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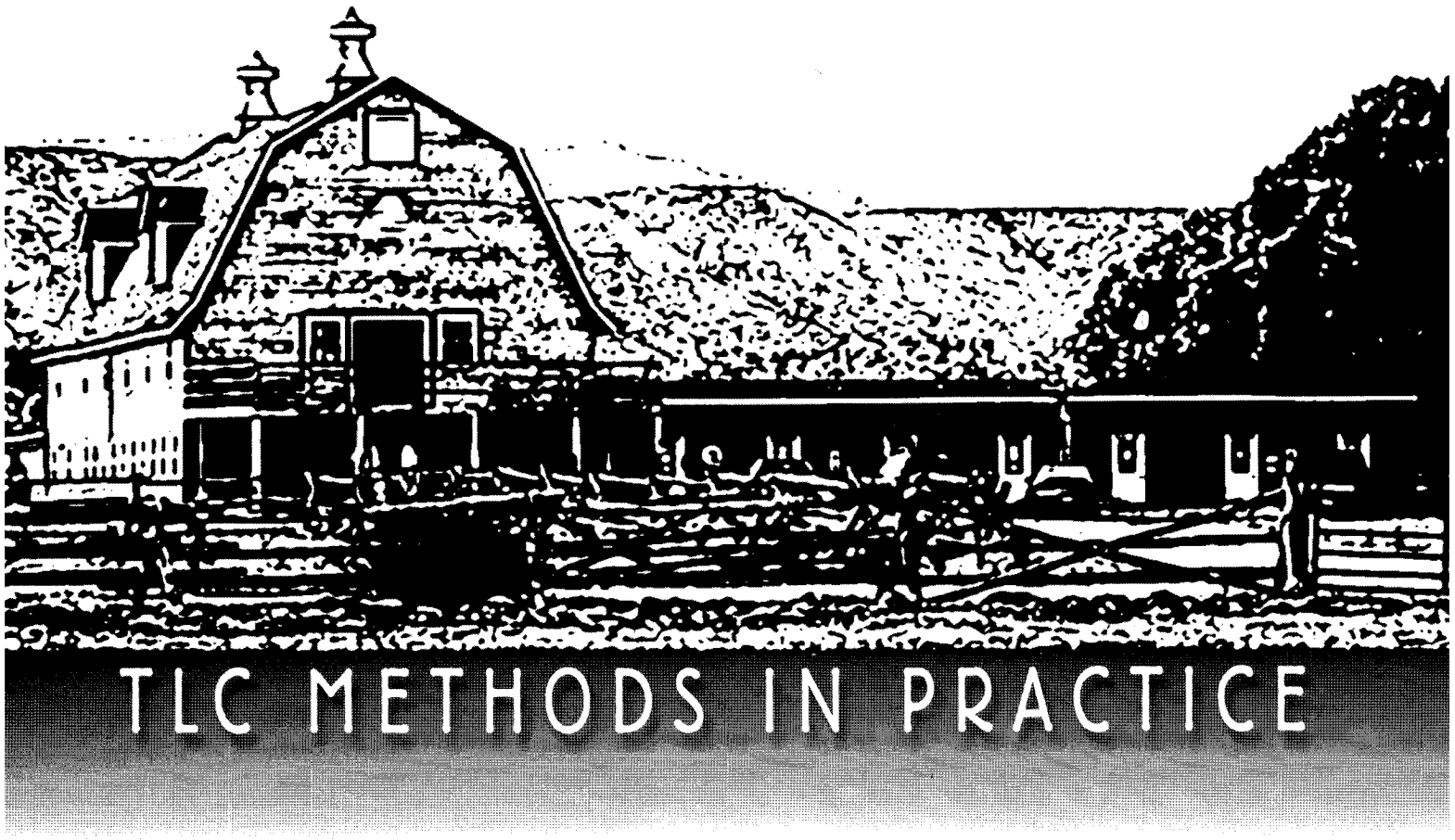

TLC METHODS IN PRACTICE

Maren Lynn Chaloupka, TLC '99

The warrior: Dan Monnat (TLC '00), Wichita, Kansas

The caveat: This article has been unusually difficult to write. It has been difficult to write this because of the concern that readers will misinterpret my goal as advocating a position on abortion. Abortion is an emotional topic on which good people can have principled disagreements (although traditional media seems to present more of the knee-jerk shouting matches than the principled disagreements). My own feelings on the issue are so fluid and so mixed—between what I think the law should be and what I would want for myself—that I would hardly be in a position to advocate any position, even if I wanted to do so.

The only advocacy I intend in this article, or any of my articles, is advocacy of the courage to take the tough cases for the unpopular clients. There could not be a better example of that courage than Dan Monnat, who risked his life to represent Dr. George Tiller, a provider of women's health services, including late-term abortions.

