

## **History of the American Academy of Appellate Lawyers**

### ***Formation and Philosophy***

The Academy was formed in Florida in 1990, the inspiration of Arthur England, former Chief Justice of the Supreme Court of Florida. Arthur envisioned a structure and membership criteria modeled after the American College of Trial Lawyers. The Academy was envisioned as serving several functions: (1) Identification and recognition of outstanding appellate lawyers; (2) Enhancement of the quality of appellate justice by advancing the highest standards and practices of appellate advocacy; and (3) Provision of opportunities for fellowship and the exchange of experiences and ideas among Fellows.

### ***Membership growth***

The original Fellows were 12 Florida appellate lawyers. From there the Academy grew in numbers and geographical breadth. By early 1992 there were 53 Fellows; by 1994 there were 102 Fellows. The 200-Fellow threshold was crossed in 1998. In 2014 membership surpassed 300 Fellows for the first time. After that growth slowed down somewhat as members of the original generation of Fellows either retired or passed away. Earnest efforts to identify new Fellows resulted in a gradual increase that outpaced attrition, so that by 2022 the number of Fellows was in the mid-300s.

By 2020 the long-held goal of having a Fellow in every state was realized. The Academy also has consciously endeavored to reflect diversity in gender, ethnicity, practice areas, and the size and nature of practice environments.

### ***Meetings Evolution***

For the first eight years the Academy met biannually in conjunction with the ABA Spring and Fall Meetings, with occasional mid-year meetings or retreats on its own.

Although the relationship between the Academy and the ABA (particularly the Appellate Judges Conference) was important in the early development of the Academy, as the Academy grew and matured, meeting in conjunction with the ABA became increasingly difficult and less essential. The Academy amended its by-laws in 1997 to give the Board discretion to schedule Academy meetings independently of the ABA meetings, and that formal separation began in 1999.

In 2002 and 2003 the Spring Meetings were held in conjunction with a seminar, co-sponsored with the Fifth Circuit Bar Association. A proposal was made to establish an ongoing relationship with the Fifth Circuit Bar to co-host every Spring Meeting, but that proposal ultimately was rejected in favor of independent biannual meetings.

In addition to the bi-annual meetings, the Academy's Board of Directors and other interested members have held periodic Strategic Planning Meetings. The first Strategic Planning Meeting was in 1997, followed by meetings in 2005, 2013, 2018, and 2022. These meetings have helped to clarify challenges and goals and develop strategic plans to address those issues. Meaningful developments in the life and practices of the Academy have come out of those meetings. Common themes have included enhancing the brand and visibility of the Academy in the legal community; growing and shaping the membership; developing better relationships with other bar groups at the national, the state, and local levels; and strengthening communication within the Academy.

### *Academy traditions*

#### Website

A website was created soon after the Academy formed, and in the early years was maintained and managed by Ken Bass.

In 2005 the Academy engaged a professional website developer to take over webmaster duties and make changes to the existing website.

A new website rolled out in 2014 with enhanced Fellow profiles that made it more accessible to members of the public wanting information about the Academy and made it easier for Fellows to refer cases to Fellows in other jurisdictions.

The Academy began working on another new and improved website in 2022.

#### Logo

In 1993 the Academy adopted its first logo, the tall, narrow, black letters "AAAL," with the words "American Academy of Appellate Lawyers" in white on a small black banner running across the bigger letters.

That logo was used continuously until 2018, when it was retired and replaced with the words "American Academy of Appellate Lawyers" in white, in two lines, against a solid blue rectangle.

### Newsletter and electronic communications platforms

In 1994 the Academy published the first edition of its print newsletter, *The Appellate Advocate*, which was mailed to all Fellows. That publication was faithfully published until 2018. At that time, in response to concerns about rising printing and postage costs and the increasing tendency of younger Fellows to consume information in a digital format, the Board decided to adopt a new digital communication platform. Management Solutions Plus investigated, developed, and launched a new platform called “Amici.” This platform enables the posting of announcements and articles, the housing of documents, and discussions between Fellows. In 2022 a new and more user-friendly online communications platform was implemented, although the name “Amici” was retained.

### Management Solutions Plus

In 1995 the Academy initiated a relationship with Management Solutions Plus, Inc. to provide professional management services to the growing organization. Jean Rankin of MSP was the first Executive Director of the Academy, assisted by Beth Palys. Beth succeeded Jean as Executive Director in 1997 and continued to serve in that important role for over 25 years, providing a stability and quality of leadership that was critical to the Academy’s development.

