

I N T E C

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P R A C

{ THE HONORABLE JUSTICE WILLIAM A. TILLEMAN }

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T I C E

L A W¹

In 2009 the Honorable Justice William A. Tilleman was appointed to the Court of Queen's Bench and, ad hoc, to the Court of Appeal in Calgary, Alberta, Canada. Justice Tilleman graduated magna cum laude from BYU Law School in 1986. The following is from an address given at the first Canadian JRCLS forum in Banff, Alberta, Canada, in October 2011.²

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ven if lies are protected constitutionally by free speech, misleading people is a failure of integrity. We should never forget that our word is our bond and that telling the truth is how we build relationships. As Mark Twain said, “If you tell the truth you don’t have to remember anything.”³ Our word to others still means a great deal—at least to them—and it applies to practicing law; it is better to undercommit and overperform than vice versa.

In a moment I will reference the attributes of being a good lawyer, but I do so with a note of caution: there are certain attributes central to being a good lawyer that are unrelated to being a good person or to doing the right thing—such as being smart or timely (mob bosses can be these two things). But many other attributes are inextricably linked with the idea of being a good person in society—such as being courteous, patient, honest, and so on. This is where having integrity really comes into play. I should point out that judges are not immune; they are affected too.⁴

The attributes of a good lawyer include being smart, courteous, and honest as well as being timely, civil, and patient with everyone—including court staff—doing pro bono work; assisting colleagues; and so on. How are these things tied to the reputation of a lawyer? For a litigator, I suppose the definition would include being absolutely honest with your colleagues when you are before the courts and being honest in your briefs—meaning, for example, that when reference is made to a certain case, ensure that the reference is what the case stands for. Additionally, when a brief refers to the definition found in the contract, make sure that the definition is exactly what the contract in your filed exhibit says it is. (Not surprisingly, judges do look at the cases and the exhibits cited in the briefs, and unfortunately the cases and exhibits do not always say what counsel has told the court.) Also, when counsel drafts an order the judge gave, they should make sure it is the exact order the judge granted. Further, good lawyers never write to a judge without copying the other parties—if they write to a judge at all.

I have many more examples, but the idea I want to portray is that you *do* need to sweat the small stuff when it comes to honesty: honesty and integrity come together when you are acting consistently with principles, even when you are referring to a clause in the contract that you think nobody will look at. There are many opportunities to be even slightly dishonest, and they may seem insignificant on their own, but what is important is that consistency in our thoughts and actions makes us people of integrity.

Do judges assess your reputation? Absolutely they do. I first discovered this when I was a clerk at the court of appeals 25 years ago. After court one day my judge showed me a letter written to him *after* the arguments were in and the case was closed. The judge told me that after that one ill-timed letter, he lost all respect for the lawyer, notwithstanding the lawyer’s good reputation over the past several decades.

Other judges have commented on lawyers’ reputations. Here is a statement made by U.S. District Judge David Winder, quoted by James E. Faust 24 years ago:

The expedient or short-sighted lawyer who fails to fulfill verbal understandings with other lawyers, who presents dubious evidence, who deals loosely with the record, or who misleads judges, is quickly “pegged.” In our bar and every bar there are certain lawyers who achieve the enviable and priceless status of a good name. That status is developed gradually by word of mouth, from judges in the privacy of their gatherings and from lawyers in theirs. And, unlike the litigation you will be handling, be aware that once the verdict of your professional peers is in, there is no formal “due process,” no rebuttal, and no appeal from that verdict.⁵

Integrity shapes the attributes of being a good counsel, but it stands alone and is far more important for the following reason: integrity defines our behaviors on a deeply personal basis. There is a country-western song that tells how far down we have to dig to get to the bottom of our

moral judgments. This song, by Trace Adkins, says: “This ain’t no thinkin’ thing, right brain, left brain / It goes a little deeper than that.”⁶ Like love, integrity goes much deeper; the brain alone cannot solve the problems of either love or integrity.

