

2013

The Distinguished Life & Work of the Honorable John E. Simonett: Justice Simonett & the Art of Judging

Paul H. Anderson

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Anderson, Paul H. (2013) "The Distinguished Life & Work of the Honorable John E. Simonett: Justice Simonett & the Art of Judging," *William Mitchell Law Review*: Vol. 39: Iss. 3, Article 7.

Available at: <http://open.mitchellhamline.edu/wmlr/vol39/iss3/7>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

**THE DISTINGUISHED LIFE & WORK OF THE
HONORABLE JOHN E. SIMONETT:
JUSTICE SIMONETT & THE ART OF JUDGING[†]**

Moderator

Tom Boyd

Introduction

Honorable Paul H. Anderson

Presenters

Honorable Alan C. Page
Honorable Esther M. Tomljanovich
Honorable Martha M. Simonett

Diana Morrissey

James Sheehy

Chelsea Brennan DesAutels

Nathan Sellers

Tom Boyd: The title of the next panel is “Justice Simonett & the Art of Judging.” It will be moderated by Justice Paul Anderson. I have spoken with Justice Anderson about his plans for this part of the program, and I am still not entirely sure what he is going to do, but I think we should all expect something very dynamic and fluid. I think it will be reminiscent of what people used to do in the old days, something that I used to hear about from the 1960s—those things they called a “happening.” In any event, I think it will be very interesting.

Justice Paul Anderson of course needs no introduction because in all likelihood he is already on a first-name basis with all of you in this room. He is a graduate of Macalester College and the University of Minnesota Law School. He had a distinguished career

[†] This is an edited transcript from a daylong continuing legal education seminar at William Mitchell College of Law on March 23, 2012, honoring the legal career of the Honorable John E. Simonett.

with the LeVander law firm in South St. Paul. Governor Arne Carlson appointed him as chief judge of the court of appeals in 1992 and to the supreme court in 1994.

Another member of this panel is the Honorable Alan Page, who also needs no introduction. Justice Page received his undergraduate degree from Notre Dame and his law degree from the University of Minnesota Law School. He practiced law with the firm of Lindquist & Vennum, then he worked at the Minnesota Attorney General's office before joining the supreme court in January 1993.

The third person on this panel, who again needs no introduction, is Esther Tomljanovich. Justice Tomljanovich received her law degree from the St. Paul College of Law, which is the predecessor of William Mitchell. She was Revisor of Statutes for the State of Minnesota, and in 1977 she was appointed as a district court judge in the Tenth Judicial District. She served on the Minnesota Supreme Court from 1990 to 1998. She is a founding member and former chair of the Minnesota Supreme Court Historical Society.

We are also fortunate to have on our panel two former law clerks of Justice Simonett. Jim Sheehy received his B.A. and J.D., *cum laude*, from the University of Minnesota. Jim clerked for Justice Simonett from 1989 to 1990. He practiced law with two prestigious Minneapolis law firms from 1990 to 1997 and opened his own law office in 1997.

We are also pleased to have Diana Young Morrissey with us today. Diana received her B.A. from the College of Saint Catherine and her law degree from Georgetown University. She clerked for Justice Simonett from 1983 to 1984. She practiced law with Faegre & Benson for many years and now practices with the Sapia Law Group.

Finally we are very pleased to have two of Justice Anderson's law clerks with us—Chelsea Brennan DesAutels and Nathan Sellers. Chelsea and Nathan will share with us the reflections of some of Justice Simonett's other law clerks. Now fasten your seat belts and hang on for what comes next.

Justice Paul Anderson: Like any good oral advocate, Tom leaves me with some room when he describes what is going to happen next. He has cautioned you that it will be both dynamic and fluid. Both of these words are sufficiently ambiguous to leave all of us with

some doubt about what will come next, so I will start with an explanation.

What we are going to try to do is to talk about John Simonett and the art of judging. I will make some preliminary remarks, then we will have comments from two of John's former clerks, then two of my current law clerks will share the observations of some of John's other law clerks who could not be with us today. The law clerk comments will be followed by some comments by two of John's former colleagues on the supreme court.

Because any discussion about John Simonett and the art of judging would be incomplete if we did not acknowledge that he and Doris had two daughters who also served Minnesota as part of our state's judiciary, we will remember Anne Simonett and hear from Judge Martha Simonett. Then we will conclude by sharing with you some of John's observations and insights into the art of judging through his own words.

So let us get started. For me it is a real privilege to join all of you today as we honor the legacy and share our memories of one of our best—Minnesota Supreme Court Justice John Simonett. To many of us, John was a hero, mentor, and friend. I am one of those people who believe that we need heroes to inspire us. That is part of what we are doing today; we are seeking inspiration from the life of John Simonett and the work he has done.

Reflecting on what a heroic person has accomplished can infuse us with a certain vision and purpose. John fits very easily into this heroic mold. John had many attributes that can inspire—wisdom, a keen intellect, a passion for the law, and a willingness to mentor others. He was an outstanding lawyer and justice. He knew the law, and when he clearly articulated what the law was, something he did very often, he could make life easier for all of us. As a mentor, John was always willing to share his wisdom and experience with others. He mentored many of us as legal professionals and many in our personal lives.

What a privilege it is for me to say that I was a friend of John Simonett. Together we shared so many of his experiences and his stories about family, Minnesota history, and the law. It was something special to hear him tell stories about other lawyers he knew, especially stories about his longtime law partner in Little Falls, Gordon Rosenmeier. What a treat it was to hear him talk about being a country lawyer.

How many times did he start a pithy story or a piece of advice

with that phrase, “I am just a country lawyer”? When he would start out this way you needed to watch out and be on your toes because what was about to come after “just a country lawyer” was going to be profound, filled with common sense and wisdom, and on occasion something that would make you feel more humble. We are so fortunate to have had John serve us and our state as a supreme court justice.

