

# THE APPELLATE ADVOCATE

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## IMPORTANT DATES

**2016 Fall Meeting**  
San Antonio, Texas  
September 29–October 1

**2017 Spring Meeting**  
Boston, Massachusetts  
April 6-8, 2017



## Fall Meeting Preview



*By Warren W. Harris  
Bracewell LLP, Houston, Texas*

The Academy's 2016 Fall Meeting will be held September 29–October 1 in the historic and colorful city of San Antonio. We will meet at the Omni La Mansion Hotel on the River Walk. Attractions in San Antonio include the Alamo and four other 18th century Spanish colonial missions, which have recently been named a UNESCO World Heritage Site.

The theme of the program is the appellate bench and bar working together to improve the administration of justice. Presentation topics will include:

- The Texas Access to Justice Commission, a body made up of judges, former judges, and private and public lawyers, which addresses the provision of legal services to the poor and those who are not indigent but still cannot afford counsel.
- The Texas Supreme Court Rules Advisory Committee, a large and impressive committee of Texas practitioners and judges who meet regularly throughout the year to propose, analyze, and discuss ongoing changes to the state's procedural rules.
- The Standards for Appellate Conduct, which were drafted by a committee of the State Bar Appellate Section and adopted and promulgated by the Supreme Court of Texas and the Texas Court of Criminal Appeals, making Texas the first jurisdiction in the country to adopt ethical guidelines tailored to an appellate practice.
- The implications of a bifurcated court of last resort, with separate courts of final jurisdiction for criminal and civil matters, a feature of only two states in the nation—Texas and Oklahoma.



We also will hear from three panels of judges. One will feature the last three Chief Justices of the Texas Supreme Court, Tom Phillips, Wallace Jefferson, and Nathan Hecht, who have presided over that court for the past 30 years. Another will feature the two newest members of the U.S. Court of Appeals for the Fifth Circuit, Judges Gregg Costa and Stephen Higginson, who will provide their insights and fresh perspective as recent additions to the appellate judiciary. Finally, two of the more senior judges on the Fifth Circuit, Judges Ed Prado and Patrick Higginbotham, will give us the benefit of their considerable experience as appellate jurists. Not only are they highly respected jurists, but they are both masterful and entertaining storytellers.

We will also present an important and timely topic regarding U.S. Supreme Court practice: the ramifications of eight-Justice opinions.

Our Friday luncheon speaker will be historian and award-winning author James L. Haley, who will talk about his latest book, *Taming Texas: How Law and Order Came to the Lone Star State*. This book on judicial civics and court history was written to provide classroom curriculum for lawyers and judges to teach middle-school students.

We will also have two optional tours available outside the traditional meeting format. One will be available for spouses and other guests during the day on Friday and will include the McNay Art Museum in northeast San Antonio and the Botanical Garden

near Brackinridge Park. On Saturday afternoon, we will offer an optional tour of the four historic missions that make up the San Antonio Missions National Historic Park. These tours will not be part of the meeting registration handled by our team at Management Solutions Plus, but you will be receiving separate information from the Planning Committee about the cost and signup procedures for these events.

The Planning Committee has some special treats in store for the dine around on Saturday. In 2015, San Antonio was named by Zagat as one

of the “Next Hot Foodie Cities” in the United States, and we will have the chance to try the local cuisine—and maybe a margarita!

Special thanks go to the Planning Committee for the San Antonio meeting, co-chairs **Kevin Dubose** (Houston) and **Warren Harris** (Houston), and committee members **Skip Watson** (Austin), **Jane Webre** (Austin), and **Michael Jung** (Dallas). The Academy is also grateful to the law firms that have agreed to help sponsor the meeting.

We hope to see you in San Antonio! ❖





By President Nancy Winkelman

The sun shone on Seattle in every way during our 2016 Spring Meeting. Organized by **Howard Goodfriend** and **Cate Smith**, the meeting was a tremendous success. The program was at the Academy's usual high level. My heartfelt thanks to Howard and Cate for pulling it together. And, as always, a shout-out to Beth Palys and her team from Management Solutions Plus. They do such a terrific job for the Academy; we are fortunate to have their outstanding support—always given with a smile!

It was such a tremendous personal honor (and so very moving) for me to read the **Arthur England** induction charge. Please join me again in welcoming and congratulating our two new fellows, **Bruce Campbell** and **Mary Ruth O'Grady**. And last, but not least, we danced!

I'm pleased to report that our strategic planning process is moving full steam ahead, giving me much to report. Under **Jim Martin's** able leadership, and with the participation of 30 fellows throughout the country, we are rolling out our oral argument initiative to all the circuits. We are continuing to work to bring more fellows into active roles in the Academy. We have created two new task forces to address

appellate advocacy training. **Sylvia Walbolt** is leading one effort—a project with the American College of Trial Lawyers to develop an appellate advocacy training program for trial lawyers. **Margaret McGaughey** is heading up the second effort—a project focused on improving law school appellate advocacy courses to address some of the practical aspects of the appellate process.

Under **Dick Neumeier's** leadership, our Rules Committee is working on comments to a Ninth Circuit rule change that would retain the current 14,000-word limit on briefs. The Academy's voice on this topic has been important; I thank **Charlie Bird** again for his leadership on this issue (and so many others) last year. **Howard Goodfriend** and his Membership Committee have been hard-working and very active, and **Susan Freeman** and her Recruiting Committee have been doing a spectacular job; I am delighted to see our progress in advancing the Academy's diversity goals. The U.S. Supreme Court issued its opinion in the *Williams* judicial recusal case, ruling the way the Academy advocated in its *amicus* brief. We owe **Wendy Lascher** our gratitude for her hard work on that brief and for putting the

Academy's voice before the court in this important case. And last, but not least, my thanks to **Mike King** for all he does to publish *The Advocate*.

We will next meet in San Antonio. **Kevin Dubose** and his committee have put together a very interesting program; I encourage all to come and enjoy the great programming and fellowship that are the hallmarks of the Academy's meetings.

Let me close by reiterating my comments from the spring edition of *The Advocate*: it is my great honor and privilege to serve as the Academy's president. This is a tremendous organization, and one in which we all should be very proud.

I look forward to seeing everyone in San Antonio! ❖

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# Report on the 2016 Spring Meeting Sessions

Fellows who gathered at the AAAL Spring Meeting in Seattle heard presentations focused on appellate practice in the state courts, including litigating issues of state law, the election of appellate judges and justices, a look back on how state appellate courts can shape federal constitutional law, focusing on the decision of the Washington Supreme Court in *West Coast Hotel v. Parrish*, the varied role of *amicus curiae* in state appellate courts, how state appellate courts have grappled with factual innocence and finality, modern trends in brief writing, and the emergence of appellate practice specialization at the state court level. Thanks go to fellows **John Burch**, **Laurie Daniel**, **Miguel Estrada**, **Tom Sondag**, **Todd True**, and **Tom Weaver**, who served as reporters.

## Litigating Issues of State Law

Two justices of the Washington Supreme Court, the Chief Justice of the Oregon Supreme Court, and a mediator for the U.S. Court of Appeals for the Ninth Circuit presented perspectives on litigating issues of state law primarily based on state constitutional provisions.

Justice Debra Stephens of the Washington Supreme Court led with an overview of some key differences between litigating issues under state constitutions and under the U.S. Constitution.

She began by identifying a common misconception: that state constitutions are a kind of “mini-me” version



Left to right: Fellow Howard Goodfriend; Washington Supreme Court Justice Debra Stephens; Oregon Chief Justice Thomas Balmer; Washington Supreme Court Justice Sheryl Gordon-McCloud; Ninth Circuit Mediator Chris Goelz

of the U.S. Constitution, when, in fact, the two are fundamentally different. State constitutions are drawn from a colonial tradition that reaches back to the Magna Carta and articulates largely procedural constraints on the peoples’ sovereign, organic political powers. The U.S. Constitution is more limited in scope as a grant of specific powers from the states to the

federal government. Even where there are similar or parallel provisions, the roots of those provisions are different and lead to different analyses.

