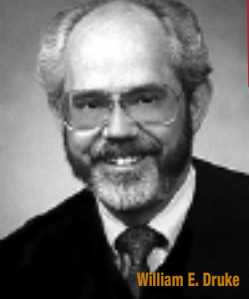
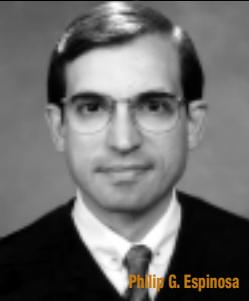


Judicial Memories

In recognition of the 40th anniversary of the Arizona Court of Appeals, we asked former judges of the court to recall their service and describe particular challenges that existed during their tenure and/or anecdotes about the court and its personnel. Here are the Judges, in their own words.



William E. Druke



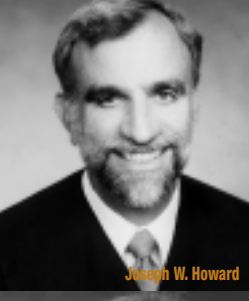
Philip G. Espinosa



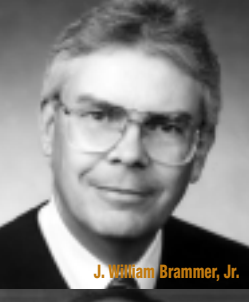
John Pelander



M. Jan Florez



Joseph W. Howard



J. William Brammer, Jr.



Peter J. Eckerstrom

James D. Hathaway
(Division Two, 1965-1997)



An appropriate motto for Division Two could have been “Have Gavel Will Travel.” The Supreme Court had plenty of old cases at issue and promptly transferred them to both divisions of the new court. We traveled frequently to Phoenix for oral argument on cases assigned to us by the Supremes, and to assist Division One with their heavier caseload (and slower productivity). Once we flew by private plane to Yuma for arguments, with Judge Molloy, a former aircraft carrier pilot, at the controls. I was pleased when he allowed me, a student pilot, to have a go at it. We eventually made inroads into the backlog, and found our own case filings keeping us well occupied.

We developed the practice of assigning cases for drafts before oral argument and found this helpful in targeting oral argument. Eventually, we began circulating these drafts to counsel before oral argument, with the caveat that it was a draft by one judge, furnished for informational purposes only and subject to change. The practice generated some criticism in the legal community that we had made up our minds before argument. Nevertheless, we found it helpful in directing argument and inviting counsel to participate in constructing the decision.

On one of my proposed drafts, the court came to a different decision than my draft. The final decision approved by the court was filed and circulated through the system. Unfortunately, the title page had not been corrected to reflect the different holding. The judges of Division One were pleased to see that I was awarded the uncoveted “Birdlime Award!” Rest assured that the title page was later corrected.

John F. Molloy
(Division Two, 1965-1969)

James Hathaway, Herbert Krucker and I assumed the role of appellate court judges on January 6, 1965. Our courtroom was the old hearing room of the Arizona Corporation Commission. In that room we had had installed a three-chaired desk as our new “bench,” elevated as high as the office-height ceiling of our new courtroom would permit. We wanted to emulate what we had seen our Supreme Court Justices have, but it was impossible to do so without enough ceiling height.

At our installation, the three of us traipsed into that room, black robes flowing, and climbed onto our seats with as much decorum as possible. For our installation, the room was full of lawyers and relatives—never again did we fill it up as on that day.

We were all three at a new job, particularly Judge Hathaway, who had never sat on a trial bench, but Jim assumed his new role as if he had been born for it. Judge Krucker, as the judge with the most years of judging experience—as a lawyer I had tried several cases in his courtroom—was elected, by Jim and I, to be our first presiding judge. We were a busy court; the Supremes in Phoenix were way behind with their overcrowded docket and shifted several hundred cases down to us to start us off.