I see that Governor Quie is here, so I have an obligation to do something on John’s behalf at this point. After I was appointed to the court, I got to know John pretty well. I know what he would want me to do now. But first a preliminary point to provide context. Most of us here got to know John because he was a justice. We knew him in this role, we have read his opinions, and we have worked with him as colleagues, law clerks, and in many other capacities. In large part that is what this program is really about—focusing on John’s career as a justice. Many of us were actually able to watch John practice the art of judging. But the message I deliver while Governor Quie is still here precedes John’s career as a judge. It is about the process of becoming a justice on the supreme court and how becoming a justice is not something that just happens.

Those of us who are privileged to have served on the court know that there is nothing certain or inevitable about getting here. As we celebrate John and his career in the law, there appears to be a certain inevitability about him becoming a justice. Believe me, there was nothing inevitable about it. He was one of the fortunate few who were struck by this particular bolt of lightning. The concept of lightning striking brings me back to Governor Quie. We have with us in the back of this room a person who, much like the mythical god Thor, had the ability to cast such a lightning bolt. That would be former Governor Quie when he exercised his power to appoint judges and justices.

There are certain things a lawyer can do that will place him or her in a position where lightning can strike. What a lawyer wants to do is to conduct his or her professional and personal life in a way that will put him or her in a place where lightning can strike. I know that John knew his appointment was not inevitable. He knew that while he had done several things that placed him in the arena where lightning could strike, one final discrete act was required if Governor Quie was to throw that lightning bolt in his direction.

So, if John were here today he would want me to do one particular act. He would want me to turn to Governor Quie and

say, “Thank you governor for having the trust and confidence in me to appoint me to the supreme court. You did not know me well when you appointed me to this position. When I applied I hoped that I was qualified, I hoped that I would be able to do this job well. Thank you, Governor Quie, for having confidence in me. I hope that through my service to our beloved state I have justified the confidence you placed in me.” Saying what I just said is one of the obligations that I must fulfill on John’s behalf today. We must acknowledge that we would not be here today celebrating John’s career if Governor Quie had not cast a lightning bolt in John’s direction.

At this point, a word about how one can place oneself in the arena where a judicial appointment is a possibility is in order. The bad news for those of you who want to follow in John’s footsteps and become a judge is that there are not that many judicial positions available in Minnesota. The good news is that being a good lawyer and doing the things that will make you a good lawyer are the same things you want to do to put yourself in that arena where lightning can strike. John did many things that put him in a position to be seriously considered for a judgeship, and we can all learn from what he did. John started out early to develop a good reputation. To prove my point I will read something to you. I will now read from the newspaper article that told about John’s marriage to Doris. In the article the reporter tells about John marrying this lovely young lady and then describes Doris, her wedding dress, and afterwards how the young couple went to the City of Montgomery where they caught a train to the Cities. But here is the important part of the news article that I need to share with you—the reporter says that the groom is “well and favorably known here.” Thus, you can see that John is starting out well; John is beginning his professional career with an excellent reputation.

Another thing John did to put himself in contention for a judgeship occurred while he was at the University of Minnesota Law School. While there he worked on the law review and associated with the best and the brightest students and future lawyers at that school. Once out of law school he did things in the profession to distinguish himself. He went to Little Falls where he associated with one of the most distinguished lawyers and political leaders in our state—Gordon Rosenmeier. Early on he demonstrated a passion for the law, and he and Mr. Rosenmeier shared that passion. One must never underestimate how important

it is to have a passion for things in life.

John had a passion for good literature. In essence he was a Renaissance man. He sought to lead an informed life. He was not content to confine his life to Little Falls, or Morrison County, or even Minnesota. Through literature and his appreciation for good literature, he made himself a world citizen, a person who understood the nature of the human condition. He was always willing to share a comment on something he had just read, especially if he found it in *The New Yorker*. These traits were what put him in the arena where lightning could strike. Incidentally, another thing that he did was to become an excellent lawyer.

Governor Quie told you what a great person Doris is, and all that he said is true. Doris was indeed a key ingredient in the formula that led to John's appointment. But there is something else that happened that helped to put John in a position where the governor would pay particular attention to him. A key rule of success is that you will never really know who it will be who will stick up for you or vouch for you when it counts most. You never are quite sure who will be your advocate. I talked to the governor on this very issue and asked him who John's advocates were. The governor responded by saying how pleased he was that I asked this question. He told me that he received a letter that described this wonderful and marvelous lawyer from Little Falls. The governor said that after reading this letter, he wanted to meet the man it described. Now before I proceed to tell you who wrote the letter, I need to pause and correct a mistake and tell you who did not write the letter. Doris did not write the letter.

Last November at the Supreme Court Historical Society, Tom Boyd read a statement from Governor Quie in which the governor said Doris had written the letter. Doris was in the audience and with a horrified look on her face she turned to Martha and said that she did not write the letter. Word got back to me about this mistake, so I thought a bit and concluded that there was only one other person who could have written such a letter. The next day I called Paul Rogosheske and asked him to ask his mother, Dorothy, if she had written this letter. The next day I received a message that it was Dorothy, wife of retiring Justice Walter Rogosheske, who had written the letter. Dorothy was someone who knew John well, but he never expected that she would do such a marvelous thing for him. So you see, you never know where your advocates will come from.

All the foregoing activities and attributes still do not provide us with a sufficient explanation to fully understand the type of justice John was. John knew what a privilege it was to be given the opportunity to serve the people of Minnesota. He knew what a privilege had been bestowed on him by the governor. He understood what a privilege it is to be in a position to serve. He also understood what I call the legacy question. The legacy question is a question every public official must be prepared to answer upon completion of a term of public service. In essence, the legacy question to be answered is this: What have you done with the privilege bestowed upon you to make this community, state, and country better for the citizens you have sworn to serve?

