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EDITOR'S NOTE

Carol L. Couch, N.M. Court of Appeals (recently retired)

As you can see from the Table of Contents this issue offers a variety of articles, filled with information about the November '06 conference at the Omni Mandalay at Las Colonias, the latest developments with the AJEI, background on our newest board member Elena Ris, an update on the CASA Directory, a recap from the '05 conference on Texas evidentiary travails (which might not be limited to Texas), an interview with Judge Lynn Pickard of the New Mexico Court of Appeals, and a trio of book reviews on: appointments to the U.S. Supreme Court, how federal courts of appeal process cases, and a nostalgic look back at the inception of the Michigan Court of Appeals' central staff of attorneys. My thanks to all of our contributors.

In the Spring Issue you may look forward to the continuing updates from Paul McGrath, our chairperson, and a report on the February ABA mid-year meeting in frosty Chicago. An essay on the Breyer v. Scalia debate is also planned as well as more detailed information about the November 2006 conference. As always, we welcome submissions, news, and views from our readership. Please feel free to contact me at clcouch505@cybermesa.com.

MESSAGE FROM THE CHAIR

Paul McGrath, New York Court of Appeals

Happy New Year to all the CASA faithful as CASA hits the big 30! That's right, for 30 years the Council of Appellate Staff Attorneys, an arm of the Appellate Judges Conference of the American Bar Association, has been conducting top notch educational seminars and providing networking opportunities for staff attorneys from across the country. Please join us in Dallas from Thursday, November 9 through Saturday, November 11, 2006 to celebrate CASA's 30th anniversary in style. CASA will be participating in a joint seminar with the appellate judges' annual Spencer-Grimes educational program and with the appellate attorneys of the Council of Appellate Lawyers. CASA will still have one and a half days of independent programming, but we will be sharing the other one and a half days with our partners in the AJC. This seminar shapes up to be an exciting one where CASA members can interact directly with appellate judges and appellate legal specialists from across the country.

Kudos go out to CASA Education Chair Lee Ramsey of the Tennessee Supreme Court, who, with the help of his committee (most notably Kembra Smith from Atlanta), has done an amazing amount of work over a short period of time in coordinating with the educational chairs of the other entities and with the folks from the Dedman School of Law at SMU to put together most of the details for CASA's first joint seminar under collective ABA and AJEI co-sponsorship. We have already locked in some of CASA's perennial top speakers. Professor Erwin Chemerinsky of Duke Law School will be on hand in two capacities. First, in a program geared for CASA seminar attendees only, Professor Chemerinsky will take an in-depth look at the Supreme Court, with John Roberts having one full year under his belt as the Chief Justice. This presentation shapes up to be bolder, more analytical and more forward-looking than previous year-end Supreme Court roundups. Second, Professor Chemerinsky will also be part of an ethics presentation for all seminar attendees in the joint part of the program. In addition, CASA is pleased to bring back Linda Elrod from the Washburn School of Law in Kansas to tackle the recent developments in family law. CASA will also cover the continuing important developments in Confrontation Clause jurisprudence in the wake of the Crawford v Washington decision. Another planned highlight of this seminar will be the dinner on the first night when Justice Sandra Day O'Connor, the first female justice of the Supreme Court of the United States and certainly one of the three or four most significant female Americans of the 20th century, will be the guest speaker. Justice O'Connor's remarks at the dinner on Thursday will be followed by an intense morning and early afternoon on Friday when all the groups will get together for what is sure to be an interesting and provocative discussion on Judicial Independence: what it is and what it isn't. This is an area where SMU dean John Attanasio has spoken to judicial delegations from across the globe. We are hopeful that Justice O'Connor, who is very interested in this topic, will participate in this presentation as well. We will be adjourning relatively early on Friday, and the AJEI staff plans on providing the details on a variety of cultural and recreational activities. Please stay tuned in the weeks and months ahead as further details get put into place for the 2006 joint seminar.

Apart from the seminar plans and commitments, there are other developments impacting the AJEI and AJC, and consequently CASA. First, in what could be seen as a negative development, the Council of Chief Judges of Courts of Appeal (CCJCA) has decided not to participate as a group in the 2006 seminar in Dallas. Details have yet to be worked out in terms of amending the AJC bylaws to exclude the CCJCA as an arm of the AJC. It appears that the CCJCA will be affiliating rather loosely with the National Center for State Courts who will assess individual states to support their

funding. On the positive side, AJC chairperson Judge Denise Johnson from Vermont has called meetings of an intentionally small Strategic Planning Committee to work with the folks from the ABA, AJEI and the Dedman School of Law in developing a road map for future educational seminars for the AJC, CASA and CAL. Realizing that the key to any successful plan for the future is dependent on our groups having a better handle on their financial picture, Judge Frank Sullivan of the Indiana Supreme Court has begun looking at the financial picture for the last several years, both pre-and post-AJEI involvement and to make recommendations to the AJC Executive Board, hopefully in time for the mid-year meeting this February in Chicago. Marcia McCormack from New Hampshire is CASA's representative on this financial subcommittee.

I close with some requests of our membership. By all means, strongly consider our seminar. For many of you, I know it means going to Dallas two years in a row, but the Education Committee promises that you won't regret your decision if you decide to come. The complete details of the seminar will be released long before the summer, so make your plans early to get a few days out of the office. Remember, Dallas can be a welcome escape from the gales of November that can hit the Midwest and Northeast. Perhaps even more importantly, make three little New Year's resolutions for the benefit of our organization and for the betterment of the profession. First, tell a few colleagues about CASA and all it has to offer in terms of opportunities for travel, life-long learning and networking. One-on-one contact is our best marketing device; it is considerably more effective than e-mails or direct mail. Second, write an article for CQ to let others know about something that struck you as significant from a past seminar or what you would like to see at a future seminar. Third, contact a board member by phone or e-mail to ask how you can volunteer to help out our organization in this time of transition. We really need you! I welcome hearing from you at pkmcg@msn.com. CASA is a young 30, but it needs its next generation of leaders to step up and carry on the tradition.

EXECUTIVE BOARD BIOGRAPHY: Elena Ris

Elena Ris is a Supervisory Staff Attorney for the United States Court of Appeals, Eleventh Circuit, in Atlanta, Georgia. She first joined the Eleventh Circuit's Staff Attorneys' Office in 1992 and served the Court until March 1997. Following a five year clerkship with federal district court Judge Ralph Nimmons, Jr., of the Middle District of Florida, she returned to the Eleventh Circuit's Staff Attorney's Office in January 2002.

Elena is a native of Havana, Cuba. When she was 4 years old, her family left Cuba, lived briefly in Nicaragua, then immigrated into the United States and resided in Indianapolis, Indiana for several years. Thereafter, she spent portions of her childhood in Jacksonville, Florida, and Atlanta, Georgia.

After graduating from the University of Florida with a B.A. in political science, Elena attended the University of Florida College of Law. She clerked for Judge Hugh Glickstein of the Fourth District Court of Appeals in West Palm Beach, Florida, and then worked in a local law firm handling civil appeals before relocating to Atlanta in 1992.

A member of CASA since 1993, Elena has attended many CASA seminars including those held in Blaine, Washington; Key West, Florida; Breckenridge, Colorado; Portland, Maine; Flagstaff, Arizona; Charleston, South Carolina; and Park City, Utah.

Elena is married and has a 19 year-old daughter who is a freshman at the University of Florida. Her husband, Steve, has worked for Delta Airlines for over 30 years. Thanks to her husband's flight benefits, Elena is able to frequently engage in her favorite pastime—traveling. She recently traveled to Switzerland and Argentina. When not on a flight to a foreign destination, Elena enjoys gardening and kayaking.

CASA MEMBERSHIP: A Cost/Benefit Analysis **by Dave Ewert, Iowa Supreme Court**

I chose CASA. So should you.

The year 2005 will go down as one of the more challenging times in CASA's illustrious history. On the positive side, we had another great seminar in Dallas, and it was wonderful to see old friends and meet new ones, while getting first-rate continuing legal education. On the other hand, 2005 will be remembered as the year some members bolted to form the National Association of Appellate Court Attorneys (NAACA), to be affiliated with the University of Richmond. Some people even questioned the continuing viability of CASA given this situation.

The pro's and con's of joining the new group or staying with CASA were debated, sometimes boisterously, at the Dallas seminar. If I had skills in such matters, I would have printed t-shirts saying "*Survivor: Los Colinas.*" And like *Survivor*, there were many clandestine meetings and a heaping helping of hyperbole in the mix.

Ultimately, though, I cut my check and rejoined CASA and the ABA.

Why? I simply weighed the costs and benefits of membership in the two groups.

An experienced attorney would still have to pay \$200 to join the fledgling organization. For not much more, the same attorney could pay the reduced government rate for ABA membership plus the required \$35 section dues and get a lot more for the money. [Ed. Note: If the ABA portion of those dues create a hardship, you can call the Service Center at 800/285-2221, to discuss affordable dues options.] Those who join CASA become members of the Appellate Judges Conference (AJC) and get the following benefits:

CASA's annual seminar. CASA has sponsored fantastic educational programs in such diverse locations as Boston, Key West, and San Diego. CASA's 2006 seminar will be held in Dallas, Texas on November 9-11, and will feature joint programming with appellate judges and appellate lawyers. While the joint seminar format is new for CASA, our education committee has ensured a significant part of the program will be directed towards our particular needs. Just as in past seminars, most of the premier speakers will focus on substantive law topics, which are necessary for appellate judges, lawyers, and staff attorneys alike. Joining forces with the judges and appellate lawyers should ensure our ability to get topnotch speakers at this and future seminars. Finally, my instincts tell me that the having these judges and attorneys in the mix will help ensure future seminars will continue to be held in exciting and diverse locations. Of course, CASA members receive a substantial discount on seminar tuition that more than makes up for the \$35 membership fee for joining the AJC.

CASA Online Resources. Another member benefit is exclusive access to CASA's two listservs -- one for announcements and the other for posting questions and surveys -- so that you can share in the discussion of important information relevant to appellate law. Members also can access CASA's electronic newsletter (*CASA Quarterly*) with substantive information as well as announcements and news, and the CASA Website www.abanet.org/jd/ajc/casa/home.html that includes a (member-protected) Directory of Appellate Staff Counsel and other helpful resources.

ABA Benefits. As part of the AJC, CASA members are invited to social/networking events at the ABA Annual Meetings in August and Midyear Meetings in February and at other AJC-sponsored programs. The ABA also sponsors a variety of online continuing education opportunities

for members. The AJC and CASA additionally provide the opportunity to join committees that play an active role in shaping appellate practice. As an ABA member you will receive the *ABA Journal*, chock full of expert legal analysis on cutting edge legal topics. Membership in the Division brings other valuable publications, such as the award-winning *Judges' Journal*, and the *Directory of Minority Judges of the United States*, the only national and most comprehensive compilation of minority judges. Additionally, the Division offers unique bench-bar collaboration opportunities through the Standing Committee on Minorities in the Judiciary, the Tribal Courts Council, the Judges Network, and the Bankruptcy Council. You also have access to a wide variety of affordable insurance through the American Bar Endowment, and rental car and other travel discounts based upon ABA membership.

CASA leaders who attended the August AJC meeting and the fall AJC and AJEI meeting have expressed optimism that CASA's concerns are being taken seriously, as evidenced by the growing role of CASA representatives in the AJC and AJEI command structure and financial oversight committees. CASA leaders have made it quite clear that CASA expects to continue to be able to provide members with CLE that is finely-tuned to their needs. Although we certainly will miss our departed friends, those who remain with CASA have a wonderful opportunity to shape its future through participation in its committee and management structure. This is especially a great time for new members to move up through the ranks.

Ultimately, I felt like leaving CASA would be too much like abandoning a beloved, and definitely seaworthy, ship. I'm staying, and I hope you'll join me by becoming CASA member.

CASA Membership is open to any attorney employed by a state or federal appellate court, whether a staff attorney, a judicial law clerk, or an attorney working in any other office of the appellate courts. CASA has a great big tent, and we want you inside.

[Editor's Note: If you click on "Join CASA" from the CASA website www.abanet.org/jd/ajc/casa/home.html, you can download the application form for membership, which includes specific information about ABA's reduced rates for government employees.]

YOU CONVICTED THE WRONG PERSON - REALLY

Bill L. Thompson, Counsel, Supreme Court of Missouri

A journalism class in Illinois does research on a person sentenced to death and determines he is not guilty. Other cases are examined, and there are more indications that the death penalty was imposed on the wrong person. The governor of Illinois, who has stated support for the death penalty, ponders the issue and decides to impose a moratorium on executions. He notes more people have left "death row" by being exonerated than by being executed.

Is this merely an Illinois phenomenon? What is to be done to prevent similar problems in other jurisdictions? This was a topic explored by a death penalty opponent, Rob Owen, an assistant district attorney, Roe Wilson, and a victims' rights advocate, Paula Kurland. Meredith Rountree moderated.

Before the discussion began, the attendees viewed a documentary outlining the journey of George Ryan, governor of Illinois, and his decision to impose the moratorium. The documentary showed the emotions of those whose relatives were killed as well as those wishing for a moratorium because of the questions about the accuracy of convictions. Ultimately, the governor made no distinctions on the basis of the strength of the evidence but commuted all the sentences. The documentary also included those who had been wrongfully convicted and how such convictions changed their lives.

One of the techniques for showing a person was not guilty is the development of DNA testing. The panel expressed hope that more and earlier testing would help prevent conviction of those not guilty. Such testing requires time and money, of course, and the material to test must be available. Those laboratories conducting the tests must be reputable.

Where a conviction has already occurred, "innocence projects," privately funded organizations provide resources for a limited number of cases. Such organizations also can help with clemency requests and the development of new evidence after the courts have determined that a conviction is final.

Although these solutions may alleviate the problem, the panel also stressed the need for adequate counsel and resources for the counsel to thoroughly defend the case. Through competent counsel wrongful convictions can be minimized before a person is wrongfully convicted. Courts can establish a standard of effectiveness that is higher than a minimal competence. State constitutions may provide greater protection than the United States Constitution, and state courts can so decide.

In addition to evidentiary issues and lawyer competence, the panel noted the studies indicating a racial disparity in imposition of the death penalty. Particularly striking is the effect of the race of the victim on death penalty decisions with a white victim leading to a higher probability of the death penalty. Death qualification of the jury and lack of jury diversity can enhance the possibility of conviction and a death sentence. Suggestions were made that peremptory challenges of potential jurors should be eliminated and that prosecutors should make charging decisions without knowledge of the race of the victim or the defendant.

Was Illinois an aberration? Many on the panel and in the audience would say, "No."

INTERVIEW ON THE 2005 NATIONAL CONFERENCE ON APPELLATE JUSTICE with Judge Lynn Pickard

CQ: You recently attended the 2005 National Conference on Appellate Justice. Who sponsored the conference? What was its genesis? Who attended?

LP: The conference was primarily sponsored by the American Academy of Appellate Lawyers, The Federal Judicial Center, The Institute of Judicial Administration of NYU School of Law, and The National Center for State Courts, although a large number of law firms and individuals provided financial support. As I understand the genesis, a number of people who either attended a similar conference held in 1975 or had read or heard about that conference thought that it was time to have another. The first conference was held in the aftermath of the criminal or constitutional law revolution of the Sixties and the consequent increase in appellate caseloads in the years thereafter. Thirty years had passed since appellate judges, practitioners, and scholars had come together to examine the process by which appellate justice was being dispensed, and the organizers thought it was high time to meet again. About 200 appellate judges, appellate lawyers (primarily members of the American Academy), federal district judges, and academicians, together with a handful of staff attorneys and chief clerks/court executive officers attended the conference.

CQ: Was there any consensus about the challenges that face appellate courts in the 21st Century? Or what different challenges face state and federal courts?

LP: I would have to defer answering the question about whether there was consensus. One of the features of the conference is that it will be reported. The conference featured both plenary and breakout sessions, and reporters attended both types of sessions. I understand that the reporters will not attempt to force a consensus position, but I am hopeful that the eventual report, which will be published in the Journal of Appellate Practice and Process, will contain a more coherent, complete statement about the participants' concerns and discussions that I am able to present here.

High caseload appeared to be a common theme among all courts. One interesting fact struck me, and that is that almost all courts believe that their caseload is higher than their resources allow for considered and well-reasoned and well-written judgment in every case. And this belief is held by courts with caseloads of 400 filings per year per judge and courts with caseloads of less than 100 filings per year per judge.