This basic difference in the nature of state constitutions has led state courts to develop an approach to interpreting state constitutions that is much more akin to the case-by-case development of the common law than to the more textually based analyses of the federal constitution. An example of this approach can be found in the way state courts have resolved the tension between balancing the power of the judiciary to say what the law is and the authority of state legislatures to exercise their plenary powers to address important social issues, like affording workers an industrial insurance system. Such a system diminishes the broad

right of access to the courts that is embedded in state constitutions and substitutes a narrower legislative right. The question for a state court reviewing the constitutionality of this kind of legislation is whether it has gone too far in impairing the broad due process rights of individuals. State constitutional texts generally do not answer this kind of question

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directly; consequently state courts have developed an approach to interpreting state constitutions that seeks to identify principles to balance the judicial and legislative powers. In the area of industrial insurance, this has led to a focus on whether the legislatively created replacement for the broad right of access to the courts is a sufficiently complete and adequate substitute remedy, and whether there is an overpowering public need that warrants limiting otherwise broad due process rights.

One of the liveliest areas where the tension between the expansive powers of state legislatures under state constitutions and the equally important role of the judiciary under these constitutions is currently playing out is in state court funding. To what extent can the legislature affect the role of the judiciary by limiting or eliminating its budget? This is not a new issue. The first Washington case arose in 1895 when a county concluded that it could not afford to pay for court services. The state Supreme Court concluded, based on the state constitution, that the county could not choose to forego funding court services. Effectively, the court said a functioning judiciary is a fundamental part of a democracy. Today, the conflict between a state judiciary and legislature is perhaps at its sharpest in Kansas where there is pending legislation that would defund the courts depending on how they decide particular issues.

Chief Justice Thomas Balmer of the Oregon Supreme Court followed Justice Stephens with a discussion of some key aspects of the development

of state constitutional law under Oregon's Constitution.

He began with the point that the primacy of state constitutions in state courts is no longer a debatable proposition. There was a time from the 1920s through at least the 1950s, after the U.S. Supreme Court made the Bill of Rights applicable to the states through the 14th Amendment, when state courts rarely mentioned state constitutional provisions. They simply followed along with federal constitutional law. An example is a 1943 Oregon Supreme Court free speech case that never cites the Oregon constitution at all. When the U.S. Supreme Court under Chief Justice Burger began to limit the reach of the Bill of Rights, lawyers began to turn to state constitutions to look for stronger protective provisions. One of the early leaders of this effort from the bench was Oregon Supreme Court Justice Hans Linde. His basic point was that in a state court, one should always look first to state law, including the state constitution, before looking to federal law because if state law affords an adequate remedy, there is no need to resort to federal law.

This analytic framework should lead lawyers appearing before state courts to focus on and use the unique provisions of state constitutions. Often, these provisions provide better or stronger vehicles than the U.S. Constitution. As an example, the Oregon Supreme Court's decision some years ago in *Sterling v. Cup*, a prisoner privacy case, relied on the "unnecessary rigor" clause of the Oregon Constitution to address prisoner

privacy issues. Another example is the express proportionality provision of the Oregon Constitution as compared to the Eighth Amendment to the U.S. Constitution, where the exact scope of any proportionality requirement is still up in the air. A third example is the Oregon Constitution's prohibition of "secret courts." This provision provides news organizations in Oregon much different grounds for access to court proceedings than are available under the U.S. Constitution. All of these are simply a way to highlight the rich opportunities for developing law under state constitutions.

Finally, Chief Justice Balmer focused on the tension between a balancing and a categorical approach to interpreting state constitutions. This is a potentially confusing area, both in terms of where the balancing should occur and which state constitutional provisions are categorical and which call for balancing. Justice Linde's view was that the state's constitution struck the balance and the court was to apply the balance struck in the constitution. This is easier said than done. Is the right of free speech under Oregon's constitution categorical? Probably, but in a moderately literalist rather than an originalist way. Are the administration of justice provisions categorical? This is an area of ongoing tension. Both the categorical and the balancing approach have their limits; the point is that lawyers should think about this issue in framing their state constitutional arguments because it is one that will be on the court's mind.

Washington Supreme Court Justice and Judicial Fellow **Sheryl Gordon-**

**McCloud** was the third speaker, and she provided an overview and timeline for the current school funding case that has been before the Washington Supreme Court, *McCleary v. Washington*. She began by noting that both the Oregon and Washington constitutions are more protective of individual rights than the U.S. Constitution, and that state constitutional provisions regarding funding for education are unique.

She then turned to the *McCleary* case and explained that it was not a case for damages but rather a systemwide challenge to the legislature's failure to meet its state constitutional obligation to fund education. The trial court in the case concluded that state funding of education violated the state constitution because it was too low. The case moved directly to the State Supreme Court. Based on the court's role to say what the law is, the court interpreted Art. I, Sec. 9 of the Washington Constitution as the basis for a positive right to education that the legislature has the responsibility to provide through ample—meaning fully sufficient—funding. The court concluded that the legislature had not met this responsibility. Since this initial decision, the court has been focused on fashioning a remedy for the constitutional violations. If the legislature passes a school funding bill, the court may defer to that legislation, but the legislature still must meet its constitutional duty to provide ample funding by 2018, the date for compliance set by the court. So far, that has not happened. The court found a 2012 report from the legislature on its funding plans inadequate to meet

constitutional requirements, and in August 2015, it imposed sanctions on the legislature for failing to comply with the court's remedial order. The next report from the legislature is due in a few months and with it, the next chapter of this case.

The final panelist was Chris Goelz, a long-time Ninth Circuit mediator who focused on the process the Ninth Circuit employs to certify questions of state law to a state court. First, he noted that state courts have rules that federal courts must follow in seeking to certify questions of state law, and state courts are not obliged to accept certification, or the questions as certified (i.e., they can reframe them and sometimes do).

He then noted that the issues underlying certification are primarily ones of comity and federalism: the federal courts do not want to decide major issues of state law, but at the same time, they do not want to use certification as a way of avoiding issues the federal courts can and should decide. Consequently, there is no bright-line guidance for when certification is appropriate. An important guiding principle is whether the undecided issue of state law is determinative of the federal appeal. Another factor is whether a question can be framed in a way that will provide the federal court with a useful response. Additional factors include whether the issue is of importance to the state and the potential effects on the parties from the delay inherent in certification. Would the answer to the certified question potentially avoid the need for a federal constitutional decision?

A request for certification made for the first time on appeal is not likely to meet with favor, although the court can *sua sponte* certify questions to a state court.

The bottom line is certification is not a very efficient process but in an appropriate case, it may be needed. Only about 20 percent of certification requests are granted each year, which amounts to 10 to 15 cases per year. Don't let that discourage, however, you if you believe certification is necessary in your case.

### **Judicial Election, Selection, and Recusal in State Courts**

Judicial elections and related issues were addressed by an informative panel that included (i) Matthew Menendez, counsel for the Brennan Center's Democracy Program at New York University School of Law, (ii) Washington Supreme Court Justice and Judicial Fellow **Charles K. Wiggins**, (iii) Laurence Leamer, author of a bestselling account of the litigation that culminated with the U.S. Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.* (2009), (iv) former Washington Supreme Court Justice and Fellow **Philip A. Talmadge**, (v) Washington Supreme Court Justice Steven C. Gonzalez, and (vi) Academy Fellow **Wendy Lascher**.

Mr. Menendez kicked off the conversation by discussing the dramatic growth in judicial-elections spending that, according to the Brennan Center, resulted from the Supreme Court's decision in *Citizens United v. FEC* (2010). Since that case was

decided, he suggested, state Supreme Court elections have become increasingly politicized, with special interests seeking to shape courts with ever-mounting expenditures.

Thirty-eight states conduct elections for their highest courts. These run the gamut from nonpartisan polls (where multiple candidates vie for a single seat) to retention elections (where sitting judges face yes-or-no votes) to traditional partisan contests. But elections require campaigns, and campaigns cost money. In some elections, “groups can move the needle with relatively low investments,” Mr. Menendez said, but many others involve big outlays. During the 2013-2014 election cycle, outside spending by interest groups and political parties reached 40 percent of the total amounts spent in those elections—a record for a non-presidential election cycle (and just shy of the all-time record of 42 percent in 2012). Much of this spending came from groups that were not required to publicly disclose their donors, or that were not required to disclose their expenditures under state law, Mr. Menendez noted.

