

BODY HEAT: AN EXERCISE IN LEGAL ETHICS OR LACK THEREOF IN
TWENTY-FIRST CENTURY ARKANSAS

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Many theologians have noted that people who have systematic, imbedded immoral behavior of one kind in their lives tend to have compromised consciences and over time will tend to develop problems with other kinds of immoral behavior. With lawyers, other kinds of immoral behavior keep cropping up with little open sign of remorse.

Uncited Author

About The Authors

The authors have been in private practice together for several years. They first met while in law school, much like most of the lawyers they tell their stories about. Professional Responsibility was one of the many classes that they had together. The lectures they received in that class made them realize that so many lawyers were breaking rules that the lawyers just didn't mean to break. They hope that sensational stories like Ned Racine's will help every lawyer to uphold a higher standard.

Other stories of Arkansas attorneys told by the authors include that of former President William Jefferson Clinton and former Arkansas Governor Jim Guy Tucker. Body Heat is meant to follow in the footsteps of the authors' prior works and provide the reader not only a good read, but also a good think about the role that ethics play in the modern practice of law.

Acknowledgments

The facts of this book are taken from Ned Racine's personal journal and interviews with his colleagues and friends. Though the events of this book take place in Hot Springs, Arkansas, any of these events could have occurred anywhere in the United States. Some parts of this story are as old as time: forbidden love, greed and murder. However, recent developments and slight changes in the Rules of Ethics have brought to light many tough ethical issues for twenty-first century attorneys. Parts of this text previously published have been reprinted with permission. We especially thank Ned Racine for sharing his story. We hope that the entire legal profession can learn both through Ned's mistakes and the mistakes of his colleagues. This is the story of Ned Racine and the legal community that made him what he is today: an inmate at Cummins Maximum Security Prison Facility, an ex-lawyer, and a lonely man.

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Introduction

They called it love. The DA called it murder.

The story begins in the late 1990s. Ned Racine is a seedy small town lawyer in Arkansas. During a searing heat wave the sultry Matty Walker picks him up. A passionate love affair

commences but it isn't long before they realize the only thing standing in their way is Matty's rich attorney/ businessman husband, Edmund. A plot is hatched to kill him. Suddenly Racine's neutral life as a small town attorney is put into high gear.

Has the entire legal community of Hot Springs, Arkansas been effected by the heat, or is this just the way law is practiced in the twenty-first century? Racine isn't the only attorney in town to face temptation and to cross over into the gray area of the law. From the judge to the assistant prosecutor, ethical issues abound in this small town.

The Arkansas Ethics Committee receives hundreds of reports a year of alleged attorney violations, but never an entire town. One wonders if the sleazy atmosphere of the racetrack and strip clubs has permeated the ideals of the city's legal community or perhaps it is just the heat...

Chapter 1

A Day in the Life of a Hot Springs Attorney

"Don't worry; we'll sue them dry"... Ned Racine to Mrs. Singer

Ned was sitting in his office putting the finishing touches on an interrogatory he planned to send out that day to the expert witness on the side of that reckless defendant whose car had viciously slammed into poor old lady Singer's car last spring. Mrs. Singer had been in so much pain since that fateful day. Ned was having a hard time finding an expert of his own who was "sympathetic" to the pain that Mrs. Singer insisted she suffered from. No one could quite figure out how her back and leg were injured from that tiny fender bender. Nonetheless, Ned was determined to sue that slimy guy dry for what he had put Mrs. Singer through. His experience in finding his own expert gave him more than enough ammunition for attacking the defense expert witness.

Sometimes Ned wondered if this claim was frivolous, thus violating Rule 3.1(a) of the Arkansas Rules of Professional Ethics. Allowing a client or witness to testify when he only suspected that they were lying wasn't a violation of Rule 3.3. Was it? These were after all tactical decisions that the attorney makes. He was just following his duty to Mrs. Singer. He didn't think he was violating Rule 1.2. He didn't want to get sued for malpractice again. Although his behavior was not always

exemplary, he did often struggle with issues like this. Many times he wrote of these things in his journal.

"This claim for old lady Singer bothers me. It could really make my year if it goes well. I could use a new corvette or maybe one of those big fancy houses by the lake. There's one I've heard about with tons of wind chimes. I'd love to get my hands on a house like that. I just don't want Costanza to throw me out of court again. I can hear the ringing of those words in my ear... "Mr. Racine, your case is frivolous."

This time I checked all the pocket parts on the law but I haven't really questioned Mrs. Singer about the details of the accident. She insists that she suffers this pain even though there seemed to be no medical basis for it. I don't know for sure that she's lying so its my ethical duty to let her testify and to call any witness willing to testify about her condition. It wouldn't actually be fraud on the court, especially since I don't know for sure. Would it? Just because I had to call 85 experts before I found this one, that doesn't mean the suit is frivolous or that I'm perpetrating a fraud on the court. Does it?"

He knew if he went before Judge Costanza again that he might be in trouble. All of this bothered him, but he needed the money. It was hard to make a living in Hot Springs being an honest lawyer. Without cases like this Ned would not be able to dine out at the expensive restaurants he so loves. Ned quickly returned to his interrogatory.