There also appeared to be consensus that self-represented litigants were a challenge to most courts, that the level of attorney competence was also a challenge, and that most courts faced challenges to judicial independence from the political system, as well as from the media, representing some portion of the public.

I did not detect different concerns emanating from state courts as opposed to federal courts. To be sure, federal courts are vastly better funded and staffed than state courts. However, federal courts appear to have a higher percentage of self-represented litigants than state courts, and some judges believed that state courts have a more interesting caseload.

CQ: Were you surprised by anything you learned at the conference?

LP: I was surprised that there were not more cutting-edge ideas bantered about. As I understood the results of the 1975 conference, there were a number of ideas that courts then implemented to deal

with the caseload problems of that era. Here in New Mexico, we began a central staff of attorneys and experimented with fast-track procedures. The staff has grown and the experiment, which first involved only criminal cases, has now grown to encompass our Court of Appeals' entire caseload. CQ: Did you come away from the conference with any practical ideas for change in your court?

LP: The most practical idea I learned was from Shirley Abrahamson, Chief Justice of the Wisconsin Supreme Court, who was our keynote speaker. She said that Wisconsin has a rule that every attendee at a national conference is expected to bring back at least one idea and to put it into effect. Among the ideas that I believe can be put into effect in New Mexico include expanding our web site to be even more helpful to attorneys and self-represented litigants and to include more information about the Court, including streaming video of our oral arguments. One way to improve the public perception of the judiciary is to convey to the public what we do. [Editor's Note: The N.M. Court of Appeals website can be found at <http://coa.nmcourts.com> by clicking on "court sites." In addition to a wealth of general information about the court, the site includes pro se forms and a video instructions for appeals.]

BOOK REVIEW:

JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENT FROM WASHINGTON TO CLINTON by Henry J. Abraham.

429 pp., Rowman & Littlefield, 1999 (4th ed.)

Reviewed by Alise Rudio, New Mexico Court of Appeals

As soon as it was announced that Harriet Miers had asked President Bush to withdraw her name as a possible justice to the U.S. Supreme Court, I got a call from one of my friends.

“Good news,” he said. “You just moved up a notch.”

Yeah, I and a million other lawyers. While I had no trouble understanding why *I* would never be nominated for the U.S. Supreme Court, I was at the time eagerly following the nomination process. I was trying to make sense of why some people got nominated and others did not. And as John Roberts’ championship season rolled into the winter of Samuel Alito’s discontent with the confirmation hearings, I wondered if there was a better way to understand why some learned lawyers (and yes, it turns out there have been no exceptions there -- at least with the lawyer part) actually made it to the highest court and others did not.

To gain some perspective, I picked up the latest edition of Henry J. Abraham’s *Justices, Presidents, and Senators: A History of the U. S. Supreme Court Appointments from Washington to Clinton*. Originally published in 1974, Abraham’s book is considered a classic history of judicial appointments to the high court. In comprehensive detail, Abraham tries to explain why certain individuals were chosen over others. A professor of government and foreign affairs, and an expert court watcher, Abraham compiles an impressive assortment of information to guide one’s understanding of judicial appointments over the course of American history. Chock full of charts, statistics, and reference lists, including rankings of the performances of both justices and presidents, Abraham’s book provides an essential reference for any scholar of the Supreme Court and the judicial process. Yet, as a narrative history, *Justices, Presidents, and Senators* is also entertaining, offering a one-stop shop of anecdotes about the men and women who have composed the court.

In 1999, Abraham added “senators” to the title of the fourth and latest edition of his book in an effort to reflect the increasingly important, and often contentious, role of the Senate Judiciary Committee and confirmation hearings in placing appointees on the high court. Abraham also updated his book to include information on President Clinton’s appointees. Thus, the latest revision chronicles the history of the selection, nomination, and appointment of each of the justices of the Supreme Court from 1789 to 1999, which includes the first 108 members on the court.

When I first realized that Abraham’s study ended with the Clinton administration, I was a little disappointed. I wanted to know what was going on *now*. It turns out that I was pleasantly surprised, as Abraham’s book gave me exactly the perspective I needed to better understand the latest wave of judicial appointments and the ensuing wake of congressional hearings.

As Abraham explains in the first chapter, *Justices, Presidents, and Senators* is “an attempt to analyze and evaluate the motivations that underlie the process of presidential selection and appointment, the role of the Senate in that process, the degree and kind of fulfillment of presidential hopes or expectations, and the professional performance of those entrusted with the responsibilities of the business of judging.” Rather than glibly write off all judicial appointments to plain old politics, Abraham proposes that a “quartet of steadily occurring criteria” best explain the presidential selection of members of the Supreme Court: (1) objective merit; (2) personal friendship; (3) representation; and (4) “real” political and ideological compatibility. Abraham then explores these themes in the following chapters in what is mostly a chronological account of each appointee set

against the background of the presidential politics of his or her era. Balancing lots of research with snippets of human interest, Abraham offers biographical sketches of the careers of individual justices and then evaluates their contributions to the development and understanding of constitutional law. Finally, Abraham measures the performance of the justices against the expectations of those who appointed them. True to the new title, Abraham also discusses how the confirmation process has become more political over time, though I suspect this area is ripe for further exploration.

In what is something of an aberration in the chronological story Abraham presents in the bulk of the book, Abraham devotes his second chapter to “a turbulent case study” of the Nixon era. From June 1968 to December 1971, Abraham proclaims, “the attention of the American public was drawn to the highest court of the land more closely than at any time since the epic Court-packing battle between Franklin D. Roosevelt and the U.S. Senate in 1937.” In revisiting the story of this fascinating era, I saw a lot of parallels to the present and wondered how the recent round of judicial appointments would fare in Abraham’s rankings of attention grabbers.

While Abraham makes an admirable effort to identify the motivations of presidents in appointing individual justices, and then to find discernable patterns over time, he acknowledges that for many appointees winning a nomination is all about timing – and luck. Justice Sandra Day O’Connor once remarked that becoming a justice on the U.S. Supreme Court was “a classic example of being the right person in right spot at the right time.” Taking his lead from O’Connor, Abraham recognizes that sometimes losing a nomination was about being the wrong person in the wrong place at the wrong time, as in the furious fight over Robert Bork. And in what Abraham calls the most contentious battle yet, that of Clarence Thomas, a nominee is “the right person in the wrong place at the wrong time.” The same, I suppose, can be said of one of the greatest jurists never to grace the high bench, Learned Hand. Always deemed either “too old or in the wrong political party,” Hand never had the opportunity to ascend to the high court. Meanwhile, more unlikely candidates became accidental jurists (such as Chief Justice Morrison R. Waite, who was widely called “His Accidency”).

Perhaps the most fascinating aspect of Abraham’s book is his analysis of whether justices lived up to expectations of presidents, politicians, and the public. In approximately twenty percent of Supreme Court appointments, Abraham proposes, presidents often were bitterly disappointed with the voting patterns of their nominees once they got on the bench. President Teddy Roosevelt, for example, was taken by complete surprise when Oliver Wendell Holmes ruled against his administration in antitrust cases and proclaimed: “I could carve out of a banana a Judge with more backbone than that!” When President Dwight D. Eisenhower was later asked if he had made any mistakes as president, he allegedly replied, “Yes, two, and they are both sitting on the Supreme Court.” He was referring to Chief Justice Earl Warren and Justice William J. Brennan. After one of President Harry S. Truman’s cronies ruled against the executive power to seize striking steel mills during the war, the president called his appointee a “damn fool” and his biggest mistake. Ironically, the decision that so irritated President Truman is rearing its head in present-day confirmation hearings as senators probe nominees’ stances on presidential war powers.

Often, it seems, justices who met with great opposition at their appointment made remarkable transformations on the bench. Justice Felix Frankfurter regarded Justice Hugo L. Black as “a rural, country bumpkin in judicial robes who ‘delivers flapdoodle in the name of democracy.’” However, as Abraham persuasively argues, Black probably left one of the largest impacts on our jurisprudence.

That is not to say that the folks back home approved of his legacy of liberalism. A former member of the Ku Klux Klan, Black was reviled as a traitor in the Deep South. A fellow Alabaman said of Black: “Hugo Black used to go around in white robes scaring black people. Now he goes around in black robes scaring white people.”

In an oft-repeated pattern, presidents opted for a moderate candidate for strategic reasons, only to find the justice make an unexpected swing to one side of the pendulum or the other. Chief Justice Warren, for example, was appointed as a moderate Republican, though his court came to personify liberalism. Justice John Paul Stevens, in turn, was chosen by President Gerald Ford because he was thought to be confirmable by a heavily democratic senate in the aftermath of Watergate. Yet many might forget that Stevens was chosen by a Republican president just as some might forget that Justice Byron R. White was appointed by President John F. Kennedy. Similarly, Nixon-appointed Justice Harry A. Blackmun was expected to heed to the political ideology of his close friend Chief Justice Warren E. Burger but ended up with the label of a liberal.

While one may certainly disagree with some of Abraham’s assessments and the ratings of the individual justices, his insights are for the most part exceedingly fair and non-partisan. As Abraham evaluates the contributions of the various members of the court, he displays both a profound respect for the human beings beneath the robes and a reverence for the judicial process that is somewhat refreshing in the midst of contemporary confirmation battles.

In the epilogue, one senses that Abraham could go further in exploring the role of confirmation hearings and other factors that influence the appointment process in the current era, such as public opinion polls, special interest groups, and endorsements of the bench and bar. With blogs, web sites, and advertising campaigns pumping up the volume on the public debate over individual candidates, a brave new world certainly deserves analysis. However, I expect another edition is needed to really address these issues in anything approaching the comprehensive manner of the rest of the book.

Perhaps in a quieter time, when “death and retirement seem[s] to have taken a holiday,” Abraham will grace us with another revision. In the meantime, *Justices, Presidents, and Senators* not only helps to put the careers of individual justices in perspective, but offers an excellent primer for pondering the politics of contemporary judicial appointments to the U.S. Supreme Court.

BOOK REVIEW:

MAKING LAW IN THE UNITED STATES COURT OF APPEALS, David E. Klein 190 pp., Cambridge University Press 2002

Reviewed by Joseph C. Merling, 6th Circuit Court of Appeals & Past CASA Chair

What factors determine how a federal court of appeals judge decides an issue of first impression in that judge's circuit? This question drove David Klein, a government and foreign affairs professor at the University of Virginia, to conduct a study of such decisions over a two year period and to interview federal court of appeals judges to expand upon the results of his study. He developed numerous hypotheses about the factors that would enter into this decision, and he tested those hypotheses against the data that he collected from both sources.

Klein's hypotheses were as follows: (1) the probability of adopting a precedential rule should be greater the more compatible the ideological direction of the rule is with the ideology of the deciding judges; (2) the probability that judges will adopt a precedential rule should increase with the prestige of the judge initially promulgating the rule; (3) the probability that judges will adopt a precedential rule should increase with the expertise of the judge initially promulgating the rule; (4) the probability that the judges will adopt a rule should be lower if the court announcing the rule is not unanimous in supporting the rule; and (5) the probability of adopting a rule should vary positively with the strength of the support for that rule among the circuits already considering it. Klein viewed the first hypotheses as the traditional legal realist view that judges decide cases primarily on their policy preferences and find the law that supports their position. Klein saw the second, third and fourth hypotheses as supporting the view that judges are interested in making good law as an important goal in itself, independent of the judge's policy preferences. Klein considered the last hypotheses as supporting the need to decide cases quickly and easily and to avoid unnecessary conflicts.

Klein found that all of his hypotheses were supported by his study. As an example of his method, he cites in the conclusion of his book the case of *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984). That case held that judges had the power to authorize the video surveillance of private buildings. Over the next ten years, five other circuits addressed the issue and adopted the Seventh Circuit's rule. One possible explanation is that judges, generally conservative in the area of criminal law, adopted a rule favoring the state over criminal defendants. Klein pointed out that this process cannot be the only cause of the results in these cases because two of the judges writing the opinions were liberal. Klein noted that the original Seventh Circuit opinion was written by Judge Posner, one of the most respected of federal court of appeals judges. Klein noted that this cannot be determined for certain, because Judge Posner was not mentioned by name in the subsequent decisions. Perhaps, according to Klein, the rule was just particularly persuasive. As a final comment, Klein noted that the cases supported the final hypotheses because the later cases emphasized the unanimity of the previous decisions and the lack of dissent from the rule.

Klein also considered whether judges when looking at issues of first impression ever tried to predict how the Supreme Court would rule when faced with the question. Klein discovered that this was not an important factor. Only a few cases mentioned what the Supreme Court might do as a factor, and only a few judges in the interviews said that they considered what the Supreme Court might do.

What can staff attorneys take from the study? The discussion must start with the difference between those staff attorneys who work for the court as a whole and those who work for a particular judge. Those who work for a particular judge must take his or her policy preferences into consideration when drafting a memorandum about a case. Those attorneys who work for the court as a whole cannot take any particular policy preferences into account because they do not know to whom their work will be assigned. They must be as objective as possible when making a recommendation.

For the vast bulk of work in federal staff attorney offices, the object is to look for a Supreme Court or circuit court of appeals case on point. If an issue of first impression arises, the case is usually referred to a hearing panel where the judges will use their elbow law clerks to assist them in analyzing the case. There are a few rare situations where an issue of first impression must be addressed, such as when the staff attorney is addressing a motion that must be decided before the case can continue or is drafting a bench brief for the panel. In these cases, Klein's discussion of the judge's interest in making good law can provide some useful suggestions for how to proceed.

It would certainly be appropriate to refer to the prestige of the judge who originally developed a rule of decision on the issue. While the fact that a judge like Judge Posner decided a issue a certain way is not controlling, it should be allowed to carry some weight in the discussion of an issue. The same weight should be given to a judge who has well-known expertise in an area. An example might be when Justice Breyer was a court of appeals judge and may have decided a U.S. Sentencing Guidelines issue a certain way, given his expertise in the area.

The strength of a majority view is also a valid consideration when analyzing an issue of first impression. A staff attorney could make a recommendation with much greater vigor when all the courts of appeals to decide the issue so far are in agreement than when they are split three for and two against a particular rule. Similarly, if there is only one prior case deciding an issue, a dissent in that case would require careful consideration.

Klein does make the practical point that relying on a strong majority in favor of a particular rule makes deciding a case quick and easy. While that may be true, it is not a consideration that a staff attorney should make an important point. Getting to a just result on an issue of first impression is much more important than deciding such a case quickly and easily.

Finally, I will admit that I was surprised that considering what the Supreme Court will do is not a significant factor when deciding an issue of first impression. On reflection, however, Klein's data on this point makes a good deal of sense, at least for staff attorneys. Where should staff attorneys begin in such an analysis? Do we look at the cases in the same general area (criminal law, environmental law, etc.) and see where they are headed? Or do we look to the type of issue presented and see how it is decided across various subject matter areas (standard of review, district court standard for decision, agency deference, etc.)? Such an effort does not seem to be productive. For example, no matter whether you believe that it is or is not appropriate for the Supreme Court to consider foreign law when deciding constitutional issues, staff attorneys in general should not be in the business of suggesting a reliance on foreign law. The only exception might be if the staff attorney is assigned to a specific judge whose policy is to consider such sources.

When a staff attorney has the time to do so, working on an issue of first impression is fun and worthwhile. Klein's book carefully charts a number of important factors to consider when a staff attorney analyzes such issues and strives to help his or her judges make good law. I recommend it as a valuable and interesting book to read.

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T. JOHN'S COURT: A REMINISCENCE IN THE FORM OF A BOOK REVIEW

A MATTER OF RIGHT: A HISTORY OF THE MICHIGAN COURT OF APPEALS,
Charles E. Harmon

Reviewed by Norman Otto Stockmeyer, Professor of Law, Thomas M. Cooley Law School.

In the interest of full disclosure, in 1964 I wrote the first published article about the Michigan Court of Appeals.¹ This experience had two profound effects on my nascent legal career. It led to a twelve-year employment stint with the court, as a judicial law clerk, commissioner, and research director. And it introduced me to the thrill of seeing one's words in print, which has led to over 100 subsequent articles, book reviews, and columns.

Because I was there at the inception of the court, and have published several articles about aspects of its operation, I was excited to learn that the Michigan Court of Appeals is publishing a history of its first thirty-seven years. It's called A MATTER OF RIGHT: A HISTORY OF THE MICHIGAN COURT OF APPEALS and is available from the Publications Office of the Department of Management and Budget, 7150 Harris Drive, Dimondale, MI 48821 (enclose a check or money order for \$35 payable to the State of Michigan).