Shakespeare wrote, “To thine own self be true.”⁷ In this context, how do we find our true self? Acting with integrity links the brain with the spirit, meaning integrity goes right down to the soul. I have heard a speaker suggest that having our soul speak back to us when we make moral mistakes is a good thing; it is healthy because it is a sign of a strong spirit talking to us, and that is both fortunate and a path of correction. That’s exactly how deep morality lies. But, again, it is important because others—and not just judges, lawyers, courts, and society but our families—look to us and expect us to make good decisions. We read from the Bible that “the just man walketh in his integrity: his children are blessed after him.”⁸ Everyone is watching you. As Senior U.S. District Judge Bruce Jenkins profoundly said, “Like it or not, ‘wherever you go, there you are.’ Never forget that you leave your moral fingerprints on everything you touch.”⁹

Years ago, and in a different capacity, I taught ethics at a law school. I always began the class by telling students to close the professional book or code of ethics—at least temporarily. I said this for two reasons: first, because each of us has the power from within to answer any question of a moral nature; and second, because there is a proven frailty with depending too much on a code of ethics reduced to writing and based on a common denominator that would work for the masses. It was not prepared for the weakest among us, as was the well-known health code that we are all familiar with.¹⁰ Integrity is extremely personal—almost intimate in its character. Ralph Waldo Emerson said, “I cannot find language of sufficient energy to convey my sense of the sacredness of private integrity.”¹¹ Going beyond written rules is where the virtue of integrity is cultivated.

Indeed, many professional people who have fallen from high positions did so on the basis of “compliance” with ethical rules either known to themselves or followed based on the advice of professionals, including some of the best. In fact, in North America we are aware of lawyers who use ethical loopholes to justify generally bad behavior.

Intelligent people have suggested a division between professional morality and ordinary or personal morality. How tricky is this distinction? In breaking morality down to its essential parts, don’t we conclude that it is based on honesty in our dealings with our fellow man? Are there really two definitions of honesty, one being more virtuous than the other? Is honesty becoming an on-off switch? Can we really justify moral criteria based on the boardroom or courtroom in which we are standing or with whom? And where does courage fit in—not just as a stand-alone virtue but as the way in which we demonstrate our morality when others depend on us to help them?

In discussing courage and virtue with a judicial colleague, I reviewed comments from moral philosopher Alasdair MacIntyre, who stated:

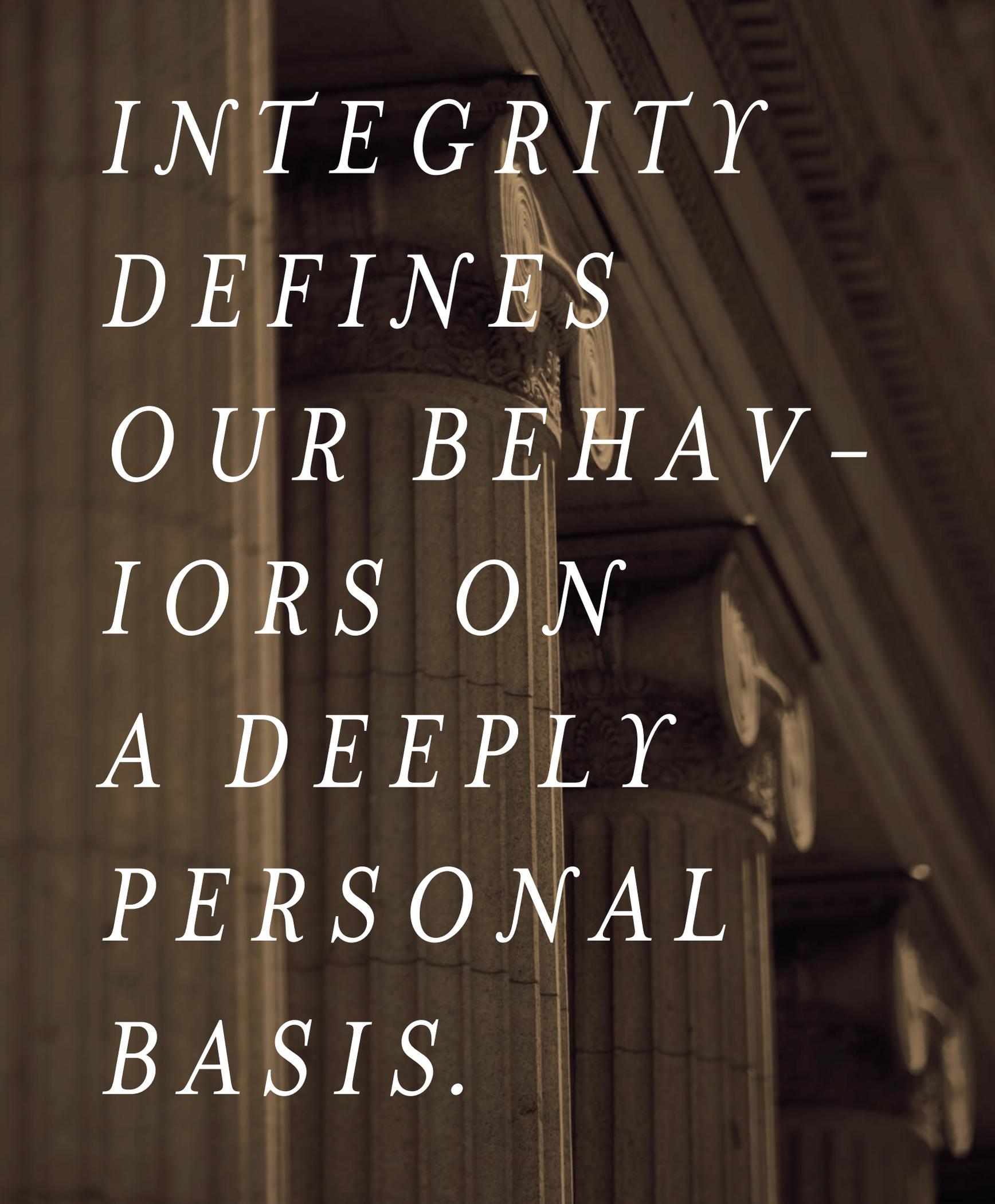
*To be courageous is to be someone on whom reliance can be placed. Hence courage is an important ingredient in friendship. The bonds of friendship in heroic societies are modelled on those of kinship. Sometimes friendship is formally vowed, so that by the vow the duties of brothers are mutually incurred. Who my friends are and who my enemies [are], is as clearly defined as who my kinsman are. The other ingredient of friendship is fidelity. My friend’s courage assures me of his power to aid me and my household; my friend’s fidelity assures me of his will. My household’s fidelity is the basic guarantee of its unity.*¹²

What about the virtue of justice—something that all of us care about every day? MacIntyre also points out how this virtue relates to our profession. He said:

*There is however another crucial link between the virtues and law, for knowing how to apply the law is itself possible only for someone who possesses the virtue of justice.*¹³

I recognize that the word *justice* carries different meanings. Ronald Dworkin spoke about justice and fairness in the law as leading to the law’s integrity. Even if Dworkin and others spoke about justice in the way judges should apply it, the same rings true for lawyers. We are all part of an adversarial system and must all be mindful as officers of the court that in serving others we strive for the application of a just and fair result. Period.

Thus justice and morality are linked. But have we lost this tradition? To quote MacIntyre again:



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The virtues find their point and purpose . . . in sustaining those traditions which provide both practices and individual lives with their necessary historical context. Lack of justice, lack of truthfulness, lack of courage, lack of the relevant intellectual virtues—these corrupt traditions. . . . To recognize this is of course also to recognize the existence of an additional virtue, one whose importance is perhaps most obvious when it is least present, the virtue of having an adequate sense of the traditions to which one belongs or which confront one.¹⁴

For us, what are those key traditions? Are they the same as those things spoken about in Philippians?

Whatsoever things are true, whatsoever things are honest, whatsoever things are just, whatsoever things are pure, whatsoever things are lovely, whatsoever things are of good report; if there be any virtue, and if there be any praise, think on these things.¹⁵

We lose those traditions when we lose our courage and truthfulness. Paul knew better. And so do we.