In deciding cases, seldom did we disagree with each other, but when we did there was respectful dissent and no animosity. A dissent by me, which I have quoted from in my book (now in bookstores: *The Fraternity*) was to an opinion authored by Judge Hathaway, which adopted the then-new products liability law for our state.

My five years on this court were the most productive in my life. When I resigned, in 1970, to return to my law firm—attracted by the promise of better earnings—I had feelings of giving up tremendous power, but heavy responsibility. I shall always look back on those years as the ones in which I got to know myself, when I learned what my core beliefs are. It was an honor and privilege to so serve.



L. Ray Haire (Division One, 1969-1989)



I was initially appointed to Division One of the Court of Appeals in 1969, along with Judges Eino M. Jacobson and William E. Eubank. I remained on the Court until I retired in 1989, having served several terms as Chief Judge. In my early days on the Court, there were only two three-judge panels (Departments A and B), and there was no rotation of judges between the two Departments.

One of the major challenges to the Court in its incipient years was the lack of adequate facilities. Division One's Clerk's Office (with its inadequate space) fronted on the third floor of the rotunda of the "old" State Capitol Building, and the only entrance to the judges' chambers of Department B was through the Clerk's Office. Also, Division One did not have its own courtroom, but had to use the courtroom of the Arizona Supreme Court. This led to numerous scheduling difficulties. These difficulties were later alleviated when the Court moved to the first floor of the south wing of the "new" State Capitol Building. Later, due to the ever-increasing appellate caseload and the addition of more three-judge panels, the Court moved to its present quarters in the State Courts Building.

Any discussion of the Court's early years would be incomplete without a tribute to Judge Henry Stevens and to Clerk Classic Gantt and their contribution and dedication to the procedural development of the Court.

Although understandingly stressful at times, my years on the Court were very fulfilling and pleasurable, due in large part to the excellence of the many judges I sat with, among others, Judges Sandra Day O'Connor, Eino Jacobson, Jack L. Ogg, Joe Contreras and J. Thomas Brooks.

Lawrence Howard (Division Two, 1969-1992)

When lawyers asked me what the key is to winning at oral argument, I always told them how important it was to be frank with the court. Two cases stand out in my mind.

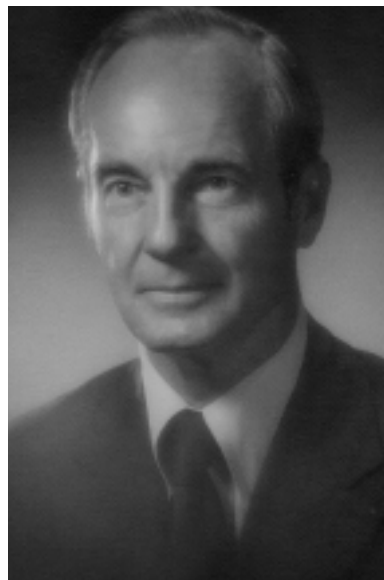
In the first one, after the lawyer made a telling argument, I asked him if he presented that argument to the trial court. His answer was, "I'm not going to tell you." "What!" I said, "you are not going to tell me?" "No," he responded. I turned away in disbelief. Needless to say, he did not prevail. Lack of frankness.

But sometimes one can be too frank. At one oral argument the lawyer commenced his oral argument by throwing the rough draft opinion on the table with disgust and stating, "It is obvious that the judge who wrote this rough draft has never had any experience as a trial judge." It just happened that the judge who wrote the draft was sitting on my right. It was Judge Birdsall, who had several years as a trial judge and who was highly esteemed by the bar and bench. Judge Birdsall never said a word and looked stonically ahead. Needless to say, this lawyer also lost his appeal. Too much frankness.

So what is the moral of these two incidents? An artful lawyer is frank, but not too frank.



Jack L. Ogg (Division One, 1973-1985)



P r e s i d e n t Reagan was smart enough to appoint Sandra Day O'Connor as the first lady on the United States Supreme C o u r t . Although we were sorry to lose her, we were proud of her record here as a great judge and what she is now doing in the Supreme

Court. We immediately gained vicarious fame, and all the reporters were in the downstairs garage waiting to ask us about Sandra. They even wanted to know what perfume she used. I told them I honestly don't know, but she always smelled good.