It always surprises me how many public officials do not get this question, much less try to answer it by their services. But the good public servants get it. They understand what a privilege it is to serve the citizens of this state, to be given this honor. But with this honor comes the obligation to be accountable for making things better. A public servant has an obligation to leave things better than he or she found them. To justify this privilege, good public servants understand that fulfilling the legacy is not something that just happens naturally; no, it must be earned. One must earn it by doing one's absolute best every single day one is on the job.

As we reflect upon the career of John Simonett and the art of judging, we realize that he understood what a privilege it was to be placed in a position to render public service. But he also was aware that he was accountable and that he had an obligation to leave things better than he found them. I believe the very fact that we are gathered here today at William Mitchell College of Law to celebrate John's life and legacy—and I use that term purposefully—we celebrate his understanding that he was obligated to do everything he could to make things better for the citizens of our state and that he had to work at achieving this goal every day he served as a justice. He understood that this is what it is all about. In essence, he got the legacy question and answered it. John Simonett, through his service, left things better than he found them.

What we are going to do next is learn how John went about building his legacy. We will do this through the recollections of John's law clerks, his colleagues, and his daughter Martha, and finally through his own words.

We will start with the law clerk section of the program. We

have two of John's former clerks with us. They have already been introduced. But, before we start with John's clerks, I want to let you know I have some pictures that I will be putting up on the overhead screen while the clerks speak. The first picture is of John sitting on his first court. I will randomly put up the other pictures during the clerks' presentation. So, let us start with Diana. You are going to go first, and I must warn you that I may ask you some questions as you go along.

Diana Morrissey: Back during my days as a clerk we called Justice Simonett, "Judge" Simonett. While today that might sound a bit disrespectful, to us it was a more familiar and almost endearing title. It was the professional equivalent of calling your father "dad" or "daddy." So we always called him Judge Simonett, and that is what he wanted us to do.

Continuing on the "dad" theme, Judge Simonett was just a couple years older than my own dad. They were both small-town attorneys. They were both public servants in the highest sense of that term, and they both, in my mind, really embodied the highest of professional standards. In the same way that my dad as a prosecuting attorney would sometimes even assist a *pro se* defendant's opening and closing arguments in criminal proceedings, Judge Simonett would give thoughtful consideration and dignity to the often-tortured appellate arguments of jailhouse lawyers. Both men valued both sides of the litigation process and felt strongly about giving all litigants their "day in court."

Judge Simonett's appellate opinions and published articles attest to his fine writing talent, keen intellect, and sharp wit. And others today, from various vantage points, have talked a lot about these traits. As I reflect on Judge Simonett as a jurist, from the perspective of an adoring law clerk, three additional attributes stand out—patience, deliberation, and common sense.

Judge Simonett's patience and deliberation were at their best in his dealings with his law clerks. My co-clerk—Mike Fairchild—and I often took quite different analytic paths and reached different recommendations from the same appellate record. Perhaps protectively, I don't recall if one or the other of us was more often correct, but Judge Simonett genuinely seemed to enjoy exploring our different approaches. I think we both relished our meetings with him in his chambers when we would discuss our respective analyses and recommendations, and then typically

meander from the issues in our case to issues in life generally. Through comments and questions, Judge Simonett often gently and skillfully steered us through the correct analysis of each case. Sometimes he left us with certain “food for thought,” and we would revisit the matter at a later session. But he never lost patience with our law-schoolish tendencies to over-argue our points or with our failure to consider a key factual, procedural, or legal point in the record.

Judge Simonett’s strategic use of his pipe during our chambers sessions manifested both his patience and his deliberative nature. During our discussions he often leaned back in his chair and took a thoughtful puff of his pipe midsentence. It was difficult to discern whether he was truly processing his thoughts during those pauses or if he was just giving us an opportunity to catch up with his analysis before completing his sentence. In either case, quite obviously I sometimes missed the point. On several occasions, I enthusiastically completed Judge Simonett’s sentence for him during such a pause, only to have him calmly put down his pipe and finish the sentence quite differently than I had anticipated. But Judge Simonett was never impatient or reproachful—he simply completed his thought as if there had been no interruption whatsoever. I never knew whether he was sparing me the embarrassment of a correction or whether he was truly so deep in thought that he entirely missed my feeble contribution.

As a small-town girl, I like to credit Judge Simonett’s common sense to his rural and small-town roots. To me, the greatest minds are those in which intellectual prowess is balanced with basic common sense. Judge Simonett’s common sense was demonstrated by his steady focus on the practical implications of any decision rendered by the Minnesota Supreme Court. Explaining that he, as a trial lawyer, had sometimes scratched his head over opinions and remand instructions from appellate courts, Judge Simonett frequently reminded his clerks that in addition to resolving legal issues and setting precedents, an appellate court should provide guidance and instruction for the bar and the trial bench. This approach was useful both for the case at hand—when remand was ordered—and more broadly for future cases with similar fact patterns, procedural developments, or legal issues. While he truly reveled and excelled in legal analysis, Judge Simonett never forgot the practical aspect of court rulings, and he

put as much care into the instructional angle of his opinions as into his formal legal analysis.

Jim Sheehy: Diana's thoughts are similar to many of the thoughts I have with respect to how Justice Simonett interacted with me when I was his law clerk.

When I first started the clerkship, Justice Simonett told me the supreme court is not final because it is infallible; it is infallible because it is final. This is a statement he actually attributed to Justice Rogosheske. Upon hearing this statement you might think that there was some arrogance in it, but it was not that way at all with him. He took every case very seriously because he knew that the supreme court had the final word on an issue. In terms of drafting his opinions, he was an extremely hard worker, and I will get back to that point.

The background on Justice Simonett and me is that I met him when I was a student at the University of Minnesota Law School. I saw that there was an appellate advocacy class to be taught by a justice of the Minnesota Supreme Court. It sounded like a very intriguing class to take. I was surprised that a justice would take time from his job to teach a class. It turned out to be a great experience.

