

7-2006

Credits to Our Profession - A Frank and Far-Reaching Interview with Judge Lyle E. Strom and Judge William J. Riley (Part One of Two)

Tory L. Lucas

Liberty University, tlucas3@liberty.edu

Follow this and additional works at: http://digitalcommons.liberty.edu/lusol_fac_pubs



Part of the [Law Commons](#)

Recommended Citation

Lucas, Tory L., Credits to Our Profession - A Frank and Far-Reaching Interview with Judge Lyle E. Strom and Judge William J. Riley (Part One of Two) (July 1, 2006). Nebraska Lawyer Magazine, pp. 22-35, July 2006.

This Article is brought to you for free and open access by the Liberty University School of Law at DigitalCommons@Liberty University. It has been accepted for inclusion in Faculty Publications and Presentations by an authorized administrator of DigitalCommons@Liberty University. For more information, please contact scholarlycommunication@liberty.edu.

Credits to Our Profession

A Frank and Far-Reaching Interview with Judge Lyle E. Strom and Judge William J. Riley (Part One of Two)

by Tory L. Lucas



**JUDGE LYLE
E. STROM**



**JUDGE WILLIAM
J. RILEY**

Judges Lyle E. Strom and William J. Riley have been mainstays of the Omaha legal community for decades. These legendary Omaha lawyers have approximately 87 years of combined experience in the law. During those 87 years, both men have enjoyed successful careers as trial lawyers in private practice, educated law students on trial practice, dedicated their time and talent to Nebraska's legal community, motivated Boy Scouts to lead virtuous lives, mentored countless young attorneys, and served their nation as federal judges. Although Strom and Riley are not as famous as such duos as Buffett and Munger, Martin and Lewis, or Batman and Robin, they have an interesting story linked by common threads. Through a brief background and a far-reaching, question-and-answer format,

this two-part article hopes to capture parts of the interesting careers of Judge Strom and Judge Riley.

Judge Lyle E. Strom

Lyle Elmer Strom was born in 1925 in Omaha. He attended Creighton University, where he graduated with his bachelor's degree in 1950 and with his law degree, *cum laude*, in 1953. Providing a glimpse of his legal talent, Strom received the Highest Triennial Average Award for his class. From 1953 until 1985, Strom was a well-regarded trial lawyer in the Omaha law firm now known as Fitzgerald, Schorr, Barmettler & Brennan ("*Fitzgerald Schorr*" or "*Fitzgerald firm*"). He was listed in the inaugural issue of *The Best Lawyers in America* and in every successive issue until his appointment to the federal bench. On September 27, 1985, President Ronald Reagan nominated Strom to the United States District Court for the District of Nebraska ("District of Nebraska") to replace Judge Albert G. Schatz.¹ The nomination-to-confirmation process lasted one month. On October 28, 1985, Judge Strom received his commission, and he was sworn in as a United States District Judge on November 1, 1985. From 1987 until 1994, Judge Strom guided the District of Nebraska as its chief judge. On November 2, 1995,² Judge Strom assumed senior status, but he still takes a substantial number of cases.

During his 53 years as a practicing attorney and federal judge, Strom has shown an unwavering commitment to service. He has served Creighton University School of Law by teaching municipal corporations from 1958 to 1970 and trial practice from 1974 to 1995. From 1996 to 2005, Strom served as the Director of the Robert M. Spire Internship Program and Clinical Professor of Law. Judge Strom has served our courts

Tory L. Lucas



Tory L. Lucas is a law clerk to the Honorable Pasco M. Bowman II of the United States Court of Appeals for the Eighth Circuit. Previously, Lucas clerked for the Honorable William J. Riley, also of the Eighth Circuit. Lucas received his B.A. degree, *magna cum laude*, from Culver-Stockton College, his J.D. degree, *summa cum laude*, from Creighton University School of Law, and his LL.M. degree, with an emphasis in labor and employment law, from the University of Missouri-Kansas City School of Law, where he was the Arthur Mag Fellow of Law. Lucas has been a trial lawyer in private practice, served as a judge advocate in the United States Air Force, and taught law at Troy State University, Bellevue University, and Creighton University School of Law.

with distinction as well. In addition to his work as a district judge, Judge Strom chaired the Gender Fairness Task Force of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"), co-chaired the Federal Practice Committee of the District of Nebraska, and participated as a member of the Eighth Circuit Judicial Conference Committee to Study Restructuring of the Judicial Conference. Judge Strom has been an active member of the practicing bar, serving as president of both the Nebraska State Bar Association ("NSBA") and the Omaha Bar Association ("OBA"), as a member of the NSBA's House of Delegates, and as a member of the Nebraska Supreme Court Committee on Practice and Procedure. Judge Strom is a fellow of the Nebraska Bar Foundation and currently serves on its Board of Trustees. Strom is a fellow in the American College of Trial Lawyers and in the International Academy of Trial Lawyers. Strom has participated in the Nebraska Bar Foundation's High School Mock Trial Program for nearly two decades, and for the past seven years he has participated in the National High School Mock Trial Program. Along with former Creighton University School of Law Dean Lawrence Raful, Strom introduced the Omaha legal community to the Inns of Court. Strom has been a member of that organization since its inaugural year in Omaha. Finally, Judge Strom has served his community, most notably as a member of the Executive Committee and the Board of Trustees of the Mid-America Council of the Boy Scouts of America. Strom has been involved with the Boy Scouts' Juvenile Diversion Program since its inception in 1992. Strom has been a member of the Rotary Club of Omaha since 1969, serving as its president from 1993 to 1994. Needless to say, Strom has been a tremendous asset to the Nebraska legal community and a rock-solid mentor for countless attorneys. Lawyers young and old can find inspiration and guidance in Strom's life and example.

Judge William J. Riley

William Jay Riley was born in 1947 in Lincoln. He attended the University of Nebraska, where he graduated with his bachelor's degree, Phi Beta Kappa, in 1969 and with his law degree, *with distinction*, in 1972. During law school, Riley was the editor-in-chief of the *Nebraska Law Review*. Upon graduation from law school, Riley clerked for Judge Donald P. Lay of the Eighth Circuit.³ After his federal clerkship, Riley began his trial practice career at Fitzgerald Schorr, the firm at which Strom practiced. Like Strom, Riley's entire private practice career was spent at that firm as an eminent trial lawyer. As a testament to his leadership, Riley headed the firm's trial department during his final years in private practice. Riley is board certified by the National Board of Trial Advocacy as a Civil Trial Specialist, is a fellow of the American College of Trial Lawyers, and is a member of the American Board of Trial

Advocates. He is also a member of the American College of Trial Lawyers' National Mock Trial Committee and he judges both regional and national competitions. On May 23, 2001, President George W. Bush allowed Riley to follow in the footsteps of his first boss, Judge Lay, by nominating Riley to a seat on the Eighth Circuit vacated by Judge C. Arlen Beam.⁴ Although much has been written about judicial confirmation battles in recent years, Riley's nomination-to-confirmation process took just over two months. On August 3, 2001, Judge Riley received his commission and assumed his position as a federal appellate judge. He was sworn into office by Judge Strom on August 16, 2001. Judge Lay had planned on swearing in Judge Riley at the formal investiture in September 2001, but he was unable to do so because of a change of plans. Although Judge Riley has been a federal judge for less than five years, *Lawdragon* recently selected him as one of the 500 leading judges in America.⁵

During Riley's 34 years as a trial lawyer and circuit judge, he, like Strom, has committed himself to service. For many years Riley served as a Boy Scout leader, including ten years as a Scout Master. Riley currently serves as a member of the Board of Trustees of the Mid-America Council of the Boy Scouts of America. Riley has also served as the OBA's president, and since 1991, he has taught trial practice at Creighton University School of Law.⁶ Beginning in 2006, Riley also teaches trial advocacy at the University of Nebraska College of Law. He has been a charter member, a master, and currently a judge with the Robert M. Spire Inns of Court. From 1992 to 1994, Riley chaired the Federal Practice Committee for Nebraska, and from 1996 to 1998, he chaired the NSBA's Ethics Committee. Judge Riley currently serves as a delegate in the NSBA's House of Delegates and is a member of the NSBA's Professionalism Committee. Riley is also a fellow in the Nebraska State Bar Foundation. Another one of Judge Riley's judicial duties is serving on the Criminal Law Committee of the Judicial Conference of the United States. To be sure, Riley has lived an exemplary life of service, professionalism, and excellence.