What we need in the world today is a professional reputation linked more to absolute integrity than to having secured, for example, the largest damage settlement, a prominent acquisition, the best jury decision, a multinational closing, a precedent-setting case, a new constitutional ruling, or other similar attorney successes.

Judge Ken Starr echoed these concerns two decades ago at a convocation address in Provo. He said, “Regrettably, the profession is being seen less as a way of serving the cause of justice and more as a way to make a handsome living, perhaps to become rich, and maybe even a little famous.”¹⁶

We do have stellar public service professionals in North America, and I would additionally like to point specifically to former Solicitor General Rex E. Lee. As a student at J. Reuben Clark Law School almost 30 years ago, I spoke to a nonmember professor who told me that he dropped everything and came to BYU’s new law school mainly because of Rex Lee. He admired everything about him. We all did. Rex had the “golden” reputation—by that, and from my current perspective of the bar, I mean that a judge can absolutely trust every word told by that lawyer. Rex Lee’s reputation built the very school that graduated many of us and gave rise to this society.

Granted, there aren’t very many Rex Lees around, but they do exist. Since having this respect for the golden attorney affects so many people in a positive way, why, then, is it so difficult to be on the right side of absolute integrity? Unfortunately, the answer is the growing professional “gray zone” whose swath widens and whose morals narrow each passing day. How do we deal with it? Where do we find our courage? This is what Thomas Jefferson said:

Give up money, give up fame, give up science, give the earth itself and all it contains, rather than do an immoral act. And never suppose, that in any possible situation, or under any circumstances, it is best for you to do a dishonorable thing, however slightly so it may appear to you. Whenever you are to do a thing, though it can never be known but to yourself, ask yourself how you would act were all the world looking at you, and act accordingly. Encourage all your virtuous dispositions, and exercise them whenever an opportunity arises; being assured that they will gain strength by exercise, as a limb of the body does, and that exercise will make them habitual. From the practice of the purest virtue, you may be assured you will derive the most sublime comforts in every moment of life, and in the moment of death.¹⁷

This, as Jefferson says, is why we sweat the small stuff—because it grows into a habit and develops moral rules like foundations of honesty. With that high watermark, courage will be easier to muster.

Speaking to a Congressional committee, Justice Louis Brandeis spoke about courage in these words:

[Men] cannot be worthy of the respect and admiration of the people unless they add to the virtue of obedience some other virtues—the virtues of manliness, of truth, of courage, of willingness to risk positions, of the willingness to risk criticisms, of the willingness to risk the misunderstandings that so often come when people do the heroic thing.¹⁸

The gray area about which I speak leads to an ethics trap, believe it or not, in which rationalization takes us to a place without a stunningly wrong answer. Examples may include adjourning to

a court date or counsel meeting date knowing it may be impossible to meet; quoting only part of the case (or relying on a case that is on appeal); withholding relevant facts; not notifying the judge of multiple related proceedings, including related cases in other courts; taking a matter to a new judge when another jurist is seized or when you lose on a motion (clerk's notes don't always immediately catch this); not following through with promises to other counsel or to the court; not just interpreting the facts to help one's client but actually twisting the truth to get the client's needed result; and so on.

I could give many other examples, but I certainly do not want to be pointing the finger. It is just that the view jurists have of the ethics of lawyers comes from the bird's-eye view of every case that unfolds in front of us. For me, this includes having heard constitutional applications, conducted jury and bench trials, dealt with numerous contempt motions, and ruled on thousands of chambers motions of a variety of civil and family types. The result of all of this is a judge with more gray hair, but, significantly, these examples go beyond abstract theoretical ideas into what are becoming lost virtues. Judges know which counsel have them and which do not.

On a less serious note, let me point out how easy it is to tell a white lie and be successful. The following is a story I read in a rural Montana newspaper:

George Phillips, an elderly man from Meridian, Mississippi, was going up to bed when his wife told him that he'd left the light on in the garden shed, which she could see from the bedroom window. George opened the back door to go turn off the light, but saw that there were people in the shed stealing things.

He phoned the police, who asked, "Is someone in your house?"

He said, "No, but some people are breaking into my garden shed and stealing from me."

Then the police dispatcher said, "All patrols are busy. You should lock your doors and an officer will be along when one is available."