Justice Simonett really liked teaching. We had a small class, probably about ten students. Every time we were in class he was very excited for the interaction with the students. I know that he loved being a justice, but I also know that it was somewhat stifling for him in some ways because he could not interact with the bar in the way he used to when he was a lawyer. So as a teacher he was really riveted on the students and what we were learning. One thing I do remember, and it is part of his humor I think, is that when he wrote a cite on the chalkboard for a case he wanted us to retrieve and read, he used a cross in place of "N.W.2d." When he first wrote it on the board, he stared at me, I think because I am Catholic, as if to challenge me to ask him what it really meant. It is something that I remember quite distinctly.

A relationship between a judge and his law clerk is very personal, and I think that we had a good relationship. We both liked fishing, we both liked poetry, and we both liked common things. He took me for what I was. I do not think that I was the person with the highest GPA that came to interview at the supreme court, but he and I had a great working relationship.

He was a magical person to work for. Many of us who knew him as a law clerk know it was an intimidating experience, but he never made you feel uncomfortable with your analysis of an issue, even if he did not think you had gotten it quite right. He would work with you; he was never degrading and never said a harsh word. But he challenged you.

One of the things I distinctly remember that he enjoyed, just like he enjoyed being a teacher at the University of Minnesota Law School, was the give and take with his law clerks. The justices did not go down the hall and lobby their fellow justices. No, he worked with the clerks to think through the arguments, to work through what should be right. Justice Simonett had a very philosophical outlook on the law, and I know that Judge Ross touched on it. It is not really what the right rule is, the black and white rule, but it is taking into consideration all of the right policies that may go into the analysis of *why* it should be right. He did this with such energy and curiosity that made it fascinating to be part of the process.

Judge Ross might be thinking, “The law clerks have the answer of how he wrote such great opinions,” but we do not. Although I will say this: every opinion that he wrote, he worked on very hard. He wrote in pencil, often with his pipe in hand. He worked all day long in his chambers. He would write his draft opinion in pencil, his faithful secretary Dee would type it up, he would edit the draft again in pencil, Dee would type up the next draft, he would edit it again in pencil, and then there would be yet another draft. Every opinion went through many, many drafts over many days and weeks. He would not release a draft opinion for the other justices to see until it was in just the form he wanted it.

In terms of utilizing his clerks, we would have to review his opinions and try to critique them. But as you can imagine, trying to critique his writing was not easy—so the response was often, “Sounds good to me, Judge.”

I will say this, and this may come as a surprise to some of you: he did not enjoy writing criminal opinions. I did write a draft of a few of them. He would work them over rigorously, of course. His forte was the civil cases—cases where the parties were trying to mold the law in a certain way. Many things about the criminal law were pretty cut and dry. Criminal defendants often did not have much of a chance on appeal. It is not that he was not sympathetic with criminal defendants, but he enjoyed working on aspects of the law that he could really have an impact upon.

In *State v. Richards*, he let me take a stab at the first draft because the case involved a pretty bright-line rule involving the right to represent oneself. Mr. Richards had killed his attorney, and it was such a gruesome record to read through. Mr. Richards asserted his right to represent himself and was denied that right, even though it was clear that he could make a knowing, intelligent, and voluntary waiver, which is the standard. Justice Simonett drew the assignment to draft that opinion. Later, when the report on the opinion was in the newspaper and we were having lunch, he said to me, “You know, I read the report in the newspaper quoting my opinion, and I thought to myself, ‘I didn’t write that.’” Well, I had not written it either. It was a quote from a U.S. Supreme Court case, which was the binding case on this point of law.

Justice Paul Anderson: Jim, I understand that you wrote a poem about or to Justice Simonett. Is that true?

Jim Sheehy: I did write a poem.

Justice Paul Anderson: Can you share that poem with us?

Jim Sheehy: I will. Justice Simonett taught me a lot of things. He taught me that even when skewering your opponent, do it in a dignified and thoughtful manner. In other words, practice law with respect. The practice of law, especially in litigation, is confrontational, but you have to be respectful to all the people involved, including the support staff. He also taught me about how to craft words. He did influence me, but like Judge Ross said, nobody is going to write like him, but we all can be influenced by him.

Here is a poem that I wrote; I started it last year. I sent him that draft, and now it has evolved a bit since then. It is called, “Justice Simonett”:

Justice Simonett

Justice Simonett
I will never forget
Clerking for you
It was the best

Your smiling eyes
Playful grin
Discussing law
And who should win

Pipe in hand
As you edit
Wonderful words
Flow like magic

Brilliant style
Wisdom and wit
Tell the story
Of your gift

Up on the river
As the sun does set
Thank you, Thank you
Justice Simonett¹

Justice Paul Anderson: Thank you, Jim and Diana. Now what we are going to do next is to have Chelsea and Nathan take about four or five minutes to share with us what some of Justice Simonett's other clerks had to say about what it was like to work with him. Chelsea, we will start with you.

Chelsea Brennan DesAutels: Justice Simonett's clerks were clearly charmed by his style and his demeanor. They called him a "Renaissance man," "perfect, like a character in a movie." For example, Reid Mandel, one of Justice Simonett's first clerks, writes:

I never heard Judge Simonett utter a profanity or raise his voice. Not that I oppose profanity in appropriate circumstances, and a raised voice can have its uses. But Judge Simonett just didn't operate that way. He wore broad suspenders, big bow ties and striped shirts, which all served to enhance his perceived lankiness. He had several kinds of pipes on his desk, corncob included, and he used them.

He liked to discuss books with us, books on the law as well as more general literature; particularly poetry. He

1. JAMES B. SHEEHY, JUSTICE SIMONETT (2012) (reprinted with permission).

usually had a small pile of current reading on the corner of his desk. We exchanged books and magazine articles from time to time. Some of the debates we had later made their way into an article he wrote, *The Use of the Term “Result-Oriented” to Characterize Appellate Decisions*.

