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The House that Rex Built

Dee V. Benson

Every story has its beginning, and in my opinion the story of BYU Law School began when a telephone rang in a law office in Phoenix, Arizona, in 1971. The law office belonged to Rex Lee. He told me this story himself, so I'm sure it's true. He said he had a secretary who was a veteran of the law firm and not easily impressed, and all of a sudden she yelled out from the outer office, "Hey, there is some guy named Harold Lee on the phone from Salt Lake City. Do you want to talk to him?" Rex said it took a minute to digest—"Harold Lee, do I know a Harold Lee?"

When it occurred to him it was Harold B. Lee, the president of the Church, he took the call. That was the conversation in which President Harold B. Lee asked Rex Lee if he would serve on the committee searching for a dean for the new law school that the Church was planning for Brigham Young University.

Coincidentally, my genesis with the legal system began at that same time. I was on a mission in Sweden, dutifully tracting and trying to convert people to the gospel. I was planning to do a split with another pair of missionaries in the southern Swedish town of Malmo. We went to the other elders' apartment, and when we got there my companion and I found them in a heated exchange with their landlord. The landlord claimed they hadn't paid their rent; the missionaries said they had. There was a strong smell of alcohol in the air, and I was pretty sure it wasn't coming from the elders. Their landlord was really drunk and really mad, and so I tried my first-ever attempt at mediation. I intervened, and all it did was cause the landlord to grab a very big butcher knife with a blade of about eight inches. The landlord came around the table after me, saying he was going to slice my throat. We elders went running down the road with him chasing us and yelling Swedish obscenities all the way.

The next thing I knew, courtesy of the state of Sweden, I was on a train headed back to Malmo to attend the trial against the landlord. I was the state's chief witness; it was a great little diversion from tracting. I took the witness stand, the prosecutor asked me what happened, and I told him. It was quite uneventful. Then the defense lawyer stood up. I still remember what he looked like: He was this very heavyset Swedish man, middle-aged, wearing a three-piece suit. He had a book on the counsel table. He stood up, looked at me, and said, "So, you're a missionary?"

I said, "Yes."

He picked up the book, and it was the Bible. Then he said, "So, do you believe in the Bible?"

I said, "Yes." I didn't think that this was the time to do the "as far as it is translated correctly" thing.

So, then he said, "Have you read it?"

This is when I was glad that the mission president wasn't there, because I was under oath. I said, "Parts of it."

He said, "Have you read the New Testament?"

I said, "Yes." Then he opened it up and with great drama said, "Are you familiar with the scripture that says: 'I was an hungred, and ye gave me meat: I was thirsty, and ye gave me drink. . . . Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me?'"

I said, "I'm generally familiar with that scripture."

And he said, "Do you believe it?"

I said, "Yes."

He leaned into me and said, "Do you live it?"

I said, "I try to."

He stomped away and with dramatic flourish said, "I think not!" And he sat down. That was the whole thing!

We had an intermission shortly after that, and I asked the prosecutor what he thought, and he said, "Thank you. You did fine. We'll let you know how it turns out."

I then pointed to the defense lawyer, who was huddling up with the landlord, and I said, "So, what was that all about?" and he said in Swedish, "Jag har ingen aning," which means, "I have no idea."

I finished my mission without getting killed and returned to my studies at BYU, as a PE major. I didn't think a whole lot of this incident until I heard President Oaks announce at a devotional assembly—which, I want noted, I attended—that a law school would be formed at BYU. Somehow it got my mind working in that direction, and I took the LSAT. So, there I was in the charter class at the first class that was ever held, with Rex Lee teaching. The search committee had found as its first dean one of the searchers. It was such an interesting experience: all of us brand-new law students and listening to Rex. I remember he emphasized two things: One, he said, "We're not going to teach you law so much as we're going to teach you to

think like a lawyer.” As soon as he’d emphasized that, he started teaching us some law. He told us about the common law of England, emphasizing the difference between questions of fact, which go to juries, and questions of law, which go to the court. Just when I thought I was grasping the distinction, it would leave my brain. I think I was seated next to Bruce Whiting, and when we had an intermission, he turned to me and said, “What was that all about?”

I said, “I have no idea.”

About a month later, I remember, Professor Bruce Hafen, who was my torts professor, saw me after class and said, “So, Mr. Benson, are you learning to think like a lawyer yet?”

I said, “Well, if it means going through life in a state of perpetual confusion, I am getting it down.”

He laughed and said, “It will get there; you’ll get there.”

