

# Portrait of



# a Litigator

Merlyn Clark remembers his mother saying, “You are NOT going to be a miner.”

Raised in Wallace, Merlyn said his family emphasized education as the road to a better life. His father worked as a mechanic at Hecla Mining Company’s Star Mine, and “back then you could make a living working in the mines,” he said, so staying put was a real option.

Merlyn spoke recently about his journey from the mining town to the ninth floor offices of Hawley Troxell Ennis & Hawley in the Wells Fargo Building in downtown Boise. A consummate storyteller, Merlyn shared scenes from his life, lessons he has learned and things that are important to him. All these things contributed to his considerable success as a trial lawyer.

Professional success aside, Merlyn enjoys good health, and at age 73, runs long distances in relays and fun runs. He beams when talking about his six children, grandchildren, great-grandchildren and wife, Sandy. He talks happily about mentoring young lawyers, teaching and serving as an Idaho State Bar Commissioner.

Some lawyers might know Merlyn from his presentation at “Lessons from the Masters” at the ISB Annual Conference in 2009, and he remains in high demand for arbitration, mediation and corporate litigation cases, including serving as a hearings examiner for the high-profile “megaloads” case, which made headlines this winter.

None of that success has come without relying on core values fashioned from his unique personal history. Merlyn spoke plainly about how those core values developed. Because his parents wanted something more for their son than a lunch box, hard hat and drill, the path out of Wallace was clear — education and hard work. In addition to his paper route delivering *The Wal-*

*lace Times*, Merlyn went to work in the evenings and weekends for his father, who owned his own auto mechanic’s shop.

“At 12, I started working in the shop cleaning parts,” he said, adding that having a car as a teenager helped his social life. “I had a ’36 Ford, and kept it running,” he said with some pride.

He also set pins at the local bowling alley and delivered groceries after school. “I didn’t have time for athletics,” he said, and the family was focused on his education. He was sent to Gonzaga Prep School in Spokane for a semester, but found it difficult. “I was homesick,” he said. But higher education still figured in his plans.

## Adventure and learning about a good alibi

Merlyn enrolled at the University of Idaho and started working on a degree in Business Administration. He joined Delta Sigma Phi fraternity, which he credits for teaching him good study habits and formal manners.

He also discovered the big world of ideas. After his first year, he and a friend, Lee Fushel, took some time off school to hitchhike to the East Coast with hopes of working aboard a freighter to Europe. While they didn’t make it that far, they had several memorable adventures, ones that Merlyn recalls vividly.

Hitching rides wasn’t uncommon in the 1950s, but

Merlyn said he was struck by people’s kindness toward him and his friend, Lee, and how strangers offered them meals and places to stay. He learned that cooperation and friendliness were essential life skills.

They made it to Maryland, where they hoped to find work aboard a coal freighter headed for Yugoslavia. They stayed for two months at the DSP fraternity house at the University of Maryland waiting for a National Maritime Union strike to end. Eventually they got a meeting with the union

president to discuss their prospects. He told them the strike could go on for some time. “Our money was running low so we decided to go home to Idaho,” he said.

Their adventure wasn’t over. Lee’s father told them that if they were ever in need of a place to stay, “just go to the city jail and ask to spend the night,” Merlyn recounted. Travelling through rural Illinois, that’s what happened. The local police obliged, but said they would be locked up between 10 at night until 5 in the morning. The young men agreed. After moving on down the road, they suddenly found themselves surrounded by police, now suspects in an armed robbery. The hitchhiking pair

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By Dan Black, *Managing Editor*



Merlyn grew up in Wallace, a place that left a strong impression. At left, is Merlyn with his mother, Lilia. At center is the infant Merlyn in a sleigh, and at right, Merlyn stands with his sister, Barbara, who now lives in California. These photos were compiled by Merlyn's children for a slideshow shown during his 70th birthday party.

perfectly matched the suspects' description, "even down to the details of a red-checked shirt," Merlyn said. "We told them we couldn't possibly have done it because we were spending the night in jail in Long Island, Illinois," Merlyn said. "We asked them to contact the police." Finally, word came back and "they cleared us." At that point, the police were friendly, even jovial.

If it weren't for the jailhouse sleepover, "we might still be there," he said.

#### **Studies at the University of Idaho**

Back at the university, Merlyn married, started a family and took jobs at a gas station and with the Student Union Building, where he washed dishes, bussed tables and oversaw ticket sales for student events. Merlyn learned that even modest jobs come with unexpected rewards. Merlyn moved up to supervisory role and got to meet big-time travelling jazz acts such as Louis Armstrong and the Kingston Trio.