The author, Charles E. Harmon, is a retired political writer for the Booth Newspapers and former press secretary to Governor George Romney. The large, coffee-table size book contains over 100 pages of historical information, biographical squibs on all 67 past and present judges (through early 2002), annual caseload statistics, and wonderful historical photographs. I think Harmon succeeded admirably at what he saw as his biggest challenge: How to make it interesting? Relatively few lawyers practicing today can recall what it was like to pursue or defend against an appeal back before there was an intermediate appellate court in Michigan. Over the years the availability of the Court of Appeals (and the appeal of right) contributed to an increase in appeals out of all proportion to the increase in the general population or the number of lawyers. And the court's 250+ volumes of published opinions have contributed greatly to the jurisprudence of Michigan. Harmon's T. JOHN'S COURT A Reminiscence in the Form of a Book Review book explains how this came to be.

More than any other individual, T. John Lesinski was responsible for what the Court of Appeals has become. As Lieutenant Governor, and thus the presiding officer in the state Senate, he oversaw passage of the 1964 enabling legislation. As the court's first chief judge, he picked the staff, developed the internal operating procedures, and even designed the offices and courtrooms. It was, by unanimous consent, T. John's court. (Fellow judges called him Ted, but to everyone else he was T. John.)

Lesinski's greatest innovation and most lasting legacy is the court's central research staff. To increase judicial productivity and consistency, every issue was worked up by staff before being placed before the judges. Procedural motions got a Clerk's Office memo; applications for leave were reviewed by Commissioners; appeals of right went through the Prehearing Division. No other appellate court in America had such a large and highly organized staff, and no other appellate judges produced the volume of opinions per judge that Michigan's Court of Appeals issued.

Lesinski was proud of his court's ability to keep abreast of heavy caseloads through efficient organization and a centralized research staff. Beginning in 1969 he lectured on the Michigan experience at annual Appellate Judges Seminars sponsored by the Institute of Judicial

Administration. During 1972-73 Lesinski, Chief Clerk Ron Dzierbicki, and I spoke at a series of regional American Bar Association programs for appellate judges throughout the country (California, Florida, Louisiana, Nevada, and New Hampshire) on the court's procedures and research department. We put on similar presentations in Minnesota and Texas in 1976.

The proselytizing was not directed only at insiders. At Lesinski's urging, I wrote articles for lawyers and legal academics on our use of commissioners and prehearing research attorneys. They appeared in *Federal Rules Decisions* (1970),² the *American Bar Association Journal* (1973),³ *Vanderbilt Law Review* (1973),⁴ *Judicature* magazine (1976),⁵ and in the 1974 book *Appellate Courts: Staff And Process In The Crisis Of Volume*.⁶ By 1990, the Vanderbilt article, which I co-authored with Lesinski, had been excerpted, quoted, or cited in more than fifty books and articles on appellate-court productivity. Continued on next page *Appellate Practice Section Newsletter* 10

The Michigan Court of Appeals' innovative use of a centralized research staff became a national model for other intermediate appellate courts with burgeoning dockets. Most were still laboring under the one judge-one law clerk staffing model, and attempting to issue traditional full-blown opinions in every appeal. A 1976 book, *Justice On Appeal*, correctly called the Michigan Court of Appeals research department the most fully developed central staff in the country.⁷ In 1977 Bernard Witkin, long known as the dean of California jurisprudence, described the Michigan experience in these terms in his book *Manual On Appellate Court Opinions: The first successful use of central staff began in Michigan in 1968 in a newly created Court of Appeals with statewide jurisdiction. Under the Michigan system, a central staff attorney prepares a memorandum for every appeal. This memorandum, accompanied by the record and briefs, goes to the three-judge panel assigned to the case. The panel uses it to prepare for the oral argument and drafting of opinions. If the appeal seems suitable for routine disposition, a staff member drafts a recommended Per Curiam opinion, which the court may adopt, with or without editing.*⁸

"The pioneer in the use of central staff by appellate courts was the Court of Appeals of Michigan," University of Virginia law professor Daniel Meador, a close observer of appellate courts for many years, wrote in 1983. "It quickly developed the largest and most effectively organized staff of any appellate court in the United States."⁹

There were detractors almost from the beginning, and almost all were academics. One of the first was University of Michigan law professor Paul Carrington, who warned of the dangers of judicial delegation in a 1971 article in *Federal Rules Decisions*.¹⁰ In 1975, California appellate judge Robert Thompson acknowledged in the *California State Bar Journal* that over-reliance on staff research and draft decisions could lead to one-judge or no-judge appellate opinions.¹¹ University of Michigan law professor Joseph Vining criticized what he saw as the growing bureaucratization of the judiciary in a 1981 article in the *Michigan Law Review*.¹² And Michigan State University political science professor Harold Spaeth caused a stir when he labeled central research staff "the monster in the judicial closet" in a 1992 *Judicature* article.¹³

Defenders stepped forward to respond to the critics. Witkin fired back in 1979:

In brief, the critics' attack, reduced to simple terms, is not on central staff; it is in essence a charge that the appellate justices have

abandoned their responsibilities by producing decisions which are not their own; and the charge is no less outrageous when it is leveled at the allegedly culpable staff rather than at the justices themselves.¹⁴

Federal appeals court judge Harry Edwards strongly disputed Vining's bureaucratization thesis in a 1981 speech printed in the *Michigan Law Review*.¹⁵ Donald Ubell, a former Court of Appeals prehearing attorney and Michigan Supreme Court commissioner, offered an insider's perspective on the delegation issue in the *Thomas M. Cooley Law Review* in 1984.¹⁶ David Brown, a former central staff attorney for the Kansas Court of Appeals, faced down the "monster in the closet" in a 1992 issue of *Judicature*.¹⁷ The shortest retort may have been that of Patricia Wald, another federal appeals court judge, who responded to the bureaucracy charge with a pithy "Even Batman had Robin to help out in tight spots." (*Maryland Law Review*, 1983)¹⁸

By and large the judges of the Court of Appeals chose not to respond in print; perhaps they were too busy deciding appeals and issuing opinions. But they continued to subscribe to Lesinski's observation in a 1971 issue of the *Judges Journal*, and remained content to let him speak for them (or take the heat as some called it):

The day of the single, unassisted legal practitioner is over and so is the day of the unassisted judge. . . . [T]he use of supporting research personnel, functionally organized, can effect a significant increase in judicial output without derogation of the essential judicial function.¹⁹

Sol Wachtler tells the story of how, when he first became Chief Judge of New York's highest court, he proudly told his wife that he would be using Benjamin Cardozo's desk. She replied, "Yes, but remember in fifty years it will still be Benjamin Cardozo's desk."²⁰ In many ways that is true of the Michigan Court of Appeals: it's still T. John's court.

Professor Stockmeyer was the first law clerk to Chief Judge Pro Tem John W. Fitzgerald, the court's first commissioner, and research director from 1969 to 1976. In the latter position he hired, trained, and helped place more than one hundred Continued from previous page Fall-Winter 2003-2004
11 prehearing research attorneys, some of whom became appellate judges, supreme court commissioners, and leading appellate practitioners. He teaches at the Thomas M. Cooley Law School.

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NOTE FROM THE EDITOR

Carol L. Couch, Staff Attorney (retired), New Mexico Court of Appeals

Spring Greetings to All! I like to think of this edition of CQ as the “Essential Edition.” No extras, just the essential information to keep you apprised of CASA developments and to encourage you to participate in CASA’s future development. Toward this end, you will hear: the mid-year report from Paul McGrath, our erstwhile Executive Board Chair about the latest news from the AJC and AJEI (who needs soap operas?); an update on some new and exciting configurations (guess who’s coming to dinner?) as well as time-honored traditions for the November ’06 seminar from Lee Ramsey, our intrepid Education Chair; and a report with a request for Executive Board nominations (check out that rolodex) from Jack Fowler, our stalwart Past-Chair; and you can peruse the minutes of the mid-year Executive Board conference call meeting, submitted by yours truly. And please check out the announcement about scholarship opportunities for court managers and administrators and spread the word.

In this issue, we also bid farewell to Paula Nessel, who has supported CASA these past years through her excellent staffing, and welcome Amanda Raible, our new ABA staff liaison. Welcome, Amanda!

Contest Announcement

As part of our welcome to Amanda, CQ is holding a contest to submit the most outrageous fact about Idaho that any of our resourceful readers can dig up. And, yes, there will be a (token but fun) prize. Results will be posted in the Summer CQ. The deadline is June 1st. Submissions should be sent to clcouch505@cybermesa.com.

Looking forward to hearing from you about Idaho, about this issue, or with any thoughts or submissions for future issues.

MID-YEAR MESSAGE FROM THE CHAIR

Paul McGrath, Chief Court Attorney, New York Court of Appeals

Greetings, fellow CASA members. As Spring returns to the Northeast, I have these developments to report on the state of CASA. First, I, along with Kembra Smith, Elena Ris, and Lee Ramsey attended the Appellate Judges Conference mid-year Meeting in Chicago this past February. The AJC meeting was followed by a brief AJEI meeting at which AJEI president Craig Enoch and Dedman School of Law at SMU Dean John Attanasio both participated.

At this meeting, the Council of Chief Judges of the Courts of Appeal (CCJCA) formally announced that it was leaving the Appellate Judges Conference as a separate Council, leaving the AJC with two councils: CASA and the Council of Appellate Lawyers (CAL). It should be noted that most of the members of the CCJCA will remain members of the Appellate Judges Conference of the ABA; the separate council has just been dropped from the ABA. That Council will affiliate with the National Center for State Courts. It bears recalling that the CCJCA carries weight that CASA does not have. To that end, the National Center is actually assessing individual states on behalf of the CCJCA and thus there will be no increase in out of pocket dues for these Judges. In last year's Long Range Planning Committee Report, CASA at a Crossroads, the Long Range Planning Committee looked into the possibility of a having CASA affiliate with the National Center, but that organization could not give CASA the same kind of financial arrangement that it was able to give the CCJCA. The loss of CCJCA as a separate Council is not really a negative development from a CASA member's perspective. First, because many, if not most of the Chief Judges affiliated with CCJCA will remain ABA members (in their roles as appellate judges in the Appellate Judges Conference), the number of members in the Conference (and thus the amount of money in dues revenue from the ABA) will not decrease. Second, the Chief Judges traditionally ran the most costly seminars and thus CASA will not indirectly have to absorb the financial losses that the CCJCA incurred in the last several years.

The actual highlight of the AJC meeting was a detailed financial report done by Justice Frank Sullivan of the Indiana Supreme Court. Judge Sullivan did an immense amount of work in putting together a power point presentation on AJC and AJEI budgeting both before and after the creation of the AJEI in late 2002. These conclusions were very favorable for CASA. For example Judge Sullivan reported that in 2004, the CASA Conference in Park City, Utah had \$52,500 in registration income and \$48,200 in direct costs, a profit of \$4,300. Thompson-West contributed \$8,000 to this conference, producing an overall profit of \$16,300. In 2005, the CASA conference in Dallas had \$52,500 in registration income and \$54,300 in direct costs, a loss of \$900. Thompson-West contributed \$4,000 to this conference, producing an overall profit of \$3,100. It bears emphasis, however, that these figures do not include any adjustments for SMU "soft costs."

Judge Sullivan concluded that to date for the entire AJC and its councils, the law school absorbed \$50,000 in costs. Second, the law school provides AJEI staffing on an in kind basis equal to approximately 1.3 full time people, including one half of Rebecca Greenan's time. Third, the law school provides many services on an in-kind basis.

Judge Sullivan drew the following major conclusion in the budget report: First, in the waning days of ABA only involvement, the Council of Chief Judges (CCJCA) seminars, and to a slightly lesser extent the regular Spencer Grimes seminars, lost a great deal of money. This loss of money was sheltered to some extent by the large SJI grants that the AJC received in those

years that paid some of the overhead costs at the ABA that now must be absorbed through regular membership dues. The strategic plan to make up for the loss in SJI funding is to implement an administrative services agreement between Southern Methodist University, the Dedman School of Law and the Appellate Judges Education Institute whereby the University would engage in fund raising on the AJEI's behalf. The details of this fund raising arrangement have yet to be fully worked out, although Judge Denise Johnson and Judge Sullivan are making it a priority this year to get an agreement in place.

Interestingly, several of the Judges of the Appellate Judges Conference, including Judge Johnson and Judge Sullivan, were in favor of pressuring the AJEI into allowing CASA to return to its separate (and presumably summer) stand alone conference in 2007. Although CASA was appreciative of this support from the AJC and the idea looked attractive from a distance, on closer examination the CASA Board members in attendance realized that this overture may have come one year too late. I polled the CASA Executive Board and, after a conference call, the Board decided that given the present realities it would not be in the best interest of CASA or the AJC to try to undertake a summer seminar for the year 2007. There were several reasons for this decision. First, the National Association of Appellate Court Attorneys has attracted a number of former CASA members and that organization is financially viable at this point in time. That organization is planning a summer seminar for 2007. Partly because several CASA members are also members of NAACA, the Board concluded that it did not make sense to try to compete head to head with NAACA to try to attract the same seminar attendees. The Board concluded that those staff attorneys who could only attend a summer conference have probably already committed to NAACA. The Board also realized that many of the members who have remained CASA members may actually prefer a fall seminar with appellate judges and appellate attorneys over a separate summer seminar, especially if specialized CASA only programming can be worked into any joint seminar -- something CASA will insist upon and something the AJEI is comfortable supporting. Thus, the plan for 2007 is to participate in the next AJEI/AJC joint conference, which is tentatively scheduled for the Washington D.C. area in late September or October. This Seminar will no doubt include a trip to the Supreme Court of the United States and possibly an opportunity to participate in a Supreme Court Bar admission ceremony.

Plans for this year's Education Seminar in Dallas are nearly complete. The program shapes up to be a great one as CASA Education Chair Lee Ramsey will explain in a separate CQ article. Our only challenge for this seminar is to try to attract as many registrants as possible, both members and nonmembers alike. Each CASA member has to try to introduce new staff attorneys to the quality CASA education seminar.

Beyond the seminar, the "new post-NAACA CASA" needs to continue to develop its relationship with the ABA. All CASA members should know that there are opportunities to serve on CASA's Executive Board (if interested contact a member of this year's nominating Committee). However, apart from this opportunity, each CASA member, as a member of the Judicial Division of the ABA, has the opportunity to attend at absolutely no registration cost the ABA mid-year meeting which this year was held in Chicago and next year is in Miami, Florida. With incredible negotiating leverage, the ABA is able to secure great rates at top notch hotels. In addition, several organizations offer CLE programs at the mid-year meeting and some of these programs are free. In addition the mid-annual dinner is partially subsidized by Thompson-West, which makes for a very nice dinner at a very nice price, with a chance to network with appellate Judges from around the country. Finally, there are opportunities for CASA members to volunteer for Judicial Division committees. Traditionally, CASA and the entire Appellate Judges

Conference have not participated much in Judicial Division-wide activities, but under the new reality -- where ABA involvement must mean more to CASA members -- these opportunities should be pursued. For more information on pursuing activities within the Judicial Division, contact Judicial Division Chair Elect Leslie Miller of the Superior Court of Arizona at lmiller@sc.pima.gov.

Finally, a special word of thanks goes out to the CASA Education Chair Lee Ramsey who has done a tremendous amount of work this year under difficult circumstances to plan and organize the November 2006 seminar. Show your appreciation to Lee and the Education Committee members by making it a point to attend the November Seminar.

CELEBRATING CASA'S 30TH ANNIVERSARY

Lee Ramsey, CASA Education Chair, Tennessee Supreme Court

CASA's 2006 seminar in Dallas (November 9-11) will be a milestone—CASA's 30th anniversary. Over those thirty years, CASA has provided CLE programs specifically designed for state and federal appellate staff attorneys. And in addition to providing first-rate CLE programs, our annual seminars have allowed us to get to know our colleagues from around the country.

CASA's 2006 seminar is being held in conjunction with the Spencer-Grimes (Appellate Judges) Seminar and with the seminar of the Council of Appellate Lawyers, our fellow organizations within the Appellate Judges Conference of the ABA. This year's joint conference format offers CASA attendees several opportunities which CASA couldn't have offered on its own. The highlight of this year's conference is that retired Justice Sandra Day O'Connor will be joining us in Dallas. She will speak at a banquet on Thursday, November 9, and also will participate (on Friday, November 10) in a panel discussion on "Judicial Independence," a session for all three groups. Justice O'Connor's participation presents a rare opportunity for us to hear from one of the nation's most influential jurists. We also will have another prominent guest at a luncheon on Saturday, November 11—at that event, Ms. Harriet Miers, Counsel to the President, will be the guest speaker.

