The Litigator

Published by the Litigation Section of the North Carolina Bar Association • Section Vol. 32, No. 1 • February 2012 • *www.ncbar.org*

The following article was published in the February 2012 edition of the NCBA's Litigation Section Newsletter.

"Five Things Mark Ash Taught Me"
By Clifton L. Brinson

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On Feb. 21, 2011, the North Carolina bar lost one of its best litigators when Mark Alan Ash passed away. After graduating from Harvard University in 1975 and the University of Virginia School of Law in 1978, Mark practiced in Boston before moving to Raleigh and joining Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP. He was a litigator at Smith Anderson for over 20 years, during which time he accumulated numerous honors, including a place in the Top 100 in *North Carolina Super Lawyers* and admission to the American College of Trial Lawyers.

Mark Ash

Mark was a mentor, example, and resource for many attorneys at Smith Anderson. I had the privilege of working with Mark closely during his final years of practice. The lessons I learned from him were numerous and invaluable. I've tried to capture a few of them in this essay.

1. Know your case, not your notes.

We had been working on a wrongful death case for years, and were finally at trial. The decedent was a senior executive, still in the prime of life, who earned in excess of $1 million per year. Accordingly, the damages being sought by the estate were substantial. The case hinged largely on expert testimony – we had our experts, the plaintiff had hers, and the party whose experts the jury found more credible would likely win the case. The plaintiff's primary expert, who had extensive experience giving trial testimony, testified at length. Finally, the witness was tendered to us for cross-examination. In preparation for this key moment in the case, Mark had . . . about a half-page of scribbled handwritten notes.

Armed with only this meager outline, Mark launched into a detailed cross-examination of the plaintiff's expert. And it was brilliant. It quickly became clear to everyone in the courtroom that Mark understood the subject matter at least as well as the expert, if not better. He deftly pushed past the expert's talking points and elicited the admissions that we needed for our case.

The brevity of Mark's notes (on this and other occasions) was not from a lack of preparation. It was exactly the opposite – Mark was always so prepared that he didn't need to rely heavily on written notes. He knew exactly what the key legal and factual issues were in the case, and where any given witness fit into those issues. He knew what the key documents said and could easily pull them out if needed. And, he had enough experience examining witnesses that he instinctively knew how to ask questions and handle evasions. If the witness went in some unexpected direction, Mark could extemporaneously decide whether to ignore the testimony, impeach it, or develop it, depending on how it fit into the case. Because he thoroughly understood his case, the development and presentation of that case – through depositions, witness examinations, arguments, and so forth – came much more easily.

2. "A judge is just a jury of one."

This one is in quotes because it is a direct quotation from Mark. It has stuck with me because it encapsulates a number of different things I learned from watching Mark in practice.

First, Mark's manner of argument was largely the same whether he was speaking to a judge or jury, namely clear, straightforward, and direct. Mark understood that judges, like juries, do not have patience for convoluted or sloppy presentation, including legalese or extended discussion of cases. He also recognized that judges, like juries, will never understand the details of a case as well as the lawyers involved, and that the judge relies on the lawyers to separate the wheat from the chaff and focus on the key points necessary to decide the matter.

Mark's observation that "a judge is just a jury of one" also captures the idea that judges have the same fundamental sense of fairness as jurors. A judge is not a machine into which facts are input and, applying some legal algorithms, spits out a decision. Judges are human. They get upset when they perceive that someone is being treated wrongly. They are sympathetic to people in difficult circumstances. And while judges are far more knowledgeable about the law than jurors, they are equally hesitant to apply the law in a way that leads to an unfair outcome. Mark therefore kept these big picture fairness issues in mind, regardless of whether he was arguing to a judge or jury.

3. Don't be afraid of a jury – prepare for it.

Speaking of juries, one of the things that distinguished Mark as a litigator – particularly one who was often on the defense side – was his complete confidence in his ability to take a case to the jury. This confidence was based on experience; he tried numerous cases to a jury verdict during his career, with an outstanding record of success.