Chapter 2

A Day in Judge Costanza's Court

"Don't come back into my courtroom unless you have either a better defense or a better class of clientele"...Judge Costanza to Ned Racine__

By calling them "judges" we both make them superior and assert that their superiority is justified. They are still, however, human beings, and as such, sometimes fall down on the job, morally and otherwise.

The quality of our judges is the quality of our justice.

Robert A. Leflar

From the first time that Ned set foot into Judge Costanza's courtroom a dark cloud had loomed over their interactions. Costanza was recently sanctioned for statements he made to Ned regarding one of his criminal clients. This was not the first time that Costanza had influenced Ned's future in the legal community and it wouldn't be the last.

As a young attorney, Ned erred in drafting a will for old man Gorson. The will was so messed up that it was declared void by Costanza in the probate action. A malpractice suit followed shortly thereafter. Attorneys on the case would later tell Ned that they were "practically forced" into pursuing the malpractice action against him by none other than his favorite judge, Costanza. Did Costanza abuse his usual influence over attorneys and the community at large with regards to Ned Racine? Years later during the investigation into Edmund Walker's death,

Costanza revisited what appeared as Ned's incompetence in will drafting. This time it appeared that Ned had written a will that violated the rule against perpetuities. It seemed as if history had very conveniently repeated itself.

Because of Judge Costanza's obvious bias and avid dislike of Ned, should he be disqualified in all cases in which Ned serves as counsel? Is this his duty according to The Arkansas Code of Judicial Conduct Canon 3(E)? In a small town such as Hot Springs, is this really feasible? Do his actions toward Ned rise above mere "general hostility"? Or does he believe that his authoritarianism is the only way to keep criminal and civil defendants from taking advantage of the system?

Judge Costanza has exhibited personal bias against Ned on several occasions. Yet, if Ned stands up for himself he runs the risk of being held in contempt of court and further prejudicing his client. He details his painful experiences with Judge Costanza throughout his journal entries.

"I lost yet another case in front of Judge Costanza today, well ... pled out, but same difference. He wouldn't even let me get the facts of the case out before degrading me in open court. I swear since day 1 he has never given me chance. Should I report that slimy creature to the Ethics Committee? Or would that make life harder on me?"

Has my entire legal career been framed by Judge Costanza? Today while in Pine Bluff on business I ran into the attorney who pursued the malpractice action against me on that Gorson case. In 30 seconds or less he said that Judge Costanza had forced him into

pursuing that action against me. Did I ever have a chance to succeed as an attorney in Hot Springs or was that judge always against me? I thought that it was just my class of client... but this goes much deeper. I should have just called him on it in open court and risked being held in contempt. At least that way I would still have my pride. I wonder what he will have to say to the Ethics Committee? I would love to see the look on his face when Stark Ligon gives him a call.

I think I'll take the rest of the day off and just think about it over a cigarette and a few drinks. Maybe a drive to the lake where the jazz bands are playing would clear my head. Then I could make the right decision."

Currently, Ned's adventures in front of Judge Costanza are tabled due to his incarceration and subsequent disbarment. However, the Ethics Committee will meet later this year to consider whether or not Costanza's actions in the will issue are subject to sanctions.

Chapter 3

The Attorney Turned Businessman: Edmund Walker

"Honest attorneys don't make very much money and the other kind are too slimy for me"...Edmund Walker to Ned Racine

As Hot Springs' crime rate shot up in the nineties and respectable business owners moved out of the once hip Breakers area, businessmen such as Edmund Walker moved in. Walker was born and raised in Little Rock, where he later decided to start his law firm. However, Walker soon grew bored with the practice of law and left it to pursue other more lucrative opportunities. Walker still retained his license to practice law until shortly before he was murdered.

When asked for more details about his business, Walker responded by saying that he did "various things" involving venture capital opportunities. His former business associates have refused to comment on their business practices. Walker was very much admired among his friends and associates as a man who was willing to do whatever it took to get an idea off the ground. He apparently left the practice of law because he wanted to be upfront to the people that he was shafting.

"I met Matty's husband last night. I was pretty shocked when I saw Matty at the restaurant. I wanted to reach out and grab her. Just then HE appeared. It seemed like he came from nowhere. He looks much older than I had pictured him. I can see why she doesn't want him to touch her. She was dressed so different from how she dresses when she's with me. He hair was up. She looked 10 years older, more like someone he'd be with

than the vixen that I'm falling in love with. He invited me to join them for dinner. I thought I'd die but I didn't know how to get out of it. Besides, I was curious as to what he was like so I did. He knew how to make me feel small. Said he went to Columbia and that Arkansas was a "good school." How I hate pompous guys like that.

I asked him what type of business he was in. Boy, did he give me the run around on that one. It makes me even more curious as to what that old goat is up to. "Various things" he told me. I'm sure he must have that response down cold and give it to everyone who asks. Said he got bored of being a lawyer and wanted to make the money faster. He said something like "honest lawyers don't make very much and the other kind are too slimy for me." Who is he trying to kid? Can't get much slimier than him. Matty thinks he's into something illegal but says he won't even talk about it to her. I heard he bought his way out of some federal charge over in Eastern Arkansas. Surely she knows what her own husband is up to.