After we recovered from the Sandra stampede, we made plans for the Appeals Court part of the proposed new courts building. Judge Joe W. Contreras, who grew up near the site of the State Courts Building, was responsible for the fine facilities for the Court of Appeals, along with the vision of Justice James Duke Cameron of the Arizona Supreme Court.

Eino M. Jacobson
(Division One, 1969-1995)



When I went to the Court of Appeals, in 1969, the court had two departments: Judges Henry Stevens, Duke Cameron and Francis Donofrio comprised department A, and Judges L. Ray Haire, William Eubank and I comprised department B. At that time judges were not rotated, and I sat with Judges Haire and Eubank for six years. On occasion, however, because of conflicts, a judge from department A would sit with department B and vice versa.

We were chambered in the old Capitol building (the one with the copper dome) and shared the Supreme Court's courtroom for hearings. The judges' access to the courtroom was through the chambers of the Chief Justice, at that time Justice Jack Hayes.

On one occasion I sat with department A, Judge Stevens presiding. Judge Stevens had the reputation of being a strict disciplinarian and as a trial judge was known to rap the knuckles of any lawyer who had the audacity to touch his bench. After we had finished oral arguments and were preparing to leave the bench, through the door to Justice Hayes' chambers, I had a matter I wished to discuss with my law clerk, so I motioned him to come into chambers.

The dutiful law clerk proceeded to come up behind the bench and follow us into chambers. He had just gotten through the door when Judge Stevens stopped him saying, "Young man, there are only two types of people who go through that door—judges and the char lady." The law clerk, being duly chastised, turned and left.

Judge Stevens demanded respect for traditions of the judiciary.

Mary M. Schroeder
(Division One, 1975-1979)



I went to the Arizona Court of Appeals when I was very young—just before my 36th year. It was a most hospitable place. The judges ate lunch together often, piling into Judge Froeb’s car that was always in need of repair. I marveled at Judges Ogg and Jacobson, who commuted from Prescott, and was in awe at Larry Wren’s diligence in driving down the hill from Flagstaff, whatever the weather.

Without a doubt, however, the best thing about the Court of Appeals decision-making process was its custom of having the judges’ law clerks attend the conference that discussed how cases were to be decided. Each judge had only one clerk (some of our federal judges now have four), so the clerk knew everything that the judge knew about every case. There was no need to go back and explain what happened, with the concomitant risk of miscommunication.

The two life-enriching lessons I took from my experiences at the court were these: (1) You have to work hard to get along with folks who disagree with you almost all of the time, but it is worth it, and (2) there is never enough time to read all the opinions, periodicals and books you think you ought to be reading, so live with it.

Sandra Day O’Connor (Division One, 1979-1981)

I remember my years on the Arizona Court of Appeals in the 1970s with much pleasure. We were nine in number, working in panels of three. My colleagues were intelligent, hardworking, and very nice to be around. We had plenty of criminal cases and workmen’s compensation cases to keep us busy, along with a few more challenging issues. It was easier to get agreement among three judges than it is among nine.

L. Ray Haire had a careful, analytical approach. Eino Jacobson was quick, smart and amusing. Joe Contreras and Bill Eubank were splendid colleagues.

On occasion we would walk to a local Mexican food restaurant for lunch and pitch some quarters to see who landed closest to the sidewalk seam to win the “round.” Jack Ogg usually won. Jack also kept us entertained with amusing stories from his interesting life in World War II.

All in all, I enjoyed my time on the Court of Appeals and found it satisfying work.



Gary K. Nelson (Division One, 1974-1978)

After serving two terms as Attorney General of Arizona (elected in 1968, reelected to first four-year term in 1970), I was appointed to a newly authorized panel of the Court of Appeals in July of 1974 (Larry Wren and Don Froeb were the other two judges). Since my name was on all the State briefs, I recused myself from all criminal cases for about two years, and became an expert, more or less, in workers’ compensation cases. I was honored to work with the real expert in the area, Henry Stevens.