Nathan Sellers: Reid Mandel continues by explaining how Justice Simonett’s unique personality shaped his interaction with his clerks:

Justice Simonett was a fan of *The New Yorker*. I remember running across a cartoon in the magazine in which the punch line was the same argument being used by an appellant in one of his cases. We got into a discussion as to whether the cartoon, because the Judge had seen it, had become some form of ex-parte communication for the case. I think we finally agreed that, like the rest of our research, it could be shared with the other justices without notice to the litigants.

Chelsea Brennan DesAutels: Like Nathan said, I have been struck by Justice Simonett’s relationship with his clerks—they seemed both intrigued by and respectful of one another. And it seems that humor played a big role in this relationship. The next two stories come from Carolyn Brue. The first involves Sparky, a goldfish given to Justice Simonett by his children. He apparently cherished Sparky, and clerks were taught to care for Sparky from the beginning.

Sparky

I become used to knowing when the Judge has arrived at work because he begins each day by winding the music box for Sparky. The Judge sometimes encourages me to come out to watch Sparky, who (according to the Judge) perks up and swims ever so much more happily when the music is playing. Several months later, I notice that Sparky has some dark orange blots on him and seems to be a little lackluster. I change the water more often, I feed him more often, then I feed him less. I even play the music box after hours to give Sparky an extra boost. In desperation, I go to a pet store and learn that Sparky probably has a condition aptly called, “ick.”

I buy medicine to treat the water and begin a vigil to save Sparky’s life. At the same time, I shop around and ask for prices on goldfish to decide whether I should just

quietly replace Sparky now with a similar fish, but realize that I can't be sure Sparky II would have the same disposition and my ruse would be discovered. So, for over a week, I worry because Sparky does not seem to be improving despite all my efforts, and even the Judge notices Sparky's failing health. Sadly, one day I arrive to see that Sparky has died. It was after Sparky's demise that I realized how truly nice the Judge was—I had killed his pet, and he kept me on as his law clerk.

Erik

The clerkship ends with the birth of our son, Erik, in late June 1992. The birth is a little earlier than expected, and so I am supposed to be at work that Monday morning but am instead in the hospital with our new little boy. My husband calls the Judge to make our happy announcement, and even though I am not on the phone, I can still hear the Judge's delighted laughter. Later, the Judge and Dee, Justice Simonett's judicial assistant, make a trip to the hospital to meet Erik and return to the chambers with a photo of Erik to display. The Judge leaves a gift with a note that I still cherish. It reads, "You will have many legal and jurisprudential victories in your career, I'm positive, but none will compare, or come even close, to Erik." He was right.

Nathan Sellers: Justice Simonett's clerks clearly enjoyed clerking for him and reaped many rewards from their one-year clerkships. But Chelsea and I were also struck by how his clerks' experiences shaped their professional careers as well and how they apply what they learned from Justice Simonett in their work.

Anne Meredith-Will, a Bemidji family law attorney who clerked for Justice Simonett from 1989–1990, writes:

Justice Simonett knew how to write. Most legal writers follow the path of least resistance by repeating boilerplate and following the formula. Not Justice Simonett. He could coalesce briefs, case law, and memos and put his own stamp on them. He could state complicated ideas with simple, eloquent language. When I worked for him, he did not lift sections from memos or briefs, but always wrote opinions himself. It showed; his writing ability was a gift.

Anne Meredith-Will continues by explaining:

I have tried to learn from Justice Simonett's writing style. For example, when drafting marital termination agreements, I use the words "visiting rights" as opposed to the typical "visitation rights." Justice Simonett said "visitation" sounded like something involving God, not a parent. I have tried to avoid puffed-up language and legalese according to his example.

I remember agonizing over the preparation of my first memorandum for Justice Simonett. The case had been in an area to which I had had limited exposure in law school, and it had taken many hours of research and analysis to complete the memorandum. The record alone, I recall, filled many boxes, and the briefs of counsel for the parties were replete with detailed analysis and argument on the seemingly endless issues in the case.

I was called down to meet with the Judge, it seemed within minutes of having delivered the memorandum to him. He was sitting back in his chair in chambers with the same twinkle in his eye. I do not remember much about the first meeting, apart from my own trepidation and the fact that the Judge had so quickly discerned every single issue, including a number of esoteric issues that had not even occurred to me, in a very complex case. I do remember that one of the first things he did was to flip to a page at the back of my memorandum of some twenty pages single-spaced and ask why I had used a particular word in a sentence somewhere on the page. Thinking that I had misused a phrase or misunderstood a concept, I quickly found the word in my own copy, but could not for the life of me figure out why I had used the word or why he would be concerned about it. I finally responded something to the effect of, "I have no idea, Judge. It's the only word that came to mind in that late hour of evening." He chuckled and went on to a substantive question. I later came to expect and look forward to his good-natured humor and, after some time, even started to have a clue of when he was joking and when he was making a serious inquiry.

Justice Paul Anderson: Thank you, thank you all for sharing those insights into John Simonett and his law clerks. I think we all have a better perspective on what it was like to work for and with John Simonett. In essence, it was a real privilege.

At this time, Esther and Alan will come forward to share their perspectives on what it was like to work with John Simonett as a judicial colleague. As they are taking their seats, I will share some perspectives from two of his other colleagues.

Over the years I have talked with former Justice John Todd about what it was like to serve on the court with John. I have done the same with former Chief Justice Sandy Keith. I will start with some of John Todd's observations.

John Todd and John Simonett were colleagues on the court from 1980 to 1985. Justice Todd said he always enjoyed working with Justice Simonett because he worked well with his colleagues on the court, and he was always collegial. Justice Todd said this was true even when Justice Simonett was writing for the other side of a case. "John's writing was so good he often made my own writing better." Justice Todd loved it when John would preside over a meeting because he had such a great sense of humor; he always had a humorous story to tell, and he treated everyone so well. John was also known for being polite and gentle in the way he would slice and dice the inadequate arguments of counsel who appeared before the court.