In the time between when Dan tried Dr. Tiller's case and when I submitted this article for publication, a man named Scott Roeder shot and killed Dr. Tiller in his church. The threat Dr. Tiller faced for years was real; and the "reward" for association with Dr. Tiller was that every threat to Dr. Tiller was effectively a threat to Dan. Organizations opposed to abortion had sought for years to disable Dr. Tiller from his practice by varied legal actions. If they could deter Dr. Tiller's highly-effective lawyer from continuing to represent Dr. Tiller—either emotionally or physically—then that would empower their advantage in the legal actions. Beyond that, Dan faced a physical threat of harm any time he appeared in public at Dr. Tiller's side.

Dan knew his client needed strong and steady representation. He knew Dr. Tiller needed to feel and know that his lawyer had courage. Dan never backed down and never let the ever-present physical threats influence his representation of Dr. Tiller. He showed courage that my own law practice has not yet required of me, and courage I hope I would have if I were asked to serve such an intensely controversial client. That courage, rather than a position in the abortion debate, is what I hope to extol and advocate in this article.

The client: Dr. George Tiller was a second-generation physician practicing in Wichita, Kansas. He had grown up accompanying his father, a family doctor, on rounds and house calls, and had grown to admire the bond his father had with his patients. From a young age, Dr. Tiller could see how important his father was in his patients' lives. That inspired Dr. Tiller to attend and graduate medical school, after which Dr. Tiller enlisted in the United States Navy. At that time, Dr. Tiller had intended to specialize in dermatology after completing his military service.

In his third year of military service, Dr. Tiller's parents, sister and brother-in-law were killed in a plane crash. The crash orphaned Dr. Tiller's 12-month-old nephew and left Dr. Tiller's father's patients without a doctor. Devastated by this shocking loss, Dr. Tiller petitioned for and received a humanitarian discharge from the Navy. His intention was to adopt his nephew (which he did) and gradually wind down his father's practice, getting his father's patients transitioned to other doctors.

But the deadly plane crash proved to be a transformative event in more ways than "just" the loss of Dr. Tiller's family and the end of his military service. His father's patients, stunned to sud-

denly lose their longtime relationship with their family doctor, objected when they learned Dr. Tiller's original plan was to wind down the practice. *We need you,* they told Dr. Tiller. And Dr. Tiller realized some solace in seeing his father's patients, at his father's clinic. He enjoyed working as a young doctor who had meaning and importance in the lives of his patients, who could stand with his patients in their crisis moments.

At that time, operating a family practice meant that the physician would have to deal with patients who wished to terminate their pregnancies, or whose wanted pregnancies would not result in a baby who could survive. Dr. Tiller began providing abortion services just as part of what a family doctor did at that time. After the abortion controversy intensified following the issuance of ***Roe v. Wade***, however, the number of physicians who were willing and trained to provide abortion services began to diminish. Those patients turned to Dr. Tiller, and Dr. Tiller's practice began to increasingly specialize in abortion services, and then to subspecialize in medically complicated abortions. By the 1990's, that trend had both led Dr. Tiller to obtain additional training in late-term abortions, and had left Dr. Tiller as one of three providers of late-term abortions in the United States.

Dr. Tiller viewed his work as his mission—serving patients who by definition were desperate and whom no one else would serve. The pregnancies he was terminating were not what his patients would characterize as "unwanted": most involved defects to the baby that were belatedly discovered, lethal and likely to cause suffering to the baby (such as conjoined twins who could neither survive together nor be separated). Some involved child victims of rape or incest as young as 10 years old, whose assailants had concealed the child's pregnancy until late in gestation. All of his patients were referred to his care by other physicians. "Abortion services" at Dr. Tiller's clinic included not only the procedure itself, but also care for the patient's emotional and spiritual needs, including a full-time chaplain on Dr. Tiller's staff. Dr. Tiller had the support of his wife of 45 years, his three daughters (two of whom are now physicians), the nephew he adopted and his 10 grandchildren.

This background is provided for the reader who wonders why Dan Monnat would risk his life for this client—a client who was sensationally controversial but whose personal story was rarely told. When Dr. Tiller first approached Dan for representation in 2003, the then-attorney general of Kansas, Phil Kline, had initiated proceedings to subpoena records of Dr. Tiller's patients. Mr. Kline suspected that the records would show that the patients did not truly medically qualify for the procedure that Dr. Tiller had performed on them, which would then clear a path to prosecuting Dr. Tiller for performing abortions illegally.