Although my tenure on the court was short, I had started to get involved in the administrative work, such as the Clerk’s Office committee, when the unfortunate breakdown in our system occurred that eventually led to my nonretention in the election of 1978.

Unbeknownst to me, the IRS had begun an investigation of my tax returns based on allegations of bribes and payoffs during my tenure as Attorney General. The first I knew about the grand jury investigation being conducted in Tucson was when someone from the IRS or U.S. Attorney’s Office leaked the information to the press. The agents eventually did contact me, read me the *Miranda* warnings (I argued the case for the State in the United State Supreme Court), and discovered there was no truth whatsoever to the allegations.

The results of the investigation came much too late for the retention election. I never blamed the voters: If you have doubts about the integrity of a judge, throw the rascal out. But what disappointed me the most was the bar poll. The lawyers should have known that an “investigation” proves nothing about a person’s integrity until it’s over and a jury resolves any fact issues. I believe the current evaluation system is much better. The worst aspect of the whole process was the so-called campaigning. We must never go back to the straight election of judges.

I enjoyed the time I spent on the court and believed then, as I believe now, that it is one of the best intermediate appellate courts in the country. Thank God the members of the Arizona Supreme Court knew my integrity was beyond question. I served as their Chief Staff Attorney for 18 years from June 1979 through 1997, when I retired.



Bruce E. Meyerson (Division One, 1982-1986)

I had been a public interest lawyer for 10 years and in 1982, I was appointed by Governor Bruce Babbitt to the Arizona Court of Appeals.

I came on to the court with Judges Tom Kleinschmidt, Dick Greer and Tom Brooks. These judges and the excellent members of the court at that time—Ray Haire, Eino Jacobson, Joe Contreras, Sarah Grant, Bob Corcoran, Bill Eubank, Don Froeb and Jack Ogg—were wonderful role models for me. My five-year experience as an appellate judge profoundly changed my professional interests and future career in law. Although I left the Court to become the General Counsel at Arizona State University, and then devoted 10 years to civil and appellate litigation, the experience of looking at legal problems from a neutral perspective greatly enhanced my skills as an advocate.

Moreover, my experience as a Judge on the Court of Appeals changed my professional life. It was during my service as a judge that I became interested in the field of alternative dispute resolution, which has now become my career.

When I joined the Court in 1982, the Court was experiencing a significant delay in the disposition of its cases. At that time, it took two years for a case to be considered after the last brief was filed. Despite the diligence of the judges, the caseload was simply too much for the Court's 12 judges to handle. The judges who joined the court that year immediately began to work with the veteran judges to explore how the court's work could be done more expeditiously.



The first reform implemented was actually the result of an inquiry by Robert Myers. Bob Myers, who later became the Presiding Judge of the Maricopa County Superior Court, had been involved in an ABA project that demonstrated the successful use of lawyers as “judicial adjuncts.” Bob met with Eino Jacobson, who was then serving as our Chief Judge, and proposed using experienced lawyers to sit

on cases to bring more resources to bear on the problem of delay. The Court of Appeals embraced the idea; Judge Jacobson asked me to spearhead the project, and soon a special panel of the court was created. Each week a different judge would sit with two attorneys to hear three cases. The combination of the judges taking on extra cases, with the addition of attorney resources, was a major step in reducing the court's backlog.

It was through my involvement with addressing the Court's delay that I began to think about alternative ways of resolving the backlog of appeals. I came across an article in the county bar newspaper inviting lawyers to a meeting of the State Bar's ADR Committee, then chaired by Superior Court Judge Robert Gottsfield. The meetings were chaired by Judge Gottsfield and then, unlike today, the subject of ADR attracted only a handful of lawyers. But it was learning about mediation and alternative dispute resolution from Judge Gottsfield that prompted my interest in the subject. Because we could literally have these meetings in a closet, it wasn't too long before I became the chair of the Committee.