George said, "Okay."

He hung up the phone and counted to 30. Then he phoned the police again.

"Hello, I just called you a few seconds ago because there were people stealing things from my shed. Well, you don't have to worry about





them now because I just shot and killed them both. The dogs are eating them right now.” And he hung up.

Within five minutes, six police cars, a SWAT team, a paramedic, and an ambulance showed up at the Phillips’ residence and caught the burglars red-handed.

One of the policemen said to George, “I thought you said that you’d shot them!”

George said, “I thought you said there was nobody available!”⁹

More seriously, let me talk about the things that pressure lawyers into the gray zone and why it is so difficult to stay out of it. First, you face obvious pressures of increasingly demanding schedules, tough clients, higher overheads, minimum hours, and billing mandates. There may be other pressures—for example, pressures to avoid embarrassment in front of peers or clients.

Let me give you an example. On a particular day a lawyer had to deal with an affidavit in Canada’s capital, Ottawa. The problem was that the lawyer was across the river on the Québec side, called Gatineau. But the affidavit’s facts listed Ottawa as their genesis, not Gatineau, and that’s what counsel said had to be sworn to in Ottawa. Accordingly, the lawyer told the clients that they must take the affidavit halfway across the bridge, where the river divides Ontario and Québec, and then deal with it there, as the facts stated. While it was embarrassing, he had to do it that way because those were the facts being sworn to. What was further embarrassing is that it was a busy time of day, which meant it was difficult to catch a cab, as it always is at the federal government headquarters at noon.

At the insistence of counsel, and notwithstanding the badgering of the clients, everybody walked to the middle of the bridge dividing the two cities where the clients demanded action: “Okay is this far enough? No one will ever know. We are in a hurry. Can we finally deal with this? Why do we have to walk any farther?”

Counsel was firm, and only *after* the parties got halfway across the bridge did the lawyer allow the important papers to be sworn.

Another problem with staying out of the gray zone is that, like a nice warm bath, it’s hard to get out. The danger is that spending too much time in the gray zone blurs the boundaries to the point that we do not even

know where the boundaries are. We self-validate too easily in this compromised zone; we follow the low road, and soon our behavior becomes the low road.

Such rationalization may be the same reason witnesses swear to facts that are false. With the passage of time, and after a few white lies, witnesses are convinced by their mental conditioning that the false statement is true. This is rationalization, and it easily misdirects our principled moral bearings. Don't let your clients do it. Our internal endorsement of what we knew was the truth is what counts. Twisting the facts is actually lying. Some witnesses swear they are not lying, but they are. Over time, failing to gut

meeting in 2007 that he was a retired Marine who received the Medal of Honor, the nation's highest military decoration. In fact, he had never served in the military.

He was indicted and pleaded guilty with the understanding that he would challenge the law's constitutionality in his appeal. He was sentenced under the Stolen Valor Act to more than 400 hours of community service at a veteran's hospital and fined \$5,000.

*A panel of the San Francisco-based 9th U.S. Circuit Court of Appeals voted 2-1 to strike down the law. The majority said **there is no evidence that lies such as the one told by Alvarez harm anybody and no compelling reason to make a crime out of them.** . . .*

however, social expectations were irrelevant to the way in which he assisted someone who needed help. His act was immediate and courageous. For that and other reasons, including allegorical meanings, it is a story of significant ethics and deep morality. We are all neighbors, and there is a special power called love in the morals of reciprocity between those of us who need help from each other. And we all do.

What makes the act of a good Samaritan an act of integrity is that he behaved *consistently*. He would have helped the robbed man by the side of the road in exactly the same way the year before, five years later, and regardless of the circumstances or pressures placed upon him. The good Samaritan showed us



check the very personal values of our own morals blurs the lines of a delicate hierarchy between right versus wrong.

Let me tell you about a pending case that shows a judicial interpretation of lying. The following comes from a summary sent to me by an association I belong to:

The Supreme Court will decide whether a law making it a crime to lie about having received military medals is constitutional.

