

In Memoriam

Kenneth W. Gideon

Ken Gideon, who chaired the Section of Taxation in 2004–2005, died suddenly on January 10, 2016. He was an extraordinary tax lawyer who achieved important precedent-setting victories for clients throughout his career, and served at the highest levels of government and the organized bar, but never let go of the plain-spoken, unassuming ways and values that he learned in Lubbock, Texas.

Born in 1946 to a hard-working World War II veteran, Milton Jean Gideon, and his loving wife, Mary, Ken was raised in Lubbock, along with his sister Donna, to live a humble life, to treat others with respect, and to be thankful for the gift of life itself. Those who later served in government and worked in private practice with Ken can attest to the fact that he lived those values throughout his career.

During his senior year of high school, Ken's path crossed that of Carol Almack. After an inauspicious start, with Ken teasing Carol incessantly, they soon fell for each other. The two married in 1968, the year Ken graduated from Harvard University, and began to build a life together while Ken studied law at Yale Law School and Carol supported them working as a teacher. After graduating from law school in 1971, Ken and Carol returned to Texas where Ken briefly served in the United States Army before commencing his legal career with Fulbright & Jaworski in Houston. He also became active in the Section of Taxation, chairing the Committee on Court Practice and Procedure.

In 1981, Ken was called to Washington, D.C., when President Reagan appointed him to serve as the Chief Counsel for the Internal Revenue Service. As Chief Counsel, Ken played an important role in one of the most sweeping changes to tax litigation. When he entered office, the Internal Revenue Service and the Tax Court were inundated with tens of thousands of cases involving tax shelter partnerships. At the time, the Service was required to pursue each individual partner separately, through audit and litigation, and risked disparate results depending on how each case progressed. Congress responded to this predicament in 1982, when it enacted a system of uniform partnership audit and litigation procedures as part of the Tax Equity and Fiscal Responsibility Act of 1982. Although complicated and much maligned over the years, the TEFRA partnership rules streamlined the audit and litigation process for partnerships, saving the Internal Revenue Service significant resources and helping the Tax Court reduce by more than half the size of its docket.

Another important, but less noticed, role that Ken played as IRS Chief Counsel came in connection with the defense of the Service's revocation of the tax-exempt status of Bob Jones University, which litigation arrived at the United States Supreme Court in the fall of 1981. In 1970, the Service had

announced that it would no longer grant favorable determination letters for private schools unless they announced a racially nondiscriminatory policy as to their students, and followed up that announcement with Revenue Ruling 71-447, which set forth guidelines for determining whether a school's admissions policies were nondiscriminatory. The Service subsequently revoked the exemption of Bob Jones University, and that determination made it to the Supreme Court when Ken was Chief Counsel. By that time, the Reagan Administration had decided not to defend the lower court's decision that had affirmed the Service's determination, and over the objection of the Acting Solicitor General, the Department of Justice filed a brief arguing that the Service's interpretation that section 501(c)(3) prohibited discrimination was not correct. Working quietly behind the scenes, Ken fought this change of position, and helped maneuver the case so that the Supreme Court would continue to hear it, despite the Justice Department's abandonment of the Service's position.¹ In an unusual move, the Supreme Court appointed William Coleman to file a brief *amicus curiae* in support of the Service's position, and in an 8-1 decision, upheld that position. True to his humble Lubbock roots, Ken never claimed credit for his role in helping to ensure that his client's position was zealously protected.

In 1983, Ken returned to private practice at Fulbright & Jaworski, but remained in Washington. By this time, Carol and their children Chris, Kevin, Tim, and Emily had established a new home in McLean, Virginia. As the children grew, Ken was an active father, participating in Boy Scout activities with his sons, attending Little League baseball and soccer games, ballet recitals and school plays. Ken loved to travel with his family, but as his son Tim recently regaled friends and family, some of Ken's well-planned vacations involved Clark Griswold-esque mishaps for which he was teased endlessly.

Several years later, in 1986, Ken joined Fried, Frank, Harris, Shriver & Jacobson, where he practiced with another legend of the tax bar, Martin Ginsburg. Together they and others litigated the *Citizens & Southern* case in which the Tax Court held that a bank was entitled to amortize its basis in core deposits of acquired banks. They also developed a deep friendship that endured for decades.

In 1989, Ken was called back to government service, this time by President George H. W. Bush, who appointed Ken as Assistant Secretary of the Treasury Department for Tax Policy. In that capacity he worked tirelessly to ensure that the Office of Tax Policy could churn out regulations and other guidance, and initiated an important strategic project to study the integration of the corporate and shareholder tax systems. He also played an important role in the negotiations that lead to the bipartisan 1990 Budget Act, which set the stage for the federal government to generate surpluses and return to a position of fiscal strength.

¹ See Harvey P. Dale, *Public Policy Limits on Tax Benefits: Bob Jones Revisited*, TAX FORUM No. 459 (Apr. 2, 1990), at 14, n.51.

In early 1992, Ken returned to private practice, first at Fried Frank and later at Wilmer, Cutler & Pickering. In 1998, Ken delivered the Laurence Neal Woodworth Memorial Lecture in the House Cannon Caucus Room, advocating for administrable rules, which he defined as “rules that are understood by the taxpayers to whom they apply and that are enforceable by the Internal Revenue Service with a minimum of dispute.”² In his prescient remarks, Ken predicted that the growing trend of anti-abuse rules that came into fashion during the 1990s would yield less transparency in the tax system and result in a set of vague rules of uncertain application that would increase uncertainty and lead to greater tax controversy in the long term.