He made some comment about guys wanting to get rich quick but not be willing to do what is necessary. That slimy guy, I didn't know what he meant until I stopped at the Breakers today when I went for my run. As I sat on the beach smoking my cigarette, just then it came to me. He had to die. I knew what Matty and I had to do."

Fraud is Fraud

With so little talk about Walker's business practices and his generally low profile in the community, it was a surprise when the prominent local businessman was disbarred shortly before his murder. Walker was either unaware or simply didn't care that an attorney can be disciplined according to Rule 8.4 for conduct that is unconnected with his activities as an attorney. It doesn't matter whether the client is harmed or not. It seems as if Walker's reluctance to disclose the particulars of his business practice, stemmed from their illegal basis. Matty was right all along.

A Prominent Local Law Firm Moves On After Walker's Disbarment and Murder

Although Walker had not taken any new clients in the past 5 years at his Little Rock law firm his name still remained on the door. Only shortly before his death was it removed from the door of Walker, Smith, and Jones. Smith is quick to point out that Smith and Jones did not want to be guilty of violating Rule 7.5. They would have retained Walker's name upon his death to show respect. Once he was disbarred, they immediately removed his name from their law firm.

Senior Partner, Mark Smith expressed dismay and disappointment when interviewed by *Vanity Fair* after Walker's death. Stories in local publications had openly speculated as to

whether the other members of Walker's firm were involved in his schemes. Both Smith and Jones, deny any involvement in Walker's illegal course of conduct.

Chapter 4

An Assistant D.A. Covers for a Friend, and Tap Dances Around Disbarment

"Buddy Your Lawyer Is Present"...Peter Lowenstein to Ned Racine

"I have no respect for a person who would not lie for a friend."

Overheard at a local Arkansas Bar Association Meeting and reprinted in the Arkansas Lawyer

A prosecutor may forego legitimate charges, but should an unsavory victim or well-liked criminal suspect have any role in the prosecutor's decision to be lenient?

Ned and Peter Lowenstein met in law school at University of Arkansas, Fayetteville. They became social friends and both started their perspective legal careers in Hot Springs. Lowenstein became an Assistant Prosecutor while Ned started a solo practice doing general law including numerous criminal cases. Throughout the years they have remained close friends and would see each other often either on opposite sides of the courtroom or across the lunch table at the local diner.

Lowenstein recognized early on that Ned had an attraction for trouble. The local judge frequently chastised Ned for his low class clientele and shabby defenses. Ned also had a thing for the ladies. Lowenstein would forever live his life vicariously through the stories Ned would tell the next day about the ladies he had been with.

"Peter loves to hear me tell about my women. Sometimes he comes to my place to read Playboy and hear my stories. Today I told him about the hot waitress who was at my place when I noticed the building down the street was on fire. My cigarette was just about through when I thought about how it was probably Teddy Lewis who started that fire. Betty was zipping up her skirt but I just couldn't let her go yet. When I told Peter about this at the diner he quickly said "More Neddy boy, tell me more." He's told me repeatedly that if he can't live my love life through me he'd just have to settle for his wife and that would be so boring. Not me, I'll never fall for a dame like that. I want to be free forever."

It came as no surprise to Lowenstein when Ned became involved with the beautiful Walker widow. It was only a short time later that Lowenstein discovered the depth of his long time friend's involvement in Matty Walker's plot to murder her husband. Was Ned actually involved or was it just a plot to frame Ned for her husband's murder while she escaped to some sultry island? Lowenstein always believed the story Ned would tell, even from Ned's prison cell.

"I was pretty surprised to find Peter and Oscar at my place when I got home today. They wanted to talk about Matty. They asked me how I got involved so I had to make up the story about the Walker's wanting the will redone. I hate to lie to friends but what can I do? Peter thinks Matty is bad news and told me to take some "incredibly intelligent advice and stay away from her." He must think something is up because until now he has wanted me to sack every good-looking chick in town just so I could tell him about it. I hope they don't suspect. I told them that I was going out to her place tonight and I was going to keep on going as long as that rich dame would have me. I hope this is a good cover. Maybe they won't suspect. Peter thinks my anatomy is going to get me in trouble with Matty. I sure hope so!!"

"The More I know about the man the happier that I am that he is dead. I don't care who gets rich because of it"...Peter Lowenstein to Ned Racine

Lowenstein didn't have much public outcry to investigate Edmund Walker's death. And personally he felt as if Walker was a bad guy. Lowenstein even stated off the record that he "didn't care who killed him or who got rich from doing it." He suspected Matty Walker from the beginning, but backed off of the investigation when he realized that his law school buddy Ned Racine was more involved than he thought. But could he make the city detective back off?

"Someone Is Putting You In Trouble Man"...Peter Lowenstein to Ned Racine

Lowenstein knew that Matty Walker was the kind of woman a man would kill to be with. Unfortunately he also knew that Ned was one of those men who would kill to be with her. Worse yet, Matty was setting Ned up to take the fall. Lowenstein was torn between his oath as a prosecutor and his dedication to his friend. City Detective Oscar Grace was also torn about what to do. For Grace it was easier. Although he was a friend of Ned's, he didn't have to follow those same professional conduct rules. He hadn't gone to law school and taken Professor Brill's Professional Responsibility Class with Ned like Lowenstein had. Lowenstein hadn't done well in that class but he knew some of the things he was doing just weren't right. He tried to remember back to that IPI about the prosecutor's duties. He couldn't remember what the answer to question number 8 was. Oh well, he'd find a way to get Ned a light sentence, if he had to prosecute him.