Mr. Menendez suggested that the bulk of these non-candidate expenditures, perhaps as much as 70 percent, favor Republican and center-right candidates. But the actual campaigns rarely focus on the business interests that fund the political right, he said. Instead, those outside groups tend to focus on criminal justice issues, touting their candidate’s history of putting offenders behind bars while attacking rival candidates as “soft on crime.” Mr. Menendez conceded, however,

that special interests on the political left have also waged deep-pocketed campaigns against judicial candidates. He cited, as an example, the long running efforts by well-funded plaintiffs’ lawyers in Illinois to unseat or recuse Illinois Supreme Court Justice Lloyd A. Karmeier.

The influx of outside group money has more recently hit retention elections. These elections used to be low-cost and low-attention affairs, but in a handful

- Public financing of judicial elections
- Increased financial disclosure by candidates and donors
- Stricter judicial codes of conduct, and in particular recusal rules that are responsive to campaign spending
- “Pass through” disclosure for Section 503(c)(4) organizations

Justice Wiggins next discussed judicial elections in Washington State, where all courts of general jurisdiction and appellate courts are elected.



Left to right: Washington Supreme Court Justice Charles K. Wiggins; Former Washington Supreme Court Justice and Fellow Philip A. Talmadge; Fellow Wendy Lascher; Matthew Menendez; Washington Justice Steven C. Gonzalez; Laurence Leamer.

of states, Mr. Menendez said, retention campaigns have become intensely contested and expensive, often in response to a controversial decision, or when partisan interests believe they have an opportunity to change the ideological balance of a court.

Mr. Menendez proposed a number of reforms that he believes would curb the influence of outside interest groups on the judicial system, and that would also improve accountability and transparency. Among these, he cited:

Three of the Supreme Court justices are up for election every two years. The contests are ostensibly “nonpartisan,” Justice Wiggins observed, but political parties routinely pick sides. Nonetheless, judicial candidates face the problem of “low visibility”—they are listed at the bottom of the ballot, and voters lack “the usual clues” about philosophy that are provided by partisan designations. Some Supreme Court races, of course, attain a higher profile when they involve justices associated with controversial rulings.

According to Justice Wiggins, Washington State is a “low-money state.” In Supreme Court races since 2000, all candidates together spent as little as \$120,000. The high was \$1.6 million in 2006, when all three seats up for election were contested and there were numerous candidates. In the last 14 years, only one Supreme Court candidate broke the half-million-dollar mark. Judicial candidates cannot raise money, though a committee can do so on their behalves. Even so, Washington has low contribution limits and a good reporting system. Because recusal rules are opaque, lawyers—the most likely source of campaign funds—are reluctant to get involved in the process; many fear that contributing will result in the recusal of the candidate they support when their cases come before her.

The potential impact of campaign contributions on judicial recusal led the panel to the Supreme Court’s decision in *Caperton*. Larry Leamer’s book on the case—“The Price of Justice”—recounts the bare-knuckled business dispute that underlay the litigation: Massey’s Chairman, Don Blankenship—a “larger than life figure” who is “a nineteenth-century capitalist” in the Dickensian mold—sought to drive Hugh Caperton out of business in order to buy his coal mine. Caperton resisted and ultimately won a \$50 million judgment against Massey. To improve his chances of securing a reversal of that verdict, Blankenship then spent some \$3 million of his own money to defeat incumbent West Virginia Supreme Court Justice Warren McGraw, whom he viewed as a probable vote against

Massey. The \$3 million that Blankenship spent on the race was more than two-thirds of all money raised in the election. Blankenship’s candidate, a relatively unknown Charleston lawyer named Brent Benjamin, did beat Justice McGraw, and he later voted to reverse the *Caperton* judgment. However, the U.S. Supreme Court ultimately ruled that Justice Benjamin’s participation in the decision under these circumstances violated Caperton’s due process rights.

Mr. Leamer noted that the recusal and other judicial-ethics issues raised by judicial contests are often discussed, but that the human toll of those elections is rarely noticed. A critical issue used to attack McGraw was a 2004 Supreme Court decision releasing one Tony Arbaugh from prison. Arbaugh had been convicted of molesting his half-brother and sentenced to a long prison term in 1997. But Arbaugh, who could barely read and write, was himself a victim of sexual molestation—and he had been reared in a dysfunctional family that treated incest as “normal.” The 2004 decision placed Arbaugh in a rehabilitation program. But the decision also allowed Blankenship to launch a “vicious advertising campaign” that accused McGraw of being “friendly to child molesters.” That campaign disseminated Arbaugh’s name and picture throughout West Virginia, both on billboards and on television. As a result, according to Mr. Leamer, Arbaugh found it impossible to go anywhere in the state without being immediately identified as “the child molester,” and any chance he might have had to remake his life was completely lost.

Speaking after Mr. Leamer, **Justice Talmadge** offered a vigorous defense of judicial elections. He noted that many people decry judicial elections, and any mingling of money and politics, as “politicizing the judiciary” and thus “bad.” “But,” he asked, “is an appointive process any less political?” “No,” he responded. He noted that “people get appointed as judges for political reasons,” and that the same outside interest groups that have learned to take advantage of elections to influence the composition of the judiciary also know how to game, to the same end, “merits commissions” and other tools touted by “good government” advocates who support appointing judges. The difference with appointments, he said, is “that a lot of the politics happens behind closed doors,” and thus, elites get to influence the selection of judges without any transparency. And vast amounts of money are spent anyway, he said, but it is all “entirely in the dark” because there are no relevant reporting requirements.

As a practical matter, **Justice Talmadge** concluded, the voters will not give up the election of judges. We should deal with that reality and concentrate on making the electoral process better. *Caperton* is a limit for extreme cases. But courts or legislatures can also adopt rules to limit contributions. Reporting laws can be improved too. And rules can be devised to restrict the ability of candidates to make specific promises about how they will act as judges and to clarify judicial recusal obligations.

Justice Gonzalez then addressed the special challenges faced by minority and female candidates for judgeships. The “low information environment” that pervades many judicial elections—which often amounts to voter ignorance or indifference—also means that voters choose candidates based on whether their names sound “familiar” or “foreign.” A lot of people who vote leave the judges’ ballots blank. Others simply guess. This makes it especially hard for minorities to gain the bench through the electoral route. Many are initially appointed and only run for their seats much later, after they have acquired judicial experience and become better known. All three persons of color on the Washington Supreme Court, for example, were initially appointed. But even then voters often prefer utterly unqualified candidates with familiar-sounding names to minority candidates, even when the latter have the unanimous endorsement of bar groups and knowledgeable civic organizations. Justice Gonzalez then used some of his own electoral experiences to illustrate these points with witty but telling examples. Elections may be okay, he concluded, but the devil is in the details. If we are going to go on electing judges, we have to understand that candidates of color will have a harder time. We will need to improve civic education and consider other reforms, such as increased terms and alternative ballot positions.

The panel concluded with a discussion among the panelists and **Wendy Lascher**. Following up on Justice Gonzalez’s remarks, **Justice Wiggins** observed that voters’ lack of familiar-

ity with names can be an issue for all candidates in judicial elections, even if no minority candidate is running. Others agreed that a big part of the problem is the “low information environment” but noted that lack of information can be aggravated by racial issues. The exchange ended with a discussion of the progress made by women in judicial offices in Washington State.

### **West Coast Hotel v. Parrish: How One State High Court Shaped the Constitution**

At the Friday luncheon, fellows heard a presentation by former Washington Supreme Court Chief Justice Gerry Alexander about the role played by Washington’s high court in one of the truly great cases of constitutional law: *West Coast Hotel v. Parrish* (1938). Justice Alexander’s 38 years of service on the courts of the state of Washington is unparalleled. He was a judge on the Superior Court, then the Court of Appeals, and finally, for 16 years he was a justice of Washington’s Supreme Court. Had it not been for Washington’s mandatory retirement rules, Justice Alexander would still be serving the citizens of Washington State on the state’s high court. Gerry Alexander believes strongly in judging as a public service, and that the judge is a public servant; the fellows who had the privilege to hear his talk at the Seattle meeting quickly came to understand why he is one of the

most admired judges in Washington history, both for his commitment to fairness in the administration of justice, and (particularly noteworthy to an audience of appellate lawyers) his incisive but respectful demeanor toward every lawyer who ever came before him.