Long before Dr. Tiller first asked Dan to represent him, Dan was well aware of exactly who Dr. Tiller was. As Dan says, "you can't live in Wichita, Kansas and not know who Dr. Tiller is." Dan says,

> I knew he was serious about his patients' rights. I knew he was serious about being able to take care of the health care needs of women against overwhelming odds. I knew he'd been shot. I knew his clinic had been bombed. I knew there had been over two thousand arrests at his clinic during the Summer of Mercy.
>
> And my reaction then, and now, was that it would be a great privilege to represent Dr. Tiller.

With that, Dan made the commitment to defend Dr. Tiller.

The case: Kansas law allows a physician to perform an abortion after the 22nd week of pregnancy if the baby is so genetically compromised that he or she is not viable. If the baby is viable, there must be medical evidence that the mother will not survive the remainder of the pregnancy and labor, or that she will suffer a "substantial and irreversible impairment of a major bodily function." It is not enough that the actual abortion provider reaches those medical opinions. There must be a documented referral from another physician who has made the same findings, and who has no legal or financial relationship with the abortion provider.

The Kansas statute does not specify that the referring physician must be licensed in Kansas. However, the Kansas Board of Healing Arts (which regulates medical practice) announced that it interpreted the statute to require that the referral must come from a Kansas physician. This interpretation pleased Dr. Tiller's opponents: most of Dr. Tiller's patients came from out-of-state (and even from other countries), with limited resources and limited time to travel to and from Kansas for what was realistically a near-emergency procedure. It was unlikely that most of Dr. Tiller's patients would have the money and time to first obtain a referral from their local physician; then travel to Kansas, establish a relationship with another Kansas physician and obtain a referral; then return to Kansas for the actual procedure with Dr. Tiller.

Dr. Tiller's legal team asked the Kansas Supreme Court, on a writ of mandamus, to enjoin the State from applying the statute according to this new interpretation. The Kansas Supreme Court declined to issue a writ, reasoning that the question was not ripe until and unless Dr. Tiller were arrested. Dr. Tiller's lawyers then sought an opinion from the Kansas attorney general, but the attorney general rejected the request for an opinion. The next step would be to seek an injunction in federal court; but before his attorneys filed suit, Dr. Tiller had what turned out to be a critical conversation with the chairman of the Board of Healing Arts, who called Dr. Tiller on the phone.

This was an off-the-record and unwitnessed discussion, *mano y mano*. Dr. Tiller voiced his concern that this interpretation would effectively eliminate most patients' ability to obtain his services, without regard to their medical needs. The chairman offered a suggestion: he gave Dr. Tiller the name of a young physician named Dr. Ann Kristin Neuhaus, who operated a women's clinic in Lawrence, Kansas. The chair suggested that Dr. Neuhaus might be willing to come to Dr. Tiller's clinic periodically, to examine patients referred to Dr. Tiller by their local physicians and to provide the second opinion required by the Kansas statute.

And then the chair told Dr. Tiller, "I'm giving you this information off the record ... I'll deny that we ever had this conversation." But Dr. Tiller had written down verbatim notes of the conversation in his dayplanner. And, Dr. Tiller immediately presented the chair's suggestion to his compliance lawyers, whose dated notes (and billing statements) showed that Dr. Tiller had attributed the suggestion of contacting Dr. Neuhaus to the chair of the Board of Healing Arts.

The compliance lawyers researched the proposal and concluded that this suggestion would enable Dr. Tiller to comply with the Kansas statute without increasing the burdens on his patients. Dr. Tiller then contacted Dr. Neuhaus, and she accepted his invitation to evaluate patients at his clinic.

Thereafter, the Kansas attorney general, Phil Kline, alleged that Dr. Tiller had violated the statute in question relative to nineteen abortion procedures. To review, the statute prohibited Dr. Tiller from performing late-term abortions without a second opinion from a physician with whom he had no legal or financial relationship. Kline alleged that Dr. Tiller and Dr. Neuhaus did have a legal and/or financial relationship—meaning that Dr. Tiller had performed late-term abortions without a proper second opinion, and thus illegally in Kline's eyes.

In Kansas, the district attorney is authorized to conduct a proceeding called an "inquisition," which is comparable to a one-man grand jury. An inquisition is a secret proceeding, which may take place in front of a judge or in the district attorney's office. The district attorney may subpoena records and witnesses, and may take testimony and receive exhibits. Kline conducted an inquisition relative to Dr. Tiller's practice, subpoenaing patient files and further subpoenaing Dr. Neuhaus. Dr. Neuhaus refused to testify, and invoked her Fifth Amendment privilege against self-incrimination. Kline's response was to threaten Dr. Neuhaus with prosecution for accomplice liability, and then to confer immunity upon her.