In the end Lowenstein chose his friend. He asserted his power as assistant prosecutor to protect Ned. When Grace was questioning Racine about his whereabouts on the night of the murder, both the detective and Lowenstein suggest that Ned go out the back door to avoid a young witness to one of Matty Walker's marital improprieties with Ned. However, the protection did not stop there.

Later that same evening, Lowenstein disclosed to Ned that not only was he a suspect in the crime, but that someone was putting Ned in trouble. Ned asked if he needed an attorney to participate in that conversation. Lowenstein responded, "Buddy, your lawyer is present."

During this late night meeting, Lowenstein disclosed the mounting evidence against Ned including: the mysterious disappearance of Mary Anne Simpson, the hotel phone records, and the tipster who wanted to turn over Edmund Walker's glasses to the police. This information would have to be disclosed if and when Ned was arrested anyway, so was it wrong for him to tell his friend about it now? Was Lowenstein acting as Ned's attorney? Was he breaking Rule 1.7(b) in allowing his own interest in his long time friend to come in the way of his duties as his attorney? Was he assisting his friend in fabricating a defense, thus violating Rule 1.2? Or was he merely giving advice? If this was just advice, was it as an attorney? Or just as a friend?

Or was he following Rule 3.8 (d) in making a timely disclosure to who he believed would be the "defense" attorney. After all, Ned had represented many criminal defendants against Peter. Maybe Lowenstein was just prematurely assuming that Ned would be the defense attorney this time. It doesn't seem as though that's what Rule 3.8 (d) is all about, but what would Lowenstein say? Lowenstein has declined to comment on his

involvement and is currently running for Deputy Prosecutor in Fayetteville. Perhaps he hopes the people of Northwest Arkansas don't keep up with what goes on in Hot Springs.

Chapter 5

An Attorney Turns to a Client for Advice

"Of course, that's my recommendation, anyway. Don't do it. Cause I'll tell you, counselor, arson is a serious crime"...Teddy Lewis to Ned Racine

Matty waited in the car while Ned went in to see Teddy Lewis. Ned had represented Teddy before in an arson case. Ned knew that Teddy would give him just what he needed to blow up the building where he would leave Walker's dead body. This way it would look like Walker was trying to burn down his own building and something went wrong. Walker would be dead and Matty and Ned would be rich.

When Ned walked into the room he heard Bob Segar singing "Feel Like A Number" loudly on the radio. He remembered how Teddy always liked his music. Teddy showed him how to rig the bomb but Ned just couldn't quite get it. He figured it would be so easy. Teddy asked if he was having problems and said, "what's the matter counselor, can't you work to a little music." While Teddy helped Ned he told him that the bomb could be rigged to a clock or to something that moved. "Just add a little gasoline," Teddy told him. Ned inquired if he could just use regular gasoline, to which Teddy replied "regular, unleaded, supreme, whatever you like counselor." Teddy told Ned that the bomb would be easy to spot but Ned didn't care about that. Since he wanted it to look

like Walker had committed arson, all the better. Teddy then warned Ned not to do it.

Ned asked if that was all there was to it and Teddy's words would haunt Ned for years to come. "No, that's not all there is to it. You've got to get in, you've got to get out, you've got to pick the right spot, the right time, and try not to get famous while in the act. If that's all there was, any idiot could do it." Ned was confident at that point that he had thought of everything. Teddy insisted that Ned not do it and even offered to do it for him. Ned was sure he could pull it off. He had been to law school. He was no idiot. Granted he wasn't top of his class but nonetheless, he graduated.

"Teddy insisted that I not go through with setting the bomb. What he said makes a lot of sense. It was eerie to hear my own words come back to me about criminal acts. "Any time you try a crime, you've got 50 ways you can mess up. If you think of 25 of them, you're a genius and you aint no genius" Teddy said. When I first told Teddy that very thing, I never imagined that he would someday be saying it to me. I often say stuff like that to my criminal clients. I can't believe we are going to actually kill Walker. Teddy offered to do it for me. I should probably let him. He does have more experience, but I can't. I want to kill that man myself."

Ned should have listened to his client. They say lawyers never listen to their clients. If he had listened that one time, he would have saved himself some trouble. A lawyer is supposed to be the poster child of lawfulness and truth. He attends law school with the purpose of furthering the law, of protecting clients' interests, and preventing future crimes.

Ned certainly violated Rule 8.4(b) that prohibits a lawyer from committing a criminal act. Ned not only committed first-degree murder, he also committed arson when he burned down the

infamous Breakers building. Was he trying to destroy the evidence of the murder or to just make the murder look like an accident that happened while Walker was himself committing arson? Destruction of evidence would have broken Rule 3.4. Was that Ned's intent?