Justice Alexander is also a devoted student of legal history, and his interest in *West Coast Hotel v. Parrish*—or more precisely, when speaking of the case as it proceeded through the Washington courts, *Parrish v. West Coast Hotel*—is long-standing. In Justice Alexander’s words, what became *West Coast Hotel v. Parrish* “arose out of a lawsuit that was



Left to right: Fellow Howard Goodfriend; Retired Washington Supreme Court Chief Justice Gerry Alexander; Fellow Michael King; Academy President Nancy Winkleman

brought in a rural county by an ordinary Washingtonian of very modest means [that] ... led to decisions that ultimately benefited millions of other low income Americans, while at the same time producing an impact that was felt at the highest levels of our nation’s government, including the office of the President of the United States.” Justice Alexander reviewed the human facts of the case, focusing on Elsie Parish, who had worked from

1933 to 1935 as “what was then called a chambermaid” at the Cascadian Hotel in the city of Wenatchee. She sued the owner of the hotel, the West Coast Hotel Company, for \$216.96 in back wages, as measured by the minimum wage set by the Washington Industrial Welfare Commission—\$14.50 for women and children working a 48 hour week. The Washington Supreme Court had upheld the constitutionality of the state’s minimum wage law in 1918, but the trial court ruled against Parrish on the authority of the Supreme Court of the United States’ 1923 decision in *Adkins v. Children’s Hospital*. Ms. Parrish appealed—actually, her husband appealed, because under state law, Elsie could not prosecute the action in her own name—and on April 2, 1936, less than six months after the trial of the case had concluded, the Washington Supreme Court, then the state’s only appellate court, reversed. (In Justice Alexander’s words, “things moved fast in those days[.]”)

The stage was now set for a fight before the nation’s high court. The Washington Supreme Court is an elected body (by this time its nine members were chosen in non-partisan elections); Washington was then, as it still is, a fiercely pro-labor state; and the Washington Supreme Court was evidently determined to preserve the state’s minimum wage law, if it could. The court distinguished *Adkins* on the thinnest of grounds—that the case involved a *federal* minimum wage law and not a state one. That court became even thinner when, two months later, the U.S. Supreme Court invalidated a state minimum

wage law on the authority of *Adkins*. The West Coast Hotel Company, now represented by lawyers from (as Justice Alexander put it) “the big city of Seattle,” surely felt confident they would prevail back East. The Parrish cause continued to be represented by lawyers from Wenatchee, her original two counsels now joined by a third, Sam Driver, who would later serve as a justice of the Washington Supreme Court.

They would be proven, and for reasons of high political and judicial drama, which Justice Alexander ably chronicled for his audience. Justice Alexander ably laid out the dynamics of a high court closely divided between four staunch conservatives devoted to protecting property rights, including liberty of contract; three liberals prepared to uphold national, state, and local social welfare measures; a Chief Justice, Charles Evans Hughes, dedicated to protecting the court’s institutional place within the American system of separated powers; and finally, Associate Justice Owen Roberts, who had generally sided with the conservatives since his appointment in 1931 but who also worried that the court’s resistance to virtually every attempt to ameliorate the suffering caused by the Great Depression was damaging its standing in the eyes of the American people. Justice Alexander then ably set forth the familiar history of how Owens switched, from voting to strike down a state minimum wage law just a few months before, to providing the crucial fifth vote to uphold the Washington statute. In doing so,

Owens helped to thwart President Franklin Roosevelt’s attempt to pack the court with several new justices who could be expected to uphold just about whatever action FDR took to restore prosperity, and also made a vital contribution to the willingness of the U.S. Supreme Court to countenance a wide array of government action in the socio-economic sphere.

Justice Alexander concluded by reminding his audience that this “watershed moment would not have occurred, at least not at this time, had this woman from way out West, Elsie Parrish, not had the gumption to assert her rights in a court of law and had not small-town attorneys like Sam Driver not taken her case, presumably pro bono”:

In doing so those attorneys carried on a tradition that is embodied in the oath that all attorneys in [Washington] ... take, ... to ‘never forsake the cause of the defenseless or oppressed’—a tradition that is important to maintain.

### **Amicus: Friends, Enemies, and the State**

Following on the heels of last fall’s panel from the U.S. Solicitor General’s office, Professor Helen Anderson of the University of Washington School of Law joined Jay Douglas Geck, Washington’s deputy solicitor general, and Fellow **John Bursch** for a further discussion of amicus curiae practice, with an emphasis on the role that state governments can play as the court’s “friend.” The distinguished panel was ably moderated by Fellow **Lindsey Hughes**.

State governmental amici have a long history in our courts, dating back to Henry Clay's appearance in 1821 on behalf of Kentucky in *Green v. Biddle*. Their special status continues today, with every jurisdiction allowing governments to appear as amici without need of special permission. And yet, most appellate practitioners neglect the unique influence those amici can provide. While articles have been written about obtaining amicus support from the federal government (e.g., **Patricia A. Millett**, "We're Your Government and We're Here to Help: Obtaining Amicus Support from the Federal Government in Supreme Court Cases," 10 J. App. Prac. & Process 209 (2009)), the use of state amici has largely been ignored.

For example, during **Mr. Bursch's** three-year tenure as Michigan's solicitor general, he received but one request to appear as amicus in the U.S. Supreme Court, and another to appear in the Michigan Supreme Court. That, our panelists agreed, is a mistake. State government amici can provide private parties valuable support, not only in the U.S. Supreme Court (primarily in support of petitions for certiorari), but also in the lower appellate courts, both state and federal, where their involvement is usually looked upon with great favor.

To obtain the support of an attorney general, it was suggested that one look first to the office of the state's solicitor general, whose recommendation regarding the state's involvement

usually controls. Lacking a contact in the solicitor general's office, practitioners should look elsewhere for a champion—perhaps in the legislature or within an impacted agency. State governments do not always speak with one voice, however, and attorneys general—particularly those who are themselves elected—have been known to break ranks with other state officials.

Being able to explain why a state should get involved in a case is, of course, rather important. One typical reason is that the state's laws will



Left to right: Professor Helen Anderson; Fellow Lindsey Hughes; Washington's Deputy Solicitor General Jay Douglas Geck; Fellow John Bursch

be impacted by a case's disposition. Another motivator, probably the largest, is the affect a case may have on the state's economy. If a case impacts the coal mining industry, for example, West Virginia will likely be interested in appearing.

The offices of the attorneys general in Michigan and Washington do not accept ghostwritten briefs, but some states do, and offering that assistance can sometimes give one a leg up in obtaining their support, simply because already heavy workloads may

interfere with a state's desire to participate. In all events, a comprehensive memorandum that avoids the need for further background work by the state can assist in obtaining its support.

If a practitioner is looking for the support of multiple state amici, the first stop should be the National Association of Attorneys General (NAAG), which coordinates state amici participation. NAAG does not itself appear in cases, but acts as something of a clearing house: states notify NAAG when they are interested in a particular issue, and NAAG puts the word out, and attempts to determine if other states also have an interest.

Getting states to join in support of a position is no easy matter. Mr. Bursch suggested that if one cannot get at least ten states to support a position in the U.S. Supreme Court, the support might be counterproductive, as the Court may view it as a signal that most states don't really care about the question. On the other hand, enlisting the support of 15 to 20 states can be compelling, while a squadron of 30 or more is superb. (**President Winkelman** proudly noted that 49 states and Guam had joined against her position in a case, which all agreed constituted the record.)

States will sometimes split along political lines—Texas's challenge to President Obama's immigration plan being noted as a recent example. Such splits will often result in a neutralization of the opposing briefs.

Of course, the larger the amici contingent, the less control one has over the message. In contrast, the support of just one attorney general can be quite valuable in one's own state court—and far easier to keep on message.

### **Factual Innocence and Finality**

The title of this program conjures up images of a horror film, where the wrongfully accused is being executed, and just as the trigger is pulled (or the modern day equivalent), someone rushes in to shout out indisputable proof of the accused's innocence. But it is too late.

This is not an entirely hypothetical scenario. In the modern day, DNA evidence has surfaced in time to save wrongly accused death-row inmates. But there must have been executions in the past where innocent people were killed for crimes they did not commit. Statistics show that about 3-5 % of prisoners are innocent.

A threshold issue brought up by our panel is the definition of innocence. Is a reversal enough for a wrongful conviction to be counted in statistics on innocence? Can there be degrees of innocence? For example, should a case of mistaken identity be distinguished from conduct that, while not constituting the crime charged, is still culpable in some other respect?