This was true regardless of the type of case in which Mark was involved. He was not afraid to take a commercial dispute to a jury, even if it involved complicated stock valuation or corporate governance issues. Mark served as lead trial counsel for the plaintiff in one of the first cases to go to trial in the North Carolina Business Court – and obtained a verdict in excess of $1 million. He also was not afraid to take a personal injury case to a jury, even if he was representing the defendant in a case of severe injury or death.

Perhaps part of the reason that Mark was never afraid of a jury was because he constantly had it in the back of his mind when working on a case. For example, when Mark took a deposition, he was always thinking about how the witness would look to a jury. We had one

case in which the plaintiff was a young widow – potentially making her a very sympathetic witness. At her deposition, however, Mark quickly perceived that she came across as arrogant and uncaring, and accordingly pursued lines of questioning that would bring out those qualities. When taking a deposition, Mark was never merely collecting information or preparing for a dispositive motion; he was thinking ahead to the jury. (The case in fact ultimately went to a jury trial – and we obtained a defense verdict.)

4. Respect your adversary.

Mark always treated opposing lawyers with the greatest professional courtesy and respect. More often than not, that respect was reciprocated.

I recall one case in which we received an email from opposing counsel, and the email showed that opposing counsel had miscalculated a due date. The other lawyer thought that a filing with the court was due on a certain date, when in fact it was due several days earlier. When I pointed this out to Mark, he did not hesitate in his response: we needed to inform opposing counsel of his error and let him know the correct due date. Needless to say, the other lawyer was grateful.

Mark also showed his respect for opposing lawyers by being willing to lay his cards on the table when discussing a case. When dealing with opposing counsel, Mark would readily acknowledge what he believed to be the strengths of the other side's case. He was likewise frank about what he perceived to be the strengths and weaknesses of his own case. And he would not hesitate to explain his view of the obstacles the other side faced, whether it was a legal hurdle or factual issue, or a more practical problem such as a key witness who would not play well with the jury or the likelihood of low damages given the jurisdiction in which the case was being tried.

Mark's professionalism and candor generally inspired similar behavior in return. As a result, he was often able to get to the bottom of a matter quickly, which in turn led to prompt and well-informed settlements. On those occasions when a case went to trial, we were well-informed about the risks of the case not just because we had thoroughly prepared, but also because we'd given opposing counsel every opportunity to tell us why we should be worried. And Mark's professional courtesy throughout the case extended into trial, which in turn made the trial a much better experience.

Shortly after Mark died, I was speaking with someone and found out that he had been the party defendant in a lengthy commercial case where Mark was representing the plaintiff. He went out of his way to praise Mark as a likeable and professional lawyer. It is remarkable enough that Mark inspired the admiration and respect of opposing counsel; it is even more remarkable that he would inspire the admiration and respect of opposing parties. But that was Mark.

5. Never Compromise on Ethics.

Mark was very conscientious about being an ethical lawyer. He followed both the letter and the spirit of the rules of ethics.

I saw this routinely in Mark's practice. One time when we were at trial, a question arose after the fact about the propriety of certain contact Mark had had with a witness. Mark asked me to research the issue. He was clear that if what he had done was improper, then he wanted to know and would readily accept whatever consequences followed. As it turned out, and as I had expected, the law supported Mark's actions.

A few years ago, Mark accompanied me to my first Fourth Circuit argument in Richmond. (I was an associate at the time, and the fact that Mark allowed me to make the appellate argument – and persuaded the client to allow it as well – illustrates his dedication to developing junior lawyers.) After the argument, it was reasonably clear from the judges' questions that we would prevail (as in fact we did), and accordingly I felt great about the argument. Mark's first post-argument comment, however, was a criticism, and it related to ethics. During oral argument, I had been responding to a line of questioning relating to the point in time when we had first raised a certain argument in the district court. My answers were less than crisp. Mark's comment was that, by not giving clear and direct answers, it sounded like I was being evasive, which in turn suggested I was hiding something from the court – and you never want to even be suspected of hiding something from the court.

I had lunch with Mark six days before he passed away. Among other things, we discussed a case in which our trial team, led by Mark, had obtained a defense verdict, and a motion for new trial was pending. After discussing all of the reasons why the new trial motion should fail, he concluded, "But if the motion is granted, we'll just try the case again and win again." Mark was a winner, both in the courtroom and outside of it. He will be greatly missed. •

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