Because Judge Strom serves as a district judge in the Eighth Circuit, his cases are appealed to the Eighth Circuit (naturally). Since Judge Riley assumed his position on the Eighth Circuit, he has sat on 22 panels hearing appeals from decisions rendered by Judge Strom. Interestingly, every appeal has ended with the Eighth Circuit affirming Judge Strom.⁷ Judge Riley has authored four of these opinions.⁸ The only appeal that split the three-judge panel hearing it was in *Orr v. Wal-Mart Stores*.⁹ As fate would have it, *Orr* involved Judge Riley affirming the decision of his trial-practice mentor, Judge Strom, while drawing a stinging dissent from an earlier mentor, Judge Lay. ➡

CREDITS TO OUR PROFESSION

With that brief background, I am proud to produce the results of a three-hour interview I conducted of Judge Strom and Judge Riley in the Eighth Circuit Conference Room in Omaha on a sunny afternoon on August 15, 2005. In this part of a two-part article (*part two will be published next month*), the interview addresses the following subjects: the genesis of the relationship between Judge Strom and Judge Riley; how they became trial lawyers; memorable trial stories; mentoring; teaching; community service; the quality of trial lawyers; and civility and professionalism, hallmarks of their careers. Although the questions and answers have been edited, I tried to capture the overall flow of the interview, which was an extremely enjoyable experience for me. I hope you enjoy it, too.

Lucas: The two of you have an interesting relationship that has lasted many years. Please tell me how your relationship began.

Riley: While I was clerking for Judge Lay, he told me that if I had the opportunity to work with Lyle Strom, Jim Brown, and their firm, I could do no better than that. That is, I could learn from no better trial lawyer than Lyle Strom. That's about all I knew because Judge Lay kind of took it from there.

Strom: Judge Lay called me as Bill's clerkship term was coming to an end. He said, "I have a young man here who you really should take a look at." I talked to Jim Brown and we decided to interview Bill. That was 1973. As they say, the rest is history.

Lucas: What do you remember about your initial meeting?

Riley: What I remember is the look of shock on Lyle's and Jim Brown's faces when I told them that I was making \$13,500 as a federal law clerk. They lost all color in their faces because they were not paying associates in the law firm that amount of money. After the firm talked to Judge Lay, they matched what I was making as a law clerk. Bob Cannella, an associate at the firm at the time, has always been beholden to me for getting him a raise

Strom: When I graduated from Creighton University School of Law in 1953, I interviewed with three law firms—the Fitzgerald firm, the Knudsen firm,¹⁰ and Kennedy Holland.¹¹ The Knudsen firm was the firm C. Arlen Beam would later join. I also interviewed with a firm in Beatrice headed by Hale McCown, who later became a justice on the Nebraska Supreme Court. All of these firms offered about the same salary. Fitzgerald offered \$200 per month and the others offered \$225 per month. But there really wasn't much of a choice for me. Although \$25 was a lot of money, I just felt more comfortable with the people at Fitzgerald. And I really did not want to go to Beatrice, although the town was developing nicely and was growing. The biggest reason for

choosing Fitzgerald was because of Jim Brown. So I started at \$2,400 per year. And now Bill wants \$13,500 starting out. I remembered thinking that I used to dream about making \$10,000 per year. My wife, Regina, and I thought we would be on easy street if we could ever make that amount.

Lucas: Most graduating lawyers these days will change jobs multiple times during their legal career. Did you know when you graduated from law school what you wanted to do and where you wanted to practice? And once you were hired by the Fitzgerald firm, did you plan to remain there for your entire private practice career?

Strom: It never occurred to me to work anywhere else after I joined the Fitzgerald firm. At the outset I thought I would be a business-type lawyer, not really giving serious consideration to becoming a trial lawyer. And I never really wanted to practice as a tax lawyer. Shortly after I joined the firm, Robert Hamer, who was the chief trial lawyer at the firm, asked me to work with him on a case that was pending in the United States District Court. Hamer was a graduate of the University of Nebraska College of Law, and prior to his joining Mr. Fitzgerald, he served as litigation counsel for the Western Division of the Union Pacific Railroad. His grandfather was a justice on the Supreme Court of Nebraska, and it is my understanding that his father also was chief litigation counsel for Union Pacific Railroad. The case that Mr. Hamer asked me to work on was a wrongful death case. The decedent was a man who was suffering from high blood pressure, but it had been under control. He was driving north on a highway out of Fremont when he collided with the rear end of a cattle truck, which was parked partially on the highway with no flares or warning of any kind. The reflectors were covered with manure and didn't reflect light. As it was dark, he didn't see the truck until he was virtually on top of it. The injuries he sustained caused his blood pressure to go out of control. He died shortly thereafter. Dan Gross represented the defendant and Bob Hamer represented the Estate. It was tried before Judge Donohoe.¹² He was the only United States District Judge in Omaha at the old Post Office building. The thing I remember most about the case was that when all of the evidence was in, after about two weeks, Mr. Hamer turned to me and told me that I would make the opening portion of the closing argument for the plaintiff. We had been assigned two hours, and I was to use one hour to cover certain matters in the opening portion of the argument. As you can imagine, I was nervous about this, had difficulty trying to sleep, and worked until about 3 a.m. on the closing argument. The next morning, I made the argument. Everyone was complimentary, and that encouraged me to believe I could be a trial lawyer. Subsequently I went on to work only in the trial practice area of the firm. Mr. Hamer died in 1957 or 1958, and at that time I took over the trial practice for the firm.

Riley: Do you even remember what the question was?

Strom: Oh, yes. And now we're going on.

Riley: This goes way beyond the scope of the question.

Lucas: As the official interviewer, I grant Judge Strom permission to extend his remarks as far beyond the scope of the question as he pleases.

Strom: I will tell you that as nervous as I was in giving my argument, I noticed Dan Gross get a glass of water before he made his argument. When he picked up the pitcher, he was shaking. I figured he was as nervous as I was. That was a great lesson for me, especially since Dan Gross was one of the finest lawyers in Omaha. Bill, now it's your turn.

All: [Laughing]

Riley: Now, to answer the question.

Strom: [Laughing]

Riley: I never thought of leaving Fitzgerald. My generation of lawyers had much more mobility starting to creep into the practice of law. For years, I took calls from other law firms in town asking if I knew of any trial lawyers who were looking to make a change. I wasn't very bright, so I tried to think of someone I knew who was looking. It finally dawned on me they were asking if I was interested in changing law firms. I can't really say other than one occasion that I thought about leaving the firm. At one point while I was with the firm, I was doing so much administrative work that it was affecting my percentage. I thought it wasn't good that all that work was impacting my percentages. But I really never seriously thought about leaving the firm, mostly because I really enjoyed the people in the firm. I also have a similar story about how I became a trial lawyer. When I graduated from law school, I had decided there were two areas of the law I knew I did not want to practice in. I did not want to be a tax lawyer and I did not want to be a trial lawyer.


Strom: That's why we got along so well. That would absolutely paraphrase the way I felt.