So, here it is 30-plus years later, and I would like to happily announce that I have finally learned to think like a lawyer. I do it all the time. I am no fun anymore, but I have learned how to think like a lawyer, and I thought I’d employ that skill for you here tonight—try to say something really erudite, really profound. Perhaps I could explain how BYU Law School in its brief 30 years has taken Constitutional law to new heights and shown the world what it really means. But I couldn’t come up with anything that sounded sufficiently brilliant. Not even to me. Then it hit me, after 12 to 14 hours of watching nonstop ESPN, what I would do. They have this series of programs about the best this and the best reasons for that, which I have become quite fond of, and I thought, that’s it! I’ll use that same approach to tonight’s talk. I will focus briefly on the many accomplishments our law school has achieved during the past 30 years and sort through all the reasons why. Then, in the end I will tell you the number one reason the Law School has been such a success. I will try to tell you why we have these lofty numbers, like being currently ranked the 34th best law school in the country by u.s. News & World Report. Only 14 law schools in the nation have had more Supreme Court law clerks in the last 30 years than BYU—we have had 12. We have seen 65 of our graduates appointed as state court judges. We have had three presidentially appointed federal judges, two district judges—Mike Mosman in Oregon and me here in Utah—and we have one judge in the ninth circuit court of appeals. We’ve had five u.s. attorneys; we’ve had three members of Congress. We have had a senior partner or junior partner in most of the major law firms in America. We have what is reputed to be the best law library west of the Mississippi, if you don’t count Stanford. We have distinguished faculty members with accomplishments too numerous to mention.

I could go on and on. But the main reason for all of this success comes down to one man. The indisputable number one reason why BYU Law School has been such a smashing success is because of one man: Rex

Edwin Lee. After Rex was named the founding dean, he became to our law school what George Washington was to the original colonies. They say Yankee Stadium was the house that Ruth built; well, the J. Reuben Clark Law School is the house that Rex Lee built. I wish you could have seen him in those early years. I wish you could have been there when Rex taught classes in the J. Reuben Clark Law School when we sat in that old Catholic elementary school. As gifted as he later proved himself to be as an appellate advocate, there he employed those same tools as a classroom teacher. He did so much for the Law School; his contributions were so vast. I've never seen any man and a job come together better than it did for Rex Lee and that founding deanship. Rex had a manner about him and an enthusiasm and a salesmanship that brought together all of the separate parts that made up the early Law School. He taught classes, he even picked the façade of the new building. He was the one who got them not to put the tan brick that is seen on most of the buildings on campus. He did everything. We thought he was near deity then, because being number one in your class at the University of Chicago Law School and clerking for Justice Byron White on the Supreme Court and being a member of a law firm and actually having passed a bar was a pretty good thing in our eyes. But in fairness, viewing his credentials now with a more experienced eye, he didn't come to the job with unusually high qualifications. When he received that telephone call from President Harold B. Lee, Rex Lee was only 36 years old. Beyond any résumé credentials, what Rex happened to bring to the job was himself. And he had an unbridled enthusiasm for the project. I think the most important thing he did for us in the early years was to imbue the Law School with a sense of importance. He made us feel as if we were in the middle of the best project on earth. He called the room that we took classes in "The Great Hall." It was nothing more than an old auditorium in that elementary school, but as far as we were concerned, it may as well have been in Cambridge or Oxford. He made it feel that important.

Rex was the man who managed to get Carl Hawkins to leave Michigan. Carl was a legend even then in torts professor law circles. Rex knew the Law School needed a nationally known faculty member, someone wise and with a bit of gray hair. Rex asked him three times, and Carl turned him down twice. Finally he came. Ed Kimball quickly followed. Rex enticed Woody Deem out of California—I don't know how he did that. Woody was the most celebrated district attorney in California. People would stop doing what they were doing on their lunch hours just to go listen to the great Woody Deem give a closing argument. Rex got him to leave that and come to Provo. He talked Keith Rooker into leaving private practice and coming to teach at the Law School. Keith was the first in his class at the University of Chicago and one of the most brilliant men I ever met—I never understood a single thing he said, but he was brilliant. That

first nine-member faculty was an outstanding faculty, and it was all the work of the new dean.

