

MY HIGH COURT MENTORS



Dick Adams

By Dick Adams
OTLA Guardian

When the topic is appeals, I tend to look for inspiration no farther than the walls of my office, where I've worked since I first became a lawyer in 1980. I look at these walls and reflect on the careers of the two lawyers who were first my employers and then partners in this building, at what was then known as the Myrick Coulter Seagraves firm in Grants Pass. This was a first rate trial and appellate firm founded by Donald H. Coulter and Donald F. Myrick. What's striking is the wide variety of cases handled by these busy small town trial lawyers. They had courage, tenacity, brilliance and an ethic for client devotion and hard work. Although the diversity of their practice was a product of a mostly bygone era, they were the best influence a young lawyer could have.

Coulter graduated Phi Beta Kappa from the University of Oregon and joined the U.S. Army and survived landing at Utah Beach during the Normandy Invasion. He was a tank commander and received a Purple Heart for serious injuries received during the Battle of the Bulge. He spent a year in a Paris hospital recovering. Myrick graduated from Hill Military Academy in Portland and was commissioned as a second lieutenant, the first 18-year-old on the West Coast to be commissioned under the War Powers Act of 1941. He was a flight instructor for P51s.

After their service and graduation from University of Oregon Law School, the two separately started practices in Grants Pass. Within two years they became partners for the rest of their long careers. While they both had excellent trial skills, as time went on, their respective roles became more defined. Coulter was the brain trust on the law and briefing. Myrick was the jury persuader, although he also made many trips to the higher courts in Salem. The two worked in tandem for decades with a long list of successes in circuit court, the Oregon Court of Appeals and the Oregon Supreme Court.

Taking stride

I graduated from Willamette Law School in May 1980 and late that summer my wife, Gwen, and I spent an

evening in Grants Pass being interviewed by the firm. Sometime that evening Myrick Coulter Seagraves hired me. My first task for my new employers came the very next day when I was charged with delivering a box of briefs to the Oregon Supreme Court upon my return to Salem. (I wouldn't move to Grants Pass and officially start my job until mid-October that year.) The briefs Gwen and I drove back to Salem were in support of a petition for a writ of mandamus filed by Coulter and Myrick in the case of the *State of Oregon v. Calvin Roy Ott*, who was charged with the murder of his wife, Stephanie. This case exemplifies the best in lawyering.

Calvin Roy Ott admitted shooting his wife three times and killing her. The defense claimed he was acting under an extreme emotional disturbance which would mitigate murder to manslaughter.¹ The district attorney obtained an order from the Josephine County Circuit Court compelling a psychiatric examination of the defendant. In 1968, Myrick made the law on this point in *Shepard v. Bowe*.² Consistent with that case the court ordered that defendant Ott did not need to answer questions concerning his "acts or conduct at or immediately near the time of the commission of the offense." Although the court allowed attorney Myrick to attend the examination, it compelled him — implying that he could otherwise be held in contempt

— to refrain from advising the defendant to refuse to answer certain questions that fell outside the limitations. Relying on *Shepard v. Bowe*, Myrick and Coulter sought the writ of mandamus claiming the defendant's right to effective assistance of counsel could be impaired by placing his lawyer under such compulsion.

In an opinion by Justice Tongue, with concurring opinions by Justices Linde and Tanzer, the court directed the circuit court to modify its order.³ The trial court cannot restrain defense counsel from advising his client to refuse to answer certain questions. While the court did not allow a means to secure immediate rulings as to the propriety of the questions asked, it did allow tape recording of the psychiatric interview to "ensure no controversy over what questions were asked, what answers were given to such questions, and what, if any objections were made to questions which were not answered."⁴

Changing course

Once the state's psychiatrist examined the defendant, he reported he could not determine the issue without full answers from the defendant concerning the forbidden topics. So the trial judge changed his mind, modified his order and compelled defendant to answer the questions, retreating from his earlier order and ignoring the longstanding rule of *Shepard v. Bowe*. Coulter and Myrick sought a second writ of mandamus. In round two, the Supreme Court told the trial court to once again modify its order. The court commented that although the rule from *Shepard v. Bowe* does not have unanimous support, "[T]his did not invite the circuit court to contravene that rule."⁵

After examining defendant consistent with the boundaries set forth by the Supreme Court, the state's psychiatrist again concluded he could not reach an opinion. But after defendant testified about the forbidden matters at trial, the district attorney moved for a second

evaluation during a recess and the trial court allowed it concluding that defendant had waived his privilege against self incrimination.⁶ The jury then found defendant guilty of murder. But Coulter and Myrick weren't done. They headed back to Salem after making elaborate exceptions to the jury instructions.