Ordinarily, it is the local district attorney, rather than the attorney general, who files criminal charges against an accused defendant. Attorney General Kline filed the case against Dr. Tiller without asking the local district attorney for authority, at a time when Kline had just lost a reelection bid. When newly elected officials took office, the newly-elected local district attorney persisted in prosecuting the case that Kline had filed—albeit for a most unusual reason. The newly-elected (and married) district attorney was having an affair with Kline's former administrative assistant.

Before his departure from office, Kline had shown some of the patient files he had subpoenaed to his administrative aide, knowing that the aide was romantically entangled with the district attorney. Kline pressured his administrative aide to pressure the district attorney—her lover—to persist in the prosecution of Dr. Tiller that Kline had started. The district attorney wished to assuage his lover, and so he maintained the case against Dr. Tiller until he resigned in disgrace after the affair was revealed. His replacement—the *third* prosecutor on the case—kept the case alive as well, out of concern for the electoral ramifications of dismissing the case against Dr. Tiller.

All of this background shows that it is insufficient to say that the case Dan defended was politically-charged. The violations alleged were technical in nature, and far-removed from the procedure at issue; they were the product not of a patient or victim complaining to police, but of an elected official with a clearly-defined goal and no way to reach that goal other than to design these charges. If a jury found that Dr. Tiller had a legal and/or financial relationship with Dr. Neuhaus, that verdict would be available as a basis for action against Dr. Tiller's medical license by the Board of Healing Arts. Each of the three elected prosecutors who had filed or maintained the charges knew that this case could end Dr. Tiller's practice. So did Dan.

To arrive at the courthouse for service, prospective jurors had to drive past billboards bearing political messages against Dr. Tiller ("Tiller thinks he's above the law," etc.), and had to navigate a herd of Dr. Tiller's opponents who were protesting outside of the courthouse. The court had summoned and served preliminary questionnaires to 400 prospective jurors in order to seat a panel of six.

When it was his turn for voir dire, Dan introduced himself to the jury, and introduced his client. He told the jury some of Dr. Tiller's history—his military service, his family. He expressed to the jury how much pressure he faced, holding Dr. Tiller's 38-year career in his hands.

Dan spoke to a juror whose responses to the prosecutor's questions revealed her strong Catholic beliefs:

> You kindly shared earlier that because of your family background, you have reservations about hearing the evidence in this case. I have to ask—when I was going to Catholic school in Wichita, it seems like every other priest there had the same last name as you. Are you related to Father Dan?

Dan's revelation of his own Catholic faith provoked whispers and eye-rolling from the opponents of Dr. Tiller who were seated in the courtroom. Undaunted, Dan continued:

> What we're really asking you to do now is an *examination of conscience*. To ask yourself, based on your background, whether you can go to family gatherings where your priest will be, and say, "yes, I was on the jury that acquitted Dr. Tiller."

The phrase "examination of conscience" comes from the Baltimore Catechism, which asks supplicants to examine their conscience before confession. The juror accepted Dan's invitation, examined his conscience and told Dan, "I don't think I would trust myself to be fair." Dan thanked the juror for being honest with himself and with Dan, and obtained the court's permission for the juror to be excused for cause.

If the challenges Dan faced in talking to jurors about the emotional subject matter of abortion were not daunting enough, there was a more ominous undercurrent to confront: the risk to life and limb of anyone involved with defending—or potentially acquitting—Dr. Tiller. Agents from the Bureau of Alcohol, Tobacco & Firearms inspected the courthouse with bomb-sniffing

dogs each day of the trial.

For all of those reasons, it was a difficult voir dire, and Dan maintains today that he did not do as well as he would have liked. He sensed that his co-counsel noticed that he was having a tough go. But, in Dan's words,

> if [co-counsel] felt that way, then the jury had to see me struggling too. And you can't lose if you're struggling to bring the jury a message. That's the best reason to give up control—the one who struggles the most to bring the message to the jury is the one the jury will listen to.

Dan took consolation and encouragement from that aphorism as he prepared to tell the true story of the case in his opening statement.

Before trial, the prosecution stipulated that all nineteen of the abortions at issue were medically necessary. No one would be arguing that Dr. Tiller had aborted healthy mothers' viable babies. In fact, the jury would be instructed that the State of Kansas agrees that every abortion at issue involved either a non-viable baby or a mother whose life was in imminent danger. The prosecution had offered this stipulation to Dan in order to avoid a battle over patient privacy. Otherwise, the trial would have been interrupted by hearings on whether patients could be identified and the nature of their medical conditions.

Once the prosecution had surrendered the most compelling argument a person could make against late-term abortion, this story of a politically-motivated prosecution crystallized even more clearly. Now, there was truly nothing at stake that jurors could deliver—now it was clear that this verdict was sought not because to protect the integrity of the misdemeanor statute, but to effectuate another goal in another forum. Now it was growing clearer: these jurors were being *used*, and were just an elected official's means to an end.