During the joint conference, CASA will have a day and a half of independent programming and one day of shared programming with Spencer-Grimes and CAL attendees. We're delighted to have CASA favorites Prof. Linda Elrod and Prof. Erwin Chemerinsky returning as speakers for two of CASA's independent sessions. Linda Elrod will speak on "non-traditional families and the law," and Erwin Chemerinsky will give us his perspectives on the first term of the "Roberts' Court." (Erwin also will be a speaker at a separate legal-ethics session for all three groups.)

In a joint session with Spencer-Grimes and CAL, we'll have a Supreme Court update given by a panel comprised of moderator Dean John Attanasio (SMU Dedman School of Law), and speakers, Dean Kenneth Starr (Pepperdine Univ. School of Law) and Professor Jesse Choper (UC-Berkeley School of Law). This panel garnered rave reviews for their 2005 Supreme Court update at the Spencer-Grimes/CAL seminar in San Francisco.

In addition to the CLE sessions, several social events are planned. On Wednesday evening (November 8), CASA will have an informal get-together, following registration for CASA attendees. As mentioned above, the big event is the banquet on Thursday night, with Justice O'Connor as the guest speaker. Also, Friday afternoon and evening will be "free time" for all the attendees—time for relaxing, recreation, exploring the Dallas/Fort Worth area, and dining out. The staff of the AJEI is looking into some optional field trips and/or recreational activities for Friday afternoon for anyone who is interested. (Details and sign-up information will be included in the registration materials.) On Saturday evening, we'll wind up our 2006 conference with the annual CASA T-shirt exchange and a casual dinner for CASA attendees. For the T-shirt exchange, we're inviting our colleagues from Spencer-Grimes and CAL to bring their own "appropriate" T-shirts and to join in the fun. (Here's your chance to diplomatically

“pull rank” on a few judges, depending on the number you draw for the exchange!) Although the details about the (optional) dinner for CASA attendees are not finalized as this edition of CQ “goes to press,” we’re planning a Texas barbecue off-site from the hotel.

The CASA 2006 registration brochure will be going out soon. We hope you’ll mark your calendar for November 9-11 and plan on attending CASA’s 30th anniversary seminar. We’re looking forward to seeing you in Dallas.

REPORT AND REQUEST FOR EXECUTIVE BOARD NOMINATIONS
Jack Fowler, CASA Immediate Past Chair
Executive Assistant/Counsel Kansas Supreme Court

It is time again for CASA members to participate in the annual selection of members to the CASA Executive Board. This is your opportunity to be involved in the selection of the members who will be CASA's future leaders. Nominations are needed for the positions of Chair-elect, Secretary, and one member-at-large.

The Nominating Committee calls upon each CASA member to participate in this process by considering your CASA colleagues and their accomplishments and forwarding the names of those persons who you believe would contribute meaningfully to the Executive Board.

Chair-elect Kembra Smith of the United States Court of Appeals for the Eleventh Circuit will succeed to the office of Chair at the 2006 annual business meeting at the seminar in Dallas, Texas. At that time, Paul McGrath, our current Chair, will become immediate past Chair. Consequently, the position of Chair-elect will be open.

Carol Couch will complete a year as Secretary. Accordingly, nominations for Secretary are also requested.

The CASA bylaws require five members-at-large for the Executive Board. All five positions are open, but traditionally, the current office holders can be re-elected for a second term. By the annual business meeting, Marcia McCormack of the New Hampshire Supreme Court will be completing her second term. William Lowe of the Louisiana Second Circuit Court of Appeals, Jeffrey Luthi of the United States Court of Appeals for Veterans Claims, Lee Ramsey of the Tennessee Supreme Court, and Elena Ris of the United States Court of Appeals for the Eleventh Circuit will each be completing their first term.

The Nominating Committee consists of Kembra Smith (as Chair-elect), myself (as immediate past Chair), and three members chosen by Paul McGrath, as current Chair. Those three members are: Janette Thompson, Texas Court of Appeals; Deb Meyer, Florida Supreme Court; and Bill Thompson, Missouri Supreme Court. The Nominating Committee's slate of nominees will be published in the Summer issue of CQ, and the slate will be presented for a vote of the membership at the 2006 business meeting in Dallas. The Nominating Committee solicits your views and recommendations to select CASA members with the energy, initiative, and commitment that the Executive Board requires and who should be part of our organization's leadership during the next year and beyond. Nominations for all open positions on the Executive Board are due no later than June 30, 2006. Please contact any member of the Committee with your suggestions. We look forward to hearing from you.

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A FAREWELL TO PAULA NESSEL

With many thanks and a fond farewell, we bid adieu to Paula Nessel, who has accepted a position with the ABA's Family Law Section. Paula, you will be missed.

. . . . and INTRODUCING AMANDA RAIBLE

Hello, my name is Amanda Raible and I have been with the American Bar Association Judicial Division for the past year working as Conference Administrator for the National Conference of State Trial Judges, the National Conference of Specialized Court Judges and the Judicial Divisions various Traffic Court initiatives.

I was raised in the lovely city of Boise, Idaho. In 1999, I earned a Bachelor of Science degree in Public Communications with an emphasis in Advertising and Marketing from the University of Idaho.

After graduation, I moved to Chicago and started my career as a Marketing and Administrative Assistant for Forsythe Technology, Inc. I was responsible for executing various marketing initiatives for the Hewlett Packard team. In 2001, my husband and I moved to Denver, Colorado, after he accepted a new position in his company.

In Denver, I worked for the non-profit organization Seniors' Resource Center. As a Special Events Coordinator, I planned and organized fund-raising events and community outreach programs. I immensely enjoyed working with the corporations, foundations and the public by raising money to benefit such a worthy cause.

To continue our financial support of U-Haul, we moved to my husband's hometown of Pittsburgh, Pennsylvania in 2002. Soon thereafter, I accepted a position as an Accounting Coordinator at the law firm of Goldberg, Persky & White, P.C. The role gave me the opportunity to learn a new field and acquire many new skills.

Last Spring my husband received a fantastic job offer that gave us the opportunity to come back to our favorite city, Chicago. We could not refuse the opportunity to move back to the city we missed dearly. The food, entertainment and culture could not keep us away. When I am not working I enjoy traveling, playing with my new puppy and cheering on the Steelers.

I am excited to have the opportunity to working with you and getting to know you better. If you need to reach me, I can be contacted at:

Amanda Wynn Raible
ABA Judicial Division
Conference Manager
321 North Clark
Chicago, IL 60610
Phone 312-988-5450
Fax 312-988-5709
Email raiblea@staff.abanet.org

MINUTES
CASA EXECUTIVE BOARD
MID-YEAR CONFERENCE CALL
Friday, March 31, 2006

3 p.m. (ET); 2:p.m. (CT); and 1:00 p.m. (MT)

Approved via email 4/12/06

Board Members “on call:” Paul McGrath, Kembra Smith, Jack Fowler, Marcia McCormack, Elena Ris, Carol Couch

Board Members not on the call: Jeff Luthi, Bill Lowe, Lee Ramsey

ABA Staff Member “on call:” Amanda Wynn Raible

- 1. Welcome:** Paul welcomed Amanda and thanked her for taking on the work of CASA in addition to her other duties.
- 2. 2007 Seminar:** Paul sought further input from the Board concerning pursuit of an independent seminar in 2007 and whether to poll CASA’s membership. Given the realities of budgets and reduced funding generally from D.C., it was agreed not to pursue an independent seminar for 2007. Paul said he would convey this to Judge Denise Johnson of the AJEI and AJC. Kembra noted that the 2007 seminar may be held in September or October of 2007.

Paul proposed that he put together a poll for CASA members to be sent to both the ABA and Washburn University listservs and that he would run the particular questions by the Board before sending it out.

Amanda said she could get Paul the ABA’s list of CASA members within the week. Paul noted that he would like as much information as the ABA had.

Of note re: Nov. 9-11, 2006 Seminar: Justice Sandra Day O’Connor is scheduled to be at the seminar on Thursday evening and Friday; the business lunch is currently scheduled for Thursday; and the t-shirt lottery reception is scheduled for Saturday.

- 3. CASA Directory:** Paul mentioned that it has been his personal goal as Executive Board Chair to update the Directory, which has not been done in a couple of years. Kudos were given to Martha Newcomb who spent much time and energy last fall collecting and updating the Directory information. Because of personnel changes at the ABA, the new information has not been input for use through the website. After the Board considered the possibility of a CASA member volunteering to do this work, Amanda noted that the ABA is close to hiring a new technology person. Paul said he would check back with Amanda in a couple of weeks.

- 4. Letter to former CASA Board Chairs and Education Committee Chairs:** After some discussion, it was decided to go ahead and invite all former CASA Board Chairs and Education

Chairs to the 2006 seminar, even if few might actually attend, at least to recognize their work. Elena noted she needed the names of the Education Committee Chairs and Kembra offered to walk her list over to Elena's office.

5. Scholarship and Seminar Cost: Paul noted that there is no scholarship money for the 2006 seminar. He also noted that the seminar cost information is tentative and that Lee has a tentative budget from the AJEI and is working with Judge Sullivan as well on the finances. One question was whether to include the cost of the Thursday dinner and Saturday t-shirt lottery as part of the tuition as the Spencer-Grimes Judges and CAL are doing. After learning that this would add almost \$90 to the cost of attending, which could adversely affect attendance, it was decided, given CASA's history of allowing people to opt in or out of these events, to keep this cost separate from tuition.

After noting that the budget is dependant on attendance at the seminar, it was generally agreed that 75 is a reasonable estimate of the number of people who will be attending from CASA, although some expressed concern that it may be optimistic. Jack offered to take CASA's seminar brochures to the NAACA seminar in July and said that he would be willing to made a pitch for the CASA seminar. Kembra reminded us all that there are many, many appellate staff attorneys throughout the country who are not involved with either CASA or NAACA. Jack noted that he has always been troubled by the relatively low attendance at CASA's seminars, given how good CASA is. Paul and Kembra noted that the "Save the Date" cards were mailed out based on the AJEI's database. Elena offered to distribute more of these around the 11th Circuit offices.

6. Other Business: Jack noted that the cutoff date for nominations to the Executive Board are May 31st and that we are looking for a Chair-Elect, Secretary, and Member-at-Large. Carol said she hoped to get the Spring Issue of CQ out by mid-April but it might be more toward the end of the month.

Jack asked if the AJEI has raised any money yet and Paul answered that they had not. Kembra noted that Judge Sullivan has clearly stated his frustration with this situation.

Adjournment: After thanking Amanda again, the meeting was adjourned by acclamation at 1:48 p.m.(MT).

Submitted by Carol L. Couch, CASA Secretary.

POSSIBLE SCHOLARSHIPS FOR COURT MANAGERS OR ADMINISTRATORS –

The State Justice Institute ("SJI") has a number of scholarships available for court managers/administrators to attend educational programs. Under the SJI's eligibility criteria, staff attorneys (including supervising staff attorneys) are not eligible for the SJI scholarships, but any other court managers or administrators (e.g., court clerks with supervisory responsibilities) interested in applying for a scholarship to attend the CASA 2006 seminar in Dallas may contact Kevin Linskey, Executive Director, State Justice Institute, telephone: (703) 684-6100, extension 214, for more information.

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Message From the Chair

Paul McGrath
New York Court of Appeals

Greetings Fellow CASA Members. Plans are now finalized for the first joint CASA, Spencer Grimes, CAL "Super Seminar" to be held November 9 through November 11, 2006 at the Omni Mandalay Hotel in Las Colinas, Texas. Lee Ramsey and his Education Committee have done a fantastic job preparing both CASA-only educational programs and joint educational programs with the other arms of the Appellate Judges Conference. I am hoping that you can save the dates now and mark your date books. This seminar shapes up to be exciting and rewarding --and tasty! In addition to the formal AJEI/AJC dinner where our guest of honor and principal speaker will be retired Supreme Court Justice Sandra Day O'Connor, we will be treated to some authentic Texas Barbeque on Saturday Night at the Spring Creek Restaurant. CASA Executive Board Members Kembra Smith and William Lowe visited the Irving area over Memorial Day weekend -- at their expense -- to sample some of the local barbeque fare. Spring Creek gets the nod as the best place for CASA to continue its 30th Anniversary celebration. In addition to the food, we will be featuring some "sounds of Texas," featuring great Texas singer-songwriters, like Jerry Jeff Walker, Nancy Griffith, Guy Clark and other Texas luminaries. Bring your own personal favorites, and you'll get some air play! Our 30th anniversary celebration will formally commence at the CASA business Lunch on Thursday Morning November 9 when we honor past CASA leaders, and when CASA Chair Elect Kembra Smith will take over as Chair of CASA.

Scholarship Money Available

Having our seminar this year a little later in the calendar year actually resounds to our benefit in terms of scholarship money. Although there was no money in the fiscal year 2005-2006 AJC/CASA budget for scholarships, the AJC/CASA fiscal year runs from August 1st through August 1st and so scholarship money for the 2006 seminar can come directly out of the 2006-2007 budget. This year CASA has been allocated \$3,500 in scholarship money. A CASA Scholarship Committee will be formed to allocate the money. Although it is possible that someone may secure a full scholarship (air fare, lodging and tuition), it is more likely that the Committee will award partial scholarships to allow as many individuals as possible to attend the seminar. A copy of the CASA Scholarship form is attached to this newsletter or it can be obtained by e-mailing me at Pkmcg@msn.com.

Final Thoughts

Although the CASA seminar is still four full months away, it is not too early for me to thank three CASA members who have been instrumental this year in doing the work needed for our organization to thrive in this year of transition. First and foremost, I would like to thank Lee Ramsey of the Tennessee Supreme Court for so ably chairing the CASA Education Committee. Indefatigable of spirit, Lee worked closely in conjunction with the Education Chairs of the other arms of the AJC and with the staff at the Dedman School of Law in making all the necessary preparations for this year's seminar. Lee's patience, persistence and enthusiasm will reap its just reward at the seminar this November -- so don't miss it. Second, I would like to thank Kembra

Smith, the ever optimistic and always capable Chair elect. Kembra will be a fantastic Chair next year, and all CASA members can be assured of the success of the organization under her stewardship, even in the midst of trouble waters. Finally, I would like to thank our fantastic newsletter editor Carol Couch for all that she has done to maintain the continuity of CASA Quarterly, a publication with a great history of service to CASA members and staff attorneys across the country. Thanks Lee, Kembra and Carol. As always if you have comments or questions about the organization, you can reach me at (518) 455-7780 or at pkmcg@msn.com. See you in Irving in November!

**COUNCIL OF APPELLATE STAFF ATTORNEYS
SCHOLARSHIP APPLICATION**

Name: _____

Court: _____

Address: _____

Telephone: _____ Number of years as a staff attorney: _____

CASA member in good standing (Y/N): _____ Salary per annum: _____

No. of CASA members employed by your court: _____ Number planning to attend: _____

Funding available from your court for attendance at this seminar: Partial: _____ None: _____

Funding obtained from your court for attendance at past seminars: _____

Financial hardship: No _____ Yes (Please explain): _____

1. When did your court start using staff attorneys? _____

2. Please explain briefly any recent or contemplated major changes in the role of staff attorneys on your court.

3. Have you or any other staff attorney on your court received a scholarship from CASA in the past? If yes, please state the name(s) of the person(s) and the year(s) _____

4. Do you have present plans to leave your staff position? No _____ Yes (Please explain): _____

5. Please list the amount of scholarship assistance sought. Under "Travel" you must list the estimated cost of "coach" or reduced fare tickets for air or rail use, where applicable. If you travel by car, expenses will be reimbursed on a per mile basis for the direct distance between your home and the seminar site (round trip) at the per mile rate set by the federal government for business travel by government employees. Lodging expenses may be allowed for a maximum of four nights. Scholarship funds are not available to defray the cost of membership in CASA.

Travel: Airfare	\$ _____
Rail	\$ _____
Auto	\$ _____
Lodging	\$ _____ (_____ nights at \$ _____ per night)

6. Please attach a letter from your court supervisor or yourself stating why you should receive a scholarship.

I certify that the foregoing answers are true to the best of my knowledge and belief. If I am offered a scholarship, I agree that I will become a CASA member in good standing within thirty days of acceptance of the scholarship, or the scholarship is deemed revoked. I agree that I will attend each session and will submit a written report to the CASA Executive Board on the value of the seminar and the scholarship program to my court and me. I understand this report must be submitted before scholarship funds will be released. I acknowledge I must keep CASA apprised of any changes in my funding status that might affect my eligibility for scholarship assistance. I authorize a representative of the CASA Scholarship Committee to contact my court to verify any of the information given by me in this scholarship application.