The discussion brought to mind Steven Avery, who, after serving years in prison for rape, was exonerated thanks to DNA evidence, only to be

convicted of a murder after his release. The Avery case was the subject of a highly rated 2015 Netflix documentary, *Making a Murderer*.

Attendees learned that, in contrast to Avery's experience, in many cases, public defenders and prosecutors collaborate to achieve exonerations. This is an growing trend as more reliable evidence becomes available. Another interesting trend is the increasing use of non-DNA evidence to gain exonerations. DNA has proven that



Left to right: Fellow Lenell Nussbaum; Professor Jacqueline McMurtrie; Assistant District Attorney, Santa Clara California, David Angel; Fellow James Whisman

our system is not error-free and, in the process, has raised awareness of multiple causes of wrongful convictions, *e.g.*, false confessions, forensic error resulting from discredited techniques, prosecutorial misconduct in failing to disclose exculpatory evidence, and mistaken eye-witness identifications.

The impact of scientific developments on criminal law is the subject of much discussion today—and not just at an AAAL meeting. For example, the 2016 Eleventh Circuit Judicial Conference featured a program on

“Neuroscience and the Law,” which discussed the implications of new types of brain tests. The AAAL program and others have focused on new scientific methodologies and the growing awareness that some traditional practices are not as reliable as previously believed. Fingerprints, for example, were long thought to provide certainty in criminal investigations. There have been cases of mistaken fingerprint identification, however, and wrongful incarceration as a result.

By definition, exonerations occur after conviction and often after those convictions have been upheld on appeal. So an innocence project faces the important question of how to overcome that apparent finality. What procedure is available for this challenge? Is there a constitutional right to be freed based solely on

factual innocence? That was Justice Scalia's “embarrassing question” in his concurring opinion in *Herrera v. Collins* (1993). We learned that ineffective-assistance-of-counsel claims may allow for new evidence of innocence. Under-resourced defenders, though conscientious, may have overlooked points that should have been raised earlier.

These and other innocence-related topics made for a fine discussion during the second Friday afternoon program of our meeting in Seattle.



of black jurors in green and contained a note explaining that green = black jurors. Other notes explained the different ways the prosecutor was going to keep all the black jurors off the jury, and which black jurors were most preferable if the prosecutor could not strike them. The attorneys could have described these notes in words, but instead, they included images of the prosecutor's notes in the petition itself.

Perhaps the most notorious recent use of images in brief writing was an unusual amicus brief filed in the *United States v. Apple* case, involving pricing for e-books. Bob Kohn, chairman and chief executive of RoyaltyShare and a very outspoken critic of the Department of Justice's



settlement with Apple, found it difficult to reduce his 93-page legal argument to the five-page limit the court had imposed. So he submitted his *amicus* brief in the form of a graphic novel, to great effect.

Finally, there is the lawsuit that Ross Perot Jr. filed against Mark Cuban,

controlling owner of the Dallas Mavericks basketball team. Perot owned 5% of the team and alleged Cuban had mishandled the team's finances and management. Cuban moved for summary judgment and submitted a brief that contained no legal citations and was composed almost entirely of a single image: the team celebrating its championship. A few months later, Cuban filed a more traditional motion, and one month after that, the district court granted the motion in a one-page disposition that ordered Perot to pay costs.

Professor Porter's article concludes that images like those cited above are finding their way into legal documents at a dizzying rate. She encourages lawyers to embrace the change,



provided that the profession regulates the practice. "The question is how to create traditions that will allow the law to harness its visual power without sacrificing the virtues of our more staid traditional discourse."

Professor Sisk then presented his paper titled "Too Many Notes: An

Empirical Study of Advocacy in Federal Appeals," published in 2015 in the *Journal of Empirical Studies*, available at <http://goo.gl/Yvus8r>. For years, appellate judges, from the late Judge Ruggero Aldisert to Alex Kozinski, have complained about the unnecessary length of appellate briefs. Appellate attorneys typically have a different perspective. So, how do you strike the right balance between effective advocacy and efficient decision-making?

Professor Sisk sought to answer that question by studying briefs filed in the Ninth Circuit from 2010–2013. Variables measured included brief length by words, attorney experience, issue type, the procedural stage, and the nature of the parties. His baseline was the overall reversal rate in these cases, 34.4%, which was consistent with past studies of federal-circuit reversal rates.

There were two preliminary findings. First, oral argument had a very significant correlation to a reversal. In fact, the reversal rate for argued cases (34.4%) was more than twice as high as the reversal rate for non-argued cases (16.4%). Second, whether a case presented a procedural issue for review also had a highly significant correlation to a reversal. While the reversal rate for all civil appeals was 34.4%, the reversal rate for procedural issues was much higher at 47%.

As for brief length, Professor Sisk found a significant correlation between the number of words in a brief and the outcome of the appeal:

- Appellate briefs between 0 and 3,000 words had a 0% reversal rate.
- Briefs between 3,001 and 5,000 words had a reversal rate very similar to the 34.4% average reversal rate.
- The reversal rate dropped somewhat below average for briefs between 5,001 and 9,000 words.
- The highest reversal rates (i.e., the most successful appeals) were for the longest briefs, those between 10,001 and 14,000 words.
- Briefs over the 14,000-word limit had only an average reversal rate.
- The “sweet spot” was briefs between 10,001 and 11,000 words, which achieved a reversal rate of about 55%.

So what does this all mean? Professor Sisk does *not* conclude that lengthier briefs are positive, in and of themselves. In other words, advocates should not add needless words to a brief simply to hit the “sweet spot” for reversal. Professor Sisk believes that the results of his study show that appellate reversal is simply most likely in complex cases (i.e., those that require a substantial number of words to explain).

Professor Sisk also discussed his views on the proposed change in the federal appellate rules to reduce the length of briefs from 14,000 to 13,000 words. In his view, the rule is most likely to adversely affect appellants, since they have the most heavy lifting to do on appeal. Appellate judges like to defer to trial courts. Appellants must explain all the facts and lower-court proceedings and, because they don’t know what issue is going to persuade, must include more reasons for reversal. The impact of the amended rule is also likely to be a bigger burden

on plaintiffs than defendants. In roughly 75% of the cases studied, lower-court proceedings were resolved before trial, most frequently in favor of defendants, meaning that plaintiffs will most often be in the position of appellant. The proposed rule will also likely make appellate practice more expensive. Appellate attorneys will have to spend more time editing, and that takes time, which costs money.

Professor Sisk asked one final question: does appellate attorney experience matter to the outcome? His research showed that appellate attorneys who had little experience suffered reversals against their client’s interests at a high rate. And, although the correlation is not perfect, the trendline of “bad” reversals definitely goes down as appellate-attorney experience increases. In other words, “appellate experience really does make a difference.”

In conclusion, noted Professor Sisk, greater appellate experience translates to a higher likelihood of success on appeal. But writing the most succinct brief does not always do the same. This does not mean attorneys should use unnecessary words. But parties, the bench, and the bar should give appellate lawyers the respect to determine exactly how many words are necessary.

### **The State of State Appellate Practice: Specialization Programs and Specialty Bars**

Unfazed by at least one panelist’s concern about the relevance of and a lack of interest in the program topic, moderator and Fellow **Catherine Wright**



Left to right: Fellow Doug Alexander; Fellow Catherine Wright Smith; Fellow Bruce Rogow; Fellow Dennis Fisher

**Smith** artfully led panel members and Fellows **Bruce Rogow** of Florida, **Dennis Fischer** of California, and **Doug Alexander** in a typically—for AAAL meetings—spirited and candid discussion about state appellate practice specialization and state appellate organizations. After a discussion of the history of appellate specialization, and the requirements for and utilization of appellate specialist certification in Florida, Texas, and California, the conversation shifted to reveal varied opinions about impact and utility of appellate certifications.

The criteria for appellate practitioner certification in the three states discussed by the panelists included a minimum number of appellate cases and oral arguments over a 5-year time period, and a written examination. The pass rates for the examination were 66% in Florida and California and 30-50% in Texas, where the 6-hour exam includes what **Doug Alexander** described as “monstrously hyper-difficult questions” that nobody knew could answer. The California examination was described as seeking to measure only a “minimum or modest” level of competence. The

statistics also indicate that a limited number of attorneys pursue certification in these states. In Florida, there are approximately 171 certified appellate practitioners in civil law and 48 in criminal law, with 4500 attorneys statewide certified in any practice area. In California, out of 186,000 lawyers in the state bar, 300 are certified in appellate practice and 4900 certified in all practice areas. Out of the 90,000 lawyers in Texas, 400 are certified as civil appellate specialists and 125 as criminal appellate specialists, with a 7200 certified in all practice area. In none of the three states is certification a prerequisite to doing appellate work.

