



THE HISTORICAL SOCIETY OF THE TENTH JUDICIAL CIRCUIT

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Chair's Note

By: Andrew Schultz, Albuquerque, NM

There is no secret to making history interesting. Barbara Tuchman, the great American historian and author said it in two words: "Tell stories." That's what history is: story. As David McCulloch wrote in the introduction to his most recent book, *The American Spirit*, history "is about who we are and what we stand for and is essential to our understanding of what our own role should be in our time. History, as can't be said too often, is human. It is about people, and they speak to us across the years." That idea is perfectly embodied by the mission of the Tenth Circuit Historical Society: "To preserve and promote knowledge of the history of the development of the law in the Tenth Circuit and the judges and notable lawyers who have served in the Circuit." This interchange between our contemporary lives and earlier times helps us to understand the personalities, circumstances and events of the judges, lawyers and decisions that make up the history of Tenth Circuit Court of Appeals and shape who we are today.

We hope to make this history less intimidating and more approachable by a new series of programs that focuses on the living history that exists in all of our communities. There is a wealth of stories that exists in the experiences and careers of many of our more seasoned lawyers and jurists who we work with every day, and we encourage Society members to take full advantage of this treasure. After all, as Harry Truman once said, "the only thing new in the world is the history you do not know."

Thank you for your continued and generous support of the Society.

Portrait Presentation for the Honorable Paul J. Kelly, Jr.

By: The Honorable David M. Ebel, Tenth Circuit Court of Appeals

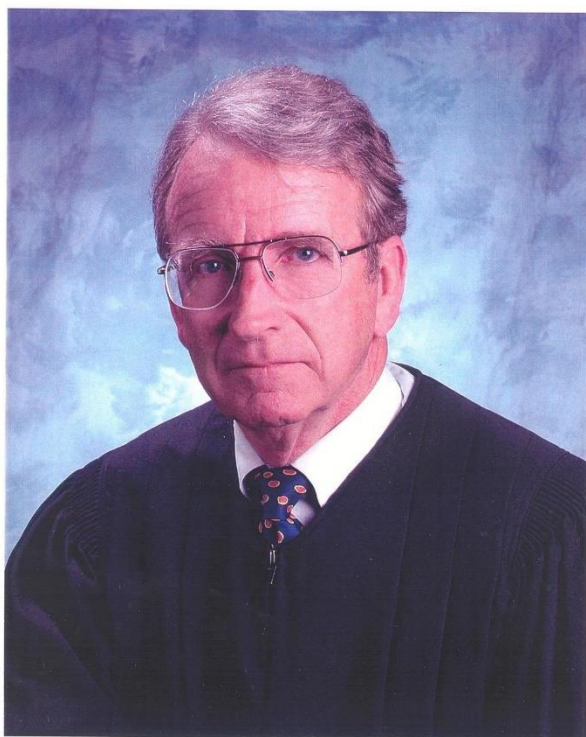
On August 24, 2018, the Tenth Circuit honored Judge Paul Kelly with a portrait to recognize his many years of distinguished service. We are proud to reproduce remarks that Judge David Ebel prepared for the portrait presentation.

Paul Kelly's route to the Tenth Circuit was circuitous, with one consistent theme—cream always rises to the top.

He was raised on Long Island, where his father was a respected jurist on the New York state trial court. His education was more or less eastern: college at Notre Dame and law school at Fordham. While in law school, he clerked for the prestigious New York law firm

of Cravath, Swaine & Moore. He was raised an easterner, talks like an easterner, and even spent one summer working on a fishing boat off the Atlantic shore.

At that point, as he was about to graduate from law school and on the cusp of starting a prestigious New York law career, something very improbable occurred. He was working on a uranium case at Cravath which involved a small seven-person law firm in Roswell, New Mexico, known as the Hinkle law firm. As a joke, Paul asked if they needed a lawyer, and they invited him down to Roswell for an interview. Now, Roswell is close to the Mexican border where it would take a jet plane to get to the nearest Macy's or Neiman Marcus store, and it is a very long way from the Atlantic Ocean. So far as I know, Paul Kelly had never been to New Mexico, and certainly had never been to Roswell. Yet, he was always willing for new adventures. So, he agreed to fly to Roswell for an interview.