Signature: _____

Date: _____

CASA 2006 Conference – Dallas, November 9-11

Lee Ramsey, Chair, 2006 CASA Education Committee
Tennessee Court of Appeals

CASA's annual conference is only a few months away, and this year's conference promises to be a special one. First, we are delighted that Justice Sandra Day O'Connor will join us for two events on Friday, November 10. On Friday morning, she will participate in a panel discussion on the topic of judicial independence, which will be a joint session for Spencer-Grimes (the appellate judges seminar), CASA and CAL (the Council of Appellate Lawyers). Then on Friday evening, Justice O'Connor will be the keynote speaker at a banquet for all the attendees, as well as spouses and guests.

There also is a second reason why the 2006 conference will be a special one – this year is CASA's 30th anniversary. In celebrating the anniversary, we will recognize long-time CASA members at the CASA business luncheon on Thursday, November 9. We also will mark the anniversary at the CASA dinner on Saturday, November 11.

Other highlights of this year's CASA conference include sessions by two of CASA's perennial favorite speakers. Prof. Erwin Chemerinsky will give us his perspectives on the first term of the "Roberts Court," and Prof. Linda Elrod will open the conference with a session on "non-traditional families and the law." Among the other topics are criminal law updates on the death penalty, habeas corpus, *Blakely/Booker* issues, and *Crawford v. Washington* issues. On the civil law side, Prof. Tom Mayo will return to give an overview of the important topic of litigation relating to the medical treatment of minors, Ira Kurzban will join us again to give his annual immigration-law update, and we also will have sessions on the internet and the law and on legal writing. In addition, CASA and Spencer-Grimes will have a joint session on ethical issues for staff attorneys and appellate judges. This year's "Supreme Court update" will be one of several joint sessions for Spencer-Grimes, CASA and CAL. The Supreme Court update will be given by a panel comprised of moderator Dean John Attanasio (SMU Dedman School of Law) and speakers Dean Kenneth Starr (Pepperdine Univ. School of Law) and Professor Jesse Choper (UC-Berkeley School of Law), a panel which received excellent reviews at the Spencer-Grimes/CAL seminar in San Francisco last fall.

In addition to the CLE programs, social events are planned for each day of the conference. On Wednesday evening, CASA will have an informal get-together following registration for CASA attendees. The next day, CASA's business lunch will be held at the Café Cipriani, an Italian restaurant near the hotel. The annual CASA T-shirt exchange also will be held on Thursday, and we're inviting the appellate judges and CAL attendees to join in the fun. As noted above, the "big event" will be the banquet on Friday night, with Justice O'Connor as the guest speaker. A second prominent speaker will join us on Saturday, when Ms. Harriet Miers, Counsel to the President, will be the guest speaker at a luncheon. Then we'll wind up our 2006 conference on Saturday night with a casual Texas-style dinner for CASA attendees at Spring Creek Barbeque in Irving.

We hope you'll mark your calendar for November 9-11 and plan on attending CASA's 30th anniversary seminar. We're looking forward to seeing you in Dallas.

[*Editor's Note:* Check out the Omni Mandalay Hotel at Las Colinas at www.omnihotels.com. And be sure to look at their *no cost* (and no unsolicited mail) "Select Guest" program.]

Spring Planning Meeting News

Kembra Smith
11th Circuit Court of Appeals

CASA seminar scholarships, diversity membership possibilities, and collaborative programming were some of the substantive highlights of the Spring Planning Meeting. In May 2006, Jim Layton, the Council of Appellate Lawyers (CAL) Chair-Elect and I, as CASA Chair-Elect, attended the American Bar Association's (ABA) Judicial Division (JD) Spring Planning meeting in Rapid City, South Dakota on behalf of the Appellate Judges Conference (AJC). The meeting is a yearly gathering of all of the incoming chairs of the conferences and councils within the Judicial Division to allow each of us to meet each other, spend some time with the ABA staff planning our upcoming year, and coordinate those plans with the other conferences and councils. The other represented JD entities included the National Conference of Federal Trial Judges, the National Conference of State Trial Judges, National Conference of Specialized Court Judges, the National Conference of Administrative Law Judiciary, and the Lawyers Conference. The Spring Planning meeting was chaired by Arizona Superior Court Judge Leslie B. Miller, as Chair-Elect of the Judicial Division.

I met with ABA staff person Amanda Raible, who is assigned to work with the AJC. We reviewed the proposed AJC 2006-07 governance budget prepared by Iowa Judge Rosemary Sackett and discussed membership and programming goals. The budget included monies allocated to CASA for our annual executive committee meeting and for scholarships. The executive committee meeting monies may be used for both the ABA midyear meeting and for the membership luncheon during the November seminar. CASA was budgeted \$3500 to CASA for scholarships for the November seminar! Amanda and I discussed the possibility of more educational programming at the ABA midyear and annual meetings, and ideas for membership to be assisted by ABA staff.

Judge Miller presented us with her goals for the JD, which included a Youth At Risk initiative, a film competition, public education on Fair and Impartial Courts, and diversity leadership and a mentorship program, membership recruitment and retention, and a disaster planning task force. In larger sessions with representative from each of the JD entities, we were advised of the many staff changes within the ABA, and encouraged to "think outside the conference" when planning our programs.

In this "outside" thinking, Judge Miller and other speakers suggested that we use the ABA resources, including the JD assigned staff members, and the JD conferences to develop a team approach for a greater vision. We heard presentations on the JD budget, the judicial clerkship program, the interactions between the JD and the ABA House of Delegates, the JD's diversity strategy, and the South Dakota Bar Association's reaction and work against the South Dakota JAIL (Judicial Accountability Initiative Law), a proposed constitutional amendment.

Of note in the budget, from ABA General Revenue, the AJC receives \$25,000 support for the Conference and another \$25,000 for the Conferences's Spencer-Grimes seminars; we share a portion of those proceeds. Each Conference also receives a portion of dues allocated upon membership; for 2006-07, the AJC is expected to

received around \$35,000. Other sources of educational funding for the AJC are a distribution from the \$1,001,375 “Judicial Improvement Fund” (JIF), and (for 2005-06) around \$2500 in “support” funds generated from publications, marketing and credit card services. We enjoyed a reception at the Journey Museum and excursions to the town of Deadwood, the Crazy Horse Memorial (<http://www.crazyhorse.org>), and Mount Rushmore National Memorial (<http://www.nps.gov/moru/>).

Taking advantage of the location of the meeting, I also visited the Wall Drug Store, the Badlands National Park, Wind Cave National Park, and Custer State Park. It is a very beautiful part of our country, and definitely worth the trip.

Photo Gallery – A Glimpse of Life in South Dakota





ABA Judicial Division Judicial Clerkship Program

Kembra Smith
11th Circuit Court of Appeals

Each year, during the ABA Midyear Meeting, the ABA's Judicial Division (JD) and the Commission of Racial and Ethnic Diversity holds a jointly sponsored three day program. The program brings together approximately 50 minority law students from around the United States to interact with judges and former law clerks to introduce and reinforce the reasons and values of pursuing a position as a judicial clerk. The judges and former clerks meet with the students in small groups and work with the judges in those groups to develop an outline of an opinion on an issue pending before the Supreme Court of the United States.

We have been asked to participate in this program. The opportunities to interact with the judges and students include panel discussions, small group discussions, and social events. The next Judicial Clerkship program will be held during the Midyear Meeting scheduled for February 7-13, 2007 in Miami, Florida. Telephone planning meetings will begin in August 2006. If you are interested in participating, please advise CASA Chair Paul McGrath and contact Minority Clerkship Program Chair Michigan Circuit Court Judge Bill Caprathe at bcaprathe@netscape.net or (989) 895.4267.

Think Fast!
or
How Reading *Blink*: The Power of Thinking Without Thinking
Changed My Thinking about Judicial Decision-Making

Carol L. Couch, N.M. Court of Appeals (retired)

We've all been there -- first year law school, sitting in a large class, probably on a hard chair lugging around a backbreaking textbook, perhaps cursing Socrates, being taught to reason, to think, to make decisions "like a lawyer." Find the salient facts, research the applicable law, maybe unearth a case on all fours, more likely analogize the body of law to the particular facts at hand and, through a sometimes tedious, sometimes exhilarating, logical argument come to a resolution of an issue. When done properly, law is sensible and makes sense. As staff attorneys in appellate courts, we are well practiced in making well-informed, reasonable, articulate decisions. But these are not the only decisions we make.

In his book *Blink* [Little Brown & Co., 1995, 254 pp.], Malcolm Gladwell explores the realm of the adaptive unconscious, which he is quick to point out has nothing to do with Freud's unconscious, but instead operates like a giant decision-making computer, processing huge amounts of information and leaping to a conclusion in, well, the blink of an eye. Gladwell sets out with three tasks. The first is to convince the reader that "decisions made very quickly can be every bit as good as decisions made cautiously and deliberately." I tried to imagine how this notion would fare in one of our court's judges' meetings and shuddered. But Gladwell does not stop there. The second task is to explore when we should trust our instincts and when we should be wary of them. Now this sounds more like the world I inhabit. Finally, in what he defines as the most important task, Gladwell seeks to convince the reader "that our snap judgments and first impressions can be educated and controlled." Hmm.

In expanding on these propositions, Gladwell peppers the papers with all sorts of fascinating trivia like why the Pepsi Challenge worked and why New Coke failed. For a small book, it is replete with examples, experiments, and studies. One of the more startling was a study demonstrating that black students perform worse on tests if they are asked to identify their race than on tests where they are not asked about race. The situations described in *Blink* range from the development and success of the Aeron office chair to predicting whether a couple will get divorced to how the military should be training for post-modern warfare to the real scoop on speed dating in New York City to why a single officer patrol car is less dangerous for everyone than a two officer patrol car. So, let me start with the first case study.

To persuade the reader of his first point, Gladwell takes us back to ancient Greece or, rather, to a controversy surrounding a statue being sold to the Getty Museum that the owner claimed was from ancient Greece. With millions of dollars at stake, the Getty employed a team of experts who spent months studying the matter. A geologist tested a core sample of the statue and concluded that the layer of calcite over the dolomite proved its age because it takes thousands of years for that process to occur. Teams of lawyers studied and researched reams of documents establishing the statue's authenticity. All the scientific and legal evidence pointed toward the statue being genuine. But, in a troublesome way, sculpture experts would take one look at the statue and get an uncomfortable feeling. They knew in the blink of an eye that the statue was fake even though they couldn't say why. And they were right. (It turns out a potato

mold can turn dolomite into calcite in a matter of months.) The Getty, which had purchased the statue before discovering its questionable provenance, has a picture of it in its catalogue with the notation, “About 530 BC or a modern forgery.” Gladwell argues that, to make better decisions, sometimes “we need to accept the mysterious nature of our snap judgments” and that it is possible to know without knowing why we know.

But we all know that sometimes our instincts or snap judgments are totally wrong. This Gladwell terms the “Warren Harding Error” or why we fall for tall, dark, handsome men. As a society, we implicitly associate tall, handsome men with good leadership even though we know rationally that this is not true. Warren Harding is a case in point. Corporate America is another example: not only are most CEOs in this country white men, which is not surprising, but almost all are close to six feet tall when the average height of the American male is five feet nine inches. The data also suggests that being short (5'6" or less) is probably as much an impediment to corporate success as being a woman. (Being a minority is still, apparently, more of an impediment.) It might be interesting to take informal data on judges in our various courts to see how it compares with these statistics.

The book contains several Implicit Association Tests (IATs), measuring our unconscious attitudes. In the test results for tens of thousands of people, the consciously stated attitude is distinctly different from the test results. If you are interested, you can try a computerized IAT at www.implicit.harvard.edu. In the test on associations of good or bad with black or white men, Gladwell argues that we cannot conclude that those whose test shows a strong pro-white association are prejudiced given the society we live in and the media images that bombard us. He does argue, however, that it is important to be aware of how these unconscious attitudes affect our behavior, not necessarily in what we say or do, but in subtle ways like body language that can critically affect how an encounter goes. And, luckily, we do not need to be at the mercy of our unconscious attitudes. Studies have shown that people who look at photos of Dr. Martin Luther King, Jr. or Nelson Mandela or Michael Jordan just before taking the test show an increase in their positive associations with black men. Because neither logic or intuition is infallible, the best decision making is “a balance between deliberate and instinctive thinking.”

Besides consciously working on our unconscious attitudes, Gladwell suggests other ways to improve the “blink think” of our adaptive unconscious. He cites the example of the emergency room procedure adopted in Cook County Hospital in Chicago to identify patients suffering a heart attack. Rather than have his staff gather a lot of information, the Hospital’s director tried out an algorithm or equation developed by a cardiologist. The cardiologist had fed thousands of cases into a computer and determined that the best indicators of a heart attack could be determined by three simple questions. Not only did this simplified protocol save precious time but it was actually more accurate than the traditional method of diagnosis. By not overloading the medical staff with information and having them focus on the critical issues, they became better decision makers.

As appellate experts, we might be comforted to know that Gladwell recognizes the value of expertise. It was not just your guy or gal off the street who took one look at the Getty’s statue and knew it was a fake. Experts, who had spent their lives studying antiquities, were able to make this immediate and accurate decision. Through their training and experience, experts learn to decode their snap judgments and intuitions and to essentially discipline their unconscious in the area of their expertise. Taste testers, for example, have a frighteningly elaborate set of scales

for describing and comparing food. In blind taste tests with three samples, even avid cola drinkers could not distinguish Coke from Pepsi. As lawyers, we have cases and statutes and rules and the expertise of our training and experience to guide us. But no doubt even our well-trained Socratic legal reasoning is influenced by decisions we don't even know we make. Would it be too dangerous to let our adaptive unconscious ponder that thought?

CASA Calendar: do we plan ahead or what?

Thursday, August 3 -- Monday, August 7, 2006

ABA Annual Meeting, Honolulu, Hawai'i

for more information and registration, see <http://www.abanet.org/>

of special note: **9:30 AM-11:00 AM, Saturday, August 5, 2006:**

“Judicial Independence in the Context of the Rule of Law in the World Today” CAL & CASA jointly sponsored session

Wednesday, November 8 -- Saturday, November 11, 2006

CASA/AJEI Annual Seminar (!!!!!!!!!!!!!!!), Irving, Texas

for more information and registration, see

<http://www.abanet.org/jd/ajc/casa/home.html>

February 7 – February 13, 2007

ABA Mid-year Meeting, Miami, Florida

for more information and **free** registration, see <http://www.abanet.org/>

Judicial Clerkship Program

CAL & CASA jointly sponsored session

August 9-14, 2007

ABA Annual Meeting, San Francisco, California

February 6-12, 2008

ABA Mid-year meeting, Los Angeles, California

August 7-12, 2008

ABA Annual meeting, New York, New York

February 11-17, 2009

ABA Mid-year meeting, Boston, Massachusetts

July 30-August 4, 2009

ABA Annual meeting, Chicago, Illinois

February 3-9, 2010

ABA Mid-year meeting, Orlando, Florida

August 5-10, 2010

ABA Annual meeting, San Francisco, California

February 9-15, 2011

ABA Mid-year meeting, Atlanta, Georgia

August 5-10, 2011

ABA Annual meeting, Toronto, Canada

AT YOUR SERVICE!!

Help spread the word. All CASA members are eligible to participate in a listserv, an email discussion group. Members receive any and all messages that other listserv members send, to which they are welcome to respond. This is a great way to take advantage of membership in a group that includes peers from around the country.

To subscribe, send an email to abacasa-request@lawdns.wuacc.edu. Leave the “subject” line blank and in the text area write “subscribe.”

Questions? Need more information? Contact:

Bill Lowe, Central Staff Director
Louisiana Second Circuit Court of Appeal
430 Fannin
Shreveport, LA 71101-5537
318-227-3780
Wllowe@mail.lasccoa.state.la.us

FUN FACT FROM IDAHO CONTEST CONCLUSION

The winner (and only entrant) in our Idaho fun fact contest is Zachary Graybill who offered the following football cheer as his fun fact: “Dice ‘em, hash ‘em, boil ‘em, mash ‘em! Idaho! Idaho! Idaho!” I feel sorry for the other team.