Consistent with that reality, the prosecutor's opening statement was brief and conclusory, focusing on certain points of evidence—Dr. Neuhaus' use of Dr. Tiller's printer and copy paper, the standardized language of her confirming opinions—rather than whatever story might have woven those points of evidence together. The prosecutor told the jury that the defense would assert that the charges were mere technicalities. He concluded his opening statement by telling the jury both that "this case ... isn't about abortion," and that "it's about how this defendant intentionally set up this relationship so that he could continue to provide the late-term abortions that he advertised." Having thus confused the issue, the prosecutor thanked the jury and sat down.

Dan wasted no time in pleasantries or introductions, having addressed those formalities in voir dire. He came out blasting with both barrels, from his first words: *"Dr. Tiller is innocent."*

> Dr. Tiller is innocent. Far from thinking he is above the law, the evidence in this case will show that Dr. Tiller has done everything he can do to comply with the laws that regulate his medical practice. He has never been legally or financially affiliated with Dr. Ann Kristin Neuhaus, and that is the only issue in this case.
>
> I'm not going to talk about a technicality. In reality, this prosecution is a poorly thought out, farfetched prosecution of Dr. George Tiller for being legally or financially affiliated with the independent Lawrence, Kansas physician, Dr. Ann Kristin Neuhaus, who was brave enough and caring enough to provide the second opinion of late-term abortion necessity required by Kansas law.
>
> These accusations extending from July of 2003 to November of 2003 were designed by anti-choice Attorney General Phil Kline. But they were nervously filed by his successor, short-term Attorney General Paul Morrison, under overwhelming personal and political pressure. The charges were filed before that administration even had time to adequately investigate or understand the very practical problems associated with a pregnant woman obtaining a second opinion of late-term abortion necessity from a Kansas physician. The evidence in this case will show that the prosecution's theory of affiliation makes no legal, medical or common sense.

And with that, Dan was ready to tell the jury the real story of the case.

Dan's opening statement was lengthy and detailed, walking the jury through how Dr. Tiller had changed his career aspirations from dermatology to performing late-term abortions. Addressing the controversial nature of the case, Dan told the jury:

> Now, I know that we've told you that this case is not about your personal views on abortion, and it isn't. But I'm afraid that it may be difficult to understand the difficulties facing women patients and Dr. Tiller in 2003 without some background greater than you heard in the prosecution's opening statement.

Dan walked the jury through the resistance Dr. Tiller had faced—legal and illegal, non-violent and violent, including the "Summer of Mercy" protests, the fire-bombing of his clinic and the shooting that nearly took Dr. Tiller's life in 1993.

Relative to the impact of the statute Dr. Tiller was charged with violating, Dan painted a word picture for the jury of how the statute would affect Dr. Tiller's patients, had he not obtained the cooperation of Dr. Neuhaus:

> Dr. Tiller could easily foresee and empathize with the practical difficulties that a woman would have to go through. She's referred to Dr. Tiller by an OB/GYN whom she trusts in her state or country. And Dr. Tiller advises every patient that comes to Women's Health Care Services about the line of protesters in front of his clinic, and that they will be discouraged and approached by the protesters.
>
> But now Dr. Tiller would need to tell the new patient and her loved ones that after they see Dr. Tiller, they will have to run a gauntlet of that line of protesters again while they go seek a third Kansas physician to give this opinion about late-term abortion necessity.

> The fearful patient will now run that gauntlet of protesters again. As they have so many patients, the protesters will follow the woman. The protesters will pursue her to her motel, as they have others. The protesters will follow her even to the third doctor's office. More expense, more fear to an already bewildered and frightened pregnant woman in medical distress.
>
> And in all likelihood, she's not going to find that third physician, a Kansas physician in a state or country she's never even been to before. She won't find that physician because after the years of pickets and protests and attempted murders and bombings, all other doctors have been terrorized away from this work.

That word picture framed Dan's explanation of why it was so important for Dr. Tiller to find and obtain the cooperation of another physician.

Dan told the jury of the phone conversation between Dr. Tiller and the chair of the Board of Healing Arts, wherein the chair had specifically suggested that Dr. Tiller contact Dr. Neuhaus. Then he explained the significance of that conversation to Dr. Tiller's defense:

> There are two important legal concepts to think about in connection with Dr. Tiller's many attempts to understand and obey the law. Number one, what's called entrapment by estoppel and reliance on the advice of counsel and public officials.
>
> The State of Kansas cannot now claim that a relationship *it* recommended and *it* advised, the one between Dr. Tiller and Dr. Neuhaus, is somehow illegal. Whether that's called entrapment or advice of public official or just plain unfair, it can never support proof of a crime beyond a reasonable doubt.
>
> Second, the same evidence shows that Dr. Tiller had no intent to commit a crime, nor knowledge that he might be committing a crime. He only followed the legal advice of public officials and counsel.