### Induction charge

In 2001 Academy founder and spiritual leader, Arthur England, wrote an inspirational induction charge to be administered to each new Fellow. That induction charge has become a significant part of each Induction Ceremony since then.

### Eisenberg Prize

In 2003 the Academy presented the first Eisenberg Prize, an award named after Fellow Howard Eisenberg, to be given annually to the best article on appellate practice and procedure published in a journal that year. The first award was presented to a journal: the Journal of Appellate Practice and Procedure, published by the University of Arkansas at Little Rock. The journal was begun during Howard Eisenberg's tenure as Dean at UALR, so it seemed appropriate to honor Howard and the journal’s unique contribution to appellate law.

### Kathleen McCree Lewis Award

In 2007 the Academy grieved the death of beloved Past President Kathleen McCree Lewis, who died of cancer only a year and a half after completing her term as President. Although the Academy had been in existence for almost two decades, Kathleen's death was the first of a Past President. In her honor, the Academy created the Kathleen McCree Lewis Award for Appellate Justice to honor individuals or

groups who have "made a contribution that has had an exceptional impact on the delivery of appellate justice." To support the Award, the Academy established its first endowed fund which many fellows contribute to annually.

### ***Working with and providing service to the Appellate Judiciary and Bar***

In 1993 the Academy joined with the ABA/Appellate Judges Conference to co-sponsor the Appellate Practice Institute, beginning a co-sponsoring relationship for this Institute that would continue for several years.

In 1996 the Academy published its first Bibliography for Appellate Lawyers, an effort spearheaded by Dennis Owens and Thomas Newman.

In 1997, under the leadership of Luther Munford, the Academy initiated a project that resulted in the Report of the Appellate Courts Liaison Committee on Federal Courts Advisory Committees. The report was distributed to the chief judges of each Circuit, to the Federal Judicial Center, and was published at 175 F.R.D. 110.

At the request of the Chair of the Appellate Judges Conference, the Academy sent Charlie Carpenter to the ABA Task Force on Unreported Opinions. Charlie's Report on Unpublished Opinions was published at 50 SC L. Rev. 235 (1998).

In 1998 Howard Eisenberg and Alan Morrison led a project on behalf of the Academy that resulted in recommendations regarding interlocutory appeals. Their report was published as "Discretionary Appellate Review of Non-Final Orders: It's Time To Change the Rules," in 1 Journal of Appellate Practice & Process 285 (1999).

In 1999 the Appellate Judges Conference (AJC) decided to form an appellate lawyer's council within the ABA to work with it. The Academy participated in the meetings and discussions, and John Charles Thomas was chosen as the first President of the Council of Appellate Lawyers. After the Academy's meeting were separated from the AJC of the ABA, this new group provided a way to assure a continuing relationship between the Academy and the AJC, while maintaining the separate identities and missions of the two organizations.

In 2001 the Board approved the Capital Case Appellate Representation Project, to help provide referrals to experienced appellate lawyers to assist primary capital case defense counsel with capital appeals.

In 2005 the Academy formed a group to review ABA rules and proposals on professional conduct. That same year the Academy named liaison members to the lawyer consultative groups for two American Law Institute projects impacting appellate practice — the Uniform Penal Code Sentencing Project and Principles of the Law of Aggregate Litigation Project.

The National Conference on Appellate Justice was held in November 2005, in Washington, D.C., on the 30th anniversary of the 1975 National Conference on Appellate Justice. Largely initiated and substantially funded by the Academy's efforts, the event was planned in conjunction with the Federal Judicial Center, the National Center for State Courts, and other institutions. The conference was attended by nearly 200 judges, practicing lawyers, and academics, and featured small group discussions and meetings and presentations to the larger group. Professor Arthur Hellman prepared a conference report based on the presentations at the plenary sessions and discussions in the breakout groups. *See* Arthur J. England, Jr., *Planning and Conduct of the National Conference*, 8 *Journal of Appellate Practice and Process* 67 (Spring 2006). The Academy's pivotal role in this conference went a long way toward establishing the prominence of the Academy in the world of appellate law.

The Fall 2008 meeting was held in Portland, Oregon in conjunction with a Conference on the 40th Anniversary of the Federal Judicial Center. U.S. Supreme Court Justices O' Connor and Kennedy spoke at the joint program.

In 2008, a committee chaired by Past-President Cate Smith was appointed to look at issues of judicial selection and recusal. This Committee developed the Academy's Policy on Judicial Recusal.

In 2013, the Rules Committee, chaired by Richard Neumeier, was able to provide input into a proposed revision of the Kentucky Rules of Appellate Procedure. The following year, the same committee provided substantive input on an Arizona rule change involving the citation of unpublished decisions.