In late 2000, Ken moved to the Washington office of Skadden, Arps, Slate, Meagher & Flom LLP, which was a homecoming of sorts. At Skadden, Ken was joining long-time friends and former government colleagues Fred Goldberg and Pam Olson and, several years later, B. John Williams, all of whom had worked together at the Service during the early 1980s. At Skadden, Ken continued to litigate major tax disputes and obtained important victories on a wide range of issues, from capitalization to privilege and work product, to transfer pricing and valuation matters. Some of his most important victories were unheralded, however, as Ken sought to settle cases quickly and quietly whenever possible. Famously generous with his time, Ken shared his insights and impeccable judgment with his colleagues and helped nurture the next generation of tax lawyers.

Ken was an active member of the Tax Section, serving as a member of Council from 1987–1989, as Vice Chair (Government Relations) from 1995–1997, and as Chair from 2004–2005. Most recently, Ken served as a member of the ABA Board of Governors from 2012–2015. A long-time fellow of the American College of Tax Counsel, he served as a Regent of ACTC from 1998–2004. Throughout his years of service to the organized bar, Ken worked to improve the tax law and professionalism on the part of all lawyers—whether in private practice or in government—and encouraged all to focus on the importance of public service and diversity in our profession. Although he didn’t live long enough to know it, Ken was slated to receive the Tax Section’s Distinguished Service Award at the 2016 May Meeting.

In 2015, Ken delivered the Erwin N. Griswold Lecture before the American College of Tax Counsel, in which he provided observations on developments in the tax law that he had observed over his more than forty years in practice, and some predictions for the future of tax administration.³ In those remarks Ken advocated for greater use of the Commissioner’s discretion under section 7805(b) to limit the retroactive effect of new rules and regulations, noting

²Kenneth W. Gideon, *Assessing the Income Tax: Transparency, Simplicity and Fairness*, 81 TAX NOTES (TA) 999 (Nov. 23, 1998).

³Kenneth W. Gideon, *The 2015 Erwin N. Griswold Lecture Before the American College of Tax Counsel: A Remembrance of Things Past and Speculation About the Future of Tax Administration*, 68 TAX LAW. 321 (2015).

that prospective rules are likely to be followed by most taxpayers and that avoiding retroactive application of new rules would reduce tax controversy and its attendant drain on scarce government resources. Ken also reflected on three decades of experience with the TEFRA partnership procedures and warned of the disruptions that might result from enactment of proposals that would “decouple liability for audit adjustments from the partners in the year for which the audit adjustment is made and, instead, to impose the liability on either the partnership itself or the current partners at the time of the audit.”⁴ While such a proposal was in fact enacted in December 2015, sadly Ken will not be able to help the rest of us navigate through the resulting morass.

Ken had the ability to find humor in anything. There’d be a twinkle in his eye, a laugh, and then a Texas witticism of some sort that fit the situation perfectly. When a strategy for a case came together, or a solution had been found to a client’s predicament, Ken often remarked that “now we’re cooking with gas!” Sometimes what fit the situation was a favorite country music song title—he collected them along with his good friend and Treasury colleague Michael Graetz—that he would recite from memory with a characteristic giggle. Some favorites included: “Does your chewing gum lose its flavor on the bedpost overnight?,” “Happiness is Lubbock, Texas in my rear view mirror,” and “Thank God and Greyhound you’re gone.”

Ken also had the ability to cut to the chase (a favorite expression of his), or get to the bottom line (another favorite), faster than anyone. He never talked for the sake of talking, or wrote for the sake of filling pages (though he still wrote out the first draft of each legal brief in long-hand on a yellow pad). He made his points clearly, concisely, and always persuasively. If Ken agreed with your argument, it was a good sign that you had reached the right conclusion; if he did not, it was a sure sign that you were on thin ice. Ken had a superb knowledge of the intricacies of the tax law, but he also possessed an uncanny appreciation of the human elements that can factor into litigation, recognizing when a sure winner on the technical rules would prove difficult to win in the courtroom.

Despite a career at the pinnacle of the tax bar, what mattered most to Ken, always, was his family and friends. Whether it was the family trips to national parks, weekend excursions to Civil War battlefields, road trips to collect antiques and vinyl albums, afternoons in the backyard with his grandchildren, or a simple outing to a baseball game (keeping score, of course), Ken pursued all that life had to offer with the same vigor that drove his remarkable career. With his welcoming spirit and Texas charm, Ken strived to make everyone comfortable no matter the setting. For example, it has been recently reported that a number of years ago, at one of the regular Council dinners held in conjunction with Tax Section meetings, Ken would implore the others seated at his table to refrain from discussing tax matters during dinner. Politics, sports, and even religion were acceptable topics, but never

⁴*Id.* at 328.

tax. If anyone at the table started to discuss a tax issue, Ken would reach into his pocket and produce a yellow card, similar to those used in the Premier League. Fortunately, no one ever persisted in order to see whether Ken also carried a red card in his pocket.

As his long-time friend and law school classmate, Robert Wellen, so aptly remarked, “Ken had great skill and judgment as a counselor and an advocate for clients. He was also a dedicated public servant. More important, though, Ken communicated true joy in all aspects of his life. We’ll miss him as a model tax lawyer and as a friend—even as a life force. We won’t see his like any time soon.”⁵

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⁵ Amy S. Elliott, *Former Treasury Assistant Secretary Kenneth Gideon Dies*, 2016 TAX NOTES TODAY 8-9 (Jan. 18, 2016).

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