From there, Dan told the jury Dr. Neuhaus' personal story, and he set forth exactly how Dr. Neuhaus operated when she evaluated Dr. Tiller's patients—that far from being a "rubber stamp," Dr. Neuhaus had the independence to disagree with Dr. Tiller. Dr. Neuhaus had declined to affirm Dr. Tiller's opinion of the necessity of late-term abortion more than once (as in the case of a patient who had flown to Wichita from Great Britain), and Dr. Tiller had accepted her findings when that had happened. Finally, Dan presented the prosecution's pieces of evidence of "legal or financial affiliation" as nothing more than scraps which did not add up to "beyond a reasonable doubt."

The prosecution called only one witness: Dr. Neuhaus, who testified under the prosecution's grant of immunity. Her direct examination was brief: the prosecutor limited his questions to the least-common denominator of his allegations, never asking any questions that would tell the jury who this witness was and how she had gotten to this trial and this witness stand. Dan knew that this presented his opportunity to commandeer the case away from the prosecution, and to tell Dr. Tiller's story and Dr. Neuhaus' own story through his cross-examination of Dr. Neuhaus.

Under Dan's direction, Dr. Neuhaus explained that she conducted her own, independent review of each patient's medical records, and her own, independent telephone interview of each patient before they traveled to Wichita. She charged her own fee (and required cash payment) and performed her own, independent evaluation in the clinic when the patient arrived, typically lasting up to an hour. She did use the clinic printer to print her opinion letters; but she also reimbursed the clinic $50 per year for use of the printer ink and paper. She kept her own patient files.

Dan then directed Dr. Neuhaus in describing the threats to her physical safety that accompanied her decision to provide abortion services. Dr. Neuhaus acknowledged the previous shootings of abortion providers (including Dr. Tiller's 1993 shooting) and clinic bombings, and that other physicians who had consulted with Dr. Tiller had ceased doing so because of bomb threats to their own clinics. She then testified:

> Q: By 1999, you knew that because of the personal and professional dangers involved, very few doctors in the United States were any longer willing to get involved in abortions at all, is that right?
>
> A: That's exactly right.
>
> Q: And you knew that there were very few doctors in the United States who would be willing to get involved in an abortion by making a referral?
>
> A: Yes.
>
> Q: When you appeared for the prosecutor's inquisition in 2006, you were asked for your address.
>
> A: Yes.
>
> Q: You declined to give your address at that time.
>
> A: I did.
>
> Q: Would you explain to the ladies and gentlemen on the jury why you did that?
>
> A: For security reasons.
>
> Q: Had you yourself been the subject of death threats before that?
>
> A: Yes, I have.
>
> Q: Were you reluctant to even have the court reporter take down your address at that time?
>
> A: I refused multiple times.

Dr. Neuhaus described the level of security at Women's Health Care Services: security cameras around the perimeter monitored round-the-clock, armed security guards and metal detectors. She distinguished that level of security from her rural home: *"There's clear sniper shots across two sides of the house, open pastures, no one else around."*

Dan continued with the story, through Dr. Neuhaus, of the

threat posed to anyone associated with Dr. Tiller:

Q: When you talked with the assistant attorney general for Phil Kline in 2006, you told him that around the time you became Dr. Tiller's only consultant, a whole group of people from Alcohol, Tobacco & Firearms were at the Women's Health Care Clinic.

A: Correct.

Q: You told the assistant attorney general that it was your memory that ATF came in a big armored vehicle, with guys in flak jackets there at the clinic for a week or two.

A: Yes.

Q: You told the assistant attorney general that the clinic *needed* to have, in your words, eight 300-pound muscle guys with flak jackets from ATF around.

A: Yes ... I think there were two separate events. There was one week-long event where there was a heightened threat and that's why ATF was there. Sometime around there, there was a bomb scare, and that's when the bomb squad and the bomb dogs came. But that was about the time when I became the only [consultant].

In addition to the threats on Dr. Neuhaus' life, there were threats to her freedom:

Q: We've already talked about the fact that Phil Kline's Attorney General's office subpoenaed you back in 2006 to testify at a secret proceeding called an inquisition, correct?

A: Yes.

* * * * * *

Q: The prosecutor for Phil Kline started to ask you questions about abortions in abortion clinics, correct?

A: Yes.

Q: When he started to ask you about abortions in abortion clinics, your lawyer advised you to assert your Fifth Amendment right to not answer those questions, correct?

A: Yes.