The interview went well. At some point, Paul asked the firm when he was going to be reimbursed for his travel expenses, and at that moment he realized there had been a slight misunderstanding. Apparently, the Hinkle firm had assumed Paul would pay for his own travel expenses, and Paul had assumed that Hinkle would pay for them. So, after an impromptu meeting of the firm, they came up with a counter offer. If the firm made Paul an offer and he accepted, or if they did not make him an offer, they would pay his entire travel costs. However, if the firm made him an offer and Paul declined, then the firm would split the travel costs with him. Well, the Hinkle firm did make Paul an offer. Paul said he accepted because he could not afford to pay half his travel costs. In any event, Paul accepted—the rest is history. This New Yorker ended up in Roswell, New Mexico.

More twists and turns lay ahead. Paul decided to run for the state legislature, and, of course, he won. He served two terms in the State House of Representatives, and retired undefeated at the polls. One of his noteworthy achievements in the legislature was to establish a bipartisan coalition of Republicans and Democrats to move along legislation. Paul, maybe a new political career awaits you at the U.S. Congress now that you have taken senior status!

Later, the Hinkle firm decided to open an office in Santa Fe and Paul moved to Santa Fe to head it up. Of course it did well.

The next big step for Paul involved his selection as a Judge on the Tenth Circuit Court of Appeals. As of my last count, he has authored over 900 published opinions and has voted on more than 6,000 federal cases, involving nearly every issue imaginable from religion, to civil rights, to environmental law, to criminal cases, and of course addressing nearly every constitutional issue out there.

I asked Paul to tell me some of his most important cases, and in typical Paul Kelly fashion, all he would say is that each case he decided was the most important one for the litigants involved. I will mention just one. He was recently appointed by the U.S. Supreme Court as Special Master for the Supreme Court in a water dispute between Florida and Georgia.

But, just being a judge on the Tenth Circuit was not enough to satisfy Paul's prodigious energy. Throughout his time on the Tenth Circuit, he also has served as an active trial judge presiding over many district court trials. He is one of the very few Circuit Judges in our entire country to maintain an active trial docket while simultaneously serving as a full-time judge on the federal appellate court.

Oh, by the way, he has also served on three national committees of the Judicial Branch: (1) Judicial Branch Committee charged with relations with the Congress; (2) Codes of Conduct Committee; and (3) Civil Rules Committee. It's unheard of to serve on three committees.

Does all of this make you tired, just hearing about it? Well, apparently, it was not enough for Paul. Throughout nearly his entire time as a judge, he also served as a volunteer fireman for the Hondo Fire Department, where he eventually became Chief. In that capacity, he made sometimes as many as 100 emergency calls a year, many of them in the middle of the night—where he was the first responder for automobile accidents, house accidents, intruders, and the like. He has talked down armed and agitated people with guns and cut victims out of crashed cars with jaws-for-life machinery. And he is certified for emergency medical response, undoubtedly saving many lives over the years. 100 calls a year typically at night! All I can say at this point, Ruth, is that you have earned your sainthood many times over.

Oh, by the way, don't even get me started talking about Paul's toys. Chief among them is a large 46-foot troller that he keeps birthed in the Atlantic off New York. Ruth and Paul spend much of their summers traveling up and down the Atlantic coast and into inland waterways on that boat. During this time, of course, he doesn't miss a beat on his judicial work because his boat is fully equipped with internet capability. While on the boat, Paul claims the official title of Captain. But Ruth, not to be outdone, insists on the title of Admiral.

Yet, most indicative of who Paul Kelly is, are the values that he holds most dear.

Chief among them, of course, is his family. Paul would say his crowning achievement and his greatest joy is his family—beginning of course with his wife of more than 50 years, Ruth Kelly. By the way, yesterday I asked Ruth for one story about Paul that I could relate to you. She said, "Tell them Paul is really kind." Could anyone ask for a better endorsement

from their spouse? Ruth, would you stand. And, of course, his five children and their spouses, and 13 grandchildren.

Next, after his family, Paul takes enormous pride and pleasure in his law clerks—past and present. They have weekly lunches together. He sometimes takes them hunting or fishing or hiking in the nearby mountains, although understand his preferred hiking route is to take the tram up to the top of a slope and then hike down. Paul Kelly's mother didn't raise any dummy.

So, to sum up, who is Paul Kelly? He is a man of faith. He is a man who puts his family first. He is a man of strong values and unimpeachable integrity. He is a man with a guiding star of public service. He has more energy than nearly any person I have ever known. He is a practical man who believes that justice delayed is justice denied. He is a gentleman who treats everyone with respect and makes all feel welcome. He is an outstanding jurist, legal scholar, and author of clear, plain spoken, and practical opinions.