Through this initiation to ADR, I worked with the City of Phoenix to create a mediation program for minor criminal offenses and neighborhood disputes, and began a dialogue with insurance companies, plaintiff's lawyers, and defense lawyers to discuss how mediation could be used to resolve personal injury claims. Today, mediation is used extensively in this area; 20 years ago it took a great deal of work and persuasion to bring these diverse groups together. But we were successful in creating the Maricopa County Personal Injury Mediation Project. But for its acronym—MCPIMP—I'm sure the program would still be operating today!

One program that is still in use today is the court's appellate mediation program. Although we started talking about mediating appellate cases in the 1980s, it was Justice Ruth McGregor who spearheaded this program when she was the Court's chief judge. Through her leadership, and the support of her colleagues, court staff and the bar, the use of mediation to resolve appeals has become a fixture among the court's delay reduction efforts.

Thus, my interest in alternative dispute resolution began as a judge on the Arizona Court of Appeals. Because of that interest, I eventually reoriented my professional career and now work almost exclusively as a mediator and arbitrator. It was my experience as a judge on the court that profoundly affected my future professional life.

I will always look back with pride and satisfaction on my work as a judge and with admiration for my colleagues who gave so much to our system of justice in Arizona.

My five years on this court were the most productive in my life. I shall always look back on those years as the ones in which I got to know myself, when I learned what my core beliefs are. It was an honor and privilege to so serve.

— John F. Molloy

Thomas C. Kleinschmidt
(Division One, 1982-2000)



Four new judges took their seats on Division One on July 1, 1982. Tom Brooks, Dick Greer, Tom Kleinschmidt and Bruce Meyerson. Bruce Meyerson did as much as anyone, and more than most, to devise and implement ways to streamline the court's procedures to deliver more timely decisions. He built a spirit of cooperation and channeled it into positive change. Among other things, he suggested and lobbied for such things as summary dispositions and a rule that required judges to circulate draft opinions by a specified time. He came, saw, improved and moved on, leaving a court that, 20 years later, still reflects his presence.

Judge Joe Contreras, who was the court's liaison with the architects when the court building was planned and constructed, deserves the credit for the design of the two courtrooms in present use. He personally rejected the architect's first rendering, and the finished product is a great improvement over the proposal.

The clearest lesson I learned from my two years as Chief Judge is that whatever power a judge, and a chief judge at that, has, does not extend to reallocating or otherwise tinkering with employee parking spaces.

Noel Fidel
(Division One, 1987-2002)

In 1989 or 1990, as construction of our new court building was nearing its end, Bob Corcoran, who had recently left the Court of Appeals for the Supreme Court, sent out a memo suggesting that the new building really ought to have an inscription for its entryway. Could any of us, he asked, supply some memorable words for that purpose. There were many responses, but I remember only three:

Tom Kleinschmidt offered a line from Clarence Darrow: "There is no justice, in or out of court."

Tom offered another line that he liked even better from a man named Stanislaus Jersey Lee: "Look out for justice; she is blind."

My own proposal was to use the last words of *Heart of Darkness*: "The horror, the horror."

Curiously, Bob did not take to these suggestions and instead chose "Where law ends, tyranny begins."

I have to admit, with the passing of the years, that Bob's inscription has served better than our proposals. It was not an unqualified success, however. Shortly after the building opened, there were rumblings among some lawyers that the court should have left out the comma and substituted the word "and."



Edward C. Voss
(Division One, 1989-2003)

I have had the good fortune of spending 25 years with a wonderful lady named Gabrielle, 17 and 18 years with two great daughters, Katarina and Kristina, and 14 years at Division One of the Arizona Court of Appeals.