Burning down a building was not the only attempt by Ned to withhold or destroy evidence. When his friends Lowenstein and Oscar Grace informed him of the missing wire-rimmed glasses, he interrogated Matty on their whereabouts for the implied purpose of either destroying them or withholding them from the police. Later, when Matty told Ned the glasses were located in the boathouse, he went to there to retrieve them. He never retrieved those glasses because Matty too had visited Teddy Lewis and learned that a bomb could be rigged to the door. She then planted a bomb in the boathouse trying to kill Ned. At least that's the story that Ned tells. Everyone else believes that Ned rigged that bomb and killed Matty to get all the money for himself.

Ned also lied to Lowenstein and Grace concerning the night of the murder, as well as the extent of his relationship with Matty. All those false statements that Ned made to Lowenstein and Oscar while they were investigating Walker's death violated Rule 4.1. Ned never reported Matty's actions. Although he knew that she was a conspirator in the murder and changed her husband's will without Walker's consent, Ned couldn't report any of that without giving himself away. Ned was only to discover later that Matty was also involved in fraud in portraying another person, murder of the real Matty Walker and obstruction of justice. Thus by not disclosing material facts needed in the investigation, he assisted Matty in her criminal and fraudulent acts.

"Any time you try a crime, you've got 50 ways you can mess up. If you think of 25 of them, you're a genius and you aint no genius"...Teddy Lewis to Ned Racine

And what about the convicted arsonist Teddy Lewis? He assisted Ned in building a bomb to burn down a building. He was later charged for being an accomplice in the murder. Thus, Ned assisted a former client in committing a crime, and Rule 4.1 applies here as well. Teddy not only provided Ned with the materials and instructions on how to set the building on fire, but also offered to commit arson for Ned so that Ned would not be charged. It was the least Teddy could do, since Ned was the reason he was out on the streets. Although a former client can give gifts to their lawyers as a "thank you," the Committee on Professional Ethics did not intend for a criminal act to be considered as such a gift.

Later, Teddy called Ned to the local jail, as he had an urgent need to talk to him. There, at the prison, Teddy informed Ned that he has been arrested on suspicion of another arson. Ned told Teddy that he would find out about it, but Teddy stopped him, stating he found another lawyer. By dropping the conversation, Ned didn't violate Rule 4.2 or Rule 1.16(a)(3). Teddy also informed Ned that he was questioned on the Breakers building fire, to which he told Ned that he did not tell the police investigators anything incriminating.

Chapter 6

A Lesson in Probate Law

When someone dies, that person's property is distributed in one of three manners: (A) Intestacy (B) Testacy or (C) Theft.

The Underground Lawyer...

"Mrs. Walker has submitted the new will you wrote up there"...Miles Hardin to Ned Racine

Racine's mind started to wonder off his deposition summary but this time he was thinking about Matty and how she looked the night before in that tight white dress. Just then the loud ringing of his phone startled him. Ned heard his secretary call out to see if he would speak with a Mr. Miles Hardin. Ned had no idea what the call was about but didn't think it was good since he didn't recognize the name. Mr. Hardin wanted to talk to Ned about the will that he had changed for Edmund Walker. Ned spoke slowly as he agreed to this meeting but once off the phone, he could feel a sudden panic attack coming on.

What had Matty done? He thought they agreed to leave Edmund's will alone. Now he had to defend "his work"? He didn't even know what the will said. They talked about changing the will but agreed not to. All the elements of a will contest were already present without making any changes: an impressive fortune, a much disliked vixen of a wife already destined to inherit almost everything, and a distrusting sister who wanted her daughter to be "comfortably" supported.

Matty hadn't told him that she changed anything and now Ned was left to pick up the pieces. Ned hadn't always done things

right, he knew that. Murdering Walker wasn't right, but he hoped that what Matty did hadn't done them in.

No matter whether you believe Ned's story about how those changes to the will came about, Ned had assisted Matty in the unauthorized practice of law. Ned says Matty insisted that they change the will so that Matty would inherit everything rather than the half that Walker had intended for her to have. Ned insists that he made it clear to her that they could absolutely not change the will but that she proceeded anyway based on some knowledge she had from a previous job with a law firm. Ned maintains that he knew nothing of the changes until he received that phone call. However, his insistence that the will not be changed was to prevent them from being suspected in the murder. This decision had nothing to do with Ned's ethical dilemma.

"Frankly, we may have a problem"...Miles Hardin to Ned Racine

Ned knew how it felt to be labeled by the legal community as incompetent. He certainly didn't want to relive that experience. He knew how it felt to have his work called into question by Stark Ligon's office and he didn't want to receive another call like that. This was one reason he still hadn't done anything about Judge Costanza and his behavior.

Ned knew how it felt to be sued for malpractice. He told Matty he couldn't purposely change Walker's will without consent and neither could she. He had messed up before when writing a will for old man Gorson. That time it was a mistake. Ned simply didn't realize that what he had done was such blatant incompetence thus violating Rule 1.1.

Perhaps he was too busy then with his social life to realize what every lawyer learns in first year property class. Perhaps Ned was absent that day with a hangover, or perhaps Ned never bothered to check with anyone else before he drew up old man Gorson's will. Ned himself wasn't sure what happened the first time but when Matty suggested they change Walker's will, Ned knew

he couldn't go through that experience again. Ned maintains his innocence in the changes to the will.