I have classmates who were accepted to Harvard and Stanford and Virginia and other leading law schools in the country, but they all came to BYU because of one man. Bruce Duffield is an example. He, like so many others, will readily say that the one thing that turned him around was Rex Lee. By the time people left Rex's office, they were willing to come to a new law school in Provo working out of a converted elementary school on Ninth East, a law school that hadn't been given ABA accreditation yet, rather than accept offers from some of the country's best universities. He sold the Law School so well that he almost caused me not to go there. I was accepted to the University of Colorado in Boulder, and I almost went there because I didn't think I would get into BYU. That's why I'm a good candidate to be here tonight, because I wasn't one of those people, like Lew Cramer, who was highly recruited. I think Rex Lee probably personally recruited at least half of my class, maybe two thirds. He talked Carolyn Stewart into coming down from the University of Utah and being his administrative assistant, and if I were to list the top 10 reasons the Law School has been a success, she would be one of them.

I've never had membership in a group that I've cherished more than that in the charter class of this law school.

It was inevitable, I think, that Rex wouldn't stay in Provo. He was gifted and talented, and everyone that worked with him knew it. He took a leave of absence from the Law School to serve as chief of the civil division in the Department of Justice in the Ford administration and then returned to resume his position as dean. And then when Ronald Reagan was elected president, he selected Rex Lee to be the nation's highest lawyer: the solicitor general of the United States.

I got to know him during those solicitor general years. The first day I saw Rex in Washington was when a friend of mine, Stan Parrish, who worked with me on the staff of Senator Orrin Hatch, asked if I'd like to go for a run with him during the lunch hour. He said that he was going to join a couple of his running buddies along the way. So there at Ninth and Constitution, right across from the Department of Justice, was my old law school dean, Rex Lee. I was suddenly nervous. I thought I'd say something stupid, which came with regularity during law school, and I didn't see why this would be any different, and I remember wondering if the position of solicitor general had gone to my former dean's head. Well, he greeted me so warmly that my nervousness was immediately gone. Then, just as we all started jogging along the National Mall, we were stopped, interestingly enough, by a park policeman. He said we had all run a red light. He gathered the four of us around and was giving us a lecture on running safety, and I'm sure he didn't know he was talking to the solicitor general of the United States. As he was talking, Rex, who was being very friendly about

it, said, “If you’re going to give us a citation, will you please make mine for speeding, because that would really impress my wife.” So there went my concern about this important job going to his head. I became, I admit, a bit of a Rex Lee groupie after that. I don’t know—we must have gone on hundreds of runs together during the next three or four years, and in spite of 13 years’ difference in age, we became not only running buddies but also very good friends. It is one of the great friendships of my life. I became addicted to Rex’s arguments in the U.S. Supreme Court, which were terrific to see. I soaked up all his many comments about law. And he talked about everything, especially BYU football. He was on the short list for the Supreme Court in those days and he knew it, the one job he would have loved as much as being dean.

My favorite memory of Rex in the Supreme Court came when he was arguing a case involving paying private religious school teachers to provide remedial educational instruction to needy children after regular school hours. Rex was arguing that that did not violate the establishment clause of the First Amendment, and the plaintiffs who had brought the case were arguing that it did. He had a deputy attorney general who was arguing almost an identical issue in a case that preceded Rex’s on the court’s docket that morning. All of the nine justices were there, of course, and they were asking Rex various questions. Just a few days before that Rex had told me that one thing you never do is try to be funny in court. It will always backfire. If you actually happen to say something funny, that’s okay, he said, but don’t try to be. So, the chief justice asked a question at the very end of this argument. He said, “So, General Lee, what if we rule against your deputy in the previous case? It’s a very similar issue; the facts were different slightly. What then should we do with yours?” Rex told me later that he felt like somebody hanging from a cliff with his climbing partner below him on the rope, “Do I cut him off, or do we both fall to our deaths?” As he was trying to think of the answer, there was a silence, and it was a longer pause than usual, and finally he said, “Mr. Chief Justice, in that event, I would only hope that the court would not err twice.” The room erupted in laughter much louder than yours, but you had to be there. Fortunately for Rex, it seemed like no one laughed harder than Justice Rehnquist. Later he won the case, and so did his deputy.