The two of them used to talk politics, but it was almost always politics with a small "p." John Todd said that when he would say that he was a pragmatic liberal, John Simonett would respond by saying that he was a pragmatic conservative, and it was probably for this reason that they got along so well with each other. There was so much that they agreed upon.

Justice Todd also said that they shared great political mentors. John Simonett had Senator Gordon Rosenmeier, and Justice Todd had Senator Paul Thuet. The fact that they were mentored by two great lawyers and politicians helped them to keep things in focus, in perspective, and to act together in the best interests of the citizens of the State of Minnesota. Justice Todd said he always believed that if John had been chosen as chief justice of our court, he would have done an excellent job.

As a parting comment, Justice Todd asked me to tell everyone that they should know how fortunate they have been to have had John Simonett serve them as a justice on the Minnesota Supreme Court. Justice Todd said he is on record saying that "the two finest lawyers I have met in my life are Bob Sheran and John Simonett, and I stand by this statement as I am getting into my late-80s."

I served with Chief Justice Sandy Keith after I succeeded John

Simonett on the supreme court in 1994. Sandy would frequently comment on his service with John, almost always prefacing his comments by saying what an excellent justice and colleague John was.

As chief justice, Sandy appreciated that John was always timely with his opinions. Sandy said that if an opinion needed a nuanced, insightful, or pithy concurrence, he knew he could ask John to do it, get an excellent work product, and get it within a couple of days. He also noted that John was always willing to go the extra mile for the court and his colleagues.

Sandy would often say how sad he was to see John leave the court. “He is such a remarkable person and we miss him so much.” I know this to be true because when I came onto the court, Sandy would frequently tell me how much he missed John.

Justice Tomljanovich and Justice Page, do you have any comments or reflections to share about Justice John Simonett?

Justice Esther Tomljanovich: You may be surprised to know that I always envied John Simonett because he looked like a casting director’s choice for a supreme court justice. I would have liked to have looked—well I didn’t really want to look like John Simonett—but I would have liked to look more judicial, so that when I went into a room people would have said, “Oh yeah, there’s a supreme court justice.” When you walk in and you are five feet tall like I am and you have curly hair, nobody says that. I mean, here Justice Simonett was over six feet tall with that white hair and a bow tie. Nobody had any doubts about who he was—but they did with me.

I think the words we have heard the most today are kind, courteous, and polite. John was all of those things, but because he was all of those things, I think people thought they knew him better than they did. But John was a very private human being. With some of the members of the court—I served with Larry Yetka—I knew a lot about Larry and his family. I even think I know what Larry’s son’s GPA was through college and law school. But with John, you didn’t know those kinds of things. I believe we all had the feeling that we knew John better personally than we did because we all knew and loved Doris. Doris is such a warm, outgoing person. So, you did feel that you knew John better than you really knew him, in large part because of Doris. Can I go on and say one more thing before . . .

Justice Paul Anderson: Oh, Esther, you have the time to say more.

Justice Esther Tomljanovich: All right.

Justice Alan Page: You can actually say two or three things if you would like to, it is okay with me.

Justice Esther Tomljanovich: Oh, [LAUGHING].

Justice Paul Anderson: I think that Alan just ceded to you some of his time.

Justice Esther Tomljanovich: Oh, well you know, I made some notes last night, and I also talked to Justice Anderson on the phone. The notes are sitting on my printer at home [AUDIENCE LAUGHTER], so I do not have all of the insights I want to share with you today.

Justice Paul Anderson: Esther, do you miss your judicial assistants?

Justice Esther Tomljanovich: I sure do, because they would have made sure that my notes were here for me. The other thing I want to share is what I have heard people say about Justice Simonett's directions to the trial court. As a trial court judge before I served with John on the supreme court, those directions were really important to me. When I first came on the district court bench in 1977, the jury instruction guides were not as thorough and not as helpful as they are now. They were not as complete as they are now. So, as a trial court judge there were lots of times I used to have to go digging through cases for the very basic instructions. You could find them in John's opinions because he had been a trial attorney—he knew that directions to the court and instructions for the jury were important. He would give you instructions in his opinions. Sometimes he would put them in his concurring opinions because John knew that the trial judge would be thinking about it.

The other thing he knew, and I think that some of the justices who had not been as active in the trial court or had not been trial court judges missed, is that any particular rule of law might not fit a slightly different fact situation. So he would give you those kinds of directions. I do have to admit though, that when a lawyer would

cite in a trial brief a John Simonett opinion, I did not take what the lawyer said as the law. What John would very often do is to show his work in his opinions, like Dean Stein said. He would set it out, the case, and he would work through it.

Justice Paul Anderson: I think what you referred to is sometimes referred to as John’s “ice tongs” way of addressing issues.

Justice Esther Tomljanovich: Yeah. [LAUGHING] It was. He would work through his analysis, and he would come to a conclusion, but if you did not read the entire opinion, you might not get to what the holding was because he might say, “And on the other hand . . . ,” and then he would work through the issue from another direction and come to the ruling of the case that was based on the second line of reasoning. In essence, when a lawyer submitted a memorandum of law and cited an opinion authored by John, the memorandum would be absolutely accurate as to part of what John said in the opinion. But, very often John did not intend that part to be the holding. So a conscientious lawyer had to read John’s opinions really carefully to be sure as to what the specific holding or rule in the case was.

Justice Paul Anderson: Esther, I am going to ask you another question.

Justice Esther Tomljanovich: Okay. You told me you would. You said, “Don’t be surprised if I ask some tough questions.” I said, “Don’t be surprised if I answer.” [AUDIENCE LAUGHTER]

Justice Paul Anderson: I am privy to some of the inside history of the court. I have learned that you and Alan and Sandra [Gardebring] were kind of viewed as the young folks when you first came onto a well-established supreme court. As you know, I was on the court with Jeanne Coyne for a while, so I suffered a little bit from some of the slings and arrows she directed at colleagues. Didn’t Jeanne say on more than one occasion that a new justice should not speak up for the first two years on the court?

