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BYRON WHITE: THE PRACTICING LAWYER

ROBERT H. HARRY*

Byron White practiced law in the same way that he did everything else in his life—with intensity, skill, and success. Following his legal education at Oxford and Yale and his Supreme Court clerkship, Byron was admitted to the bar of the State of Colorado in 1947. Despite the fact that he could have worked for virtually any law firm in America, Byron chose to return to Denver because the city was growing rapidly, a lawyer in a small firm would be in a position to come to grips with a great variety of significant problems, and because living in a pleasant environment seemed important.¹ He began work in Denver with a small firm that soon merged into a larger one, which was regarded as one of the best in Colorado. It continues today under the name of Davis, Graham & Stubbs.

Byron practiced law with that firm for thirteen years, beginning when he was thirty and continuing until 1960, when he became Deputy Attorney General of the United States at age forty-three. During those years he worked hard, learned how to practice law with great skill and competence, rendered services to a host of clients in various fields of law, achieved a reputation as an outstanding general practitioner, and became a valued partner in his firm. Byron gained experience both as a lawyer on a team and leading a team of lawyers. This work as a practicing attorney provided Byron with a competence in law that played a vital role in his subsequent service as the ninety-third Justice of the United States Supreme Court, from 1962 until 1993.

In the 1950s, Denver was an ideal environment for a young lawyer to begin his practice. It was a small community, less than a half million in population, just beginning its dramatic growth. The Colorado Bar Association consisted of 1,703 lawyers, compared to 15,000 today.² There was a single

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1. DENNIS L. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE*, 223 (1998).

2. Interview with Charles Turner, Executive Director, Colorado Bar Association (March 2003).

federal judge and the attorneys, judges, legislators and governors knew each other well. A lawyer could observe the workings of his profession and had a clear vision of his role in the process. At the same time, however, Denver was home to substantial businesses and individuals with challenging legal problems. It was the commercial center for the huge Rocky Mountain area and, as the state capitol, it was the center of political activity. The lawyers were of high quality. A lawyer like Byron could be a general practitioner and work on sophisticated matters, and could also develop and be responsible for his own clients.³

Davis, Graham & Stubbs had a broadly diversified general civil practice. It had six attorneys during Byron's early years and had grown to twenty attorneys by the time he left. The firm stressed training its young lawyers to be excellent practitioners. Its experienced lawyers performed that function well. Byron appreciated such tutelage and took full advantage of it. Moreover, he had a warm and close relationship with his father-in-law and mentor, Dr. Robert L. Stearns, one of Colorado's finest law teachers, Dean of the University of Colorado School of Law, and, later, President of the University. The firm's clientele included major corporations in the area, such as four New York Stock Exchange companies (American Crystal Sugar Company, Ideal Cement Company, Western Airlines, and Colorado Milling & Elevator Company), other important regional and local businesses (Denver National Bank, Potash Company of America, Boettcher Securities—an investment banking and brokerage firm, the Brown Palace Hotel, W.H. Kistler—the leading commercial printer, Van Schaack & Company—the largest realtor), and important trusts.

In addition to working for these clients of the firm, Byron excelled at developing his own clients and serving as their general counsel. Most noteworthy was Leadville Lead Corporation, a minerals exploration and hard rock mining company headed by a dentist from Indianapolis. Victor American Coal Company of Southern Colorado used Byron on its complex bankruptcy reorganization. Beatrice Foods Company retained him as regional counsel for its dairy and cold storage opera-

3. For descriptions of law practice in Denver in the 1950s, see Hon. Jim R. Carrigan, *The Nifty but Thrifty Fifties*, COLO. LAW., June 1997, at 115, and Daniel S. Hoffman, *The Way It Used to Be, or So It Seems*, COLO. LAW., June 1997, at 116.

tions. Other clients included Hackstaff Lumber Company, Burt Chevrolet, Waukesha Oilfield Supply Company, and many farmers and ranchers. He attracted the legal work for several restaurants and took particular delight in working for one owned by George Manley, a former professional boxer. Byron also did Colorado legal work for national companies such as IBM and DuPont. He did trial work for all of these clients as required, and he litigated cases like *Loew's, Inc. v. Cinema Amusements, Inc.*,⁴ where he was local counsel to Thurman Arnold in a treble damage antitrust case brought by a local movie exhibitor. In addition, Byron spent a great deal of time doing community service⁵ and pro bono legal work. He was captain of his precinct and later became deeply involved in the Kennedy presidential campaign.