Riley: After law school, my first job was clerking for Judge Donald P. Lay of the United States Court of Appeals for the Eighth Circuit. He loved the trial law so much that for a year, all I really heard was "you are really not a lawyer unless you are a trial lawyer." And then when it was time to look for a job, Judge Lay guided me to the Fitzgerald firm. Specifically, he guided me to work with Lyle Strom. And even when I began working at the firm, I thought I could still evolve out of the trial lawyer expectations, and maybe settle into a corporate or estate practice. But, as Judge Strom said, trial practice is infectious. Once you do well or at least people tell you that you did well, you get that positive feedback. However, when you do not do well, there are no lower lows than a trial lawyer who has lost and feels he is at fault. On the other hand, there are no

emotions higher than when you win a lawsuit and know you had something positive to do with that result. But I have to comment on Judge Strom's discussion about the feedback he got from his first closing argument. I remember the first time I gave a closing argument where Lyle and I were trying a case together. I got up, gave my closing argument, and sat down. And I covered my subject in the time allotted. Lyle sat up next to me and said, "Well, you eventually got to the point." [Laughing] That was a valuable lesson I learned—get to the point! The first few words out of your mouth should be your theme and letting the jury or the judge know what's important in the case. I kind of got up and told a rambling story about what we had just spent a week hearing. The jury had heard it, and they didn't want to hear it again. Finally, when I got around to what was important—Lyle calls it getting to the point—the jury was really interested. So it's a learning process. I will tell you I tried lawsuits, second-chairing them, with Lyle Strom. And he does get very, very nervous. Even though I am at least as nervous as Lyle was, I would not show my nervousness. I look more relaxed. Lyle, do you remember trying a lawsuit together at the old Zorinsky Courthouse, and we were outside the courtroom in the hallway getting ready for closing arguments? I'm leaning against the wall looking relaxed. Lyle is pacing the hall from one end of the hallway to the other, back and forth, doing his usual waving to himself with his hands as he talks to himself. He really uses his hands when he thinks and talks. So I'm sitting there and he's pacing the floor. About the fifth or sixth time he passes me, he wheeled around on his heels and got into my face, saying, "Aren't you nervous?" I responded, "Yeah, I'm nervous." He fumed, "Well, why don't you look nervous?" I said, "I just don't look nervous like you look nervous." And then he went back to pacing the hallway.

Strom: That's funny. Do you remember the story Jim Fitzgerald used to tell? I was returning from the middle of a trial I was in, and it was time to get ready for closing arguments. I was pacing and doing my gesturing. I always gesture with my hands. He said, "Do you know what you are doing?" I told him I was going through my closing argument in my mind. I told him I always use my hands. And I do. When I teach, I always tell my students to feel free to use their hands. I tell them your whole body is on display, and that they ought not just stand there like a mummy and talk. You should use gestures to make points. I'll never forget the times I would walk up the street just talking to myself and using my hands just like Bill demonstrated by moving his hands.

Lucas: Judge Riley, when did you become a partner in the Fitzgerald firm?

Riley: 1979. 

CREDITS TO OUR PROFESSION

Lucas: From 1973 when you joined the firm until 1979 when you made partner, had Judge Strom been a mentor to you?

Riley: Oh, yes.

Strom: And Bill Brennan, too.

Riley: I was going to say that. I had two mentors: Lyle Strom and Bill Brennan. Bill Brennan was much more accessible to me because Lyle was always taking depositions out of town or whatever. Not every day, but he would be gone one or two days per week, while Brennan would usually be in the office. I was lucky to have both of them to learn from. When I came out of law school, there were no trial practice classes, as I'm sure is true with Lyle. And so we had to learn on the run. And we learned from trial and error. We learned things that did and did not work. A lot of my early practice was in county court, which was then municipal court. I then worked up to state district court and eventually to federal court. Some of the best parts about working at Fitzgerald, Brown, Leahy, Strom, Schorr and Barmettler was they gave me

a lot of responsibility fast. On the first morning I came to work, Judge Strom put a file on my desk and told me there was a 2 p.m. hearing in muni court. I gladly took the file, but then it took me all morning to figure out where muni court was. It was in an interim city hall at the time. Within two years I was trying a Securities and Exchange Commission case—defending American Beef Packers—in front of Judge Warren Urbom,¹³ who came to Omaha to try the case. Not only was American Beef Packers' life on the line, but so was the life of our law firm. We had done the 10-K. Maybe their strategy was to put this kid on, that is, act like we have nothing to hide so we're putting on this young lawyer. So I got the benefit of getting major cases early, and especially being able to consult with Lyle Strom and, in the Beef Packers case, with Jim Brown. Having to learn on the job was a tremendous help.

Strom: It is vital for young lawyers to find good mentors to help them learn what it means to be a practicing lawyer. What we have lost is that when young lawyers come out of law school, they are unable to associate with experienced lawyers who can help them handle the profession during the first few years, when you really learn what's right and what's wrong. I had the privilege of fine mentoring, and then I passed along my training and experiences to younger lawyers to help them become better lawyers. Bill also had the opportunity of working with what I thought really was one of the great law firms, and not because I was there, but he had the ability to work with Jim Brown and Bill Brennan and Joe Leahy. Unfortunately, Bill never knew Bob Hamer, because he died in

the late 1950s. These people knew that we belong to a profession. For example, people would ask when our law firm would begin advertising. Fitzgerald always used to respond, "We advertise every day in how we do our work and how we represent our clients. If you do a good job, you get more work." He was against advertising. He was from the old school. But working with the old lawyers who have a good reputation and high ethical standards—one who knows what he should do and what he should not do—that's the best way to learn. And I don't think young people are getting enough of that these days. There are so many lawyers out there that it has almost become a dog-eat-dog world. We see that now where everything has to be in writing to protect yourself. It wasn't always like that. If I wanted to take a deposition of Marty Cannon's client, I would just call Marty and tell him I would like to take a deposition of his client next week. He'd check his schedule and then say he could do it next Wednesday at 2 p.m.. I would say that would work and that I presumed he would like to have it done at his office. He would agree. I'd promise to make arrangements for the court reporter, and then we'd just meet the following Wednesday at 2 p.m. And that's all there was to it, and the deposition would go off as scheduled. I don't think you can be assured of that today. If a problem arises now and an attorney cannot show a written record confirming the deposition, a judge cannot just say one side is lying and the other side is not lying. You look for the record.

*"It is vital for young lawyers to find good mentors to help them learn what it means to be a practicing lawyer."
—Judge Strom*

I think it would be great if all lawyers had an opportunity to find a suitable mentor. We tried to establish a mentoring program in the Nebraska State Bar Association, but it lasted only a few years because it created a number of problems. For instance, mentors were careful about what they talked about with their mentees to avoid attorney/client obligations or privileges. The program simply died out. The failure of that mentoring program is why Dean Larry Raful and I helped develop the Inns of Court. We did that after visiting Warren Urbom and the Inns of Court in Lincoln. At that time, I was chief judge for the District of Nebraska and spoke with Dean Raful about this program. He was aware of the program and was enthused to start a program in Omaha. After jointly sponsoring the program in Omaha in the early 1990s, it has grown today to be a significant mentoring program for young lawyers and law students. I think of Inns of Court as one of my significant accomplishments. I also am very proud of my involvement in establishing the Juvenile Diversion Program, which is a joint function of the Boy Scouts of America, Mid-America Council, and the Omaha Bar Association. This program was started for young people ages 12 to 18 who committed their first misdemeanor offense. They participate in this program involving six months of meeting every other week

and performing community service. This program later expanded to a pre-teen program for 10- to 12-year olds with the same purpose but with a three-month program. We now have Teen Court as the third aspect of the overall Diversion Program. I believe this is one of the most significant programs aimed at assisting young people to avoid developing criminal records. It gives them guidance on appropriate conduct and teaches them what it means to be a good citizen. Of course, it also lets them know what the consequences are for violating the law.

Lucas: What were some of your most memorable cases?

Strom: Bill, do you remember the Foxley case? That was an interesting case. Fitzgerald represented Foxley, not only on that case but also personally as well. At that time, Foxley had a large earth-moving equipment business. He had sold this huge earth mover for about \$85,000 or \$100,000. It probably would be about three times that amount today. The purchaser was in default on the payments and Fitzgerald wanted me to replevin the equipment. After the replevin was executed, about two days later, Fitzgerald asked if I'd come to his office. The purchaser and Mr. Foxley were discussing the replevin case. The purchaser advised Mr. Foxley that he really needed the equipment to finish the job he was on so he could pay Mr. Foxley for the equipment. Mr. Foxley was a crusty gentleman, and he responded, "I'm not in the business of loaning money to people. I sold you the equipment. You didn't pay. If you make your payments, you can use your equipment." The purchaser said, "But I can't do that. And I'll go broke if I can't use the equipment." Foxley looked at the guy and said, "You know, if it doesn't rain in Montana this week, I will lose \$1,000,000. You want the equipment, you get the money." There was no give whatsoever. The purchaser left the meeting. Within two days, the purchaser had obtained the balance of the money due for the purchase of the equipment and paid Mr. Foxley. The dispute was resolved. Did we work together on the criminal defense of American Beef Packers?