In late 2014, the Academy became involved in public discourse about a proposal by the Advisory Committee on Appellate Rules to change the word limits for briefs in the courts of appeals, including reducing the limit for principal briefs from 14,000 to 12,500 words. The Academy argued the proposal failed to consider the needs of complex cases, failed to address some circuits' refusal to grant motions to permit longer briefs in certain cases, and would likely result in shorter bad briefs. Charlie Bird testified at the committee hearing. Ultimately, the sub-committee recommended a 13,000-word limit for principal briefs. Then, the full rules

committee decided to leave the choice to each circuit court. At least two circuits stuck with 14,000 words. The quality of the Academy's analysis and its perseverance in presentation in this forum put the Academy at the forefront of bench-bar dialogue about effective lawyering in federal appellate courts.

The Oral Argument Task Force completed its Report and Statistical Supplement (credited to Alan Morrison), which documented the decline of oral argument in many circuits. The Report explained the value of oral argument, not only to litigants but also to the appellate courts and appellate justice. The Oral Argument Task Force chaired by Jim Martin, provided a copy of the Report to the Chief Judge of each federal circuit, and Fellows met with most of those Chief Judges to discuss the Report. Jim Martin published an article about the Task Force Report. *See* "Wither Oral Argument? The American Academy of Appellate Lawyers Says Let's Resurrect It!" 19 J. App. Prac. & Process 89 (2018). This was followed by the creation of a power point presentation on oral argument by a group led by Mark Fleming. The power point was then made available to all Fellows to use in CLE presentations, to educate the public, and to increase the brand of the Academy.

In June 2017, several Fellows representing the Academy, in conjunction with the American College of Trial Lawyers, gathered in Austin to create an instructional videotape on appellate oral argument to be made available to public interest lawyers. The project was initiated and spear-headed by Sylvia Walbolt, Past President of the Academy and a leader in the ACTL. It included lectures, panel discussions, two demonstration moot courts, and critiques of the moot courts.

The Academy wrote to the Judicial Conference Rules Committee in June 2017, commenting on a proposed amendment to Federal Rule of Appellate Procedure 29. At the suggestion of the Committee Chair and then-Judge Neil Gorsuch, the Academy compiled recommendations from Fellows for amendments to the Federal Rules of Appellate Procedure and sent them to the Committee. The suggestions included making better use of pre-argument focus letters in appropriate cases, and clarification of when cross-appeals are necessary, given inconsistencies across the Circuits and potential waiver traps.

Led by Margaret McGaughey, AAAL's Law School Education Task Force prepared an Appellate Practicum for Law Students, which was added to the Academy's website for all Fellows to use and was presented by Fellows at several law schools in the First Circuit.

The Academy Board adopted a proposal from the Rules Committee, chaired by Skip Watson, to submit a proposed new rule to the Federal Rules Committee. What would have been new Rule 32.2 concerned sua sponte consideration of unbriefed issues by appellate courts, and would require appellate courts to provide notice to counsel when considering unbriefed issues, and permit counsel the opportunity to submit supplemental briefing.

After the COVID-19 pandemic hit in 2020, in order to remain engaged with and provide valuable services to the Fellows during a period of physical separation, the Academy embarked on a monthly series of free video webinars in the summer and early Fall of 2020. The webinars covered a range of topics, some of which addressed the challenges of practicing appellate law during the pandemic.

One immediate consequence of the pandemic was conversion by many appellate courts to oral arguments by video teleconference (most commonly using the Zoom format). To address this new reality the Academy convened a Task Force on Remote Video Arguments, chaired by Jim Layton, and staffed by Charles Becker, Charlie Bird, Joel Bertocchi, Mike King, Robin Meadow and Cate Smith. The Task Force produced two excellent reports, “Recommendations for Courts Hearing Oral Argument Remotely,” and “Suggestions for Arguing Counsel.” Both reports were widely distributed to the bench and bar and favorably reviewed in national legal publications.

### *Amicus Briefs*

In 2003 the Board adopted a new Amicus Curiae Policy, which established criteria for the Academy in filing amicus briefs, and an Amicus Brief Committee to assess the need for, draft, and file amicus briefs on behalf of the Academy. The guiding principle was that the Academy should only file amicus briefs asserting positions that served the interests of all appellate lawyers, and not just partisan sub-groups.