After six years on the trial court, four of which were spent as presiding judge of the domestic relations court, I felt like I needed a new challenge. I am not sure why I looked down the street to the state capitol, but Judge Contreras' description of the new state courts building sparked an interest. After Governor Mofford made the call, I had a bit of buyer's remorse. Although I have always been a solid writer, the thought of stepping in with the likes of Judges Haire, Kleinschmidt, and Fidel produced more than a few fitful nights. Indeed walking down the hall where the portraits of retired judges were hung

added to my concern. Of course there was the inimitable and disarming portrait of then-Judge O'Connor, but next to her hung the portrait of Judge Donofrio. His stern look reminded me of when he was a juvenile court judge and suggested to me and my parents that I consider military school—somewhere out of state. His suggestion was heeded and, as it turns out, was a very good one.

I survived the fitful nights and reported for duty. My first official visitor was Justice Feldman, who, after expressing surprise that I was appointed, indicated he was available if needed to provide advice on insurance cases. That was the extent of my orientation. Although the court had no official policy manual, "policies" of the court would appear as needed from the judges aggrieved by unknowing non-compliance.

I was ensconced in what was previously a small file room attached to the

Rudolph J. Gerber (Division One, 1988-2001)

Somewhere in 1990s there was an appeal to the court from an attorney fee sanction levied against a southern Arizona lawyer. A panel consisting of Judge McGregor, Judge Shelley and I heard the oral argument. The sanctioned attorney had hired a Texas sole practitioner to do the brief and the oral argument. He was a short, flush-faced aggressive rooster sort of fellow, belligerent almost to being obnoxious. When we later upheld the trial court sanction, this Texas fellow filed a motion to vacate our decision because, as his pleading explained, the three of us were gambling on the bench on the outcome of the appeal. How he could see the dice (cards? chips? straws?) is a mystery, because the bench railing prevents counsel from seeing the bench surface where, supposedly, the dice were being cast. How the three of us could bet on an outcome we controlled also escaped us. Because of the obvious conflict, another panel headed by Judge Lankford heard his motion, denied it, and sanctioned him several hundred dollars for a frivolous pleading, along with a referral to the Texas disciplinary board. To this day I imagine the Texas lawyer roaring out of the court parking lot with his Texas license plate proclaiming "Don't Mess with Texas."



clerk's office. The couch had no legs and sat on the floor. With Sue Gonzales guarding the front door (she had been with me as my JA from the time I was a commissioner) and an ASU grad named Sandy Friedman pointing out non sequiturs and dangling participles, we got through a critical first year. And the rest, as they say ...

During the four years I served as Vice Chief and Chief Judge of the court, I was able to travel to other states in various capacities for the ABA. Through these and many other experiences, it was obvious that Division One of the Arizona Court of Appeals was a very special court. The mix of personalities, the mix of strengths and weaknesses,



on the bench.

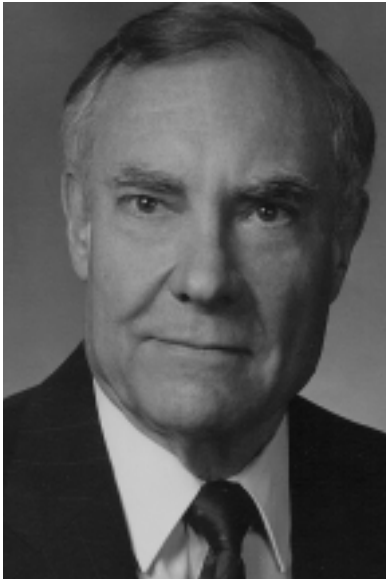
There is a reason that when asked, every able-bodied retired judge appears at a court function. They attend because they share the same wonderful memories and affection for this court.

the diversity of thought, and the common ingredient of collegiality made going to work something I looked forward to every day. It also produced an excellent work product. I would have stayed, and I am certain others would have stayed if there was any financial incentive to do so after 20 years

My first official visitor was Justice Feldman, who, after expressing surprise that I was appointed, indicated he was available if needed to provide advice on insurance cases. That was the extent of my orientation.