"Tonight after making love, Matty suggested that we rewrite Edmund's will so that Heather would be cut out and Matty would have it all. She asked me how to do this. I'm sure she doesn't know of my past problem. She was just seeking the advise of an attorney. I don't think I like the thought that I'm her attorney. I'd rather be her lover, but I guess I'm both. Although having all the wealth of her sleazy husband would set us up perfectly, I just can't do it. If the disciplinary committee ever got wind of this... I just can't relive that experience again.

Matty is getting too greedy. We will be happy with half. No matter what it is, it will be enough. I told Matty that and she agreed. I hope she doesn't do anything stupid."

"You mean it's all mine?"...Matty Walker during discussion on the revised will

Matty's story was that Ned told her that he knew how to make the will invalid. She said he explained to her that the rule against perpetuities forbids the inheritance to be passed down for generations and that this alone would make the will invalid. Matty claimed that Ned went on that night to tell her that if this were to happen that it would be as if Edmund had died intestate and that by state law she, as spouse and only surviving heir, would inherit it all. Matty's story included Ned not only giving her legal advice but also assisting her in making the changes to the will. Was this advice given in assisting her in the unauthorized practice of law or was it just advice that an attorney gives to his client?

" There's a technical problem in the language of the bequest to Heather"....Miles Hardin to Ned Racine

Whether you believe Ned or Matty, the result is the same. Ned violated Rule 5.5 (b) when he assisted Matty in the unauthorized practice of law. While many times it is difficult to ascertain what comprises the practice of law, in this case it is not. The preparation of legal documents is clearly among the things that are agreed upon in the legal community as falling within this definition. A will is just such a legal document.

One reason for having this rule is for the protection of the public against legal services by unqualified persons. This is a perfect example of how the public could be damaged by an unqualified person practicing law. The will was changed in such a way that the entire outcome thwarted the wishes of Edmund. Edmund has his attorney, Miles Hardin, draw up a will that would leave half of his estate to his wife and half to his niece Heather. Heather's mother, Roz, was devastated when she found out that her daughter was totally left out. This was certainly not Edmund's wish.

"I just hope you haven't done us in"....Ned Racine to Matty Walker

Matty admitted that she changed the will. Where their stories differ is in how the changes came about. Either way, the analysis must include the fact that when Ned found out about the change he did nothing. This ratification of the behavior, whether originally authorized or not, is another indication of unethical conduct on Ned's part. Did he violate Rule 4.1 in making false statements or failing to disclose a material fact to a third person? Was this a material fact or was Ned upholding Rule 1.6 in confidentiality to a client?

Walker's attorney, Mr. Hardin, called Ned after the death to say that there was a problem with the will. Ned, knowing that he himself had not drawn up the will, lied to Hardin and said that he did. Ned further perpetuated this lie when he attended the meeting to discuss the problem with the will. Ned pretended that he had made the changes to the will and that he knew what

those changes were. Ned now maintains that he knew nothing of those changes and that he did not know Matty had made them. He was not truthful to the other attorney, or to anyone else in the room at the time. Was he doing this to protect the confidentiality of one of his clients? After all, Matty had sought his legal advice about the will.

"After the meeting I walked Matty to her car. God, she looked so good in that tight black dress. I figured out how she had gotten my stationery and signatures she needed to make those changes. She invited me over but all I could think of was what would the guys think. I wanted so much to go. Later that night she told me how she made the changes. For once I couldn't even enjoy just looking at her body for all the fears I had about what was to come in the future."

"The Kraft lady is convinced she won't be cut in on the will" ..Oscar Grace to Ned Racine

A nonlawyer who engages in the unauthorized practice of law may be subject to an injunction, contempt, or criminal prosecution. Wouldn't Roz Kraft, Edmund's sister, who lost all that money because of the invalidity of the will like to know about that? In addition, a lawyer who assists in the unauthorized practice of law is subject to discipline. Ned's only hope of escaping discipline for these actions would be that he maintains that it was for Matty's confidentiality. Confidentiality kept him from disclosing that Matty had been activity would violate Rule 1.6. However, Rule 1.6(c) would allow Ned to wave the red flag and disavow any involvement. That is, if he truly wasn't involved.

Would Roz Kraft be able to sue Ned for malpractice in drafting the changes to Edmund's will that left her daughter out?

A 1987 statute in Arkansas involved in criminal activity in changing Edmund's will without Edmund's consent? For Ned to divulge Matty's past criminal provides that "a lawyer is not liable to persons not in privity of contract for civil damages arising from acts, omissions or other conduct in connection with professional services." Ark. Code Ann. §§ 16-22-310, 16-114-303. Roz Kraft would be out of luck on a malpractice suit against Ned unless she can show that this falls within one of the two exceptions: "fraud or intentional misrepresentation by the lawyer or knowledge that a primary intent of the client was to benefit or influence the third party, provided the third party was identified in writing and notified by the attorney." Roz Kraft doesn't seem to have any more luck than money in this situation.