Riley: Yes. That American Beef Packers case was tried in front of Judge Denney¹⁴ here in Omaha in federal court and was reputed to be the first prosecution under the Environmental Protection Act. American Beef Packers had a feedlot in western Nebraska near a wonderful creek called Nine Mile Creek, which was a nice trout-fishing stream. They were just building a feedlot and they had some cattle in it. They had an unusual spring snow, and then it immediately heated up to over seventy degrees the next day. The snow melted, and one of the retaining berms broke. A Nebraska environmental protection group was waiting out there with cameras for something like this to happen. Instead of telling American Beef Packers that the berm had broken through or trying to fix it as they were standing there, they filmed everything, like the refuse going down the hill and polluting Nine Mile Creek.


Even the dead fish. As the film panned back up within an hour of the berm breaking, a bulldozer was already there going by blocking where the berm had broken. And so it was a very tangential discharge into the creek. We tried that case together. The other side wanted criminal penalties and they wanted people to go to jail. Lyle Strom was the first chair and I was the second chair. By the time it was over, Judge Denney called up the U.S. Attorney and said, "If you ever bring a case like this again, it will be the last time you practice in my courtroom." That was the case where I gave a closing argument and Lyle told me I finally got to the point at the end. That's also the case—I think Lyle may have forgotten it but I'll remind him—

Strom: We may remember things a little bit differently. But you go ahead and tell your version and I will tell mine. [Laughing]

Riley: The U.S. Attorney asked some question. Lyle Strom jumped up and said, "I object!" Then there was a long pause. Judge Denney said, "Well, Mr. Strom, on what grounds?" There's another long pause, and you can see the wheels turning in Lyle's head. Lyle finally said, "I just don't like the question." With that response, Judge Denney rocked back in his chair and said, "Well, Mr. Strom. I don't like the question either. Sustained." It became the I-don't-like-the-question objection.

Strom: Essentially what he is saying is true. I just remember it a little differently. In federal court, you have to stand up when you make an objection. This question was asked. I knew I wanted to object, so I made the objection. Judge Denney looked down and said, "I can't hear you. You have to stand." I thought that by then I'll think of the objection. So I started to stand up. I couldn't think of the basis for the objection, but I said, "I object, Your Honor." Judge Denney said, "On what grounds?" I had to come up with something, so I said, "Frankly, I cannot tell you, but I just don't like the question." Judge Denney looked at me and said, "Neither do I. Sustained." I use that story in teaching. Lawyers have to think about making objections. You can't just wait until you get in a situation where you need to object. In some cases you'll just know there will be evidentiary issues arising, and you have to be prepared to make the proper objection. But today, you hear these objections and you know the evidence is going to come in anyway. So sometimes you're better off just shutting up and letting it come in.

Lucas: How many cases did you try together?

Riley: I second-chaired Lyle a lot. Once he had the confidence I could get to the point in my closing arguments, he didn't second-chair me or observe me. I probably second-chaired him on five or six cases that actually went to trial. Working cases up, taking depositions, etc., I probably worked with him on 20 or more cases. 

CREDITS TO OUR PROFESSION

Strom: I have tried to think about the number of cases I have tried either as a lawyer or as a judge presiding over the case. I have to be somewhere around 400 or 500 jury trials.

Lucas: Do you miss practicing law?

Strom: Oh, I don't know if I do any more. At my age, I don't know that I would enjoy trying cases any more. There's a lot of pressure involved.

Lucas: Can you think of other memorable cases that you would like to discuss?

Strom: In many respects, all cases are memorable. They are certainly more important to the parties that are involved. Some involved substantially more money or property than others. Since my appointment to the bench in 1985, I have had occasion to sit with both the Eighth Circuit and the Eleventh Circuit and I have tried cases not only in Nebraska but in other districts since I have taken senior status. During my 20+ years on the bench, there are three cases that particularly stand out. First, there was a Fifth Amendment case involving an attempt to force persons working at a facility treating people with Alzheimer's and other diseases to submit to blood tests. The second case was a suit by the First National Bank of Omaha against Trans Union involving Trans Union's failure to protect the confidentiality of a customer list of the First National Bank. The agreement between the parties provided for a \$100 per-name penalty. There was no dispute over the amount, which came to \$23,000,000. During closing arguments, counsel for the defendants argued, "If you believe the plaintiffs, you should award them \$23,000,000." The jury accepted the challenge and returned a verdict for \$23,000,000. I don't recommend that kind of closing argument. The third case is probably the *Pickett v. Tyson*¹⁵ case. Initially that began as a suit against Iowa Beef Packers in South Sioux City. It was filed in the United States District Court for the Middle District of Alabama in Montgomery. I was asked to take over the judicial responsibility for the case. The trial lasted some five weeks. The jury returned a verdict of \$1,200,000,000 plus, which I subsequently set aside and entered judgment for the defendant. The plaintiffs appealed, and the Eleventh Circuit affirmed my opinion and unanimously voted not to grant rehearing en banc. By the time this article goes to press, we should know the outcome of the plaintiff's petition for a writ of certiorari which is presently pending before the Supreme Court of the United States.¹⁶ There are a lot of other cases that stand out in my memory. At the present time, these three cases really stand out. I also recall presiding over a case involving the "don't ask, don't tell" policy of the Armed Forces. Although I upheld the policy, I was critical of it in my decision.

Riley: Let me tell you about a trial Lyle may not remember, but he will as soon as I mention it. It had to do with a young lady who was at a party with a friend who had too

much to drink and passed out. Because the young lady was supposed to stay at her friend's house that night, could not go home, and the friend was passed out, the young lady slept in a tent in the back yard with a male friend. The two of them took a candle, put it up on top of a beer can, and placed the can in a cardboard box near the front of the tent next to the netting. All we know is the next morning they were seriously burned. They had fallen asleep, kicked over the beer can, and the tent caught on fire. This was a time when tent manufacturers waterproofed the tents by putting paraffin on them. When the tent was lit on fire, it fell on them in a pile of flames. One of the parents took the young man to the hospital, but they did not know about the young lady. When they went back out and checked, there she was. She literally had her face burned off, as well as her fingers and her toes—

Strom: All of her extremities.

Riley: I worked on the case with Lyle doing mainly legal research. The plaintiff's lawyer, Marty Cannon, was one of the best plaintiff's trial lawyers in Omaha. Just an outstanding plaintiff's lawyer. This was a huge case for the day. It was a product liability case. One of the issues was whether we as the defense could bring up the consumption of alcohol, and the court said no. We got down to the trial. I had done all this work—I had read depositions, I had done the discovery—but I had never seen the young woman until she came into the courtroom. I almost got sick—physically ill—when I saw her for the first time. I had intellectually understood what was going on, but until you actually saw the injuries, you could not feel how serious this was and how much damage this woman suffered. We picked the jury and we were starting opening statements. The trial was in front of Judge Duke Schatz. It was so emotional for everybody. As a young lawyer sitting there, I was so traumatized by the sight of the young woman. Her lawyer, Marty Cannon, became sick. We thought it was a heart attack, but I don't think it actually was. They took Marty to the hospital. We had to continue the trial. We then settled. Being a trial lawyer just puts a tremendous amount of stress on people. Here's this outstanding plaintiff's trial lawyer, who just had so much stress on this big case, that it caused him some sort of physical reaction. I also know the stress Lyle was under and even myself. The lady just had horrible injuries.

Strom: I represented the insurance carrier for the manufacturer of the tent, the Trailblazer Division of Winchester Arms. The case was back in the early 1970s. All of these tents were still waterproofed using a wax substance at that time. The first problems sort of started with Boy Scout tents. The Scouts were taught how to make a candle by taking a little tuna can and cardboard and filling it with paraffin/wax. And this would be their candle. These boys would light their candles in their tents. And they were resulting in fires. The Scouts don't teach that anymore. The plaintiff in that case had terrible burns, just horrible burns, totally disfigured her.