He also noted that there enough potatoes grown in Idaho to stretch from the earth to the moon and back – eight times.

As winner of the contest Mr. Graybill was offered a Mr. and Ms. PotatoHead set but he declined the offer, opting for an outing to the local ice cream store instead.

[In the interest of full disclosure and journalistic integrity, we note that Mr. Graybill is the twelve year old son of your newsletter’s editor.]

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At Your Service

MESSAGE FROM THE CHAIR

Paul McGrath

New York Court of Appeals

T Minus two months and counting. That's right, by the time this issue goes on-line, our first ever Super Seminar under the co-sponsorship of the AJEI and the ABA will be less than two months away. Now is the time to stop debating about whether to attend and make your hotel and airline reservations. Act early to get the best prices on flights to the Dallas/ Ft. Worth Area. I know that you share my excitement of getting the opportunity to meet former Supreme Court Justice Sandra Day O'Connor and seeing old CASA favorites like Erwin Chemerinsky and Linda Elrod. Lee Ramsey and his Education Committee have done a tremendous job in putting together a quality seminar in every respect. Treat yourself to a few days out of the office and take advantage of this very precious opportunity.

WRITING SAMPLES NEEDED

Professor Sally Spurgin of the Dedman School of Law at Southern Methodist University will be leading our legal writing program this year. Sally is looking for actual samples of the opinions, internal reports and other office memoranda that we write for our Judges. Sally promises to change the names and remove other identifying information. If you have writing samples that you would like examined and analyzed, please send them to me at PKMCG@msn.com. I will forward them on to Sally and we can analyze them during our one hour legal writing program on November 9.

SCHOLARSHIPS AVAILABLE

As noted in the last issue of CQ, the November date of our seminar actually resounds to our benefit in terms of scholarship money. This year, the ABA's AJC budget has allocated CASA \$3,500 in scholarship money. So far, I have received no applications for a scholarship! Seriously, if you really want to attend a fantastic continuing legal education program but do not have the ability to secure court funding and cannot afford the cost of the trip yourself, you are just the candidate we are looking for in terms of attending on a CASA scholarship. As in the past the CASA Scholarship Committee, an ad hoc Committee set up shortly before the seminar, reviews all completed applications and allocates the money. Usually, the Committee spreads the money to cover as many applicants as possible by awarding partial scholarships. Although scholarship applicants do not need to be CASA members at the time they apply, all scholarship winners must become CASA members within 30 days of acceptance of the scholarship. Perhaps it has been a while since you have attended a CASA seminar and perhaps it is time to come back to our organization. A CASA scholarship may be just the incentive you need, so take a few minutes to fill out an application.

**COUNCIL OF APPELLATE STAFF ATTORNEYS
SCHOLARSHIP APPLICATION**

Name: _____

Court: _____

Address: _____

Telephone: _____ Number of years as a staff attorney: _____

CASA member in good standing (Y/N): _____ Salary per annum: _____

No. of CASA members employed by your court: _____ Number planning to attend: _____

Funding available from your court for attendance at this seminar: Partial: _____ None: _____

Funding obtained from your court for attendance at past seminars: _____

Financial hardship: No _____ Yes (Please explain): _____

1. When did your court start using staff attorneys? _____

2. Please explain briefly any recent or contemplated major changes in the role of staff attorneys on your court. _____

3. Have you or any other staff attorney on your court received a scholarship from CASA in the past? If yes, please state the name(s) of the person(s) and the year(s) _____

4. Do you have present plans to leave your staff position? No _____ Yes (Please explain): _____

5. Please list the amount of scholarship assistance sought. Under "Travel" you must list the estimated cost of "coach" or reduced fare tickets for air or rail use, where applicable. If you travel by car, expenses will be reimbursed on a per mile basis for the direct distance between your home and the seminar site (round trip) at the per mile rate set by the federal government for business travel by government employees. Lodging expenses may be allowed for a maximum of four nights. Scholarship funds are not available to defray the cost of membership in CASA.

Travel: Airfare	\$ _____
Rail	\$ _____
Auto	\$ _____
Lodging	\$ _____ (_____ nights at \$ _____ per night)

6. Please attach a letter from your court supervisor or yourself stating why you should receive a scholarship.

I certify that the foregoing answers are true to the best of my knowledge and belief. If I am offered a scholarship, I agree that I will become a CASA member in good standing within thirty days of acceptance of the scholarship, or the scholarship is deemed revoked. I agree that I will attend each session and will submit a written report to the CASA Executive Board on the value of the seminar and the scholarship program to my court and me. I understand this report must be submitted before scholarship funds will be released. I acknowledge I must keep CASA apprised of any changes in my funding status that might affect my eligibility for scholarship assistance. I authorize a representative of the CASA Scholarship Committee to contact my court to verify any of the information given by me in this scholarship application.

Signature: _____

Date: _____

NOMINATIONS
FOR THE 2006-2007 EXECUTIVE BOARD
Jack Fowler, Kansas Supreme Court

In accordance with CASA=s bylaws, the Nominating Committee, composed of Kembra Smith, Janette Thompson, Deb Meyer, Bill Thompson, and myself conferred to select a slate of nominees for CASA officers and Executive Board members. The Committee is pleased to announce the following nominations which will be voted on by the CASA membership at its annual business meeting in Dallas, Texas in November.

Chair: *Kembra Smith*, United States Court of Appeals, Eleventh Circuit. Kembra has been a CASA member since 1985 and is currently CASA Chair-Elect. She served on the Membership Committee from 1995-1998, as membership chair in 1998-1999. She further served on the Executive Board from 2000-2002, on the Education Committee in 2003-2004, and was CASA Secretary in 2004.

Chair-Elect: *Lee Ramsey*, Supreme Court of Tennessee. Lee has been a CASA member since 1996. He served on the Long-Range Planning Committee from 2004-2005, and joined the Executive Board in 2005. Lee was Chair of the CASA 2006 Education Committee, and CASA=s representative on the Appellate Judges Education Institute (AJEI)=s 2006 Joint Program Committee.

Secretary: *Dave Ewert*, Iowa Supreme Court. Dave has been a CASA member since 1992. He has served on the CASA Executive Board and has chaired, on two separate terms, the Membership Committee. Dave has also served on the Long-Range Planning, Nominating, and Scholarship Committees.

Immediate Past Chair: *Paul McGrath*, New York Court of Appeals. Paul is CASA=s current Chair. He has been a CASA member since 1990. Paul has served on the Education and Scholarship Committees, served on the Executive Board from 1998-2000, and was Managing Editor of CASA Quarterly from 2003-2004.

Members-At-Large:

Bill Lowe, Louisiana Court of Appeal, Second Circuit. Bill has been a CASA member since 1982, has served three previous terms on the CASA Executive Board, and is the listserv manager for CASA. Bill is currently

serving his first term as member-at-large on the Executive Board.

Elena Ris, United States Court of Appeals, Eleventh Circuit. Elena has been a CASA member since 1993. She is currently completing her first term as a member-at-large on the Executive Board.

Tim Schroeder, United States Court of Appeals, Sixth Circuit. Tim has been a CASA member for some years and has attended several CASA conferences, including Lake Geneva (1996) and Breckenridge (1998). He is currently the Senior Staff Attorney for the Sixth Circuit, having succeeded long-time CASA member Ken Howe upon his retirement in 2005.

Gail Giesen, Chief Staff Attorney, Connecticut Appellate Courts. Gail has been a CASA member for many years. She serves as Senior Staff Attorney for the Connecticut Appellate Courts. In that capacity she serves the Connecticut Supreme Court and the Connecticut Appellate Court.

Renee Simien, Louisiana Court of Appeal, Third Circuit. She is the Central Staff Director for that appellate court. She has been a CASA member since 2005 and looks forward to becoming involved in CASA activities.

CASA 2006 Conference
Join Us for CASA's 30th Anniversary
Lee Ramsey
Chair, 2006 CASA Education Committee

This year marks CASA's 30th anniversary, and we'll celebrate that anniversary at the 2006 conference in Dallas, November 9-11. It seems fitting that this anniversary year includes a first for CASA. Due to the "summit" format of this year's conference – with CASA, Spencer-Grimes (the appellate judges) and CAL (Council of Appellate Lawyers) having simultaneous seminars – CASA attendees will have an opportunity we've never had before. We'll hear from a member of the Supreme Court of the United States – retired Justice Sandra Day O'Connor who will be joining us at the 2006 conference. On Friday morning (November 10), she will participate in a panel discussion on the topic of judicial independence, a joint session for CASA, Spencer-Grimes and CAL. Then on Friday evening, Justice O'Connor will be the guest speaker at a banquet for the attendees from all three groups, as well as spouses and guests. Her participation in the 2006 joint conference is a major event in CASA's thirty-year history.

CASA's portion of the conference will begin with registration on the evening of Wednesday, November 8. We'll kick off CASA's CLE program on Thursday morning with Prof. Linda Elrod, one of CASA's perennial favorites, leading a plenary session on "Non-Traditional Families and the Law." Following Prof. Elrod's session, we'll have a series of breakout sessions. In the morning breakout sessions, attendees may choose between our annual immigration law update and our annual death penalty update. In the first set of afternoon breakouts, attendees may choose between "Internet and the Law" and the annual habeas corpus update. A second set of afternoon breakouts will offer the choice of a legal-writing session or an update on federal and state cases arising out of *Crawford v. Washington*. Thursday's programming will end with a joint session for CASA and Spencer-Grimes attendees, in which Prof. Charles Geyh (Indiana) will discuss ethical issues facing appellate judges and staff attorneys. (I saw Prof. Geyh speak at a recent seminar, and he's an excellent speaker.)

On Friday, CASA, Spencer-Grimes and CAL will have joint CLE sessions. The Friday sessions include the panel discussion on judicial independence (with Justice O'Connor participating), as well as a Supreme Court update. The latter session will be a panel moderated by Dean John Attanasio (SMU), with panelists Prof. Drew Days (Yale) and Dean Kenneth Starr (Pepperdine). The last session on Friday afternoon will be a change of pace from our typical CLE sessions. Prof. Steven Weisenburger (Chair, SMU English Department) will discuss "A Case from Legal History: The Fugitive-Slave Case of Margaret Garner." This remarkable and tragic case from the mid-1850's served as the inspiration for Toni Morrison's novel, *Beloved*.

Saturday, November 11, is Veterans Day. For those who wish to attend, we'll have a brief observance of the holiday, prior to the start of Saturday morning's CLE programs. CASA returns to independent programming on Saturday morning, leading off with CASA-favorite Prof. Erwin Chemerinsky giving us his "Perspectives on the First Term of the 'Roberts Court.'" Following that plenary session, CASA attendees may choose between two breakout sessions, one on "Litigation Re: Medical Treatment of Minors" and another on "*Blakely v. Washington* and *United States v. Booker* – An Update." Following the lunch break, CASA and Spencer-Grimes will have a second joint ethics session, this one led by Prof. Chemerinsky. The 2006 conference will conclude with a joint session for all three groups, a panel discussion on "The Effect of the Death Penalty on the Appellate Process." (Showing he's the Superman of CLE – participating in his third CLE session of the day – Prof. Chemerinsky will be one the panelists.)

In addition to the CLE programs, social events are planned for each day of the conference. Following registration on Wednesday evening, CASA will have an informal get-together, giving us an opportunity to meet and talk with our staff-attorney colleagues from around the country. The next day, CASA's annual business meeting will be held during lunch at the Café Cipriani, an Italian restaurant across the street from the hotel. On Thursday evening, we'll have the annual CASA T-shirt exchange at the hotel, and we're inviting everyone attending the conference (including appellate judges, CAL attendees and guests) to join in the fun. As noted above, the "big event" will be the banquet on Friday night, with Justice O'Connor as the guest speaker. Then on Saturday, Ms. Harriet Miers, Counsel to the President, will be the guest speaker at a luncheon. The "grand finale" for CASA attendees will be on Saturday night, when we'll have a casual Texas-style dinner at Spring Creek Barbeque in Irving, Texas. All CASA attendees and their guests are invited to the annual dinner, at which we'll celebrate CASA's 30th anniversary. (Please note that the Saturday luncheon and the annual dinner on Saturday night are optional events, so please make your reservations.)

On behalf of CASA's Executive Committee and the 2006 Education Committee, we look forward to seeing you in Dallas.

REFLECTIONS OF 1976

Paul McGrath

Chief Court Attorney, New York Court of Appeals

In the summer of 1976, the year CASA was born, I was a 16 year old looking forward to my junior year of highschool. I had just finished working and caddying at the Country Club of Rochester (CCR), the place where I learned the game of golf and where I have such fond memories. Here was my routine pretty much every summer day, Tuesday through Sunday, from the last day of school in June to the first day of school in September: I would get up, walk down to the corner of my street at about 6:45 A.M. and catch a ride from the assistant golf professional to the nicer side of town and to the back room or caddy yard of the second most famous country club in Rochester, New York, CCR. There, after helping to drive the electric golf carts -- the caddies' competition -- out of the cart barn, I would sit out back in the caddy yard (more like a pen, than a yard) and wait until the caddie master called my name for the morning's "loop." Once I received my assignment, I picked up my bag or bags --I usually caddied double -- hightailed it across Elmwood Avenue to the first tee and waited for my players. Four and a half hours later, fortified by thirst quenching grape with lemon drinks, I would return to the backroom, hand my signed ticket to the caddie master, and get paid, usually \$15 or \$16 for a double, but up to \$20, if I managed to secure a really good loop.

After eating a brown bag lunch in the caddy yard, I would then either work in the backroom, cleaning clubs, moving carts and otherwise servicing the members' golf needs or go for an afternoon loop. That second 18 was often less fun than the morning loop because the morning dew had soaked through your Converse Allstars, leaving your feet like dirty wet rags, and the members' bag straps dug into your shoulders like lances. Nevertheless, you took the loop if it was available. It was money in the pocket and you were always seeing something new and exciting on the course.

Some days that summer were really special. I was fortunate to be the regular caddy for Donald C. Allen, CCR's perennial club champion and one of the finest amateur golfers in the history of the State of New York. With "Mr. Allen," I sometimes got the chance to caddy at different courses in the area in local tournaments. I felt a part of the action, realizing that my own game was never going to be at that level. Still, I could play my own part, however small, in bringing home a tournament victory for Mr. Allen. I think I was 16 when I toted his bag to victory in the prestigious Country Club of Rochester Invitational, a tournament that included all of the best amateur golfers from western New York.

Mondays were also special days. On Mondays, the club was closed, but caddies could play for free. We would usually play at least 18 holes and also take advantage of CCR's expansive practice facilities. I can still smell the freshly mowed grass and hear the wind as it blew through the pines off the first fairway. I

can visualize the faces of the other colorful caddies in the yard, The Whip, Big Red and the Gunk. If I could only go back for just a day.

I only play about 15 rounds of golf a year now, mostly on Saturday mornings or an occasional nine holes after work. Still the game is in my blood. Although I love my job as a staff attorney, if I could, I would relish the opportunity to take a sabbatical and try to "loop it" out on the pro tour. Golf-related novels, not instructional books, are still my favorite books, and I would gladly trade 99 NY2d for a chance to reread *Golf in the Kingdom*, one more time.

Happy 30th Anniversary CASA and thanks for giving me this chance to look back on my summer of 76!

HAPPY ANNIVERSARY, CASA! Reminiscences of Thirty Years

The pearl is the symbol of 30th anniversaries and, in honor of CASA's 30th, we've strung together some reminiscences. CQ asked CASA members and friends to write about where they were and what they were doing in 1976 and to add any anecdote about CASA.

Here's where we were and what we remember. . .

I was in law school in 1976. That was the summer that I clerked for Professor John Murphy and helped him update materials for his labor law class. I also worked in the Post Office as a clerk. I survived by drinking enough coffee to sink an Hawai'ian island.

My CASA memory is from the seminar in Washington state. At there resort, there was a mother bird nesting in the eaves with three chicks. One of the hotel employees told us that the biggest two would get all the food and the runt of the litter would eventually die. Chief Judge Danell Tacha of the U.S. Tenth Circuit said, "We must do something about this injustice. Can't I enter an injunction ordering her to feed them all equally?"

~~ Joe Merling

I spent the beginning of 1976 as an appellate public defender and then opened a private law practice with one of my colleagues in the appellate public defender's office. We specialized in appellate practice.

My most dominant memory of CASA is what a pleasure it was to attend the seminars. They were always so well planned in that they included components of substantive law, skills, and court administration. It was also great getting to together with other people who were so dedicated to the public service of being a central staff attorney.