Justice Esther Tomljanovich: I know that she told Justice Gardebring that she shouldn’t speak. I do think some of the senior members thought that when Sandra and I came to the court, that

we did not quite have the gravity or the depth to be on the supreme court. Some of you may agree, and that's okay. [AUDIENCE LAUGHTER] But we were there, and we got to the court just like everyone else did—all but Justice Page, who didn't get there because he knew a governor; he was elected. But the rest of us got appointed.

Nevertheless, there was a very strong feeling on the part of some of the more senior justices that we were the “kids” or the “children” and should be seen but not heard. Justice Coyne did say that to Justice Gardebring, that you do not talk for at least the first year. For Justice Gardebring, who had been the head of three state agencies before she was thirty years old, that advice did not sit too well. Also, I have never been one to be seen and not heard. Probably you can hear me more than you can see me. We ignored the advice and did express our opinion at all times.

But, the one senior member of the court who did not share that opinion, or at least he did not show that he shared that opinion, was John Simonett. He was always respectful of our opinions. He would never put down an opinion or act as though you did not know what you were saying. He did not see us as that kid who came to the court through politics and who didn't know what she were talking about. He gave as much respect to our opinions as he did to his own. He may differ, for reasons that he could always set out, but he was always kind. He was always respectful. John did not necessarily believe that we needed to be seen and not heard.

Justice Paul Anderson: Alan, you served for only a short time with John. John is in nine pictures of the court, nine times with different justices. The last picture up on the wall that John is in is from when you joined the court. You were able to serve a couple years with John. Can you share some of your insights about him?

Justice Alan Page: I served with John for about a year and a half. Not even two full years—from January '93 to June '94. And, Esther, if you thought you were junior, or not supposed to be there on the court, it was even more evident for me.

Justice Esther Tomljanovich: Yes, I recall.

Justice Alan Page: There was some of that attitude toward junior justices when I arrived on the court in January '93, but as Justice Tomljanovich notes, John was not one of those who expressed that attitude. He treated, as best I could see, all of us with the same respect that I think he wanted to be accorded. And that for me was important, having arrived at the court when I did and under the circumstances that I did. During that first year, I noticed a couple of things. One, probably not the first thing I noticed, but John had this twinkle in his eye that you could see. And there was a warmth there that really came through. Others have talked about it, but it was genuine. Thinking about the impact he had on the law, I had to look back at the cases—I actually looked online this morning to see, just to refresh myself, and it was interesting to see how many opinions he was involved in. I think John wrote, is it four hundred, and, ah, 455 was it, something like that?

Justice Esther Tomljanovich: Somebody said, I think Judge Ross said

Justice Alan Page: Something like 455 opinions.

Justice Esther Tomljanovich: Was it you that said that? [SPEAKING TO AUDIENCE MEMBER]

Justice Alan Page: And of those 455 opinions, roughly seventy-two, seventy-three, something like that, were either concurring or dissenting. Which I thought was pretty impressive, that he was able to work with all the other members of the court to be part of the majority. Unlike some of us, some of us being me, he was able to work through and come to some agreement, so that a significant portion of the opinions that he was involved with were unanimous. I thought that was pretty impressive.

One of those opinions, which was not unanimous, but one which he wrote the majority opinion for the court, which I joined, was a case captioned, *In re Blodgett*. *Blodgett* had to do with the commitment of persons with psychopathic personalities. There were a series of those cases during that first year, year-and-a-half that I was on the court. This one, *Blodgett*, ended up four-to-three. I can remember that I was initially inclined to be in the three that ended up dissenting. As I recall, it was Justice Wahl writing the dissent, which was joined by Chief Justice Keith and Justice

Tomljanovich. I recall going in to talk with John.

One of the issues in *Blodgett* was whether you had to have a mental illness in order to be subject to this indeterminate civil commitment. And I was not necessarily convinced on this point. Blodgett had something that was slightly less than a mental illness, and I was not quite convinced that on that basis he should be subject to the psychopathic personality statute. In which case, we would have ruled the statute unconstitutional. John was able to convince me, as we talked the issue through, that these conditions just shy of an actual mental illness were nonetheless a constitutional basis to commit them. I look back on that opinion today, and it is well written and well reasoned. It was John's ability to communicate both on the written page and in personal conversation that ultimately convinced me to go along with what turned out to be the majority opinion.

Another thing that was interesting to hear, I cannot remember which one of the clerks said it, but it was interesting to hear that John sort of wrote and rewrote and rewrote his opinions. I always thought that he went back to his office after conference, wrote out the opinion, and that was the end of it. [LAUGHING] I have always envied his ability to turn around things so timely. And to have his ability, the facility that he had with words. So I am a little bit disappointed to hear that he actually had to work at it a little bit. [AUDIENCE LAUGHTER]

Justice Paul Anderson: Alan, maybe you could share one more thing with us, because you are the one on the panel who is in the best position to make this observation. You came on the court in January '92; John left in June '94. We have now had the opportunity to look at John's opinions over the years many times. Can you affirm how many times we have been impressed with how well written and how sound John's opinions are?

Justice Alan Page: Oh, absolutely. As I say, he had a facility with words. He had the ability to communicate on the written page that was helpful, certainly to me as a supreme court justice, and I think to the rest of us in dealing with cases that came after what he wrote. He had a way with words that was to be envied. I should also mention something else about the warmth that I talked about earlier; that warmth came through with Doris also. I can remember.

Justice Paul Anderson: Wait a minute now! I understand that some justices and court staff did not treat you quite as well as they could have when you first came on the court.

Justice Esther Tomljanovich: I did.

Justice Paul Anderson: You did. Okay, let the record show that the parties do not dispute this fact. [AUDIENCE LAUGHTER]

Justice Alan Page: I am not going to name names as to who did and who did not.

Justice Paul Anderson: No, I would not want you to; but what I do want to point out is that the warmth you felt from Doris and John was different. It was kind of a safe harbor, was it not?