The panelists also revealed that initially specialization in appellate practice had not readily embraced by litigators in their states. In Texas, **Roger Townsend** and others pursuing recognition and implementation of appellate specialization had to overcome resistance by trial attorneys who wanted to continue to do appeals with having to compete with specialists for that work. In California, efforts at appellate specialization were met with pushback from small practitioners, older attorneys, and lawyers from large firms who did not want to have to deal with certification. This resistance contributed to the relatively low requirements for certification. The eventual change in lawyers' attitude about specialization has been followed by a change in clients' attitude about the importance of appellate specialists.

The similarity among the states regarding criteria for certification and the relative numbers of those

certified as appellate practitioners stood in contrast to the differing views among the panelists about the effect and importance of specialization programs. Counterintuitively, **Dennis Fischer** piqued everyone's interest by stating that "it occurs to me that this is the most irrelevant topic we could have," adding that none of the fellows in attendance needs to worry about having certification in their states. Noting that he has given up certification in his state because he did not maintain the required CLE requirements, **Bruce Rogow** said that certification carried no prestige or meaningful marketing impact in Florida, and that courts there had not shown any real effort to recognize appellate specialization as important. Rogow told about one judge commenting on specialization by asking, "Why would you want that?" He said that while Florida does encourage certification, the numbers of lawyers who pursue it suggest that the encouragement isn't working.

Describing a strikingly different attitude about appellate certification in Texas, **Doug Alexander** said that specialization was recognized as important among both lawyers and judges, and noted that most appellate lawyers who actually specialize will go through the process for certification. He described the three-legged stool of improved appellate advocacy as including specialization, a robust appellate bar, and a well-developed appellate CLE program, all of which exist in Texas. Commenting that a rising tide floats all boats, he said that the perception in Texas is that appellate specialization and certification

has improved the standards of appellate practice throughout the judicial system.

**Cate Smith** then shifted the discussion to the desirability of state-wide appellate organizations, and gave a history of the formation and development of the Washington Appellate Lawyers Association (WALA). While describing it as arising partly out of a desire to talk about appellate practice with other appellate lawyers and highlighting the important social benefits of the organization (low dues and cheap beer and wine), she said that the WALA has helped improved the skills and professionalism among appellate practitioners. Cate said that WALA had also increased interaction between appellate lawyers and judges, and that WALA is consistently asked its opinion on appellate rules and procedures. She urged fellows to consider starting similar organizations in their states.

In response to a comment that Florida lawyers would "have a fit" if someone tried to organize something like WALA, which would be seen as elitist, **Charlie Bird** described himself as elitist about developing and maintaining the highest standards for those specializing in appellate practice. In a characteristically impassioned comment on value of appellate organizations, Charlie brought the discussion to a close by emphasizing that the more we do to improve the quality of appellate practice—whether through specialization and certification programs or by organizations like WALA—the more we benefit the administration of justice, the profession, and ourselves. ♦

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## Amicus Report: *Williams v. Pennsylvania*

The American Academy of Appellate Lawyers filed an *amicus curiae* brief in the U.S. Supreme Court on behalf of Terrence Williams, a Pennsylvania death row inmate who asserted that his due process rights were violated because a potentially biased jurist participated in his appeal decision. The jurist was Ronald Castille, the then-Chief Justice of the Pennsylvania Supreme Court, who formerly had been the district attorney and personally approved seeking the death penalty for Williams; after he became the Chief Justice, he refused to recuse himself when the state's appeal from an order granting Williams post-conviction relief came before the Pennsylvania Supreme Court.

On June 9, the U.S. Supreme Court held that, “[U]nder the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case.” *Williams v. Pennsylvania*, 579 U.S. \_\_\_\_ (2016). The 5-3 decision overturned the Pennsylvania Supreme Court decision that reinstated Williams’ death sentence. A lower court in Pennsylvania had reversed the death sentence because the trial prosecutor

had suppressed material, exculpatory evidence, and engaged in “prosecutorial gamesmanship.” Although Chief Justice Castille apparently did not know of the misconduct, in addition to having personally signed off on the death warrant, he had campaigned for his seat on the state Supreme Court based on his record of sending defendants to death row while he served as district attorney.

The Academy’s *amicus* brief argued that due process required recusal; that recusal of even a potentially biased judge is essential to maintaining an effective legal system and preserving respect for law; and that the collegial nature of appellate decision-making prohibits participation of a biased judge whether the court is divided or unanimous.

Pennsylvania argued that any due process violation was harmless error because Chief Justice Castille did not cast the deciding vote. But the Majority Opinion had “little trouble concluding that a due process violation arising from the participation of an interested judge is a defect “not amenable” to harmless-error review, regardless of whether the judge’s vote was dispositive. As the court explained, “the appearance

of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. . . . Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.”

Chief Justice Roberts, joined by Justice Alito, dissented. In their view, the Due Process Clause did not prohibit Chief Justice Castille from hearing Williams’s case and therefore, did not require recusal, although his participation may have violated state ethical rules. Justice Thomas dissented separately, emphasizing his view that due process requirements are less stringent in post-conviction review of criminal cases than at trial.

The Academy files *amicus* briefs only in select cases; it filed in the *Williams* case because it believes that public respect for the fairness, impartiality, and objectivity of the appellate courts is essential both to the performance of their roles and to maintaining public respect for our appellate courts. The Academy expresses its deep gratitude to **Wendy Lascher**, who authored the Academy’s excellent *amicus* brief. ♦

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# Report for the Membership Recruiting Committee: “Sustaining the Ranks”



*By Susan Freeman*

Did you know that approximately 40% of AAAL fellows plan to retire within five years? That was the sobering information obtained from a 2015 survey of fellows. We aren't eligible for AAAL membership until we have engaged in the substantial practice of appellate law for 15 years and earned a reputation for excellence. The youngest of us are in our 40s, and most are older. We need to ensure that retirees are replaced and talented appellate lawyers are included. We also want to cultivate diversity in our membership, including geographic, ethnic, and gender diversity, as well as type of practice.

AAAL now has a Membership Recruitment Committee, consisting of **Susan Freeman, Lisa Perrochet, Rob Kamenec, Jerry Ganzfried, Randall Hodgkinson, Rick Deveran, James Layton, Margaret Grignon, Bob Olson,** and Beth Palys. This committee compiled a database of attorneys who are members of other national, state, and local appellate organizations, certified as appellate practice specialists in those states with such specialties; attorneys listed in Best Lawyers in America or Super Lawyers in the appellate practice category; and some state solicitors general and appellate prosecutors and public appellate defenders, not cur-

rently in AAAL (and not previously rejected as nominees).

The Membership Recruiting Committee does not know if any of the lawyers whose names were gleaned through this process meet AAAL criteria. We have therefore communicated with fellows in states where there are few of us, providing the database information for lawyers in those states, and requesting them to consider whether any of the listed lawyers should be nominated. Fellows in some states have followed up with nominations of one or more lawyers on the list, or nominees not on the list. In other states, the fellows concluded that none of the listed lawyers met our standards. Some fellows haven't responded to committee inquiries yet.

We have no fellows in three states. The committee's research on appellate lawyers in North Dakota and Nebraska was presented to the AAAL board at the 2016 Spring Meeting. As authorized by the bylaws, the board nominated a promising candidate in each of those states for Membership Committee vetting. AAAL President **Nancy Winkelman** researched potential candidates in the third state, New Jersey, and she and Vice-President Susan Freeman nominated three lawyers for Membership Com-

mittee consideration from that state. Secretary Matt Lembke has diligently researched potential candidates and made several nominations, too.

We are making progress, and the Membership Committee is very active, but we still need your help.