He did well at his studies and further refined the values that would lead to a successful career. "It's clear to me looking back, I had some good mentors," he said, recalling word-for-word a conversation he had with economics professor Irwin Graue, some five decades ago.

"I said lawyers could charge what the market would bear," Merlyn said. "And he was very upset. He said that if I was going to be a lawyer I shouldn't take advantage of people."

"Don't take advantage of people," Merlyn repeated, as though the conversation were still happening.

Another professor wanted to nominate Merlyn as a Rhodes Scholar. "He said I had an intellect and that I could succeed. I told him I was married and had a child and I just couldn't do it (study internationally). But it gave me confidence."

In another lesson, Merlyn recounted how he ended up needing a two-credit Math of Finance class in his last semester as an undergraduate. He and the teacher had a falling out and his grade "was a big frog."

"When I went across the stage," he said, "it was a blank diploma. My parents were not happy. But at that time you could attend law school if you had 96 credits with passing grades. I thought someday I'll go back. But I never did pick it up."

Merlyn shrugged unapologetically and said, "It doesn't affect my life."

#### **Starting the practice of law**

During his final year at law school, Merlyn worked for Blake, Givens & Feeny in Lewiston.

“It was a great experience,” he said. “I learned a lot from all three. Givens’s dad was on the Idaho Supreme Court and the partners taught me those values,” Merlyn said, speaking about the mindset of a consummate jurist.

“Blake taught me to use my own judgment. He would not let me go to the form books (to get boilerplate language). He wanted me to do thorough research, and THEN I could go to the form books to check my work.”

In another auspicious beginning, Merlyn took the Bar oath at the Nez Perce County Courthouse, and, moments later, presented arguments before the Idaho Supreme Court. Merlyn and colleague Bob Brown were admitted together and had an appeal and the case schedule just happened to coincide with the Bar ceremony.

“Blake said ‘if you can do this, you will have the confidence to appear in any court - either sink or swim,’” Merlyn said. “We lost the case, but it was a good experience.”

The firm had Potlatch Co. as a major client, which required some high-stakes litigation early in his career. Nervous about an upcoming case in federal court, he confided his doubts to District Judge Paul Hyatt “who had been around forever,” Merlyn said. “He said, ‘Clark, you have appeared in my court and you can appear anywhere.’”

The phrase stuck. Later, Merlyn travelled to San Francisco to argue the case, despite not having been admitted to practice in the California federal court. He said that in the courtroom “there were maybe 20 attorneys, all of them with long, flowing hair. I had a crew cut, the same as the judge. I told him, ‘Your Honor, I am not approved to address the court, but I am asking permission.’ He said, ‘Mr. Clark you can address this court any time.’”

These events made formative impressions. “For a kid just out of law school, climbing into a corporate jet to San Francisco was pretty heady stuff.”

However, living in Lewiston, there was also plenty of general practice. “I learned I didn’t like divorce or bankruptcy work,” Merlyn said, but he developed a passion for real estate and corporate litigation.

He said the firm dissolved and “some of the clients went with me. That was the end of my corporate law career.”

### Finding a niche

Merlyn formed a new firm with Ted Creason and Jack Curtin, and was later appointed Prosecutor to Nez Perce County. He hired his partners to help out. Merlyn was elected to one more term, “but it didn’t pay enough for the workload,” he said.

In his first year, Merlyn prosecuted five first-degree murder cases, which stressed the budget. When



Sandy and Merlyn at Christmas in Boise.

asked if the experience soured his view of prosecutorial practice, he clarified: “It soured my view of compensation for both prosecution and defense. Nobody wants to pay for it. The system gets good people. But some cases get the short end.”

Merlyn added, “I found myself wheeling and dealing.”

Compensation and compromise aside, Merlyn said prosecution gave him valuable experience, “especially in managing cases.” The following years in private practice were fruitful, giving Merlyn exposure to many areas of law.

After a few years, his partners wanted to start a bank, and the firm dissolved. Shortly afterward, while serving as a Bar Commissioner with Jack Hawley, “Jack asked me to come to Boise. It was a huge opportunity.”

“When I moved down here (to Boise), I didn’t know it, but I disqualified myself” from continuing to serve as a commissioner from the Second District, he said. He never became a Bar president because ISB commissioners serve as president during the last part of their three-year term. However, Merlyn later served as president of the Idaho Law Foundation and for five years as chairman of the evidence rules committee.

Immersed in the profession, Merlyn was able to focus on his favorite kinds of law — real estate and commercial litigation. Lengthy complex litigation, however, also sparked an interest in a trend making its way across the legal landscape — mediation.