— Edward C. Voss

J. Thomas Brooks (Division One, 1982-1991)



On June 1, 1982, I was appointed to Department C of Division 1 to replace Judge Laurance T. Wren, who passed away that year following a long and tragic battle with cancer. Judge Wren and I had previously served together on the Superior Court in Flagstaff.

Although I was officially appointed and began serving on June 1, I joined with Judges D. L. Greer, Tom

Kleinschmidt and Bruce Meyerson, of newly created Department D, in being “sworn in” at a ceremony on July 1. However, my one-month seniority over those fellow judges had already given me Judge Wren’s former chambers on the first floor of the Capitol and, more important, his reserved parking space in the basement!

When created by the legislature, Department C was to be primarily responsible for hearing appeals from awards of the Industrial Commission. Because I had never previously been involved in workers’ compensation law, either as an attorney or a judge, I naturally questioned my ability to begin my education on the appellate bench! My concern was somewhat tempered by the fact that my tutors and fellow judges, Jack Ogg and Eino Jacobson, had become well-respected experts in the field. My decisions were carefully scrutinized before being joined in by these learned judges.

The same year as my appointment, my friend Stanley Feldman was appointed as a Justice of the Arizona Supreme Court. Soon thereafter, it appeared that the Supreme Court was going to take a hard look at a number of its previous opinions—including the field of workers’ compensation. As the orders vacating decisions of Department C began to come down, it appeared that my writings may not have been so “learned” after all!

I have many fond memories of my time on the court. We argued with each other and even had some seemingly bitter debates, but we also laughed together and were always friends. I should mention and acknowledge those judges with whom I served who are no longer with us: Donald Froeb, William Eubank, Melvin Shelly, John Claborne and D. L. Greer.

John M. Roll (Division Two, 1987-1991)

Eighteen years ago, while serving as an Assistant U.S. Attorney in the civil division, I learned of a vacancy on the Arizona Court of Appeals, Division Two. My interest was piqued because of my appellate experience arising from the then-prevailing practice in the U.S. Attorney’s Office for each attorney to litigate on appeal any cases tried by that attorney.

The Arizona Court of Appeals opening was created by the resignation of Judge Ben C. Birdsall, who was terminally ill with cancer. Judge Birdsall had been an extraordinary superior court judge before whom I had tried several cases. He had gone on to serve with distinction on the Court of Appeals.

My wife, Maureen, was most supportive of my decision to apply. The selection process served as a catalyst for me to become reacquainted with Judge Birdsall, for whom I had worked as a summer intern in 1970.

Between 1987-1991, the years during which I served on the Arizona Court of Appeals, Division Two, I had the privilege of serving alongside a daunting group of judges who accepted me with great kindness and patience. At 40, I was the youngest member of the court and at 60, Judge Jim Hathaway was the oldest, yet he became a close friend and mentor. Other members of the court included Judge Lloyd Fernandez, who became a friend and officemate and who introduced me to golf (and who also introduced me to the need for deference to the trial court, a concept to which I later became much more attached!); former U. of A. College of Law Dean Judge Joe Livermore, who introduced me to the value of brevity in opinions; Judge Larry Howard, who was a Renaissance man (and

who delivered an eloquent and fitting eulogy at Judge Birdsall’s funeral); and Judge Mike Lacagnina, who had been an outstanding litigator and who brought color and wit to the bench. The law clerks, staff attorneys and support staff who served the court at that time created a remarkably enjoyable workplace.

During those years, Division Two granted oral argument in virtually all civil appeals. It was the practice of Division Two, as it still is today, to provide counsel with draft opinions prior to civil oral argument. A substantial part of Division Two’s caseload consisted of Division One cases. In addition to being helpful to Division One, this practice gave a statewide flavor to Division Two and afforded Division Two judges the opportunity to have attorneys from outside of southern Arizona appear before them.

I will always be grateful for the privilege of serving on the Arizona Court of Appeals.