Q: Did you take your lawyer's advice?

A: Yes.

Q: At the time, you feared that Phil Kline, the attorney general at that time, might want to prosecute you?

A: It was open season on all of us under him.

Q: But that fear of open season prosecution on abortion providers didn't stop the prosecutor from asking you questions—because he gave you a grant of immunity. Which meant that you could no longer decline to answer questions on Fifth Amendment grounds, because they agreed not to use anything you said against you.

A: Correct.

Q: You mentioned that you feared this open season on abortion providers when you asserted your Fifth Amendment rights, because you feared Phil Kline would want to prosecute you?

A: Yes.

* * * * * *

Q: You originally feared prosecution from Phil Kline because of things you had heard about in the news?

A: Yes.

Q: Was one of the things you feared that Phil Kline had fought for years to get ahold of the private medical records of Dr. Tiller's patients?

A: Yes.

Q: You were aware that Phil Kline had used his pursuit of Dr. Tiller's patients' records as a campaign bragging point for reelection and election?

A: Yes.

Q: You were aware that Phil Kline went on national television to talk about the patient records he got from Dr. Tiller?

A: Yes.

Q: And it was your impression that Phil Kline was using the power of the Kansas Attorney General's Office to shut down abortion clinics?

A: Yes.

Q: And I take it that it crossed your mind that one way to shut down abortion clinics was to prosecute doctors who perform even lawful abortions, or who lawfully consulted with abortion patients?

A: Yes.

Q: And you were a doctor who performed abortions, and consulted on abortion patients?

A: Yes.

Q: Even after you got immunity from Phil Kline, you still feared prosecution by Phil Kline?

A: Yes.

* * * * * *

Q: You sought immunity because you were afraid that if you didn't have immunity, you might be prosecuted just like Dr. Tiller is being prosecuted?

A: Yes.

Q: Do you think you are innocent of any crime?

A: Yes.

Q: You wanted immunity because even though you are innocent of any crime, you feared you might even today be prosecuted anyway?

A: Yes.

Q: Just like Dr. Tiller is being prosecuted?

A: Correct.

With that, Dan ended his storytelling cross-examination of Dr. Neuhaus.

Dr. Tiller testified in his own defense. He told the jury that only two physicians besides himself still provided abortions after 22 weeks of pregnancy, one in Boulder and one in Los Angeles. He described the firebombing of his clinic, which caused over $100,000 in damage and devastated the morale of his staff and patients, and he showed the jury photographs of the damage. He identified a videotape of the "Summer of Mercy" protesters, which Dan had played in his opening statement and which was now in evidence. And he testified:

> In 1993, in August, I was leaving the clinic. You have to slow down because there's usually some protesters. I slowed down, I looked to my left. What I saw was a person, an anti-abortion protester, I thought she was going to hand me something. And it was not anti-abortion literature. She was holding a gun. She shot me five times and hit me in both arms.

The jury saw photographs of his injuries and the bullet holes in his car.

Dr. Tiller described how the threats had, on numerous occasions (including 24-7 protection between September 1994 and January 1997), qualified him for the protection of federal marshals. He described how his opponents had broken into and disrupted services at the Reformation Lutheran Church where his family worshipped. He described a group of protesters who regularly took photographs of patients and patients' vehicles, approached patients at their motels, picketed the motels and slid threatening notes under the patients' motel room doors.

Dan then directed Dr. Tiller as he described the efforts he had made at legal compliance with and lawful challenges to the applicable regulations. Then arose the topic of Dr. Tiller's phone conversation with the chair of the Board of Healing Arts, wherein the chair recommended that he contact Dr. Neuhaus. Dr. Tiller explained that he had previously relied on the chair's advice and interpretation of the applicable laws and regulations; and he believed that the chair had the power to interpret the law about a documented referral from another physician. Dr. Tiller showed the jury his notes of that conversation in his daytimer: "Larry Buening [the chair] = use Kris Neuhaus. The Board is neither pro choice nor anti. Maybe Kris N. could come down."

In Kansas, a conversation like that described by Dr. Tiller is not hearsay if the declarant is present and available for cross-examination about his declaration. Dan had subpoenaed the chair of the Board of Healing Arts, making his conversation with Dr. Tiller admissible. Dan then chose not to call the chair as a witness (there was no need to do so, as the conversation was now in evidence); and the prosecutor elected to not call the chair either. This enabled Dan to point out, in final argument, that Dr. Tiller's statements in his dayplanner are uncontradicted. Not only Dr. Tiller, but also Dr. Tiller's compliance lawyers had taken action consistent with Dr. Tiller's recording of the chair's comments, within the following day.

