any findings, explanation or justification; and (2) awarding Eleanor attorney fees. We affirm.

FACTS

Appellant Rolland and respondent Eleanor Boom were married in 1951. They

Upon motion of wife, appeal by husband from a judgment entered in a marriage dissolution proceeding was dismissed. Husband petitioned for reinstatement of appeal. The Court of Appeals, Peter S. Popovich, J., denied the petition, and husband petitioned for further review. The Supreme Court, Coyne, J., 361 N.W.2d 34, reversed and remanded. Upon remand, the District Court, Traverse County, Bruce N. Reuther, J., divided the parties' property. Appeal was taken. The Court of Appeals, Sedgwick, J., held that: (1) disproportionate award of marital property to husband was justified where 13 years lapsed between service of summons and complaint and marriage dissolution and property was acquired solely by husband during that period, and (2) trial court may amend its judgment any time before appeal time on judgment expires.
Affirmed.

1. Divorce \S 252.3(3)
Disproportionate award of marital property to husband was justified, where 13 years lapsed between service of summons and complaint and the marriage dissolution and the property was acquired solely by husband during that period.

2. Judgment \S 297
Trial court may amend its judgment any time before appeal time on judgment expires. 48 M.S.A., Rules Civ.Proc., Rules 52.02, 59.03.

3. Divorce \S 254(1, 2)
Property divisions are final and are not subject to modification except when they are product of mistake or fraud; however,

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by seven main divisions of law
and their numerical designations*

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Document 27B-2: E-mail explaining my work arrangement

I said to a friend in an e-mail: I went to the office and showed the flag before the people who assign work, and still no work. There is a new partner in charge who doesn't know me or my work or rep – I'll have to educate him – GAWD how I loathe this whole thing. This was my first step in educating him. Names have been redacted to initials.

From: Phillips, David (03) x4955
Sent: Monday, July 08, 2002 9:56 AM
To: B.
Cc: G.; D.; L.
Subject: FW: Associate Workload Coordinator

B., we have met but I don't think we have worked together, so as you are the new litigation workload coordinator I wanted to introduce myself. I am not an associate but I have been with the firm 13 years next month as a research and writing specialist, not counting five years before that as law librarian. I was admitted in 1972. Typically what I am asked to do is investigate the law and write a memo (or a series of memos) answering specific questions or figuring out specific problems. Sometimes I am asked to write a motion, or an argument for a brief, and that's fine too. I am a quick study and can handle most civil litigation questions, and can also do criminal and corporations issues. Although I have advanced research skills which can be useful in special projects, there is no need to reserve me only for those projects – I am very pleased to work on garden variety questions as well.

One of the functions I have served over the years is to provide quick research answers to partners with relatively short-fuse emergencies. As noted I also work on longer projects, turning out memos and arguments in series as needed – the last one of these I worked on was the C. matter for N. and J. Usually what happens is either that a litigation partner (or associate acting under a partner's direction) asks me to work on a project, or the work-assigning partner matches me with a request from a litigation partner and asks me if I can do it. I make it a point to accept pretty much whatever I'm asked to do until my plate is full, but not to take on assignments *after* my plate is full, so I can be sure of being able to do a timely and thorough job with what I have already taken on. I am proud of the fact that I have never missed a deadline in my entire career, and not overloading is one reason I have been able to do this.

Another specialty I have developed over time is helping partners with practice development projects such as articles, op-ed pieces, and seminar materials. I just recently worked on some seminar materials for K. These projects generally have a longish development time, so I don't mind scheduling them even if I can't work on them right away.

Using me is a fairly good deal for the firm, I think, because I am paid by the hour and on paying jobs my time is billed out at \$325, four times my hourly rate.³⁹ And on non-paying jobs, using me spares an associate from a task which probably would not help train her for a partner's role. I like to work about 20 hours a week on an annual basis, which comes out to about 25 hours a week for the weeks I work (I travel a good deal), and have been successful in meeting that goal every one of the past 13 years. I usually work from home, where [phone number] is always the most efficient way to reach me.

G. and my supervising partner D. can advise you how my work is seen by the partners I have worked for – as well as D. and the absent N., J., D., B., R., G., J. and J. also all know my work well. As it happens I just last night finished my only active project, so I am available for assignment. I have been asked to stand by as a resource in the *M.* matter, but there is not much for me to do on that front at present. I'll await word.

³⁹ Both my billing rate and my hourly compensation continued to increase substantially, and the four-times ratio grew to more like 5½ times. I think my billing rate when the curtain came down was something like \$545 an hour.