The justices said [on October 16, 2011] they will consider the validity of the Stolen Valor Act, which passed Congress with overwhelming support in 2006. The federal appeals court in California struck down the law on free speech grounds and another appeals court in Colorado is considering a separate case. . . .

The case concerns the government's prosecution of Xavier Alvarez[, who] said at a public

The appeals court refused the government's request to have the case heard again by a larger group of judges. Chief Judge Alex Kozinski, agreeing with the majority, said people often tell lies about themselves in day-to-day social interactions. He said it would be "terrifying" if people could be prosecuted for merely telling lies.²⁰

The best example of integrity, and one that properly ascends beyond centuries of court interpretations and legislation, comes from the Bible, and it is about the good Samaritan. The story is found in Luke 10:25-37. What is interesting about the story is not simply the fact that others passed by a man who was beaten and robbed on an infamous highway and left to die. Instead, what is important is the strained relationship between the Samaritans and the Jews. To the good Samaritan,

honesty because he was true to himself and did not make up a justification for how the person did not need to be helped. The good Samaritan acted justly because he saw the person in need as a person and treated him in the same way all of us would want to be treated in that situation. The good Samaritan's act was courageous because he was not concerned about the reactions of others.

In way of advice for how to establish professional integrity, I would like to offer three ideas. But before I give that advice, let me make a couple of statements. First, I would say that we take the rule of law for granted in North America. If we look around the world we should know how lucky we are to have the rule of law with a strong constitutionally established system of justice. Mindful of what Judge Learned Hand said—that people, not courts, save the liberties

found in constitutions²¹—we should all work hard to protect this neglected treasure.

Second, I have spoken a lot about honesty because I strongly believe that being honest, by itself, almost single-handedly defines integrity. There are several reasons for this. First, honesty goes far beyond what is legally acceptable. Second, it is easy to become dishonest and still be legally balanced. For example, one might be able to make a small slip by borrowing one hundred dollars from an account and then repaying the money, knowing the account will then balance. If the money is not ours, that is wrong. Being honest in all of the *small* steps is how we establish integrity. I am reminded of the scripture that says, “He that is faithful in that which is least is faithful also in much; and he that is unjust in the least is unjust also in much.”²²

Third, our profession truly is at a critical point. Quoting Judge Starr again:

*The legal profession is at a crossroads. We in the profession are called upon in a fundamental sense to choose what it is that we are all about. I have a gnawing fear that we are gradually, but inexorably, choosing the wrong road.*²³

Now here is my counsel, and I begin it with a few questions: At the end of the day, what kind of a lawyer do you want to be known as? Do you want to be like Rex Lee? Do you want the absolute trust of your peers? If so, I know each of us knows the principles and virtues that will get us there, including charity and kindness, which also form part of the virtues that I have spoken about today. Few of us can be the U.S. Solicitor General, as Judge Starr and Rex Lee were. Few of us can have the charm, influence, and charisma of Rex Lee. But we can have his integrity. To help us get there we have guidance from other judges who have given us excellent professional tips and ethical direction.²⁴

Here’s my advice: First, if mistakes are made, such as a misrepresentation, write a letter or make a phone call and correct it. This is not a sign of weakness; this builds integrity and a golden reputation. I’ve seen it happen both ways (i.e., when the mistake was corrected and when the mistake was not corrected).

Second, dig deep into your own soul for answers. You will find an answer there that

is right, and whether it conforms to current professional practice or to your partner’s expectations of you to do otherwise is not relevant unless those practices are this generation’s version of Rex Lee. Many writers have spoken about the importance of internal reflection. Blaise Pascal, for example, wrote: “One must know oneself. If this does not serve to discover truth, it at least serves as a rule of life, and there is nothing better.”²⁵ Benjamin Franklin wrote, “There are three Things extremely hard, Steel, a Diamond and to know one’s self.”²⁶ Aristotle said, “Knowing oneself is the beginning of all wisdom.”

Dig deep and listen to your inner self. This establishes character that will give you a legal reputation and integrity-based principles. We have heard before the importance of the “heart, soul, strength, and mind” linkage.²⁷ These parts of us are also connected for reasons of moral direction.