~~ Judge Lynn Pickard

In 1976, I was practicing law in Seattle, totally ignorant of how appellate courts actually worked or who worked in them. But about that same time the Washington State Supreme Court was taking its first tentative steps toward having a central staff, and in 1979 I came to that staff as the court's Commissioner. I attended my first CASA meeting, I believe it was that year, in Santa Fe. After that I made it to probably a dozen more CASAs, concluding with last year's meeting in Dallas. And I say "concluding" because after 27 ½ years in this game I am retiring as of this Friday, September 8. I will miss all of the many friends I made at CASA over the years, and I wish you all well in keeping the organization alive and kicking for another 30 years.

I will share two memories from CASA meetings. The first is my favorite annual banquet costume/impersonation over the years -- Marge McCoy in Key West as Ernest Hemingway! The second (probably unbeknownst to CASA archivists until now) comes from the meeting in Boston. A few old-timers will recall that the hotel was the Omni Parker House. Early on I bitched to the management about the strange room they had

put me in. They moved me to a better one. On checking out, however, I still offered “constructive criticism” on the form provided for same. A couple of months later I got a nice generic letter from the manager thanking me for my comments. Some months later still I got yet another letter, this one advising that my initial comment card had entered me in a prize drawing, and how would I feel about a five-night vacation for two (air fare included) at the Omni Cancun. It was nothing like Boston or the Parker House, I can assure you! I’ve had an extra warm spot in my heart for CASA ever since.

~~ Geoff Crooks

In 1976, I was finishing my first year with a law license, working for the Missouri General Assembly, getting married, and moving from a mobile home to the property we would live at for the next 28 years.

I remember the great places where we have had CASA conferences – Blaine, Washington; San Diego at San Bernadino; Park City, Utah; Williamsburg, Virginia; Charleston, South Carolina. I remember Justice Scalia’s talk to the group at the Supreme Court; Ken Starr’s luncheon speech recorded by CSPAN; being part of a plenary session panel; the great lectures; and the great people.

~~ Bill Thompson

In 1976 I was at the University of Michigan getting a masters in Linguistics.

My favorite memory of CASA is at the Key West seminar, sitting arm to arm with many other staff attorneys from all over the country on a large metal fishing boat as the sun went down. We left the cove with pelicans lurking on the wooden posts of the harbor. We chugged out onto the ocean and the moon was out and the night was clear. Each of us had our own tub of squiggly pieces of bait and a large pole. At some point the person next to me caught a barracuda that snapped my line. Other people pulled up incredible tropical looking fish onto the deck. I ended up not catching anything, and got a shirt to that effect at the dinner party the next night. I remember the smell of the salt and the fish and the hot boat. It was awesome fun!

~~ Janet Wilson Cordova

In 1976, I was working as a mental health therapist as the criminal justice liaison for the Florida Mental Health Institute; I worked with “first time offenders” who also had been released within the past year from a Florida mental hospital (Schizophrenics, psychotics, etc.). I moved to a lovely cabin on a lovely little lake in Florida; the cabin was surrounded by 3-4 feet high ferns. It was an incredibly blissful retreat from the, uh, crazy stress of the day and made working so I could live there worthwhile. I remember the activities related to the Bicentennial – the big ships and the numerous firework displays. And, I remember attending my first Presidential-election rally; Jimmy Carter spoke at Lowry Park in Tampa, which had a “fairy-tale” theme and was filled with statuary of fairytale characters, making the assembly of folks for the speech quite surreal.

At my first seminar in Key West, I remember the pressure of being seated in the “round” with name plates and realizing that I was facing folks who all did basically what I did. I was impressed to be in their presence and awed that I was allowed to be there

under the instruction of such notable instructors as Erwin Chemerinsky. Then, Bill Lowe started arguing with an instructor (okay, maybe “engaging the instructor in a discussion” would be better) and I was even more awed; it was great to see someone with such a quick mind representing “us” and challenging/stimulating the rest of us to wake up.

~~ Kembra Smith

In 1976, I graduated from Downers Grove South High School in Illinois, spent the summer working the bread production line at the Pepperidge Farm factory (when I wasn't sorting and de-stemming raisins), and began my freshman year at Washington University in St. Louis.

One of my most lasting memories of CASA is from my first conference in Charleston in 1987, one year after I started work at the court. Our court had money to send only one staff attorney. But, after considerable discussion, the staff decided that we would all go, using the money to rent a van and camping out at a nearby campsite once we got there. Our judges were impressed with either our dedication to continuing education or our idiocy in even contemplating camping in Charleston in the summer. They found money for all us to fly and stay in shared rooms at the Omni. Instead of battling away mosquitoes and fainting from the heat and humidity, I found myself in the hotel lounge one evening sharing mint juleps with Gina Maestas. Not a bad way to begin one's career as a central staff attorney.

~~ Carol Couch

In 1976, I was wondering why I had to come of age in the era of disco.

My favorite CASA memory is of a colleague running down the hall in pink shorts in Vail, yelling out that it was time for another kamikaze.

~~ Jim Mahlum

On August 16, 1976, I started working as a Judicial Staff Attorney in chambers at the California Court of Appeal, 4th District, Division 1, in San Diego. My first CASA conference was in Redondo Beach (San Diego had been rejected as a venue) in the mid to late 1980's.

~~Buzz Kinaird

In 1976 I was commanding an infantry battalion (five companies and a headquarters – about 1,100 soldiers) at Fort Benning, Georgia.

I can't help but recall the incident at Lake Geneva, Wisconsin (1996) when Steve Brill and I “rescued” beaucoup bottles of leftover champagne from the grasping hands of hotel staff who attempted to return same to their facility from our dinner and costumed affair on the hotel grounds. Afterwards, there was non leftover, thanks to the thirsty nature of our CASA members.

~~ Jack Fowler

I was in Anderson, Indiana, finishing Kindergarten and starting the 1st grade, glued to the T.V. after school, and touring the southern United States with my family on a 3 week long vacation during the summer months.

Regarding the Listserv, my memory is how many people responded to an inquiry I had shortly after joining CASA. I was very impressed with the responsiveness and willingness many members exhibited in getting me an answer to my question.

~~Kevin Smith

In 1976, I was a junior in high school in Kansas City, Missouri. My biggest concerns were how to try to stand out in a brown, Catholic school uniform and trying to figure out why the boy I adored was taking someone else to the junior prom.

My memory related to CASA is from the Park City meeting three years ago. Having attended many boring irrelevant CLEs over the past 15 years, I was absolutely blown away by Erwin Chemerinsky's presentation and, in general, the pride that the whole conference instilled in me regarding my choice of career as an appellate staff attorney.

~~ Laurie Ward

The summer of 1976 found me driving solo from my home in suburban NYC to San Antonio, Texas to start my first year of law school. I had never been anywhere near Texas. All my worldly possessions were packed into my 10-year-old car. I had exactly \$100 to my name and my Texaco credit card with a \$50 limit but promises of mega dollars that St. Mary's University Law School would kindly loan me so I could study law. The radio was broken but my car had a complete set of new tires (a going away present from my parents). The temperature was over 100 degrees and my car wasn't air conditioned but I didn't care. I was absolutely thrilled that I was going to become a lawyer. Life just couldn't get any better.

~~ Janette Thompson

The Reds swept the Yankees in the '76 World Series. Pittsburgh beat Dallas 21-27 in the Super Bowl. Rocky was the Best Picture at the '76 Academy Awards. I bought my first home in 1976 for \$37,000, the price of the Honda roadster in our garage in 2006.

~~ Harry Thompson

Some of our favorite memories of past CASA Conferences involve the costume contest. In preparation for our lumberjack costumes at Semi-Ah-Moo, I called every store in Blaine, Washington (while still in Fort Worth) trying to rent a large cross-cut saw. I had no luck until someone suggested I call a tiny lawnmower repair shop and eureka! The owner said he had an old but usable large cross-cut that belonged to the state parks department, and he set it aside for me to pick up when I arrived in town. We remember two unusual things from the costume contest, we had a judge dressed as a lobster and we sang the Monty Python lumberjack song.

In San Diego, the CASA officers got bumped from the boat at the members-only party because there was too much weight on the boat. We all consoled ourselves with a delicious dinner on land. And, lastly, how could we ever forget that fateful hike down into the Grand Canyon by two CASA old-timers, one of whom almost didn't make it back to Flagstaff? Perhaps that's an exaggeration, but one of those fellows had us pretty worried for a few days.

~~ Janette (and Harry) Thompson

Living three blocks from the beach in Santa Monica, California, working for the Securities and Exchange Commission, and spending my free time horseback riding and playing the guitar.

The CASA conference in Vail, Colorado when I climbed one 14er with Paul Fyfe on the drive there and three more solo on a day off.

~~ Richard Becker

In October, 1976, I had just moved to Phoenix, AZ from Des Moines, IA, and I was sitting by the swimming pool in my apartment complex with a cup of coffee and the want ads, looking for a job. I had a Bachelor's Degree in Fine Arts-Painting and an Iowa teaching certificate, which made me overqualified for about everything! A market researcher walked up and interviewed me for her survey. It was fun. I asked if her boss was hiring. She gave me information about how to contact her company. For the next few months I took marketing research surveys. I also found a free lance job designing telephone book yellow page ads. When I figured out that yellow book advertising wasn't even close to the art I wanted to make, and art supplies were too expensive to afford on my "freelance" artist/market researcher budget, and that my mind was going to sleep doing the work I was doing, I went back to Iowa to study law - and the rest is history!

As for CASA memories, it would have to be my first CASA conference in Breckenridge, CO. I was delighted to meet so many appellate staff attorneys who, even though job descriptions might differ, were just like me! All the programs presented at the conference offered me something of value for my job - quite a surprise after years of struggling to find relevant seminars at a State Bar Convention! I loved the "village" atmosphere of Breckenridge, enjoyed the free day visiting Country Boy Mine and the historic railroad with my kids, and even though the Fourth of July fireworks were cancelled because of dry conditions, we had a great holiday. The only thing that would have made that conference even better would have been if my husband could have joined us. He was able to come with the rest of us to Shelter Island in San Diego, CA, but that's another set of memories (particularly hula dancing and the Gilligan's Island bunch, aka CASA members in costume, at the Luau!).

~~ Dee Rogers

January-June '76, I was finishing my senior year of college at the University of Tennessee-Knoxville (graduated in early June). June-August, I worked in my uncle's electrical wholesale business, Ramsey Electric Supply Co., in Chattanooga. In August, I moved to Washington, D.C., and began my first semester of law school at American University.

In the extracurricular-activity department, my bobsled ride in Park City (2004) stands out as the highpoint of my CASA free-day activities. The horseback trail ride at sunset, at the annual dinner in Flagstaff (2002), is also high on my list of favorite CASA events. And then there was Bill Lowe in a sarong (annual dinner/beach luau, San Diego - 2000), but that's a different kind of "memorable." In the CLE department, I still

remember my first Erwin Chemerinsky, Supreme Court update (Lake Geneva - 1996), sitting there in amazement at the end of the session. And that still happens.

~~ Lee Ramsey

In 1976, I was an electronics technician in the Air Force in a tactical mobile unit at Canon Air Force Base in New Mexico. Later that year I was transferred to Nellis Air Force Base in Nevada, where I worked on a bombing range about 120 miles north of Las Vegas. I rounded out the year by marrying my husband, Ed, a fellow electronics technician (and now a fellow lawyer). After I finished my four years in the Air Force, I used my VA benefits to attend law school.

One year, I had a good enough number in the T-shirt lottery to nab a shirt from Roswell, NM, with aliens on it. I knew my older son, Joseph, would love it.

~~ Paula Cardoza

In 1976, I turned ten years old, finished fourth grade and started fifth, and moved from Cincinnati to Weston, Connecticut. It was also the first presidential election and the first Olympics I was consciously aware of; I still remember a particular political cartoon (poking some fun at Jimmy Carter's omnipresent campaign smile that year), and of course, Nadia Comaneci's incredible gymnastics routines. I was already being told by my family that I would be a lawyer someday, but my own plan was to be a country singer. I guess we know who turned out to be right. :)

I remember my first CASA conference in Williamsburg, and how impressed I was by the phenomenal quality of the program and speakers. On a purely personal note, I was happy it was in Williamsburg, since it allowed me to renew some other memories from my undergraduate days at William & Mary.

~~ Amanda Kay

In 1976, I was just emerging from my "college coma" and realizing I had to find a job once I graduated. It will probably surprise no one to learn that I had no plans to become an appellate court staff attorney. The job that did interest me was becoming a small town newspaper reporter. Because it was small, it gave me a chance to do it all—write, edit, create clever headlines, do layout, take photographs, cover the police beat, the town council, and the school committee, write obituaries and wedding announcements, and even, on occasion, editorialize. Learning to write under deadline pressures and covering local government in action stood me in good stead when I later decided to go to law school. I have to confess, however, that I have never managed to use my experience describing weddings and funerals in my legal career!

As for memories of CASA, there are too many to pick just one. So here are just a few, mostly from the mundane end of the scale: That first aha moment of finding other people like me when I attended my first seminar. Watching the rookie of the year be anointed by Mary Ellen. Listening to Ben Scotch play the ukulele while we waited for a boat ride in Charleston. Seeing mountain goats in Colorado. Realizing that Erwin Chemerinsky really truly doesn't use—or need—notes. Having another aha moment when Rob Owen explained habeas in a way that finally made it interesting and relevant to someone who doesn't do habeas work. Going horseback riding, mountain bike riding,

hiking, river rafting, and Hollywood celebrity spotting on the free days. Doug Bader dressed as Harry Truman....in a swimming pool....in Key West....along with federal and state judges also still in costume. John Tucker on the disco floor in the concierge's husband's best 1970s polyester. Seeing the passion for social justice in people like Marge McCoy and Celeste Sabel—undimmed after years of working in the court systems. Realizing that carting that big heavy seminar notebook home was worth it when I referred to the materials throughout the year. Being wowed by the talent of some of the repeat presenters at the seminar. Listening to Mary Neel and Anne Nuttleman sing harmony coming back from dinner. Reading Carol Couch's late-night musings in CQ. Seeing photographs by Bill Lowe and Lee Ramsey. Getting to know staff attorneys from Guam. Meeting Melissa Woods's Mom in Quebec and Gina Policano's Mom in a hot air balloon. Getting George Fowler to tell the story of Cindy Lehr and the sprinklers. Forging the very best kind of "same time next year" friendships.

~~Martha Newcomb

I was born in Albuquerque in 1976, so I was pretty much loafing around during that year!

My best memory related to CASA is attending the Park City seminar before I even started working at Prehearing and having the feeling that I was going to love being a staff attorney.

~~ Tiffany Sanchez

In 1976, I was a sophomore in high school, working part time, fishing a lot, lusting after juniors, totally hooked on music, and acting basically sophomoric.

I can add a few highlights, some of which may be printable. I remember mosquitoes as big as pteranadons at the Lake Geneva annual dinner. I remember touring the Truman White House in Key West, and my wife Kathy lagging behind the tour so she could sit in one of the off-limits chairs. I also remember Key West for rum runners, a great night of CASA fishing while Kathy was seasick on top of the boat, the great vibe of walking on A-1-A, and participating in a hot chili festival that put the weather into perspective. I remember summoning the nerve to ask Irwin Chemerinsky a question in Burlington, and I wasn't even struck by lightning. I remember praying I would not get scorched by Mike Howlett. I remember some great exchanges between Bill Lowe and Cindy Lehr on the listserv.

~~ Dave Ewert

In 1976, I was two years old, living in Bay Village, Ohio, in my grandparents' house with my mom, sister, uncle, and grandparents, dressing up in my uncle's high school football uniform, eating Fruit Loops over Saturday morning cartoons, laughing at my grandpa's uncanny Bugs Bunny impression, while my mom was finishing college, working two jobs, and my ever talented grandpa was building my sister and me a 3ft. x 2ft. fully furnished dollhouse for Christmas. That's what I remember about 1976.

I have been to CASA once, in Park City, Utah, where I got the best momento. I had the nerve to attend the tee-shirt exchange without a tee-shirt to exchange. Without

knowing with whom I was speaking, I expressed my admiration for a tee-shirt a woman was carrying. It's a white tee-shirt, brilliantly designed by someone from the Brooklyn Childrens Museum, now worked into a perfect softness. I told her (without expectations) that my sister worked at there when she lived in NYC. She graciously gave me the tee-shirt, after I triple-checked and reminded her that I had nothing in return but my gratitude. I felt so humbled. But rest assured, it's in good hands.