Riley: By the time the case went to trial, the Boy Scouts went to flame-retardant, nylon tents. The plaintiff tried to get that into evidence to show it was feasible because the Boy Scouts have a flame-retardant tent. As Lyle said, the name of the tent was Trailblazer. Of course, Marty Cannon planned to make a big deal out of the name Trailblazer.

Strom: The first trial ended in a mistrial, and we settled the case before it was tried a second time. I remember that these types of tents had warnings, and the warnings were small and inside the tent. So Marty's point was you had to have a candle so you could read the warning on the inside of the tent. The Trailblazer tents were manufactured for Montgomery Ward. Because of these types of problems, the company put warnings on the box that said, "Warning: This tent is highly inflammable." Montgomery Ward said they would not sell the products with such a warning on the box. So the company took the warnings off of the box in response to Montgomery Ward.

We also had a number of cases for Ford Motor Company, including a stolen parts case. In those days, the aftermarket parts business was huge. Ford had an aftermarket parts business under the trade name Motorcraft. They would put out point sets and condensers. A fellow here in Omaha, Mr. Karp, decided he would compete with Ford Motorcraft. After taking a Motorcraft box to Kansas City to have identical boxes made, he started selling his parts in those identical boxes. When we brought suit against him on behalf of Ford, he was selling more of these parts in the aftermarket than Ford Motor Company. The interesting thing about this case was the method of proving damages. There was no question that this man had violated the law by using Ford's trademarks and trade names. The interesting technical question was how were we going to prove damages. I traveled to Dearborn, MI, to work with Ford's accountants to establish a basis for proving damages because these parts were only a small part of Ford's product line. We scoured Ford's records to find information that would allow a Ford witness to testify as to Ford's damages resulting from Mr. Karp's infringement of Ford's trademark and trade name rights. We tried the case to Duke Schatz and received a verdict in the range of \$300,000 to \$350,000.

Lucas: Were you able to collect?

Strom: No.

Lucas: Did Ford just want to send a message?

Strom: Yes, and I think they did. One of the things I always teach is that, when you get a case, you have to ask what goals can I achieve for my client, with these sets of facts, what can we really expect for a reasonable outcome. If your client and the opposing side agree with it, then you can settle it. But you should never go to a client or an opposing side with a goal that you cannot convince yourself that you can achieve. If you are not convinced of a result, you are never going to convince a

jury of the result. And I don't care what people think, juries are very good. They can see a winner. They can see certain things you cannot. You can only sincerely believe something if you are satisfied that it is a rational goal that should be reached based on these facts. I have been asked how many cases I have lost. Well, I don't know how many cases I've lost. I remember trying a case one time where a fellow was drunk and swerved and ran into a pole, injuring some people. I talked about the facts with the insurance company, and talked about how this fellow was drunk. We knew we owed money. I said I believed the case was worth somewhere between \$25,000 and \$30,000. We tried the case, and the jury returned a verdict within that range. To me, that's a victory. I looked at the facts, decided what I could achieve for the client, and then achieved it for the client. Anyone else looking at the case would say Strom lost the case. [Laughing] So you just don't know what a win is or when you can say you have won unless you know what the facts are and what a reasonable outcome would be.

Lucas: What other advice do you have for trial lawyers?

Riley: I would like to relay more of a pet peeve. Early on I learned that attorneys ask negative questions, and this is wrong. Whether this practice came from T.V. or the movies, somehow it's gotten into our legal profession. People just can't ask a cross-examination question without first saying "isn't it true" or "isn't it a fact" or "isn't it fair to say." There are two things wrong with doing that. First, it is a negative question so you don't know what the answer means for sure, particularly when you are reading the record. For example, if someone asks, "Isn't it true the light was red," and the answer is "yes," does it mean the light was red or that it isn't true that the light was red? Second, you are invading the province of the jury because you're asking the witness to decide something is true or something's a fact or fair and that is for the jury to decide or for the trial court to decide as the fact-finder.

Strom: When attorneys ask negative questions, I'm trying to figure out exactly how to rule. Then the witness answers "no" and they really mean "yes." If it's an important matter I just stop the attorney and say, "Now wait a minute. I want to be sure I understand your answer because you've given a negative answer to a negative question."

Riley: And lawyers get tied up in their questions if the questions are too long or if they use multiple negatives: "Isn't it true that this did not happen?" You can see the look on the witness's face. They aren't sure how to answer the question.

Strom: Then they might say "no" when they really mean "yes."

Riley: It's just so easy to ask the question, "Was the light red?" Or you can say, "When you looked at the light, what color was it?"



CREDITS TO OUR PROFESSION

Strom: The other one is the lawyer that repeats the answer and puts it in the frame of another question so you're getting the same answer the second time and that happens a lot. When some lawyers hear the answer they either have to make some comment or repeat the answer in the form of a question which seeks the same information. Sort of echoing, in a sense.

Riley: But there is nothing wrong, and actually it's a good tactic, to use the answer to the preceding question as a transition to another question.

Strom: Absolutely.

Riley: And that's very helpful to the jury and the judge because they hear that piece of information twice. For example, "What color was the light? The light was red. When you saw the light was red, where was the other car?" Now that's a perfectly permissible question, and now everyone has heard twice that the light was red.

Strom: Now what they say is, "Do I understand that the light was red?" Unfortunately, that happens all the time.

Lucas: You both have presided over lawsuits as federal judges. What keeps you from wanting to try the parties' cases for them from the bench?

Strom: I still anticipate objections as I hear attorneys ask questions. I immediately think of what objection I would make, and hopefully I hear that objection from the counsel table once in a while! Then I think of inserting myself, but I know I probably shouldn't do that, but it's hard not to. It is not my responsibility to become involved in the trial of the case. My responsibility is to preside over the trial and be sure that both parties have a fair opportunity to present their case either to the court or to the jury. I'm not supposed to try the case. But that fact of life was particularly hard when I first started as a judge.

Riley: Yeah, I haven't tried that many cases from the bench, probably in the neighborhood of eight to ten. I'm still in the beginning phase when you hear an inappropriate question or an argument in opening statement, and you look over at the other lawyer thinking, "Are you going to stand up and object or make this argument?" Or you might hear something so egregious in closing argument. For example, you might hear an attorney ask the jury, "What would it be worth to you to lose an arm?" Although it is absolutely forbidden to ask that, you hear attorneys ask it. When you look to the other lawyer for an objection and don't get it, you just kind of grimace and go on.

Strom: Yeah. Even after 20 years of trying these cases, I still have to watch and if something gets too bad, I sometimes interject myself. But I try to avoid doing that as I don't believe it is appropriate. It is particularly inappropriate in a jury case. But I figure if I have an experienced lawyer against a young lawyer, I might try to help out the young lawyer a little bit to try to keep it fair.

Riley: I always hated that as a lawyer.

Strom: But you know you really want a fair trial. When you have an experienced lawyer against a young lawyer, the experienced lawyer might take a little bit of an advantage of the young lawyer and this might tilt the scales a little too much. It's their case, and a lot of times you have to be careful about interjecting yourself because you don't know as much about the case as they do. So you can't start trying their case for them from that standpoint. You need to referee both sides to see that both sides get a fair trial. You don't want to let it get too much out of hand, especially when you are talking about something like guilt or when someone asks how much the jury would want for the loss of an arm or a leg or how would the jurors feel if they were treated this way by their employer. Those are just plain wrong and some of those I'll never accept or allow to happen because they are just improper.

Riley: Tory knows about a case we tried last summer where I sustained an objection keeping evidence out. After the weekend the lawyer came back and re-offered the evidence with the proper foundation. It's a long story, but I agreed to let the evidence in with the proper foundation, so I overruled the objection. This was done off the record and outside the presence of the jury. The lawyer was so ecstatic that he had won that when we called the jury in, he went on with the trial and forgot to offer the evidence on the record. After the trial went on for a while, I interrupted him, called the lawyers to the bench and said, "Do you want to offer Exhibit 101?" And he did. Sometimes, as Judge Strom said, for the fairness of the trial, the parties, and the jury, you just have to interject yourself, so the exhibit was entered into evidence.