Third, find a mentor and a true friend— not necessarily the bar’s practice advisor whose daily job it is to give such advice, but a true friend. Find that person who cares about you and your family, that person whose own reputation was built on the consistently correct resolution of little decisions. These kinds of people care about others in a compassionate and humble way. They are not far away from you. Their patience surely extends to privately hear your challenges and troubles without judging you. Go to them privately. Ask them for advice. Then act immediately; act according to the compass and comportment of your inner soul.

NOTES

1 My thanks go to Professor S. Bagg and Justice P. Sullivan for their thoughts and input.

2 Previous to his appointment to the Bench, Justice Tilleman was Alberta’s chief energy regulator on the Alberta Energy and Utilities Board (EUB). Over the last 20 years he has chaired five adjudicative boards or appeal panels, including the EUB. He also practiced environmental law and represented private individuals, industries, and governments.

A resident of Calgary, Justice Tilleman holds law degrees from Canada and the United States. He has served as a member of the University of Calgary’s Board of Governors and Senate and has held numerous positions within the university. Justice Tilleman has published books and articles in the field of energy

and the environment. He and his wife, Sandra, have four children and have been married 32 years.

3 MARK TWAIN, MARK TWAIN’S NOTEBOOK 240 (1935).
4 See Emily Kendall, *Because of “His Spotless Integrity of Character”*: The Story of Salmon P. Chase: Cabinets, Courts, and Currencies, 36 J. SUP. CT. HIST. 96 (July 2011).

5 David K. Winder, Federal Judge on the U.S. District Court for Utah, Utah State Bar Speech to Admittees (Oct. 6, 1987); quoted in James E. Faust, *The Study and Practice of the Laws of Men in Light of the Laws of God*, CLARK MEMORANDUM, Fall 1988, at 20.

6 TRACE ADKINS, *(This Ain’t) No Thinkin’ Thing*, on DREAMIN’ OUT LOUD (Capitol Records 1996).

7 WILLIAM SHAKESPEARE, HAMLET, act 1, sc. 3, line 78.
8 Proverbs 20:7.

9 Bruce S. Jenkins, *Professionalism and Civility*, 24 UTAH BAR J. 32, 36 (March/April 2011).

10 See Doctrine & Covenants 89.

11 Ralph Waldo Emerson, Introductory Lecture on the Times, Read at the Masonic Temple, Boston (Dec. 9, 1841).

12 ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 123 (2nd ed. 1984).

13 *Id.* at 152.

14 *Id.* at 223.

15 Philippians 4:8; see also Article of Faith 1:13.

16 Kenneth W. Starr, *Acquired by Character, Not by Money*, in LIFE IN THE LAW: SERVICE AND INTEGRITY 242 (Scott W. Cameron, Galen L. Fletcher, and Jane H. Wise, eds., 2009).

17 THOMAS JEFFERSON, 5 THE WRITINGS OF THOMAS JEFFERSON 83 (Albert Bergh, ed., 1904) (in a letter written to his nephew Peter Carr on August 19, 1785).

18 Louis Brandeis, quoted in CHARLES E. WYZANSKI JR., WHEREAS—A JUDGE’S PREMISES 52 (1962); see also MARTIN MAYER, THE JUDGES: A PENETRATING EXPLORATION OF AMERICAN COURTS AND OF THE NEW DECISIONS—HARD DECISIONS—THEY MUST MAKE FOR A NEW MILLENNIUM 346 (2007).

19 *How to Call the Police When You’re Old*, 9 TRICIA’S TRADER 11 (Sept. 21, 2011).

20 Associated Press, *High Court to Rule on Stolen Valor Act*, Oct. 17, 2011; emphasis added.

21 Commonly reported to have been said by him in a speech regarding “the spirit of liberty” in New York in 1944.

22 Luke 16:10.

23 STARR, *supra* note 16, at 240.

24 See, e.g., Jenkins, *supra* note 9.

25 Blaise Pascal, from *The Misery of Man Without God*, section II, no. 66, in PENSÉES (1670).

26 BENJAMIN FRANKLIN, POOR RICHARD’S ALMANAC (1750).

27 See Mark 12:30 and Luke 10:27.