The Court of Appeals rejected defendant's principal contention that the court erred in defining "extreme" in the manslaughter instruction as: " * * * the outermost or furthest, most remote in any direction, final or last * * *."⁷ The Supreme Court accepted review. The scholar Don Coulter argued the case. After an expansive discussion of the history of the defense of extreme emotional disturbance from the Anglo-Saxon law before the Norman conquest of 1066, the unanimous court held the trial court's jury instructions were faulty and reversed and remanded for a new trial.⁸ The court overruled the lead case

See High Court Mentors p 16

(Advertisement omitted)

on extreme emotional disturbance, another Josephine County case involving a double murder and beheading.⁹ In the opinion by Justice Lent, the court struck a balance between applying an objective standard (a reasonable man state of mind) and subjective standard (viewing the circumstances through the lens of defendant's personal characteristics).

Press accounts of the decision quote Myrick, "We don't take a court-appointed case and dump it. We go after it."¹⁰ The DA rejected a reporter's suggestion that Ott might be allowed to plead to manslaughter saying, "We plan to retry Ott for murder."

During the retrial, Myrick suffered injuries when he fell out of a tree while retrieving his cat. He rejected any suggestion that it was a play for sympathy. On retrial, the Myrick Coulter team won a verdict of manslaughter.

While working on jury instructions,

(Advertisement omitted)

Coulter developed a relationship with Professor Herbert Wechsler, a professor of law at Columbia University, a director of the American Law Institute, and chief reporter of the ALI's Model Penal Code. After the court's decision, Professor Wechsler sent a hand written note of congratulations to Coulter:

The outcome is plainly right and I congratulate you on a job well done. At this time of near-hysteria in penal law, it is gratifying to have in the books so accurate and rational an exposition of a carefully thought out reform. Let us hope that you can hold it in the legislature.¹¹

The legislature has not amended the test. I have no doubt that the scholarly and likely poetic briefs of Coulter captured the court's imagination.

While the *Ott* matter was playing out, appellate court records show the Myrick Coulter team was involved in a number of other appellate matters: a quiet title action,¹² a first impression case allowing parents' presence during an *in camera* interview of minors in a custody case¹³ and the defense of an attorney in a bar prosecution.¹⁴

The records reveal many other notable cases for the partners: affirming an award of punitive damages for breach of fiduciary duty by a real estate broker who failed to disclose self-dealing,¹⁵ a finding that marijuana is not contraband when smuggled into the Josephine County Jail,¹⁶ that a mother's sale of her child did not amount to child abandonment,¹⁷ and the binding effect of joint, mutual and reciprocal wills as contracts on interests passing by survivorship.¹⁸ Their diverse trial and appellate practice included divorce, criminal, real estate, personal injury (plaintiff and defendant), tax, business, will contests and proceedings both for and against the Oregon State Bar and the Commission for Judicial Fitness.

Number one priority

The client was always the priority. As the *Ott* case demonstrates, when Coul-

ter and Myrick took a case, they were tenacious. Myrick tells the story of coming to work early one morning finding Coulter on his knees in the middle of 6th Street in downtown Grants Pass. He had a tape measure in hand and was measuring the cross walk stripes. His client was charged with killing a pedestrian in a crosswalk.

Coulter won an acquittal by proving that the crosswalk was not a crosswalk. The regulatory authority required uniform striping of a certain width. Coulter's investigation determined there was a variance. As it turned out, ODOT painters had been refreshing all the crosswalks in downtown Grants Pass and some local merchants paid them to add some striping in a new area for more convenient crossing to their coffee shop. The new stripes were not a crosswalk because they exceeded the width standard.