DOCUMENT 27B-3: E-mail to Peter Miller

From: Phillips, David(20) x4955
To: kamprint@gol.com
Subject: RE: IP note
Date: Sunday, July 13, 1997 1:43AM

Not wishing to get into a huge debate on the question, still I cannot agree that there is "much" satisfaction in my craft. There is some slight satisfaction in actually being able to do it, despite everything, but still rather complete loathing of the task itself. Words can hardly describe the misery of having to get up yet again today, for example, and face more knotty research into a messy question of limitation of liability and remedies and disclaimer of implied warranty of merchantability in an interstate sales contract for an electronic component. My heart is very very heavy as I face this shit, which I can hardly do for more than an hour at a time without very literally passing out in my chair from boredom and disgust. So not only is your suspicion unfounded, I must confess to some annoyance at repeatedly being told that I really do like after all what know I despise. I feel like someone's dotty old grandmother being told again and again that I like prunes, or my son-in-law, when I know I don't. "Granny, I know deep down you have warm feelings for Hank, I know you do. You don't have to admit it to me, of course, but we both know, don't we? You just think you don't." Maddening.

Yes, I take a kind of grim satisfaction in how I have ordered my process, much as a prisoner feels pride in having cunningly sharpened a shiv out of a spoon. But does he enjoy his work? I don't think so. He only needs the shiv because he's in prison. Let him out and see how many spoons he sharpens. (If he keeps on sharpening spoons he's a nut case.) The same is true of the prisoner's day job in the mailbag shop. After a while he gets really good at making mailbags, and naturally that feels better than being bad at making mailbags when he has to make mailbags every day. But that doesn't make mailbagging interesting or worthwhile, or the prisoner satisfied by his task. Being pleased that you only have to wallow in rancid skunk guts 20 hours a week instead of 40 is not the same as liking your work. To the contrary, it is a negative measurement-- only its absence is valued.

And as far as being a unique resource, WHY won't you believe me that I am not socialized that way, to take pride in being a resource for an organization whose work I don't care about AT ALL? The mink is a resource for the furrier, and where does it get him? The slave was a resource for the planter-- that's the kind of resource I am. Some of them were unique resources, but they were still slaves. I am a wage-slave.

I am not such an idiot that my little heart leaps with joy that the litigation department values me. Such mindless terrestrial conditioning was jolted out of me by LSD in 1971 and never came back. Maybe I'd have a better time of it if I still had my old conditioning, designed as it was to equip me for a career as a white-collar slave (an intellectual worker, the socialists called the likes of me), but the last whiffs of it have long since evaporated. I do my craft ONLY FOR THE MONEY, and because I am so attached to my middle-class lifestyle that, like many slaves, I don't dare to risk escaping. I truly do not care one good fruity pink goddamn for any other part of it except the money. You are projecting attitudes onto me that I really don't share even one little bitsy witsy bit. It's a free country, and all, but I don't know why you feel it necessary to do that. (I hope you won't take offense or feel that I am censoring your speech-- you can see I'm not censoring mine.)

The great zen master Sosan (Seng Ts'an, the Third Patriarch) wrote in "On Believing in Mind":

To set up what you like against what you dislike --
That is the disease of the mind.

Despite the above rant, I'm trying to learn that lesson as well as I can, as it is the only thing between me and a total breakdown, I hate this stuff so much. I'm trying hard to learn the yoga of no preferences, and a demanding yoga it is too. Pretending to like what you dislike is a blind alley-- learning not to mind either way is the key. Sosan again:

The perfect way knows no difficulties
Except that it refuses to make preferences;

Only when freed from hate and love
It reveals itself fully and without disguise;
A tenth of an inch's difference,
And heaven and earth spring apart
If you wish to see it before your own eyes
Have no fixed thoughts either for it or against it.

I am trying to cope with my situation by the yoga of non-preference (1) because I am too cowardly to try to change my situation (and having my nose rubbed in that over and over again with cheerful plans for new web careers is not the most pleasant sensation I've ever had), and (2) because I really do believe that even a career as a flag scholar would have its drawbacks, lifestyle improvements even if possible are temporary and distractingly beguiling, and the only true path to freedom is the Dharma's hard path of non-attachment and non-preference. "Outwit desire!" says the Dhammapada. I'm trying. Give me credit at least for trying.

Here comes that nice lady with my medication.

DOCUMENT 27B-4: Law school faculty adjunct appointment

I got one of these every year for quite a while. I continue to teach even though the adjunct position was defunded.

David Phillips
2331 - 47th Avenue
San Francisco, CA 94116

DATE: March 16, 1995

SS# 132-34-6725

ADJUNCT FACULTY CONTRACT

I am happy to inform you of your appointment to the faculty. Your appointment includes the following course(s) with stipend as indicated:

Semester: Spring 1995: January 9 - May 2, 1995

Location: Main Campus San Francisco

Course: MOCK TRIAL (taught Fall 1994)

Stipend:

Location:

Course:

Stipend: \$1500.00, minus standard deductions, to be paid in one lump sum

Any section that enrolls fewer than 15 students is subject to cancellation.

The stipend will be paid in semi-monthly payments over the length of the semester. Paychecks will be mailed twice a month to your address above unless we are otherwise instructed in writing. To change your address, please contact the Office of the Dean of your School and the Payroll Office.

It will be a privilege to work with you as a member of our faculty this semester.

Sincerely,



Barbara M. Anscher
Associate Dean for Academic Affairs

UNIVERSITY	REGISTRAR	PAYROLL
Line Number 92124	Initial Date	Dept./Act. Initial Date 0360-4140

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