"How did you ever get involved with this lady? She's poison"...Oscar Grace to Ned Racine

The question of when the attorney-client relationship between Ned and Matty began remains a mystery. For sure this relationship was in place the minute that Ned told Hardin that he represented the Walkers and when he walked into the room where the will was being discussed. Ned came to that meeting under the pretenses that he represented both Walkers and to discuss the changes he had made to Edmund's will. The question remains when Matty, with or without Edmund's involvement, first sought Ned's advice as an attorney. For an attorney-client relationship to be

established, no money need change hands, no formal agreement need be drawn up, and no official representation need be apparent. If a client comes to an attorney with the express desire to share a confidence and obtain legal advice, an attorney-client relationship has been established. As Matty's attorney, Ned violated Rule 1.2(d) in engaging or assisting her in conduct that is criminal or fraudulent. Whether he was assisting or counseling her in these activities, Ned has violated his ethical code of conduct.

"They came in while you were on vacation. They live in Pine Haven, I think"...Ned Racine to his secretary, Beverly

To the world at this time, Ned's representation was a joint representation of Matty and Edmund. Had the underlying murder not been the driving force for all the lies that Ned told, would it have been unethical for Ned to secretly help Matty in rewriting the will without disclosure to Edmund? If Ned had helped the couple plan their estate and years later one of them came to him to represent only that person, Ned could have argued that the representation of the couple was over. However, this would have been a clear betrayal of Edmund. This activity would have violated Rule 1.9 in a conflict to a former client or Rule 1.7 (b) in materially limiting his representation of Edmund by his responsibilities to Matty and her secret activities. Ned, if put in this situation, should have told Matty to seek help elsewhere.

No matter how you analyze the sleazy behavior of attorney Ned Racine in his civil side of life, it could certainly be said that he violated Rule 8.4(c) in engaging in conduct involving dishonesty, fraud, deceit and misrepresentation. He also violated Rule 8.4(d) in engaging in conduct that is prejudicial to the administration of justice. If Ned Racine ever gets out of jail, it's for sure he'll never practice law again.

Conclusion

It is racing season again in Hot Springs. Professional gamblers fill seats in the Jockey Club, smoking cigarettes and ordering drinks all around. The boats and jet skis cover the lake and the traffic is at a stand still going through town. A warm breeze ushers in summer. The wind chimes at the empty Walker house softly clang.

A new assistant prosecutor and defense attorney stand before Judge Costanza as he plays God or at least King of his court.

At a hotel bar, customers watching the local news about Ned Racine's convictions and the investigations into Lowenstein and Judge Costanza have nothing new to say. What's the point? Every nonlawyer is relatively sure that you have to sell your soul to the devil to become an attorney. Perhaps they harbor the belief that The Devils Advocate was a nonfiction piece, perhaps they don't care.

On law school campuses across the south, students have formed or are forming Ned Racine societies. Membership is based on class ranking and is usually limited to the bottom 20% of the class. They pride themselves on their greed and incompetence. Many of the men are also being easily persuaded to commit sordid acts by alluring women. The goal is to be able to smoke a cigarette and practice law at the same time.

Meanwhile, Stark Ligon's office in Little Rock is gearing up for another long hot summer. The ethics committee has hired extra staff and a compelling story of greed and wasted careers comes to an end.

A Framework for the Ethical Practice of Law

The following Rules of Professional Ethics have appeared in the text:

Rule 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Rule 1.2(a): " A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."

Rule 1.2(d): "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law."

Rule 1.6: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation..."

Rule 1.6(c): "Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like."

Rule 1.7(b): " A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation..."

Rule 1.9(a): "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."

Rule 1.16(a)(3): "...a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if...the lawyer is discharged."

Rule 3.1(a): "A lawyer shall not bring or defend a proceeding...unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

Rule 3.3: "A lawyer shall not knowingly (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (4) offer evidence that the lawyer knows to be false. If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable measures..."

Rule 3.4: "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; (b) falsify evidence, counsel or assist a witness to testify falsely..."

Rule 3.8(d): "The prosecutor in a criminal case shall...make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal..."

Rule 4.1: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a

criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

Rule 4.2: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

Rule 5.5: "A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

Rule 7.5: Comment 1: "It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name... However, it is misleading to use the names of a lawyer not associated with the firm or a predecessor of the firm."

Rule 8.4(a): "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

Rule 8.4(b): "It is professional misconduct for a lawyer to...commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

Rule 8.4(c): "It is professional misconduct for a lawyer to...engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Rule 8.4(d): "It is professional misconduct for a lawyer to...engage in conduct that is prejudicial to the administration of justice..."

Judicial Canon 3(e): "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned..."

ADDENDUM

THE FOLLOWING DISCIPLINARY ACTIONS WERE RECENTLY PRINTED
IN THE ARKANSAS LAWYER

LAWYER DISCIPLINARY ACTIONS
FROM THE ARKANSAS LAWYER
VOL. 01 No. 01 Spring 2001

DISBARMENT

NED RACINE #11111
Little Rock/ Hot Springs, Arkansas.

A disbarment complaint was filed October 22, 2000, stating Attorney had been convicted of felony counts too numerous to list (but including murder, arson and obstruction of justice) in the United States District Court of Eastern Arkansas on September 15, 2000, and entered a guilty plea in the same court on June 1, 2000. Attorney entered into an Agreed Order of Disbarment in Pulaski County Court based on violations of Model Rules 8.4(b), 8.4(c) and 8.4(d), and the Supreme Court ordered disbarment.