One of Rex’s most remarkable qualities for such an intellectually gifted man was his wit. Among my best memories of that wit and Rex’s sense of humor is one that involves Dale Kimball, who joined the faculty during our second year. Dale is now on the district bench with me, and he is still given to bouts of immaturity. On the day Harold B. Lee passed away and Spencer W. Kimball was installed as the new prophet, Dale, who was a very distant relative of Spencer W. Kimball’s, called Rex on the phone and said just one thing, “The Lees are out, the Kimballs are in,” and hung up. Eleven years later Rex called me and said, “President Kimball passed

away, and Ezra Taft Benson is the new prophet. I want you to call Dale Kimball in Salt Lake. When he answers the telephone, I want you to say just this and nothing more: “The Kimballs are out, the Bensons are in.” So I did—delivered it just like he told me—and before I could hang up, Dale said, “Benson, Rex put you up to this.” Judge Kimball later told me I wasn’t smart enough to think of this on my own. But he wasn’t smart enough to find somebody named Hunter a few years later.

When Rex was leaving the solicitor general’s office, we must have devoted 12 runs to nothing but fielding his job offers. It was a vicarious thrill for me. They were some of the best law firms in the country. And a seat on the Tenth Circuit Court of Appeals was offered as well, which he turned down, because, he said, he wanted to make some money for a change. He wanted to buy Thomas Muffins instead of the generic brand at the Giant grocery store in McLean, Virginia. But the one thing he insisted upon most of all, no matter what job he took, was that he be allowed to continue teaching at the Law School and move back to Provo. That arrangement was fine by the law firm of Sidley and Austin, and Rex became, by anyone’s measure, the foremost Supreme Court advocate in the United States. And through it all, he taught classes at the Law School.

Then cancer came calling. I watched Rex go through an enormously difficult battle with a rapidly progressing form of cancer in his lymph system. He and Janet came back to Washington, where Rex was treated at the National Institutes of Health, and I watched her nurse him along. I’ll never forget the day we went to the King’s Dominion theme park; it was their daughter Kristy’s birthday. Janet was being a good mother but, at the same time, constantly thinking of that hospital bed where Rex was lying. I know funeral plans were going through her mind. The chemotherapy was stopped, the radiation was stopped, and it looked hopeless. Then, the cancer went into remission. It was as close as I’ve ever been to a miracle. The medical doctors started sounding like lawyers. When asked how this happened, all they could say was, “I have no idea.” But God did, and he preserved Rex Lee for another decade on this earth. He went back to Provo and continued his work as an appellate advocate. Then the Church came calling, asking him to be the president of Brigham Young University. He and Janet served through that period until another bout of illness caught up with him, and he was gone from us much too young at the age of 61.

Rex did a lot of things through the period between that phone call in 1971 and his death in 1996. Who knows why he was taken so early? I have a theory on that. You know how they have this 10-run rule in Little League baseball, and after the fourth inning, if you’re 10 runs ahead they call the game? Well, I think if you accomplish the things that 10 really successful people could do in a lifetime, then God needs you on the other side and He takes you over. That is the only way I can explain why Rex Lee left us so early. From the age of 36 through 61, he did so many remarkable

things, and nothing was more remarkable than assisting our law school and making it the nationally known school that it is today. Before Thomas Jefferson died, someone asked him what he wanted to be remembered for. Remember, this was a man who had been president of the United States and ambassador to France, and he built Monticello and had a very long list of other remarkable accomplishments. But Jefferson said he would like to be remembered for just two things: “I’d like to be remembered for writing the Declaration of Independence and for founding the University of Virginia,” he said. I think I know Rex Lee well enough to say that I think he’d like to be known for being the foremost appellate advocate of his generation and the founding dean of BYU Law School. Next to family and church, he always said that BYU Law School was his great love.

I know tonight I’ve used a lot of hyperbole and a lot of superlatives in trying to describe just a little bit about why Rex Lee was the number one reason the Law School has been so successful. For those of us who were involved with J. Reuben Clark Law School, Rex Lee’s memory should never be forgotten, not because he deserves it, but because he lends us so much. Winston Churchill said at the end of World War II that the future is unknowable but the past should give us hope. Rex Lee was our past, and he should give us hope. I would think that for this law school—from Dean Kevin Worthen, who is a product of Rex Lee; to Reese Hansen, who is certainly a product of Rex Lee; to the entire current faculty—there is a thread running back to him. It would be good to stop and ask ourselves, “I wonder if Rex would’ve done it this way?”

This Founders Day address was given to the J. Reuben Clark Law Society at Little America Hotel in Salt Lake City on September 14, 2006. Reprinted from the Clark Memorandum, spring 2007, 22–28.

Dee V. Benson received his JD from J. Reuben Clark Law School in 1976, served as legal counsel to the U.S. Senate Judiciary Committee 1984–86, and was U.S. attorney for the District of Utah 1989–91. He is currently a judge for the U.S. District Court for the District of Utah in Salt Lake City.