AAAL surveys and communications with members have clearly established that we don't want membership criteria to be relaxed. This is an organization of the "go-to" lawyers for significant appeals in any geographic area, not just the competent specialists. In some jurisdictions, we may already have all the stars. In some, we may have had the stars once, but they're retiring or becoming judges, and we may not have focused on the up-and-coming new stars. In some, there is a recognized appellate specialist bar. In others, that's rare, with most appeals handled by litigators who also have an active trial practice, in which case we still need to determine which of them are the outstanding lawyers to whom clients and other lawyers turn for significant appeals. Academy fellows should be lawyers to whom other fellows can feel comfortable referring their clients. The AAAL Membership Committee vets each nominee in a lengthy process, and not everyone nominated is approved

by that committee for consideration by the board (which underscores the importance of confidentiality in nominations).

Two fellows need to agree to submit any nomination, one as a nominator and one as a seconder. The bylaws provide:

b) Screening. The Membership Evaluation Committee shall assess whether the nominee's practice focuses substantially on appeals, based on an assessment of the nature of the nominee's practice, geographical location and demonstrated skill, and commitment and interest in appellate work. This requirement shall presumptively be met by substantial involvement as counsel in an average of at least two appeals per year for at least 15 years. If the nominee meets this requirement, the committee shall make relevant inquiries of opposing counsel, co-counsel, and judges identified by the database search or by other means to determine whether the nominee possesses a reputation of recognized distinction as an appellate lawyer. The committee shall then evaluate each nominee. If a nominee is approved by two-thirds of the Membership Evaluation Committee, the nominee shall be presented for election as provided in Article 3.3(c). (emphasis added)

Time spent as an appellate judge or law clerk may be considered in determining whether the 15-year requirement has been satisfied.

Nomination is easy. There's a link on the AAAL website: <https://appellateacademy.org/fellows/nominate.cfm>. You just need to check with the state bar to determine that the lawyer has not been the subject of disciplinary proceedings. Then, get a biography of the nominee (for those in private practice, usually available from the nominee firm's website; for those in government-paid or public interest positions, it may be possible to find one they have used as a speaker or instructor). Also, get a Westlaw or Lexis printout of the most recent 50 reported decisions listing the nominee as counsel, with at least the most recent 10 also listing the opposing counsel and names of judges deciding the cases (which Membership Committee members have to track down if the nominator doesn't already do it).

Also, please take advantage of informal interactions with appellate judges, and ask them for any suggestions they might be willing to share, in confidence, about potential candidates that our Membership Recruitment Committee and Membership Committee would then vet. Thank you very much for considering and assisting in this endeavor! For AAAL to survive and thrive, we need to bring in new blood, but only those meeting our qualifications. ♦

## Spring Meeting 2016 Inductees

### Bruce Campbell



Bruce Campbell is a partner in the litigation department at Miller Nash Graham & Dunn, heading the firm's

Portland litigation and appellate practice teams. His practice emphasizes appeals, securities litigation, and commercial litigation. He served as a clerk for Ninth Circuit Court of Appeals Judge Cecil F. Poole in San Francisco. Mr. Campbell's litigation experience includes handling matters involving securities, shareholder litigation, school law, energy law, antitrust and trade regulation, and appeals. He served as chair of Miller Nash Graham & Dunn's hiring committee from 1997 through 2003 and was a member of the firm's executive committee from 2004 through 2006.

### Mary Ruth O'Grady



Mary O'Grady's practice focuses on appeals, civil litigation, and administrative law. As a former solicitor general for the

state of Arizona, Ms. O'Grady has a unique breadth of experience with public law issues. She has represented

*[continued on page 22]*

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# Update on the Academy's Oral Argument Initiative



By Jim Martin

With substantial assistance from a number of fellows, the Academy's Oral Argument Initiative is moving forward in the various circuit courts, and feedback from the initial meetings is encouraging.

To recap a bit, in early 2016, the initiative got its kickstart with a letter from AAAL President **Nancy Winkelman** to the chief judges of the 13 federal circuit courts of appeals, briefly highlighting the principal observations from the Oral Argument Task Force's report and indicating that fellow-representatives from the Academy would be contacting them to start a dialogue on ways to improve the frequency and quality of oral argument because of its importance in our system of appellate justice.

Simultaneously with Nancy's communication, groups of fellows were organized to lead the discussions and report back on what they had learned. Here are a few progress notes so far:

- Meetings with the respective chief judges are in the works for the Sixth, Seventh, Eighth, Ninth, and Tenth Circuits. A meeting with Chief Judge Garland from the D.C. Circuit is on hold pending his Supreme Court nomination, but he has circulated the Task Force Report to the circuit's judges.
- Organizational efforts are still underway in the First, Second, Fourth, Fifth, and Eleventh Circuits.
- Fellows **Nancy Winkelman** and **David Marion** met with Chief Judge McKee and incoming Chief Judge Smith of the Third Circuit. Chief Judge McKee had distributed the Task Force Report to all the circuit's judges. The Third Circuit currently holds oral argument in all cases in which the court has appointed *pro bono* counsel. The meeting featured an open discussion on the judges' views about holding oral argument, with Nancy and David adding their input on the reasons oral argument is critical to the justice system. Nancy and David offered their observations regarding the importance of argument to litigants, irrespective of the outcome, and noted why the benefits of having argument outweigh the incremental cost. The judges were receptive to Nancy and David's comments; Nancy and David are hopeful that the Academy's input will make a difference in the Third Circuit.
- Fellows **Don Ayer** and **Robert Long** met with Chief Judge Prost and Judge Taranto of the Federal

Circuit and held a wide-ranging discussion on multiple issues related to the circuit's approach to oral argument and beyond. Chief Judge Prost pointed out that the circuit holds oral argument in a significant percentage of its cases. One reason for this is the relatively high percentage of cases (25 percent) that are affirmed per curiam. Holding oral argument in these cases gives the parties an opportunity to hear the judges' views. For veterans' cases, the circuit has a robust pro bono program, operated in conjunction with the Federal Circuit Bar Association. A primary goal of this program is to provide younger lawyers with argument experience, which both judges favor. The judges also indicated that the court makes use of pre-argument focus letters and finds them helpful. As for improving the quality of argument, the judges pointed to moot courts as a valuable tool, and the possibility for some formal moot court program for circuit argument was discussed and left open for further meetings.

Once the circuit meetings are complete, the input will be collected and evaluated for next steps. In the meantime, thanks to the participating fellows for all their hard work so far. More to come in the next issue. ♦

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# SCOTUS Report



*By Amy Howe and Fellow Tom Goldstein*

During the October term 2015, the U.S. Supreme Court ruled in five cases implicating appellate issues. These cases involved a diverse group of topics ranging from prisoner filing fees to standing in voting rights appeals and whether a statute-of-limitations defense can be raised for the first time on appeal. As has been in the case in other terms recently, the appellate cases were neither hotly contested nor especially ideological. Indeed, each of the five cases was a unanimous decision, and two of the five were so uncontroversial that the Supreme Court disposed of them as summary reversals—that is, overturning the decision below without even calling for briefing or oral argument on the merits.

In *Bruce v. Samuels*, the issue before the court involved how—or, more precisely, how much—an indigent inmate pays to initiate a case or appeal in federal court. The Prison Litigation Reform Act requires an indigent prisoner to pay a portion of the filing fees up front; he then must make installment payments, amounting to 20 percent of his income from the previous month, until he has paid his fees in full.

What the act did not make clear, however, is whether an inmate should

pay 20 percent of his monthly income for each case or appeal that he has filed—as the government argued—or rather, 20 percent of his monthly income per month, regardless of how many cases or appeals he has filed—as inmate Antoine Bruce argued. The court made quick work of this question. In a brief unanimous opinion by Justice Ruth Bader Ginsburg, the court sided with the government, ruling that an inmate must make an installment payment amounting to 20 percent of his monthly income for each case or appeal.

The court's decision resolved a fairly deep divide in the courts of appeals on this question. Moreover, although only about 60 inmates are currently paying fees for five or more cases or appeals in the federal system, the ruling could still affect the approximately 30,000 cases filed by prisoners in federal courts each year.

In *Musacchio v. United States*, the court—in an opinion by Justice Clarence Thomas—unanimously upheld Michael Musacchio's conviction against a challenge to the sufficiency of the evidence, notwithstanding that the jury instructions in his case had added an element to the crime with which he had been charged.