### Mediation and arbitration

An oversized map hangs in Merlyn’s office. It shows the route of Napoleon’s campaign from Poland to Moscow, a wide swath representing the size of his army as it went. Beginning the drive with

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442,000 soldiers, Napoleon's force diminished to a mere 10,000 at its return. Inscribed above the picture is a saying: "Is the Quest Worth the Cost?"

The problem with litigation, Merlyn points out, is that it takes a long time, a lot of resources and the outcome is uncertain. Like many litigators, Merlyn sought a less confrontational way to resolve disputes. In 1989, for Law Day, then Deputy Attorney General Jack McMahon initiated a program to teach mediation. A Pepperdine University professor, Randy Lowery, presented a two-day seminar and Merlyn attended. He said that at the time, mediation was growing around the country, "but it still didn't exist" in Idaho.

"As a lawyer I wanted to learn these skills to help my clients," he said.

After the class, "I had some success as a mediator and started to get phone calls from other lawyers." In 1995, Merlyn became certified as a professional mediator, and things took off from there. His reputation grew and mediation accounted for about half of his practice. In part, Merlyn credits his success with being in on the ground floor. The market soon became flooded with mediators.

When the legislature created senior status for retired judges, they were allowed to practice mediation. Many entered the field as mediators and "my practice reduced," Merlyn said. Currently, "there's not enough mediation in Idaho to do it full time."

Animated with the topic, Merlyn explained:

"I get a lot of people who come and ask my advice on how to do a mediation practice. I tell them to 'get gray hair, get experience, do litigation, build a reputation.' It also requires understanding the intangible — their clients' needs and interests. When you start to focus on that, then you touch on what motivates them. Most people want instant gratification. You explain that litigation is a long process and that they might never see the result they hope for."

### Taking high-profile cases

His skills in high demand, Merlyn did mediation work for state agencies and public officials. He was asked by the Idaho Attorney General to draft the contract with Corrections Corporation of America to operate a private prison in Idaho. He was also asked by the Idaho Supreme Court to negotiate a resolution with a contractor, and he served as an arbitrator for administrative appeals for the Idaho Transportation Department. These experiences led to being asked to serve as a hearings examiner for the Highway 12 "megaloads" case



On professionalism, Merlyn said true success comes with setting high ethical standards: "The one thing we all start out with, and the one thing you can lose, is integrity. You can gain knowledge of law and procedures, but you can't get your integrity back."

in front of the ITD in December, 2010. Merlyn didn't initially grasp the high-profile nature of the case, but the daily headlines about it didn't faze him.

Four shipments of giant oil refinery equipment were stalled at the Port of Lewiston awaiting permission to move along Highway 12 to Montana. Making headlines every day for weeks, the ship-

ments were highly controversial because the loads were so large and could set a precedent for 200 more loads. Merlyn issued an opinion that the permits would not break the law and they were eventually issued.

"There are times when acting as a neutral decision maker that I apply the facts to the law and reach a conclusion, and render a decision that is not my personal preference," Merlyn said. He has spent considerable time on the Clearwater River fishing and is familiar with the road's scenic qualities.

"The laws that give the department the authority, its rules, etc. are pretty clear. The concerns of the interveners were not supported by the facts or the record. They are more concerned with the 207 more loads that are planned. But that was not part of what I was presented with."

### Making the best of it

Not every one of Merlyn's efforts has met with success. A few years ago Merlyn trained to qualify for the Boston Marathon. He didn't make the cut, "but I comforted myself by saying at least I tried."

In a three-month trial the plaintiff sought a several million-dollar settlement. Eventually, the sum was reduced to \$3 million. "My partner said it was a victory, but I felt it was a failure," Merlyn said. "I've been fortunate I have not had a lot of failures."

Asked why, Merlyn said, "I'm pretty conservative. I don't stick my neck out much and when I do, it's calculated."

Another strategy helps — "manage your weakness." For Merlyn, that means delegating computer research to the younger associates. "I'm not fooling anyone," he said, adding that the firm has some tremendous talent. "When you use a team, be sure to give credit."

In his personal life, Merlyn said "There have been times when I have ignored issues. But it doesn't work. When I have addressed difficult issues, I get a good feeling. I have gained respect."

On losing cases, Merlyn shared his view: "Many people set unreasonable expectations — especially young lawyers. They think they have to win every case. They forget their job is to put forth the best effort within the system. It's not about winning or losing. It's about putting forth my best effort to represent the needs of my clients."

With that kind of commitment, Merlyn's chosen profession allowed for a rich and colorful journey. Far from his tiny hometown of Wallace, Merlyn built his own style of personal and professional success — one that derives from his unique journey.