Byron was the hardest working lawyer in the firm. He continued his habit of performing at the highest level as he had previously done in high school, college, law school, professional football, the Navy, and all of his endeavors. As a lawyer practicing in the firm, Byron embodied everything a firm could want. He was loyal, unselfish, good-spirited, dependable, appreciative, and enormously competent, while at the same time retaining his humility. Byron's research was legendary, he was a superb negotiator, and his sense of humor was delightful. He was always willing to help when asked and his work was un-failingly helpful. In a word, Byron White became the consummate practicing attorney while working at the Davis firm. He always displayed complete professionalism.

A unique and outstanding aspect of the way that Byron practiced law was his eclectic ability to quickly acquire competence in any substantive field of law. He had an uncanny understanding of jurisprudence that enabled him to move into a new area and quickly comprehend and master it. He had the unerring instinct to know the underlying common principles

4. 210 F.2d 86 (10th Cir. 1954). Reported court decisions in which Byron White was an attorney of record include the following: *Craig v. Hunter*, 167 F.2d 721 (10th Cir. 1948); *E.I. DuPont De Nemours & Co. v. Cudd*, 176 F.2d 855 (10th Cir. 1949); *McIntyre v. Dower*, 213 P.2d 834 (Colo. 1949); *Western Air Lines, Inc. v. Hollenbeck*, 235 P.2d 792 (Colo. 1951); *George v. Dower*, 240 P.2d 897 (Colo. 1951); *J.J. Sugarman Co. v. Davis*, 203 F.2d 931 (10th Cir. 1953); *State v. Newton*, 300 P.2d 527 (Colo. 1956); *Colorado v. American Mach. & Foundry Co.*, 143 F. Supp. 703 (D. Colo. 1956).

5. HUTCHINSON, *supra* note 1, at 227.

basic to all fields of law and to use them as the foundation for whatever specialized knowledge was required.

This talent showed in litigation. During his practice, Byron did not try cases day in and day out.⁶ Indeed, he once characterized himself as “just an office lawyer.”⁷ He did try a significant number of cases, however, and was totally competent in the courtroom. He showed the same great skills in trial that he displayed in other fields of the law. Byron never played the role of a great orator, and indeed was not a very good public speaker. Campus lore has it that the only college course in which he did not achieve an “A” grade was Speech! Yet, when he communicated in court with his piercing blue eyes boring into his listeners, his pithy concise argument coming through so convincingly, and his logic and authority being so persuasive, he was a formidable trial lawyer. He was elected to be an Honorary Fellow of the American College of Trial Lawyers in 1965⁸ and was found to be “exceptionally well qualified” for the United States Supreme Court by the ABA Standing Committee on the Federal Judiciary in 1962.⁹

Byron cared as much about winning a point in a negotiation, a trial, or an appeal as he had in scoring six against the Bears. After an exhausting day of law practice, he was heard to say that he intended to take the bus home in order to have a chance to “simmer down” before joining his family for the evening.

When Byron was practicing law, the profession had not yet developed its obsession with the number of billable hours accrued annually by each attorney. If that number had been calculated for him, Byron’s total would have been off the charts. His days were long and full and he often worked long into the night when he considered it necessary. The economics of law practice then were very different from today. Byron characterized his and the other partners’ incomes as providing a “decent life.” He always provided well for his family but was motivated by values other than accumulating wealth. Ironically, when the firm acquired the probate of the large Boettcher estate shortly after Byron left to become Deputy Attorney General,

6. *Id.* at 226.

7. *Id.* at 306.

8. American College of Trial Lawyers, *Honorary Fellows*, at <http://www.actl.com/about/honoraryfellow.htm> (last visited Oct. 24, 2003).