The court then ruled that Musacchio could not raise his statute-of-limitations defense for the first time on appeal. It reasoned that 18 U.S.C. § 3282(a), the general federal criminal statute of limitations, would be jurisdictional—and therefore could not be waived—only if Congress had clearly stated that it was. But, the court concluded, Congress had failed to do so: the statute's text does not refer to jurisdiction, while its context and history also confirm that the statute of limitations “is a defense that becomes part of a case only if the defendant presses it in the district court.” Moreover, the court added, if a defendant fails to do so, “there is no error for an appellate court to correct—and certainly no plain error.”

*Wittman v. Personhuballah* came to the court as a voting rights case: voters in a Virginia congressional district alleged that the state's 2013 redistricting plan constituted an unconstitutional racial gerrymander. Ten members of Congress intervened in the case to defend the plan. When a three-judge district court agreed with the voters, the state declined to appeal, but the members of Congress opted to take a direct appeal to the U.S. Supreme Court.

In a unanimous opinion by Justice Stephen Breyer, the court ruled that the members of Congress lacked standing to pursue an appeal. The court explained that, when standing has been challenged, “the party invoking the court’s jurisdiction cannot simply allege a nonobvious harm, without more.” As such, the court concluded that two Republican members of Congress cannot establish standing simply by claiming that, if the challenged redistricting plan at issue is not reinstated, “their districts will be flooded with Democratic voters and their chances of reelection will accordingly be reduced.” But, the court found nothing in the briefs to substantiate that claim. A third member of Congress, the court found, also lacked standing. Although he had originally alleged that the changes to his old district had led him to run in a different district, and that he would run in his old district if the plan at issue were reinstated, his attorney later informed the court that he would run in the new district in any event. Because none of the other members who had intervened in the case to defend the plan had suggested to the court that they had standing, the court dismissed the appeal.

In *Maryland v. Kulbicki*, the court—in a unanimous per curiam opinion—overturned a decision by the Maryland Court of Appeals, which had ruled that James Kulbicki’s attorneys were constitutionally ineffective at his 1995 murder trial. The lower court held that Kulbicki’s attorneys should have uncovered a 1991 report on bullet analysis that contained a methodological flaw, and that they

should have used that flaw to cast doubt on an expert’s testimony during Kulbicki’s trial.

The Supreme Court disagreed. Noting that the bullet analysis method was “widely accepted” when Kulbicki was tried in 1995, the court emphasized that Kulbicki’s lawyers “did not perform deficiently by dedicating their time and focus to elements of the defense that did not involve poking methodological holes in a then-uncontroversial mode of ballistics analysis”—particularly when “there is no reason to believe that a diligent search would even have discovered the supposedly crucial report.”

In *Johnson v. Lee*, the state of California (through Deborah Johnson, a prison warden) asked the U.S. Supreme Court to weigh in on the case of Donna Kay Lee, a California woman convicted in state court on two counts of first-degree murder. On collateral review, the state courts denied Lee relief, relying on a state procedural rule known as the “*Dixon* bar”—a state court decision holding that a claim is procedurally defaulted when it is raised for the first time on state collateral review but could have been raised on direct appeal.

When Lee sought federal habeas relief, the district court dismissed as procedurally defaulted several claims that she had not previously raised on direct appeal. Lee appealed to the Ninth Circuit, arguing that the “*Dixon* bar” was not an “adequate” procedural ground to bar federal habeas review. The court of appeals agreed, but the Supreme Court

summarily reversed. It stressed that the “*Dixon* bar” was both firmly established and regularly followed: it was in place (and subsequently reaffirmed) long before Lee defaulted her claims, and the California Supreme Court repeatedly cites the bar. The Supreme Court was not swayed by the California Supreme Court’s failure to cite the bar in several orders in a one-day sample offered by Lee, particularly when each of those orders denied relief. Moreover, the Supreme Court added, “[f]ederal and state habeas courts across the country follow the same rule as *Dixon*.” ♦

### Spring Meeting 2016 Inductees

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the state of Arizona and public officials in a variety of complex, high-profile lawsuits and appeals in state and federal court. Her work has included 10 cases that the U.S. Supreme Court heard on the merits. Ms. O’Grady’s areas of expertise include election and campaign finance law, the Voting Rights Act, state constitutional law, government contracts, state legislation, open meeting and public records laws, redistricting, and school finance. Ms. O’Grady has also worked extensively in the area of tribal–state relations, with a particular focus on tribal–state agreements. She is now a partner with Osborn Maledon, P.A., in Phoenix. ♦

## Miscellany



Michael B. King, Fellow

It is a commonplace for the person introducing a speaker at an event to say that he or she is “privileged” to be making the introduction. Sometimes, though, the commonplace hits the mark.

At the luncheon at our Spring Meeting, I *was* privileged to introduce the Hon. Gerry Alexander, the former Chief Justice of the Washington Supreme Court. Gerry Alexander is, quite simply, one of the finest persons ever to grace the appellate bench of the state of Washington and, I will dare say, of any appellate bench of any state of the Union. He feels *privileged* to have had a life involving law, including being able to serve as a judge of the Washington trial and appellate courts (culminating in his service as Chief Justice of the Washington Supreme Court). Moreover, as long as he served as a judge, Gerry Alexander saw himself as a public servant, and as a public servant, the *last* thing he would presume to do would be to lord it over the lawyers who came before him. Our country’s court systems would benefit from having more like Gerry Alexander on their benches!

As described elsewhere in this issue, Chief Justice Alexander spoke to us about the local history of *West Coast Hotel v. Parrish* (1938), one of the truly “Great Cases” of American constitutional law. For my “Read the Law” recommendation, I offer a book I referred to in my introduction of Chief Justice Alexander: *The 168 Days*, by the noted journalists Joseph Alsop and Turner Catledge. *The 168 Days* was the very first chronicle of Franklin Delano Roosevelt’s attempt to “pack”

the U.S. Supreme Court. Published in 1938 and based on a series of articles that appeared under the same name in *The Saturday Evening Post*, *The 168 Days* is what may still be called a “crackling good” read. When I first read “The 168 Days” many years ago, I was instantly convinced it had served as the model for the great Washington, D.C., inside-story novels of Allen Drury, particularly his prize-winning *Advise and Consent*. Divided into four parts—“Birth of the Bill,” “Attack,” “Rear-Guard Action,” and “Death of the Bill”—*The 168 Days* fully captures the *personal drama* of a grand moment in American constitutional history, which also vindicates the judgment of the Ancients that Pride is truly a deadly sin which goeth before a fall. In the case of the Court Packing fiasco, FDR would pick himself up from this particular fall and go on to great accomplishment. Not so the man who loyally led the fight for his chief’s plan on the floor of the United States Senate. For Senator Joseph Robinson of Arkansas, Majority Leader of the Senate, to whom FDR had promised his first appointment to the U.S. Supreme Court (a promise Roosevelt came to regret, as the need for new liberal blood on the Court to secure the New Deal became ever clearer), the Court Packing fight would prove literally fatal. And instead of a Justice Robinson cut from senatorial cloth, the judicial robes would be placed upon the shoulders of another senator, Hugo Black from Alabama, whose ensuing votes in favor of Social Security and the National Labor Relations Act would give to President Roosevelt the victory over “horse-and-buggy” constitutional-

ism he had been denied by the Court Packing’s defeat.

As we go to press, we are delighted to learn that Fellow Carl A. Solano, of Schnader Harrison Segal & Lewis in Philadelphia, has been appointed to be a judge on the Superior Court of Pennsylvania (one of Pennsylvania’s two intermediate appellate courts). We extend our hearty congratulations to Carl! In addition, we have recently learned that in September, Sylvia H. Walbolt will receive the 2016 John Paul Stevens Guiding Hand of Counsel Award from the American Bar Association’s Death Penalty Representation Project. This award is given annually to a lawyer who demonstrates exceptional commitment to providing pro bono counsel for individuals facing the death penalty. Bravo, Sylvia!

I would like to reiterate that the pages of *The Advocate*—*your* newsletter!—remain open to your contributions. I would be delighted if the next issue could be graced by several meaty pieces on matters of appellate practice, authored by Academy fellows, thereby contributing to the continuing education of our fellowship—a central objective of this publication.

Finally, an important announcement from the president—**please update your personal Academy website pages!** Many of you have no picture, and that generic, featureless image appearing where your face should be is no substitute for the real thing. As your editor, if I can manage navigating the simple technical steps involved, you all can! ❖



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