Lucas: You both have taught trial practice for years at Creighton University School of Law. Judge Strom, you taught my trial practice class. Judge Riley, you made a guest appearance in my advanced trial practice class. How did you get into teaching and why do you dedicate so much time and energy to teaching trial practice?

Riley: I got into teaching because of Lyle Strom. He had been teaching at Creighton since the 1950s. He originally taught municipal corporations, but he also taught trial practice. His schedule was so busy by the time I came to the firm that he was missing some of his classes. At some point, I know he had Rob Robinson—an outstanding lawyer—fill in for him. Then I started filling in for him. I never thought I would be any good as a teacher, but I thoroughly enjoyed it. Hopefully, I'm pretty good at it. But I started because I was filling in for Lyle in his classes. He had an outline for each subject—a curriculum that he was following. As I taught year after year, it got easier. After a while, Creighton told me that, because I was teaching some of Lyle Strom's classes anyway, I might as well teach my own class. So I started in 1991 teaching at Creighton and it has been 15 years now and I thoroughly enjoy it.

Strom: As Bill said, I taught municipal corporations from 1958 to 1970. I realized it was not really fair to the students as I was not as qualified as another person who was more involved with municipal corporation law. While Creighton would never agree to that, I felt the school should get someone who was more competent and practices more in that area. In 1974, the Law School decided to establish a trial practice program and I began teaching that course, which I taught until 1995. In 1996, I took over the Robert M. Spire Internship Program. Last year, Barbara Gaskins assumed responsibility over that program. Why do I teach? Well, I teach young people for the same reason I teach Scouts or work with the mock trial program. Working with young people is one of the most satisfying things for me. Bill and I both teach the Scouts. I teach for several reasons, and some are selfish. I was Scout Master for Troop 407 for about 12 years, from about 1980 to 1992. The best part about it is you are always teaching the same age people. As the people you are working with are not growing older, then neither are you. [Laughing] Psychologically for me anyway. It seems to me that if there is something we have to share then we have a duty to help someone else. Whether it's teaching young kids about integrity, scouting skills, making them more self-reliant, directing them away from bad things, then it seems to me we have that obligation. Working with young people who are really involved is always productive for the young people. It is never destructive. When I first got in scouting, people would ask why I did it, as I am a father of seven children, two sons and five daughters. Maybe the reason was I wanted to make sure there were qualified young men who could marry my daughters. [Laughing] But I do it because I think I can help young people. You like to think that you are making a difference.

Riley: I would echo what Lyle says about working with young people. I was a Scout Master for 10 years, from 1979 to 1989. Shortly after that, I started teaching at Creighton in 1991. I thoroughly enjoy it and I highly recommend it to any lawyer. When I was practicing, I always learned from the students I was teaching. They would try things differently, because they are not encumbered by the history of knowing the "only way" to do things. So they would come in and try things, and I would often say, "Wow, that is a great way to argue that or that's a great way to ask a question. I'm going to use that." And I would use it. There is just a tremendous satisfaction of working with these students, just like working with the Scouts. From the time you start teaching at the beginning of the semester until the time you walk out, they learn so much. And you contribute to that. It's the same way in scouting. In ten years of scouting, the kids leave somewhere between the ages of fifteen and seventeen. They grow up, they mature. You hope you have established character. That age for young men and young women—age seventeen—is a wonderful time. On the


one hand, they are blossoming. But on the other hand, they are very fragile and may not know where they are going. Are they going to follow a good life or are they going to follow a bad life or are they going to fall somewhere in between? The thing you try to do is guide them—their character traits and things they can do—to keep them going. To a different degree, it's the same thing you do when you teach. The self-satisfaction you gain is tremendous. And you learn stuff for yourself. I will tell you the first time I had one of my students practice and argue against me. It was in front of Judge Mary Likes. When we finished, Mary Likes said, "Bill Riley is a very good lawyer and I understand he was your teacher. This may not happen often, but I'm going to find in your favor." So he beat me.

All: [Laughing]

Strom: I had a young man once in scouting whose mother was very protective. The first time we went out to camp, she asked me, "Will you watch Bill and make sure he eats his meals?" I looked at her and told her I had been doing this for a number of years, and I have yet to lose a Scout because he missed a meal.

All: [Laughing]

Strom: But he went all the way through the Scouts to become an Eagle Scout. Just an outstanding young man. And I thought he would not even make it. I thought he would quit. But he persevered and became an Eagle Scout. That's just one of many that you see blossom.

Riley: Let me just add a story that is satisfying to me. I had a young man just like you did who came in at 11 years old. His father was a very good lawyer here in town. They were having some health problems in the family, and the father did not have a lot of time at that moment to spend with his son. The kid felt a little lost—he felt a lot lost—because of the things that were happening in his family. He just couldn't quite fit in, and he was there for several years. He had all of this potential, as he was such a good kid. But he was carrying such a burden. But he became an Eagle Scout. Nobody worked any harder getting there than this young man. I don't want to detract from the support from his father, but they had so many problems to deal with. I always thought, "Well, I hope he does well and I think he will do well." Several years later—in fact, a year or two ago—I was sitting in an airport and a young man walked up to me with this grin. He said, "You don't remember me." Believe me, they change from the time they were 15 or 16 years old to the time they become young men. I said, "No, I'm sorry. I don't remember you." That was the same young boy, and he was now a soldier going off to Afghanistan or some place in the Middle East. You couldn't see someone who was in better shape, carried himself with confidence, and was such a solid citizen. I was so proud to think that scouting had something to do with getting him there. 

CREDITS TO OUR PROFESSION

Strom: The young man I discussed became a master electrician. It just makes you feel so good. And that's just one example, as some just stand out more than others. And there's some that come in and they don't make Eagle Scout, but, boy, they have problems, and you're able to work with them and able to maybe help straighten out their thinking about what they should and should not be doing. Because they are almost on the edge of going the wrong way, not so much in drugs as it wasn't that big of a deal back in those days, although they were coming into the picture. We were more concerned with them just doing the wrong things.

Riley: When Judge Strom and I talk about doing things such as the Boy Scouts, we are not trying to act like we are unique or special. Lawyers are out there doing all kinds of things that are public and civic matters. Whether it's civic clubs, church, synagogue, scouting, the playhouse, the symphony, boards of non-profit organizations, or whatever it might be, they are doing all of these types of activities. One of the things that irritates me is the public perception of lawyers as being these people who are always out there to twist things or just to make money—all of these negative connotations. The message doesn't always get out that most lawyers—the vast majority of lawyers—are good people. They are good people when practicing law and they are good people outside the law. I don't know of any other profession that does so much for the community. There may be other professions, but I would think lawyers do as much for the community as any other profession.

Strom: I also think of politics, but maybe you would expect lawyers to get involved in politics. But what Bill is saying is really true. Pro bono—if you want to use that word—is work that lawyers do within and outside the law. They do it because it is the right thing to do and they want to be involved. Lawyers take a bum rap. But you can go back to 1620 when the first lawyer showed up in New England, and you can see the same jokes beginning then that you have now. I think we've always been a great subject for having people pick on us. That may be because of all of the things we do.

Lucas: Having taught trial practice for years and having been trial lawyers, do you think the quality of trial lawyers is going up or down?

Riley: Let me segue that into what we were just talking about. I think the quality of trial lawyers is going up. However, the professionalism and civility of trial lawyers certainly isn't going up at the same rate and may be declining. Part of that may be we are dealing with bigger cities and are not seeing the same lawyers over and over and over.

Strom: And there are a lot more lawyers.

Riley: Yeah, there is a lot more competition. People are competing for the same clients, same cases, and trying to make reputations. Whatever the reason is, civility and professionalism are probably declining. The quality of the actual trial skills is going up. As I said earlier, I had no trial practice class in law school, nor did Lyle. We had to learn by trial and error. Today's students have far superior trial skills at this point in their careers than we did. What I hope we are trying to instill when we teach—I know I do—is civility and professionalism. As a lawyer, you are a professional and not just a business person who just happens to be in this business. The students today are way ahead as they come out to practice with their skills. But I'm not so sure they have that same ability to understand what is professional and what is not professional. And I'm not sure that is the fault of the law schools. I had the huge advantage of going into a prominent law firm with outstanding lawyers who could tell me that, when someone called and needed two more weeks to answer, for instance, I could go down the hall and ask Lyle Strom or Bill Brennan. They would usually tell me to give the other side the two weeks. They lived the example. When something happens and you are angry and you want to

strike out, you have to learn that is not the way to respond. You need to maintain your own equilibrium. And that will even make you a better trial lawyer, as long as you keep your emotions in check. You need to be nervous and have your adrenaline going whether it's a trial or taking a deposition or making an argument to the court, but you cannot lose control of your emotions. I think you see more of that now, losing control.