Dr. Tiller confirmed Dr. Neuhaus' testimony, that he did not pay Dr. Neuhaus; that they had no legal relationship such as a partnership or corporation; that she received no ownership in Women's Health Care Services; that she did not use Women's Health Care Services' billing system or bank accounts. He did not charge her rent, because he concluded that a landlord-tenant relationship would be a "legal affiliation" which would violate the statute.

In summation—and this is what Dan argued at the end of the trial—the nature of the statute was such that a physician could not comply with the statute without violating it in the process. For one physician to refer a patient to another could constitute a "legal affiliation." If Dr. Neuhaus paid rent to Dr. Tiller, that would count as a legal affiliation; but if she did not, she received a financial savings benefit that would count as a financial affiliation. "Your attempts to obey the law are, in fact, breaking the law," Dan argued.

The prosecution's response, in rebuttal, was to argue, "I don't know—maybe Dr. Tiller should have said, 'there's no way to obey this law without breaking it,' and stopped performing these abortions." That response shone the light on Dan's defense: that the law was not about a genuine concern for what kind of relationship one physician had with another, but rather about setting a trap to shut down a controversial, but lawful, medical practice. The prosecution thus revealed that the State was willing to pass laws that were little more than a trap—not just for the unwary, but even for someone like Dr. Tiller who had paid a team of legal experts to find a way to comply with the laws. Dan had spent the entire trial telling the truth of that story—and with that comment, it was the prosecution that issued the final confirmation that all that Dan said was the truth.

After only 25 minutes, the jury announced that it had reached a verdict. It was another 35 minutes before the verdict could be read, however: during the short period of deliberations, courthouse security received a tip that one of Dr. Tiller's opponents had snuck a container of battery acid past the metal detectors, and planned to throw it on Dr. Tiller and his attorneys. In addition, the court determined that each juror, each defense lawyer and Dr. Tiller should have armed escorts to their vehicles and homes.

The air in the courtroom was palpably tense as the foreperson handed the verdict form to the jury. The judge read the verdict to himself, and then aloud: *not guilty*, on each of the nineteen counts. On his own initiative, the judge then polled the jury, requiring each juror to state aloud and identify himself or herself with the acquittal before the hostile crowd. This risky development demonstrated how Dan's courage had emboldened and encouraged the jurors themselves: when he reached the juror who was a devout Catholic, the judge asked, "is this your verdict?" In a clear voice, the juror answered, "*absolutely*." Before the jurors left, they collectively asked the judge to express to Dr. Tiller that they were glad to know that there was a safe and secure facility where women could receive the treatment they needed.

The coda: The facility and practice for which the jurors expressed their admiration are now every bit as dead as Dr. Tiller

himself. On June 1, 2009, while his wife sang in the choir, Dr. Tiller was murdered as he ushered worshippers into the entryway to his church. Dan, along with Dr. Tiller's other lawyers, were summoned to another church for "safekeeping" until the killer could be apprehended; they stayed in their homes instead, not wanting another church to be desecrated by extremist violence.

Approximately one week later, Dr. Tiller's family decided that it would not reopen the clinic.

Speaking of the environment that protesters created for Dr. Tiller and his family for decades, Dan speaks against limiting free speech: "We don't want to fly off the handle and make a rash restriction on speech that really is embraced by the First Amendment freedoms that we've fought so hard for." In the years of this century, Dan displayed great courage to face the criticism, the harassment and even the threat to life and limb that any lawyer for such a controversial client must have. It is unspeakably sad that Dan's work for Dr. Tiller came to an end by criminal violence; but that fact demonstrates exactly what it cost Dan to accept the challenge of representing Dr. Tiller.

Dan says that it was his honor and his privilege to represent Dr. Tiller. All of us can relate to the client who earns and commands our respect and our love. In this case, Dr. Tiller's courage inspired Dan, and Dan's courage in turn inspired Dr. Tiller's jury. Dan's work is a model for each of us who need more courage and seek more courage.

Thank you, Dan, for sharing with us your story of this enormously challenging representation.

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Note: "TLC Methods in Practice" is a regular feature in this magazine, and I am always in need of material from warriors who have put TLC methods, taught at the Ranch and at regional workshops, into their practice. This includes:

- trial work (any part of any type of trial);
- deposition work (preparing your own client/witnesses, or deposing the other party's clients/witnesses);
- discovering the client's story through reenactments;
- telling the client's story at sentencing hearings;
- communicating with judges and adversaries;
- appellate work;
- mediations and plea conferences;
- and any other part of your practice where you have noticed a wonderful success in using TLC methods.

Transcript is helpful but not necessary. Just call me at 308/635-5000, or e-mail your story to me at mlc@chhsclaw.net. As always, I look forward to reading and writing about great accounts from fellow warriors of finding justice through the use of TLC methods!