DISBARMENT 01-15-02.

DISBARMENT
Local Attorney who was not connected with this story but who

could have been had he known Ned Racine and his seedy gang.

DISBARMENT

EDMUND F. WALKER #00000
Little Rock/ Hot Springs, Arkansas.

A disbarment complaint was filed November 23, 1999, stating Attorney had been convicted of two felonies (racketeering and money laundering) in the United States District Court of Eastern Arkansas on October 15, 1999, and entered a guilty plea to a third felony (extortion) in the same court on June 15, 1999. Attorney entered into an Agreed Order of Disbarment in Pulaski County Court based on violations of Model Rules 8.4(b), 8.4(c) and 8.4(d), and the Supreme Court ordered disbarment.

DISBARMENT 04-15-01.

JUDICIAL DISCIPLINARY SANCTIONS
FROM THE ARKANSAS LAWYER
VOL. 02 No. 02 Spring 2002

THE HONORABLE ROBERT C. COSTANZA
DISTRICT JUDGE
P.O. BOX 1234
HOT SPRINGS, AR 71901
Re: Case # 01-103

Dear Judge Costanza,

At the October 3, 2001 meeting, the Judicial Discipline and Disability Commission decided to issue a letter of admonishment to you in complaint number 01-103. After a review of the complaint, your responses, the results of the investigation, and other material, the Commission determined that you violated the Code of Judicial Conduct.

The Commission found that on July 1, 2001 a young local attorney appeared before you. In a crowded courtroom, while chastising the attorney and his client, you stated, "That it was clear that defendant was guilty of fraud." This statement came before any facts or testimony were presented in the matter.

Additionally, while addressing the attorney you stated that if the defendant did not immediately accept the plea agreement offered by the state, that you would "nail him." You unilaterally and systematically cut the heart out of the client's defense by openly taking sides and by not allowing the client to present his side of the case, and by continually discrediting the attorney in open court.¹ You then continued to chastise the attorney and stated "You had better find a better defense or class of client before returning to my courtroom."

You indicate in your response that the defendant had been a repeat offender and that previous punishment had not been effective. With regards to the attorney, you indicated that he had repeatedly appeared before you with obviously guilty clients and had continually failed to plead accepted defenses for them. You stated that it was your goal to bring home squarely to these persons the extent of their continued violations. Although that you believed such language would have the salutary effect of preventing further criminal violations, the Commission disagrees. Your language was not appropriate and fails to comport with the requirements of the Code of

¹ Michael Louis Minns, *The Underground Lawyer* (1989) (discussing the two worst judges that he had ever appeared before, Judge Frank Seay of the Eastern District of Oklahoma and Judge Andrew Ponder of Lawrence County, Arkansas).

Judicial Conduct that a judge be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others and maintain proper decorum in the courtroom.

Hot Springs Tribune

July 15, 2001

*Convicted Arsonist Questioned on Breakers
fire*

Police are holding convicted arsonist Teddy Lewis in custody as they question his whereabouts on the night of July 4, when the Breakers building burst into flames.

Lewis had been arrested for the fire that destroyed a factory building in the older section of Hot Springs. Police noticed several similarities between the factory fire and the Breakers fire, and have decided to question Lewis about his whereabouts and any other information he has to offer.

"The accelerant and the contraption used to burn Breakers are

very similar to prior fires Mr. Lewis has been convicted of," said Police Chief Andy Griffith.

The Breakers building, once owned by Henry "Old Man" Fisher, had been bought by Edmund Walker, a wealthy businessman. Walker's burned body was found by the source of the fire.

Ned Racine, Lewis' former attorney, cannot represent Lewis as he himself is being investigated for the Breakers fire. Racine could not be reached for comment. Lewis meanwhile has found other representation.

Lewis is scheduled for arraignment on July 31.

CITY OF HOT SPRINGS
STATE OF THE CITY
ANNUAL REPORT
JANUARY 31, 2002

STATE OF THE CITY REPORT

As required by Arkansas state law, this State of the City Report is being prepared to update the citizens of Hot Springs on the status of your city government. I always find it refreshing to look back, both in terms of our achievements and disappointments.

According to state law, our municipal courts officially were renamed as district courts in 2001. Court activity increased dramatically with over 36,000 criminal/traffic cases and 1,335 small claim cases.

As indicated, there are usually several setbacks or disappointments that take place every year. Heading the list for 2001 is the fact that several of our legal practitioners have been the subject of much criticism from the Arkansas Ethics Committee. This has created a negative perception of our judicial system. This is starting to impact the residents of this area. We will have to develop a permanent solution to this problem, however in 2002 the city of Hot Springs in conjunction with the Arkansas Bar Association will be sponsoring a CLE on Professional and Judicial Ethics. The CLE will feature the Vincent Foster Professor of Professional Responsibility and Legal Ethics from the University of Arkansas, Howard Brill. Professor Brill is excited to join us and help our city out. In addition, Hot Springs attorneys are required to retake and pass the MPRE during 2002. I am confident that this approach will be the first step in solving these problems, which have characterized the legal practitioners of this fine city.

City Manager

William Hurt

William Hurt