Strom: If we talk about the current status of the law and of lawyers, I think lawyers probably are better, at least technically. But we had a great advantage because we benefited from solid mentoring, as I discussed earlier.

Lucas: I have always wondered if you take the average case and randomly assign it to competent trial lawyers, would the same or similar result occur most of the time? Is a jury verdict indicative of what the case is worth regardless of the trial attorneys involved? So, how does advocacy add to the typical case?

Riley: In appeals like I work on, it adds very little because you've got a record and you've got three judges and their staffs looking at the issues. I guess I've been surprised since coming to the circuit what little oral advocacy brings to a case. Oral advocacy certainly brings something and I'd never do away with

*"The message doesn't always get out that most lawyers—the vast majority of lawyers—are good people... I don't know of any other profession that does so much for the community."
—Judge Riley*

it, but when you have the record and everything set in stone for the circuit judges to look at, there's not a whole lot that good oral argument or bad oral argument is going to do. On the other hand, in any one day of sitting, hearing about six oral arguments, at least one judge is going to change his or her opinion based on oral advocacy. So if you have three judges hearing six cases or twelve arguments, at least one of those judges might change his or her decision. So oral advocacy does make a difference at the appellate level. Even though I can say it is helpful and it does make a difference, I guess I would say I had assumed as a trial lawyer that oral advocacy made a lot more difference than it actually does. I'll leave it to Judge Strom to answer the other part of the question, but my perception is that at the district court advocacy makes a big difference.

Strom: Does advocacy make a difference? I think so. I think that experienced and high-quality advocates make a good impression on the jury, and it reflects in the jury's verdict. Usually when a case is over, I visit with the jury to find out first how the jury accommodations were and what we can do to make their service more convenient. Then I always inquire—just out of curiosity—if they had any thoughts about the lawyers or about the way the case was presented. They are always very frank and compliment the lawyers who did a good job and will be critical of an attorney who did a poor job. Here in this district we are fortunate to have a high-quality United States Attorney's Office and a high-quality Federal Public Defender's Office, both of which provide outstanding representation to their respective clients. I think by and large the standard of advocacy we get from our attorneys is very good. But I am certainly convinced the more competent the advocate is in a civil case the better result.

Lucas: How about writing skills—are lawyers in the Eighth Circuit good writers? Would you consider Eighth Circuit lawyers to be better writers or better oralists?

Strom: In my experience, some that are great writers may not be great oralists and some that do very well in the courtroom are not very good writers. But I think Nebraska lawyers are better at both than anywhere else I sit, whether I'm in Albuquerque, Alabama, or New York. I just find that the quality of our lawyers here are outstanding.

Lucas: That certainly reflects on our law schools.

Riley: Back to your question about the difference, I think the difference of lawyers in the district court in getting a result in front of a judge or jury or for the record makes a whale of a difference. But once you get an appeal, the record is already made and they've done their damage by then. So you just deal with it. So I think if you could have a great lawyer in trial or a great lawyer on appeal, I'd take the great lawyer in trial. But good writing is critical on appeal.

Lucas: It seems like satisfaction with the profession of law is dwindling. Attorneys as a whole may not be as happy practicing law as they once were. You have already discussed a few things that add stress to an already stressful profession. Do you believe that satisfaction with practicing law is decreasing? If so, what do you think is causing this phenomenon to occur in our profession?

Strom: I agree with it for exactly the reasons we have been discussing. I can remember trying a case against Leo Eisenstadt and John Delehant. Judge Delehant¹⁷ was a very stern and formal judge. For instance, you could never use a first name in his courtroom. But John Delehant, the judge's son, Leo Eisenstadt, and I tried this case together for three or four days. When we finished, we went to have some drinks. Now we all drank more than we should have, but we just sat around and talked about the case. In the old days, you would almost always join your opponent for at least one drink after the case was over and before you went your respective ways. All of the fighting was in the courtroom. Outside the courtroom, we were friends and we respected one another. I am not sure that is as true today. I think that's why people may be unhappy with the practice, if they are unhappy with it. They are not seeing that camaraderie like we used to have when practicing law. That's reflected in the lack of civility—everyone is fighting for everything they can get without realizing that there is a time to fight and there is a time to be friends. Lawyers ought to be your greatest friends. You are all in the same profession, you all have generally the same overall interests. That's where you should focus when you get a chance to sit down and laugh about things and talk about things rather than getting bent out of shape over things.

Riley: We have talked about civility and professionalism. As an example, I will give you the name of one of two lawyers that really showed me what it means in practice. Don Witt from Lincoln is a really tremendous trial lawyer. Don, I, and a third lawyer were in Maryville, MO, where I was going to take a deposition of a third-party witness. When we got to Missouri, there was a mix-up in my office—probably my fault—where we didn't have a court reporter. When you talk about civility, you can talk about the reactions of the unnamed lawyer and the reaction of Don Witt. The one lawyer knew that he had me caught for sanctions. He started thundering that he would move the court for sanctions and costs for his time. He said the next time we did the deposition it would have to be somewhere inconvenient to me and convenient to him. When he finished, Don Witt said, "No, we're not. These things happen. I'll be happy to return to Maryville whenever Bill is available and has a court reporter." Don calmed down the other lawyer, shook my hand, and then walked out with the other lawyer. Now that's civility and professionalism as opposed to



CREDITS TO OUR PROFESSION

someone who thought he now had an advantage over another lawyer who made a mistake. I have always been indebted to Don Witt for his treatment of me. Now he has probably gotten a lot more out of it for his reaction to me because what it showed me about his character. I think there is a lot of that out there, but I certainly think a higher percentage of younger lawyers are acting like that other lawyer and not Don Witt.

Lucas: Judge Strom, how would you describe Judge Riley as a trial lawyer?


Strom: What I saw in Bill to make me think he could be a great trial lawyer, and makes him unique, is what Bill is saying here in this interview. It demonstrates how he conducted himself, and I think it helped make him one of the finest trial lawyers in this part of the country. He was involved in representing his clients the best he could—especially in the courtroom—without getting involved in personal vendettas or worried about whether he was being too polite. He was just a reasonable person handling matters as they came along so he could assist his client. It reflected itself in the courtroom at all times—how he made arguments and conducted examination. And it really reflected in his performance. You can see it right away, too. When you see a lawyer in practice who demonstrates all of these characteristics, then you know you have seen a good lawyer. And you always see it in Bill. It was apparent early on. It just makes a big difference, it really does. You really have to know what your goals are. Your goals are not to kill the other guy or show them how much better or smarter you are. Your goal is to go out there and present your argument as correctly and effectively as you can so that you can get a fair result.

Lucas: Judge Riley, what did you take away from the dozen years you worked closely with Judge Strom? How would you describe Judge Strom as a trial lawyer?

Riley: The characteristics that attracted me to Lyle as a mentor are the things that everyone who knows Lyle soon learns. The obvious is he is very bright. He graduated from Creighton University School of Law at the top of his class. He has an incredible ability to look at a set of facts and boil it down to what's really important. That's one thing I try to teach—you have all of these facts and must now ask what ones are important and what ones really are not important. From what I observed from working with Lyle when he was representing his client, whether in a deposition or in a courtroom, was he can be very firm, very stern, and get what he wanted. But when it was over, it was over, and that was true for the deposition or for the courtroom. He was friends with the other lawyers and clients. He didn't have a grudge with the clients on the other side. He always tried to instill in me that you can do what's right. Sometimes you can see an opportunity where you can take advantage of a person or a situation. I don't know how many times as a young lawyer I would come running down the

hallway and say, "Look at this. We can take advantage of this to their detriment." Lyle would say, "Yes, but that's not right, and that's not the way we are going to do it." He would say it much more gracefully, as he usually would try to have me come to that conclusion. There are certain people in the law—and any profession—that have that charisma or the ability to come across to people as genuine, and people like them. Lyle always had that ability. Now that's not something you can learn or really even strive for, but judges and juries liked and respected Lyle Strom. It also shows now that he is a judge. He has that ability to inspire people and lead them to do good things as a lawyer or as a judge or working in civic projects or mock trial teams or whatever it might be. Every time I see Lyle he is doing something positive for the law or the bar or the community. He has that ability to lead. I've always been proud to be talked about as being a partner with Lyle Strom. To anyone who knows him, that says a lot, and I am really proud to be able to say that.