And that is why I can say without embarrassment, "Paul, I love you, my friend." Ladies and gentlemen, I give you Paul Kelly.

Practitioner Spotlight: Malcolm E. Wheeler

By: Julian Ellis, Denver, CO

Amos Tversky said, "Reality is a cloud of possibilities, not a point." One need not study Malcolm Wheeler's story long to see that Mal, as his friends know him, has navigated the cloud of possibilities with vigor, success, and humility. For Mal the possibilities were near endless, and this short article provides only a snapshot of his life and his 50-year career as a litigator, trial lawyer, and academic.

Mal was born in Berkeley, California, but he grew up in the Panama Canal Zone, a former unincorporated territory of the United States. Mal's father was born and raised in Panama and returned there after serving in the U.S. Navy in WWII. Mal lived in the Canal Zone from the age of two through high school and described it as a sort of "socialist environment," because the U.S. Government was the only employer and owned all of the housing. Mal's high-school teachers in math and the sciences had graduate degrees, were superb teachers, and inspired in him a love for physics. When it came time to select a college, Mal turned down his Ivy League offers and left the Canal Zone to attend the Massachusetts Institute of Technology with dreams of becoming a theoretical physicist.

After two years at MIT with just a B average, Mal recognized that upper-level physics was not intuitive to him as it was to the "real" geniuses in his math and physics classes. Rather than turning to applied physics, he returned to the West Coast after earning his Bachelor of Science degree and attended Stanford Law School. It was not until his third year at Stanford that a love for the law started to take shape. Sitting in a seminar taught by Professor Richard Posner and attended by five other professors who would have been on anyone's list of who's-who thinkers in economics and antitrust theory, Mal found the participants' application of quantitative economics to antitrust law and policy "the most intellectually

stimulating dialogue” that he had ever encountered. Mal had found his alternative path to theoretical physics.

After graduating from Stanford in 1969, Mal practiced antitrust law in New York and California for two years. In 1971 he accepted an offer to join the faculty at the University of Kansas School of Law. Mal continued his focus on antitrust, but he also taught courses on prisoners’ rights, regulated industries, and intellectual property. While teaching there from 1971 to 1973, Mal did pro bono litigation for prisoners at the Kansas State Penitentiary and at the U.S. Penitentiary in Leavenworth, for the Potawatomi Tribe, and for the Munsee subtribe of the Lenape Nation.

Mal returned to private practice in 1973 to work at Hughes Hubbard & Reed in Los Angeles. The firm had just lost the liability phase of a defamation case against Howard Hughes, famed personality and one of the most reclusive and financially successful individuals in the world at the time. The issues in the second phase of the trial were to be compensatory damages and punitive damages. Mal’s first assignment was to figure out how to limit the amount of punitive damages. He did it by writing, arguing, and winning a motion asserting that the California punitive-damages



statute was unconstitutional as applied to public-figure plaintiffs, including the plaintiff in that case. Mal’s work in that case, along with a later article in the Virginia Law Review, launched his career as one of the country’s preeminent scholars and defense lawyers on the constitutionality of punitive damages awards under the U.S. and state constitutions, the applicable standards, and the most effective ways for defending claims for punitive damages in jury trials. Even today, Fortune 500 companies and the U.S. Supreme Court consult Mal’s contributions to the literature and law on punitive damages when faced with challenging putative damages questions.

Mal returned to academia in January 1978 by taking a leave of absence from Hughes Hubbard to serve as a visiting professor at the University of Iowa School of Law. At the end of that semester, he decided to accept Iowa’s offer to leave private practice and again become a tenured full professor of law. But Ford Motor Company had a different idea.

Around that time, Ford had been slapped with a record-setting \$125 million punitive damages judgment, and another \$2.8 million in compensatory damages, in a high-profile California case in which the plaintiff, Richard Grimshaw, claimed that all Ford Pinto autos were defectively designed. Faced with dozens of similar civil cases around the country, Ford asked Mal to defend the company. With dual appointments in hand—tenured professor by day and law-firm partner by night—Mal put his science background to work, delving into every facet of the Pinto’s design and development. Mal spent the summer of 1978 living in Dearborn, reading every Pinto document he could find and interviewing every Ford engineer who had played any role in designing, testing, or manufacturing Pintos. In August, three teenage girls in Indiana died in another Pinto crash, and the State of Indiana charged Ford with a felony: reckless homicide. Based on massive additional work over the next 17 months, Mal and Jim Neal, who had prosecuted Haldeman and Ehrlichman in the Watergate tape cases, successfully defended the criminal case in a month-long trial in 1980. As a result, the civil cases soon faded.