In 2008 the Academy filed an amicus brief in *Caperton v. Massey* in the United States Supreme Court, a case involving the propriety of campaign contributions to appellate justices by parties with cases pending before that justice. The brief was authored by Fellows Wendy Lascher and Gloria Phares, and it argued that in some circumstances permitting a judge to sit on a case when one of the parties had made a significant campaign contribution could violate the Due Process Clause. In a 5-4 decision the Court adopted the view advocated by the Academy and numerous other amici.

In 2015, the Academy filed an amicus brief in *Williams v. Pennsylvania*. Wendy Lascher principally authored the brief, with consultation from the Amicus Committee. The Academy argued that parties have a due process right for an appeal decided by judges who were not engaged in executive-branch decision making at the heart of the dispute on appeal.

In 2017, the Academy filed an amicus brief in the U.S. Supreme Court in *Hamer v. Neighborhood Housing Services of Chicago*. Authored principally by Charlie Bird, the brief argued that missing a court rule deadline to file an appeal should not deprive an appellate court of jurisdiction unless the rule is congruent with a statute. The Academy's amicus brief was favorably cited in a footnote of the Court's opinion.

### ***Memorable Meetings***

In 2000 the Academy met in Washington D.C. to celebrate its tenth anniversary. This began a tradition of meeting in Washington, D.C. every five years to celebrate significant anniversaries of the Academy. These are the best-attended meetings of the Academy, and typically include attending oral arguments before the U.S. Supreme Court, meeting with the advocates before or after the arguments, and holding the Induction Dinner in the Grand Hall of the Supreme Court building.

The Fall 2003 meeting in Williamsburg, Virginia was one of the most memorable in Academy history. It included an induction ceremony in the historic chamber of the House of Burgesses, which recognized all of the Fellows of the Academy who had joined before the Academy had a formal induction charge and ceremony. Former President and founder Arthur England administered the induction charge he had written to those Fellows.

The Fall 2005 meeting of the Academy was held in conjunction with the previously described National Conference on Appellate Justice. Academy events were attended by Judicial Fellow and Chief Justice John Roberts and Justice Sandra Day O'Connor.

The Fall 2006 meeting in Charleston, South Carolina was another one of the Academy's more memorable meetings. The highlight was a panel about *Brown v. Board of Education*, which involved three consolidated cases, one of which came out of South Carolina. The panelists included three men who were involved in the *Brown* case as young lawyers: former United States Senator Fritz Hollings, former South Carolina Supreme Court Chief Justice Ernest Finney, Jr., and E. Barrett Prettyman, Jr. The New Fellow Induction Ceremony was held at the historic Charleston County Courthouse, which has been in continuous use as a courthouse

since the 1700s. The ceremony included a dramatic reading of a poem by Professor Nikky Finney, the daughter of former South Carolina Chief Justice, Ernest Finney, Jr.

The Spring 2011 meeting in St. Paul, Minnesota was another memorable meeting. Past President Eric Magnuson chaired the meeting and gave it a distinctive local feel, while addressing themes of Judicial Activism and Judicial Funding. The Minnesota state demographer Paul Gillaspay spoke and was the runaway surprise hit of the program as he entertained the audience while explaining how demographics are critical to judicial funding. A group of Fellows attended a live broadcast of Garrison Keillor's "A Prairie Home Companion" at the historic State Theater in Minneapolis.

In 2013 the Academy held its first meeting on foreign soil, in Ottawa, Canada. This gave the Fellows the chance to exchange ideas with Canadian appellate judges and practitioners. We also observed an oral argument before the Supreme Court of Canada and were entertained with a reception at the Court hosted by Chief Justice McLachlin.

The Fall 2015 meeting featured the Academy's 25th Anniversary celebration in Washington, D.C. Chief Justice and Judicial Fellow John G. Roberts presented the Kathleen McCree Lewis Award to Associate Justice Anthony Kennedy, honoring his 40 years of service as a federal appellate judge. Justices Alito, Sotomayor, and Kagan attended the presentation. Justice Kennedy and his wife joined the Academy for the Induction Dinner in the Great Hall of the Supreme Court. A special 25<sup>th</sup> Anniversary lunch featured an outstanding video presentation produced by Thom Hudson and Executive Director Beth Palys. It included photographs from the previous 25 years and interviews of founding members and early Presidents.

After the pandemic ruled out in-person meetings in 2020, the Academy pivoted to online meetings in a virtual format for its Fall 2020 and Spring 2021 meetings. Thanks to a huge assist from Beth Palys and others at Management Solutions Plus, over a hundred technologically challenged appellate lawyers were able to gather online, conduct business meetings, induct new Fellows, visit informally in small break-out rooms, and enjoy a stellar array of CLE presentations.