Strom: It is because of people like Bill Riley and Bill Brennan that I have enjoyed practicing law and have been successful. You know, it makes a big difference. A lot of times I get the credit for things that really were someone else's ideas. You don't always convince people of those things, but that's the fact. You just can't do all these things by yourself.

I hope you enjoyed reading part one of my interview with Judges Strom and Riley. In part two that will be published next month, the interview will discuss the following topics: the judicial nomination process, including personal stories about each judge's nomination; the current climate for federal judicial candidates; the makeup of the United States Supreme Court; appeals from Judge Strom's decisions to Eighth Circuit panels involving Judge Riley; judicial philosophies; future plans; and advice to young lawyers and future law clerks. Please check back! 

Endnotes

- ¹ On April 12, 1973, President Richard Nixon nominated Albert G. Schatz to serve on the United States District Court for the District of Nebraska. Judge Schatz was confirmed by the Senate on May 10, 1973. Judge Schatz was still on the court when he died on April 30, 1985.
- ² I had the great fortune to take trial practice from Judge Strom in 1994.
- ³ On July 11, 1966, President Lyndon Johnson nominated Donald P. Lay to serve on the United States Court of Appeals for the Eighth Circuit. Judge Lay was confirmed by the Senate on July 22, 1966. Judge Lay served as chief judge of the circuit from 1979 to 1992. On January 7, 1992, Judge Lay assumed senior status.
- ⁴ On October 14, 1981, President Ronald Reagan nominated C. Arlen Beam to serve on the United States District Court for the District of Nebraska. The Senate confirmed Judge Beam on November 18, 1981. Judge Beam served as the chief judge of the district from 1986 to 1987. On July 1, 1987, President Reagan nominated Judge Beam to serve on the United States Court of Appeals for the Eighth Circuit. Judge Beam was confirmed by the Senate on November 6, 1987. On February 1, 2001, Judge Beam assumed senior status.

⁵ *The Leading Judges in America: The Lawdragon 500*, Lawdragon at 47 (2005), available at http://www.lawdragon.com/images/uploads/pdf/LD500_Leading_Judges2.pdf.

⁶ I have been fortunate to substitute for Judge Riley when his schedule precluded him from teaching trial practice.

⁷ See *United States v. Erwin*, No. 05-1649, 2006 WL 938517 (8th Cir. Apr. 12, 2006); *United States v. Chavez*, No. 05-1297, 2005 WL 3288136 (8th Cir. Dec. 6, 2005); *United States v. Islas*, No. 04-2557, 2005 WL 1924723 (8th Cir. Aug. 12, 2005); *United States v. Henderson*, 408 F.3d 1078 (8th Cir. 2005); *Jacob v. Clarke*, No. 04-2559, 2005 WL 926516 (8th Cir. Apr. 22, 2005); *United States v. McNeally*, No. 04-1717, 2005 WL 551867 (8th Cir. Mar. 10, 2005); *United States v. Franklin*, 397 F.3d 604 (8th Cir. 2005); *United States v. McLennon*, No. 04-1925, 2004 WL 1982511 (8th Cir. Sep. 7, 2004); *United States v. Benford*, 360 F.3d 913 (8th Cir. 2004); *United States v. Washington*, No. 03-2805, 2004 WL 516220 (8th Cir. Mar. 17, 2004); *United States v. Cook*, 356 F.3d 913 (8th Cir. 2004); *United States v. Martinez-Camacho*, No. 03-1335, 2003 WL 22069736 (8th Cir. Sep. 5, 2003); *United States v. Mallari*, 334 F.3d 765 (8th Cir. 2003); *United States v. Harris*, No. 02-2352, 2003 WL 1025042 (8th Cir. Mar. 3, 2003); *United States v. Pelowski*, No. 02-2902, 2003 WL 139198 (8th Cir. Jan. 21, 2003); *United States v. Murry*, No. 02-2850, 2003 WL 23302 (8th Cir. Jan. 3, 2003); *Mitchell v. Union Pac. R.R. Co.*, No. 01-2133, 2002 WL 31011249 (8th Cir. Sep. 10, 2002); *United States v. Robinson*, 301 F.3d 923 (8th Cir. 2002); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002); *United States v. Jarmon*, No. 02-1667, 2002 WL 1343834 (8th Cir. June 21, 2002); *United States v. Fellers*, 285 F.3d 721 (8th Cir. 2002) (affirming conviction), *rev'd*, 540 U.S. 519 (2004), *remanded to*, 397 F.3d 1090 (8th Cir.) (affirming conviction), *cert. denied*, 126 S. Ct. 415 (2005); *United States v. Abboud*, 273 F.3d 763 (8th Cir. 2001).

⁸ See *Benford*, 360 F.3d 913; *Cook*, 356 F.3d 913; *Mallari*, 334 F.3d 765; *Orr*, 297 F.3d 720.

⁹ *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002).

¹⁰ Currently Knudsen, Berkheimer, Richardson & Endacott.

¹¹ Formerly Kennedy, Holland, DeLacy & Svoboda.

¹² On April 15, 1933, President Franklin Roosevelt nominated James A. Donohoe to serve on the United States District Court for the District of Nebraska. Judge Donohoe was confirmed by the Senate on April 20, 1933. Judge Donohoe served as chief judge of the district from 1948 to 1956. Judge Donohoe's service terminated on February 26, 1956, due to death.

¹³ On March 11, 1970, President Richard Nixon nominated Warren K. Urbom to serve on the United States District Court for the District of Nebraska. Judge Urbom was confirmed by the Senate on April 23, 1970. Judge Urbom served as chief judge of the district from 1972 to 1986. On December 31, 1990, Judge Urbom assumed senior status.

¹⁴ On January 28, 1971, President Richard Nixon nominated Robert V. Denney to serve on the United States District Court for the District of Nebraska. Judge Denney was confirmed by the Senate on March 4, 1971. On April 16, 1981, Judge Denney assumed senior status. Judge Denney died on June 26, 1981.

¹⁵ *Pickett v. Tyson Fresh Meats, Inc.*, 315 F. Supp. 2d 1172 (M.D. Ala. 2004), *aff'd*, 420 F.3d 1272 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 1619 (2006).

¹⁶ On March 8, 2006, the plaintiff's petition was distributed for conference to be held on March 24, 2006. On March 27, 2006, the Supreme Court denied the petition.

¹⁷ On January 19, 1942, President Franklin Roosevelt nominated John Wayne Delehant to serve on the United States District Court for the District of Nebraska. The Senate confirmed the nomination on February 9, 1942. Judge Delehant served as chief judge of the district from 1956 to 1957. Judge Delehant assumed senior status on April 30, 1957. He died on April 20, 1972.

Do you or your client need California Counsel?

John R. Wertz is a Nebraska raised and educated lawyer (U.N.L. Business Admin. - 1969, Law School -1972), Member of the California and Nebraska Bar Associations, practicing in California for over 30 years.

Wertz McDade Wallace Moot & Brower is a 20-lawyer, general civil practice law firm, practicing throughout California. The firm is available to assist you or your client as local, associated, or co-counsel on a broad range of client matters or assist in the referral of your matter if outside the firm's expertise (criminal or domestic law matters).

WERTZ McDADE WALLACE MOOT & BROWER

945 Fourth Avenue, San Diego, California 92101
Telephone 619-233-1888 • Facsimile 619-696-9476
jwertz@wertzmcdade.com • www.wertzmcdade.com

&

A PROFESSIONAL CORPORATION