9. HUTCHINSON, *supra* note 1, at 321.

his comment was, "Just when I leave, they start making money."¹⁰ Coincidentally, a similar pattern prevailed in his professional football career. His contract with Pittsburgh in 1938 was a record \$15,000 a season. Today it would be more like \$15 million.

In one sense, Byron's time as a practicing lawyer was an interlude in his career when he could be just a guy out of the public eye. He married and raised a fine family. He was a superb fisherman and took up golf. He drove his aged Chevrolet coupe to Canada on vacation and was a Rotarian. He met the Chicago Cardinals at the airport when they came to Denver for an exhibition game and came back to the office with his wry smile and the comment: "I'd forgotten how big those guys are."¹¹ During part of his law practice Byron suffered severely from back injuries sustained in athletics. It was not unusual to go into his office and find him conducting business stretched out on his daybed with his telephone and dictating machine beside him. Many people considered Byron's actions to be brusque. It is certainly true that he did not win popularity contests or indeed seek to do so. He also took pains to guard the privacy of his family and himself. At the same time, however, he was the best friend that a man ever had. The ladies agreed that he was the best dancer in Denver.

In another sense, however, Byron's law practice played a role in shaping his legal and judicial philosophy. His maxim: "You can't change the facts." The judgments formed and lessons learned in his practice probably helped to convince him that the function of law was to resolve disputes, help people, and make our society work efficiently. He was fully exposed in his practice to the practical aspects of the law. He appreciated how much the profession mattered to people and changed their lives for better or worse, as well as affecting their families, friends, employees, and associates.

Byron serviced all kinds of clientele with the same skill, devotion, warmth, and responsiveness. His standard was to do the best legal job possible, regardless of whether the client was rich or poor, smart or unsophisticated, likeable or not. Byron is quoted as having said he would have been happy to continue

10. Byron White, personal communication to author.

11. Byron White, personal communication to colleague of author.

practicing law for his entire career as a lawyer.¹² When President Kennedy invited him to become Deputy Attorney General, he left the law practice with regret and left a void in the firm that his partners knew could never be filled.

In addition to his competence as a lawyer, Byron also had the practical ability required to be successful. He had a flair for business management. It was largely through his efforts in hiring personnel that the firm grew and prospered as it did. Even the mundane area of billing and time recording was not beneath him. Byron designed and instituted a double-entry timekeeping system that was simple both for the lawyers to use and for preparing bills. He also instituted weekly early morning meetings of all lawyers to review pending matters and cases and discuss how to handle them.¹³

After a law practice such as this, it is small wonder that Justice White later stated his view that the job of the judiciary is "to decide cases," rather than to promote causes.¹⁴ That subject is, of course, beyond the purview of this article.¹⁵ In conclusion, however, it seems appropriate to quote Justice White's own words when speaking at the dedication of the Potter Stewart Courthouse in Cincinnati, Ohio:

Brother Stewart was very leery of labels, such as conservative, liberal, activist, textualist, and so on. When asked at the time of his retirement how he wanted to be remembered, he replied that he wanted to be remembered as a good lawyer who did his best. That said an awfully [sic] lot; for one thing it meant proceeding on a case-by-case basis, sticking to the facts and the law, without being bound by an overarching judicial philosophy, by political or policy considerations, and especially not by his own personal set of values, preferences, or biases. Such an approach defies classification and is frustrating to those who write about

12. HUTCHINSON, *supra* note 1, at 230.

13. For further discussion of Byron White's law practice, see *Id.* at 223-30; Donald W. Hoagland, *Byron White As A Practicing Lawyer in Colorado*, 58 U. COLO. L. REV. 365 (1987).

14. HUTCHINSON, *supra* note 1, at 331.

15. For a discussion of Justice White's view of the judiciary, see David C. Frederick, *Justice White and the Virtues of Modesty*, 55 STAN. L. REV. 21, 23-27 (2002).

judges, but by definition to one with Potter's approach that was a negligible, if not an irrelevant, consideration.¹⁶

When Byron White spoke in Cincinnati, was he describing only his friend, Potter Stewart, or someone else as well?

16. Byron R. White, *Remembering Potter Stewart*, A.B.A. LITIG., Fall 1994, 3, 4.