Through all this, Mal gained national recognition for his product liability work, which fundamentally changed how manufacturers approached product liability litigation. At the time, he was also one of a few academics in the country that actively litigated cases. Mal returned to the University of Kansas to teach from 1981 to 1983, but took a leave of absence to serve as Chief Counsel to the U.S. Senate Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice, a committee organized to investigate the FBI and Justice Department in the Abscam probe.

Mal then again recommenced his national litigation practice first by rejoining the Hughes Hubbard partnership and then agreeing to head the product liability group in the Los Angeles office of Skadden Arps Slate Meagher & Flom. In his words, “litigation was back in my blood.” For several years he went back and forth between coasts trying cases, arguing appeals, and serving his many clients. In the summer of 1990, however, he and his wife, Donna, knew they wanted something different, a place that would be good for raising their two children and allowing him to be home more often. They relocated in 1991 to Denver, where Mal joined his long-time friend, John Siegesmund, at the Denver firm Parcel, Mauro, Hultin & Spaanstra. While there, Mal continued to serve as national trial counsel or national class action counsel for various Fortune 500 companies, including manufacturers of automobiles, pharmaceuticals, or appliances.

In 1998, Mal, along with several colleagues from Parcel Mauro, formed the Denver-based litigation firm Wheeler Trigg Kennedy (now Wheeler Trigg O’Donnell), which is now one of the largest law firms in Denver by attorney count. Soon after co-founding the new firm, Mal achieved one of the capstones of his career in *Geier v. American Honda Motor Company*, a case in which he briefed, argued, and prevailed before the U.S. Supreme Court on the question of whether federal preemption applied to certain state-law product claims. The Court ruled 5-4 in favor of Mal’s client, Honda.

After nearly 45 years in private practice and academia, Mal stepped down from the Wheeler Trigg O’Donnell partnership on December 31, 2012, and was given the title of counsel emeritus in the firm. But for the next four years he found it difficult to say no when

asked to help the firm's clients on interesting cases, and he ended up arguing and winning a case in the Colorado Supreme Court and working on high-stakes cases in trial courts in other states that kept him away from home almost as much as previously. Since 2016, although Mal's office light can still be seen on early in the mornings, he has transitioned his focus away from billable matters to other time-intensive projects. He regularly advises The Thinking Project Institute, a nonprofit that works with teachers and public schools in lower-income communities to build open-minded, socially, and emotionally literate learning communities, and other pro bono clients. He has served as a mentor in the Denver Kids program. He remains an active member of the American Law Institute, most recently serving on the Members Consultative Group for the Restatement of the Law, Liability Insurance. And he is intensely conducting research for a book that he hopes to finish sometime in 2021.

By all accounts, Mal's professional accomplishments are sterling, and his A-list clients are the first to sing his praises. They say he is "renaissance attorney," "an absolute brilliant strategist," and, most importantly, is "humble." As one of Mal's long-time clients put it, "He's the most normal genius I've ever met in my life." Mal shares a similar respect and appreciation for his former clients. He and his colleague Jack Trigg recently organized a social event in Michigan for retired in-house lawyers at Ford with whom they had worked closely during their careers as Ford's outside counsel. The event gave Mal and Jack the opportunity to express their appreciation to all those lawyers, and there was an outpouring of reciprocal affection that no one who attended will soon forget.

So how did Mal mold a cloud of possibilities into a distinguished legal career? If you ask him, he will tell you that he was always chasing a dream and trying to make a meaningful contribution. In the end, you have to dedicate yourself to something, give it all you have, and acquire the breadth of knowledge—whether it comes from academic research, digging through boxes on the warehouse floor, or any other effort—that is the ultimate secret weapon. In his words, when it comes to trials, "the other lawyers may be smarter than I am, more clever, more articulate, and funnier; but none of them will know the facts, the law, and the specific case better than I do."

Happy Holidays!

The Tenth Circuit Historical Society's Directors, Officers, and State Representatives wish you and yours a safe, happy, and healthy holiday season. We look forward to remaining in touch through the new year and welcome any comments or suggestions you may have.

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