~~ Lucy Curry

In 1976, I was attending the University of Florida majoring in political science. No idea that I would eventually go on to law school.

Memory of CASA seminar--not exactly a "fond" memory but one I'll never forget. We were in Breckenridge, Colorado. My hotel room had no air conditioning. All local stores had sold out of fans. The hotel room had a refrigerator and to cool off, I would periodically open the refrigerator door and put my head into the refrig. I've never been so miserably hot in my life!

~~ Elena Ris

In 1976, I was busy juggling. I was a mother of a one-year-old, wife of a medical resident (a/k/a absentee spouse), and graduate student in business school at the University of Rochester. "The law" was not on my radar screen.

To me, CASA has meant quality CLE, presented by amazing speakers, and an opportunity to feel good about what I do every day by mingling with fine folk who spend their time doing similar, thankless work.

~~ Marcia McCormack

In 1976 I was in law school at the University of Texas in Austin. I took classes in the summer, too, and my favorite memory of that year is the bicentennial celebration on the 4th of July. I remember grilling burgers and chicken on a hibachi on the roof of an Austin apartment, and watching the fireworks.

My first CASA conference was in 1995, at the Inn at Semi-Ah-Moo, in Blaine, Washington. My kids were little then (ages five and almost three), and I was so pleased that there were other little kids there for my kids to run around with. My daughter Jenny made friends with Norm Vance's daughter, Emma, and after that, any year we went to a conference, Jenny wanted to know if Emma would be there. I loved the conference. It was a wonderful discovery, finding programs that were relevant to what I did (as opposed to being aimed at people in private practice), and getting a chance to talk to people at other courts about how their courts did things.

~~ Casceil Aronson

1976: My heart was broken by the man (I thought) of my dreams. When I graduated from University of Chicago with an MSW, I got into my Toyota station wagon and moved to upstate NY - the northern Catskills - to work for a residential treatment center for delinquent and ungovernable adolescent boys. (Good preparation for law school).

CASA Memories: I have three.

1. The Education Committee (Wayne, Spencer, Mary Neel, Antje??...??) was meeting in Charleston in October of '91 (I think) (obviously as to this I am using the term "memory" loosely) planning the Vail seminar.

It was the weekend of the Clarence Thomas/Anita Hill hearings. We were so transfixed we kept taking breaks to watch the proceedings and barely got the seminar planned.

2. My plane flight out to San Diego for the seminar at Rancho Bernardo had a stopover in Salt Lake City. Antje got on the plane there. When we landed, we met up with Cindy Lehr and Steve Brill. On the way up to Rancho Bernardo, we stopped and bought bottles of Moet, which we drank along the way in Styrofoam cups. I watched July 4th fireworks with Steve, Cindy, Antje and Melissa Woods from a bar in La Jolla built on rocks overlooking the ocean. A wonderful night!

3. The 1996 (I think) Executive Committee meeting was held in Mt. Hood, Oregon in the lodge where "The Shining" was filmed....

Congratulations to all CASA folk past and present!

~~ Marge McCoy

THANKS, CASA, FOR ALL THE MEMORIES!!
and
CHEERS TO THE NEXT 30 YEARS!!

**30 YEARS (and counting) OF CASA'S
"TOUR AMERICA" PROGRAM!**

Seminar Sites

- 1976 Washington DC
- 1977 New York, NY (in conjunction with the ABA Annual Meeting)
- 1978 Chicago, IL (in conjunction with the ABA Annual Meeting)
- 1979 Williamsburg, VA
- 1980 Santa Fe, NM
- 1981 New Orleans, LA
- 1982 Washington DC
- 1983 San Francisco, CA
- 1984 Chicago, IL
- 1985 Philadelphia, PA
- 1986 Denver, CO
- 1987 Charleston, SC
- 1988 Redondo Beach, CA
- 1989 New Orleans, LA
- 1990 Washington DC
- 1991 Vail, CO
- 1992 Boston, MA
- 1993 Rancho Bernardo, CA
- 1994 Key West, FL
- 1995 Semi-ah-moo, WA
- 1996 Lake Geneva, WI
- 1997 Burlington, VT
- 1998 Breckenridge, CO
- 1999 Williamsburg, VA
- 2000 San Diego, CA
- 2001 Portland, ME
- 2002 Flagstaff, AZ
- 2003 Charleston, SC
- 2004 Park City, UT
- 2005 Dallas, TX & San Francisco, CA (the latter in a joint seminar with AJEI)
- 2006 Dallas, TX
- 2007 To Be Determined**

JUSTICE IN THE BALANCE: Competing Approaches to Judicial Interpretation

A Review of Active Liberty: Interpreting Our Democratic Constitution by Justice Stephen Breyer (Knopf 2005, 176pp.) and A Matter of Interpretation: Federal Courts and the Law by Justice Antonin Scalia (Princeton Univ. Press 1998, 176pp.)

Tiffany Sanchez, NM Court of Appeals

As it appears that we are continuously experiencing a conflict regarding issues related to constitutional and statutory interpretation, it proved incredibly helpful and enlightening to read Justice Stephen Breyer's "Active Liberty: Interpreting Our Democratic Constitution" and Justice Antonin Scalia's "A Matter of Interpretation: Federal Courts and the Law." Both Justices Breyer and Scalia provide insightful explanation and bases for their methods and theory of constitutional and statutory interpretation. As I read both books and canvassed the citations and references critical to the respective arguments, I was relieved and impressed to encounter that, although Justices Breyer and Scalia may be ideological rivals when it comes down to their own methodologies of interpretation, each man acknowledges and responds to the alternative and competing theories of interpretation in order to illustrate and bolster their respective positions.

Justice Breyer's book is based on the Tanner Lectures on Human Values that he presented at Harvard University in November 2004. The theme of the book focuses primarily on what Justice Breyer defines as "active liberty." The way I understand it, Justice Breyer describes the concept of active liberty as the people's right to an active participation in collective power of the government. The concept "refers to a sharing of a nation's sovereign authority among its people."

Borrowing concepts from ancient ideologies, political philosophers, and the Framers themselves, Justice Breyer sets forth his thesis “that courts should take greater account of the Constitution’s democratic nature when they interpret constitutional and statutory texts. That thesis encompasses well-known arguments for judicial modesty: The judge, compared to the legislator, lacks relevant expertise. The ‘people’ must develop ‘the political experience’ and they must obtain ‘the moral education and stimulus that come from . . . correcting their own errors.” In short, I perceive Justice Breyer’s theme to be democracy and the Constitution and why judges should pay greater attention to a document’s democratic underpinning.

In considering his theme as falling within an interpretive tradition that is in balance with the Constitution’s history, Justice Breyer applies his theory to recent Supreme Court cases drawn from the areas of free speech, federalism, privacy, equal protection, statutory interpretation, and judicial review of administrative action. Justice Breyer uses the examples to illustrate how his theory applies to modern government-related problems that call for a democratically based response and each raises difficult questions of constitutional or statutory interpretation. The applications were helpful examples of how “reference to the Constitution’s basic democratic objectives can help courts shape constitutional doctrine, reconcile competing constitutional values, time judicial intervention, interpret statutory ambiguities, and create room for agency interpretations.”

Justice Breyer concludes his argument by responding to those who would object to his theory of interpretation. Specifically, Justice Breyer acknowledges the view of interpretation which he calls “textualist” (in respect to statutes) or “originalist” (in respect to the Constitution) or “literalist (to describe both). In his opinion, the literalist interpretative approach asks judges “to focus primarily upon text, upon the Framers’ original expectations, narrowly conceived, and upon

historical tradition.” Justice Breyer suggests that the literalist interpretative approach does not undercut his entire argument because the nature of the literalist approach is unsatisfactory and may have serious drawbacks. First, he responds that originalist judges cannot appeal to the Framers themselves in support of their interpretative views. Second, it appears that Justice Breyer doubts that it is true that the judges who reject literalism necessarily open the door to subjectivity as each judge's unique need to be consistent over the long term constrains subjectivity, and a focus upon consequences does not always invite legal change. Third, Justice Breyer contends that subjectivity is a sort of “two-edged” sword that literalists cannot avoid. Fourth, Justice Breyer does not believe that literalist methods of interpretation are necessarily more likely to produce clarity or workable legal rules. Fifth, and finally, Justice Breyer contends that literalist methods may also produce consequences which may outweigh whatever risks of subjectivity or uncertainty that are inherent in other interpretative approaches.

Justice Scalia's book offers a poignant commentary regarding the literalist approach to interpretation that Justice Breyer rejects. Justice Scalia's essay sets forth his argument and defense of his interpretative approach. Like Justice Breyer, it appears that Justice Scalia invokes the ideologies and theories from politicians, philosophers, and the Framers to bolster his argument. Justice Scalia begins by discussing the common law and its development. While Justice Scalia makes it clear that he has no contention with the common law and its development, he does apparently question “whether the *attitude* of the common-law judge— the mind-set that asks ‘what is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?’” is appropriate for most of the work he does. Justice Scalia's essay describes what he titles the science of statutory interpretation and acknowledges that some American judges have no intelligible theory of what they do most and

warns against focusing on the intent of the legislators, as it is important to look at what the legislators say rather than what they meant.

Justice Scalia states that “Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former.” Justice Scalia resists the invitation to judicial lawmaking. Justice Scalia makes clear that “[t]o be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hide-bound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.” I think that a good summation of Justice Scalia’s argument (one that I find to be truly contrary to Justice Breyer’s theme of “active liberty”) is that the process of using legislative intent to interpret statutes and the Constitution is “simply not compatible with democratic theory .”

Following Justice Scalia’s essay regarding his interpretative approach, the book contains criticism by commentators, who include both lawyers and non-lawyers. The questions raised by Justice Scalia’s commentators include concerns regarding what judges following the textualist approach do when the text is ambiguous and concerns regarding why judges should refrain from employing moral principles and other aids to help interpret the law when the law is unclear. Justice Scalia concludes his book by responding to the commentator’s statements each in turn. Justice Scalia acknowledges the argument most frequently made in favor of an interpretative approach that takes into consideration that the Constitution is a sort of living thing that requires flexibility that a changing society requires. In the end, Justice Scalia acknowledges that “textualism is not ironclad protection against the judge who wishes to impose his will, but it is *some* protection.” In the final analysis, both Justices Breyer and Scalia provide thorough description and analysis of their respective interpretative approach. It is clear to me that both approaches have

inconsistencies and downfalls. However, after reading these two thoughtful essays, one can gather a deeper understanding as to what considerations play into our Supreme Court's decisions and perhaps find a reasonable balance between the two approaches.

Of Courts and Crowds: A Review of The Wisdom of Crowds (James Surowiecki, Anchor Books 2005, 282 pp.)

Carol L. Couch, NM Court of Appeals (retired)

How many jellybeans are in a jar? Who will win the next election? What is IBM stock worth? What is the best 4th down strategy when a team is within 10 yards of the goal? Why do we pay taxes? Who can best answer these questions? Why, the crowd.

And just who or what is a crowd? James Surowiecki offers a broad definition: a crowd can be a tightly organized management team; the collection of cars driving the L.A. freeways; stock market investors; or any group that has the ability to collectively make decisions and solve problems, consciously or unconsciously. The book's basic premise is that, under the right circumstances, a group is more intelligent than even the smartest person in it and that the aggregate of imperfect judgments is often excellent. As Surowiecki succinctly states, "The idea of the wisdom of crowds is not that the group will always give you the right answer but that on average it will consistently come up with a better answer than any individual could provide." (p.235) He also argues that the best decisions are the product of disagreement and contest rather than consensus or compromise.

But he is not naive or utopian about the wisdom of crowds. Surowiecki acknowledges the madness of crowds often manifested as rioting mobs. A crowd by itself is only a group of people; it needs the right circumstances to function wisely. In particular, a crowd's intelligence depends on: (1) independence and a diversity of opinion; (2) decentralization of decision-making; and (3) a way to aggregate individual decisions or opinions into a collective decision or opinion.

So, we know what crowds are and we know what they need to make wise decisions. What kind of problems can these decisions address? Surowiecki examines three types of problems – cognitive, coordination, and cooperation. While appellate decision-making clearly falls within the cognitive category, courts are also faced with coordination and cooperation problems in managing caseloads and staff resources. In fact, there seem to be few endeavors that do not implicate the wisdom of crowds. Surowiecki's book is peppered with a myriad of examples of decision-making at its best and worst. The range of these examples alone makes worthwhile reading.

In an apocryphal example of the importance of independent thinking, Surowiecki recounts the behavior of army ants in Guyana moving in a huge circle (1200 feet circumference) going around and around and around for days until they drop dead. This "circular mill" is created when the ants are separated from their colony and they simply begin to follow the ant in front of them. Unless one ant, by chance, moves off course, the circle is doomed. Humans are equally capable of such behavior as illustrated by the Columbia disaster.

The decision-making process of NASA's Mission Management Team (MMT) after the Columbia's launch in 2003 illustrates the worst ways that small groups function. Unlike the "crowd" who invests in the stock market and collectively decides what a stock is worth or a "crowd" of pedestrians on a Manhattan sidewalk who navigate their way with surprising dexterity, a small group has an identity of its own and "the influence of the people in the group on each other's judgment is inescapable." (p.176) As a consequence, small groups may be more prone to make bad decisions. In MMT's case, the discussions and decisions were "verdict-based" rather than "evidence-based." Because of this, they failed to gather necessary information, ignoring information contrary to the pre-determined verdict, and seeking those bits of information that supported the conclusion that the foam did not damage the Columbia's heat shield tiles and, if it did, there was nothing they could do about it. Meetings had no debate and allowed no minority opinion.

One of the most detrimental characteristics of the MMT, however, was its lack of diversity – not socio-economic-racial diversity but cognitive diversity. Although the MMT was relatively diverse in the usual sense we have come to think of, it has been suggested that the 1960s all-white, all-male, all short-sleeved, pocket-protector, crewcut team of NASA's Apollo missions were a more diverse team in that they came from a variety of industries and technical backgrounds while most of NASA's team by 2003 came directly to NASA from graduate school. One need only contrast the successful return of Apollo 13's crew with the disastrous reentry of the Columbia to appreciate how critical cognitive diversity can be in reaching good decisions. Small groups can be more than just the sum of their parts but, like any crowd, they must function under the right circumstances.

The above is an abbreviation of just one of dozens of examples discussed. A review – or at least this review – cannot do justice to the originality, breadth, and thoughtfulness of the book. Surowiecki moves with ease from the intricacies of selling short in the stockmarket to the purpose of a representative democracy. In the Afterward to the Anchor Books edition, Surowiecki reflects on events that took place after the initial publication of the book, including his own doubts about the wisdom of crowds that were consistently dispelled in experiments as varied as asking random people in Times Square how many jelly beans were in a jar to asking listeners of a radio show how many books he had in his study, which even he didn't know. Yet, as counterintuitive as the idea is, corporations and some government agencies, including some people working in U.S. intelligence, have begun to apply its principles to their work.

And what of the judiciary? In some ways, an appellate court is set up as an ideally wise crowd. Because decisions are made in panels, there is no one individual who decides a case, promoting the necessary decentralization. When

appellate staff are included to provide information and guidance to the court, the court “crowd” comes even closer to meeting the requirements of independence and a diversity of opinion. And, the process of compiling a decision provides a way to aggregate the decision into a collective decision or opinion.

Still, it seems to me that the judiciary is as prone as any group to the pitfalls of the “circular mill” if precedent is blindly followed without consideration of new realities. And, I am sure we all can think of a situation where a case was approached from a “verdict-based” mindset so that vital facts or law contrary to the desired outcome were ignored. Certainly judges and their staff are susceptible to engaging in discussions where no debate is allowed and no minority opinion may be expressed. Finally, judges and their lawyer staff have all been indoctrinated in how to “think like a lawyer,” which makes achieving cognitive diversity more of a challenge. After reading The Wisdom of Crowds, I am certainly more aware of these pitfalls and the potential wisdom to be gained by overcoming them.

How wise is the crowd we call an appellate court? Each of us will undoubtedly have our own opinion based on our unique experience and information. We now know that our collective opinion is likely to be more true than any one individual’s.

AT YOUR SERVICE!

Help spread the word. All CASA members are eligible to participate in a listserv, an email discussion group. Members receive any and all messages that other listserv members send, to which they are welcome to respond. This is a great way to take advantage of membership in a group that includes peers from around the country.

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