Coulter would scour pleadings, deed records and would walk in the steps of surveyors and trace legal descriptions back to Donation Land Claims. His lodestar was, "somebody screwed up somewhere."

To young lawyers asking him a question, his response was, "What do the grey books say?" Grey being the color of the Oregon Revised Statutes when this lawyer first received that response. He was always available for help once he was convinced the young lawyer had done the homework. He pressed on us young lawyers to take different forms of order to hearings on motions to get the order signed right away as a prelude to appeal. He expected us to always request special findings. The team's question upon return from court, "Did justice prevail or do we appeal?" Coulter had an extra wrinkle in his brain, a benefit to all those around him, except his opponents in court.

Coulter usually typed his own pleadings and briefs with a manual Royal typewriter. His muscle memory was unable to make the transition to an electric

typewriter. Following one Supreme Court argument by Myrick, Justice McAllister asked him if he would do him a favor upon return to Grants Pass, buy Coulter a new typewriter. I'm sure the courts welcomed the day when Coulter allowed staff to use the new IBM Selectrics on his briefs. Coulter's career ended before Westlaw was widely available.

Finding balance

In balance to their professional lives, these lawyers raised families, volunteered time in our community and played as hard as they worked. Myrick golfed, fished with only dry flies except on the Rogue, and then likely only with a Golden Demon. He also flew airplanes and first shot his age on the golf course at age 87. He's repeated the feat several times.

Coulter was instrumental in obtaining the building that houses the Josephine County Library. He re-built a Stearman airplane and collected Packard

automobiles. On the 50th anniversary of his WWII campaign, he and his wife Carol joined other members of the 5th Armored Division and retraced their route across France and into Germany. We lost a pre-eminent lawyer when Coulter passed away in 2006.

I had the benefit of working with these two lawyers for most of the first decade of my career. The experience left me a better lawyer.

Dick Adams operates Rogue Law Firm PC in Grants Pass. He continues to maintain a diverse practice handling plaintiffs' personal injury and workers' compensation matters, contested estate plans and general civil litigation. He contributes to the OTLA Guardians of Civil Justice at the Guardian Club level. His office is located at 600 NW Fifth St., Grants Pass, OR 97526. He can be reached at rda@roguelawfirm.com or 541-476-2110.

¹ For a full recitation of the facts, see *State v. Ott*,

297 Or 375 (1984).

² *Shepard v. Bowe*, 250 Or 288 (1968). (Court held that with defense of mental disease or defect, trial court cannot compel defendant to answer questions in a pretrial mental examination concerning his conduct relating to the offense charged. Nor can the court compel his counsel to not advise his client to refuse to answer certain questions.)

³ *State ex rel Ott v. Cushing*, 289 Or 705(1980)

⁴ *Id.* at 712.

⁵ *State ex rel Ott v. Cushing*, 291 Or 355 (1981)

⁶ *State v. Ott*, 61 Or App 576(1983)

⁷ *Id.* at 580.

⁸ *State v. Ott*, 297 Or 375(1984).

⁹ *State v. Akridge*, 23 Or App 633(1975).

¹⁰ Grants Pass Daily Courier (July 24, 1984).

¹¹ Professor Wechsler was also a law clerk to U.S. Supreme Court justice Harlan Fiske Stone and argued *New York Times v. Sullivan*. He was an assistant attorney general in charge of the War Division from 1944 to 1946 where he developed the legal framework for the trying of Nazi war criminals during the Nuremberg trials. I can see why he and Coulter hit it off.

¹² *Nelson v. Hughes*, 290 Or 653(1980).

¹³ *Leson and Leson*, 293 Or 368 (1982).

¹⁴ *In re Conduct of Thomas*, 294 Or 505(1983).

¹⁵ *Starkweather v. Shaffer*, 262 Or 198(1968).

¹⁶ *State v. Franklin*, 283 Or 439(1978).

¹⁷ *State v. Laemoa*, 20 Or App 516(1975).

¹⁸ *Ricks v. Brown*, 15 Or App 160(1973).

(Advertisement omitted)