Justice Alan Page: Well, it was a safe harbor and appreciated. I can remember a couple of years, maybe two or three years after John left the court, they were back for some reason. They were in my office, in my chambers. They know that I am a collector of toy trucks. They had been someplace, I think either South America or South Africa, where little kids make, or they sell, tin toys made out of tin cans in the shape of cars or trucks or what have you. They were kind enough to bring me one of those for my collection, and that toy vehicle still sits in my office.

Justice Paul Anderson: Thank you both, Justice Esther Tomljanovich and Justice Alan Page. We just learned an important lesson in the art of judging on an appellate court. The art of judging involves working well and getting along with your colleagues.

Martha, would you please join us on the stage for the next part of the program? At this point, I need to give all of you a heads-up that we are going to go past the designated end time for this part of the program. But, as you are aware we did not reconvene until about ten minutes after the scheduled start time. So we are going to use that missing ten minutes now to do the two remaining parts of our planned presentation.

By now it should be obvious that the judicial gene runs in the Simonett family; not only was John a supreme court justice, but John and Doris have two daughters who have served Minnesota as

judges. No symposium on John's life as a judge would be complete without remembering Anne and hearing from Martha. During this part of the presentation, we will hear from John's daughter, First Judicial District Judge Martha Simonett. Martha will share with us some reflections on how her father influenced how she approaches the art of judging. But, as Martha makes her way to the stage, I will share some of my own reflections on John and Doris's daughter Anne and her role in Minnesota's judiciary.

Anne succeeded me as chief judge of the Minnesota Court of Appeals. There are two personal stories that I want to share with you that will help explain how Anne's judicial appointments came about and provide some insight into their father/daughter relationship. The stories center on two different conversations I had with John and Anne about the judicial selection process. The first conversation occurred when Anne was about to become a district court judge. The second conversation occurred when Anne was appointed to the court of appeals.

The first conversation took place in John's chambers after Anne came back there after she had been interviewed by Governor Arne Carlson for a position on the Hennepin County District Court bench. Anne was very concerned, even worried, about whether she would be selected by the governor. The two of them asked me to sit down and to visit about the selection process. Both Anne and John felt they were in the dark about how the governor's decision would be made. They also knew that I had some knowledge about the process because I had helped to set up the governor's Judicial Selection Commission and had chaired the commission before being appointed to the court of appeals.

I told them not to worry because, based on Anne's stellar qualifications, the governor was going to appoint her. Both were more than a bit surprised by the certitude of my statement. I then went over a list of Anne's qualifications and summed it all up by setting out the reasons why Anne's appointment was inevitable. John gave a surprised response and said something like, "Really, the governor knows all that about Anne?" I confirmed that the governor did have this information and that he would consider all of these things when making the appointment. Again John was more than a bit surprised at how thorough the process was, but he also appeared to be very pleased that the governor was aware of Anne's stellar qualifications. Of course, the next day Governor Carlson announced that he was appointing Anne to the Hennepin

County bench.

The second conversation occurred in May 1994. John's birthday is on July 12, and in 1994 he would turn seventy on that date. In Minnesota, seventy is the mandatory retirement age for judges. This meant that John was required to leave the court by the end of July 1994. He had let it be known that he would serve until the end of July. But filings for elective office, including judicial offices, opened on July 5. Governor Carlson wanted to appoint me to the supreme court as John's replacement; but he did not want things to get too complicated given that filings would occur in early July while John was still on the court, and both Anne and I were still serving in our current positions. More particularly, both Anne and I were slated to be on the November ballot for election to our current judicial positions.

The plan was to get John to leave a month early so Arne could make the two judicial appointments before filings opened. For the plan to work, we needed John's cooperation. Chief Justice Sandy Keith was asked to talk to John about leaving early but was unable to get the job done. It then fell to me to do the job. I clearly remember going up to John's chambers and very carefully and diplomatically explaining to him the situation and why he needed to leave the court by the end of June. But, I left out one important detail when I talked to John—the governor's decision to appoint Anne as my replacement as chief judge of the court of appeals.

After I explained the situation to John, he quickly grasped what needed to be done, and by 9:15 the next morning his letter of resignation was on the governor's desk. By 2:00 PM that same day Anne was at the governor's mansion being asked if she would be willing to replace me as chief judge on the court of appeals. Anne said yes and then went to her father's chambers to give him the news. Shortly thereafter, the two of them came down to my chambers.

The first question John asked me was whether I knew that the governor was planning to appoint Anne to replace me. I told him that I did know that detail. He then asked why I had not told him the governor's plans the previous day. I told John that we had to keep both him and Anne ignorant about what was going to transpire so that there could be no possible allegation that he left the court early in order to facilitate Anne's appointment to the court of appeals. I told him that we needed to keep him as pure as the driven snow and that by keeping this information from the two

of them, we had been able to do that. For a second time John was a bit astonished with how the system worked but was clearly pleased that his daughter had been appointed an appellate judge. Shortly thereafter in Little Falls, the governor announced our appointments along with the appointment of Ed Stringer to the supreme court. On July 1, Anne and I were both sworn in at a joint investiture ceremony at the Landmark Center. Trust me, it was a marvelous event—Anne’s remarks that day were special. As I left Landmark that day I overheard a conversation between a mother and her daughter who was about ten. The daughter was overjoyed with Anne’s appointment and said how much she admired Anne. The mother turned to her daughter and told her to take Anne as her role model. Anne was that type of person—a role model.

Unfortunately, Anne died of a brain tumor within one year of her appointment to the court of appeals. In the short time she did serve on that court she made her mark and demonstrated that she would be a great chief judge. Her premature death was a great loss not only to her family and friends, but to the State of Minnesota. I am convinced that Anne was destined for service on our supreme court and might well have served as its chief justice.

John and Doris have another daughter who presently serves our state as a judge. Martha, would you please share with us some of your thoughts about how your father has influenced you on how to approach the art of judging.

Judge Martha Simonett: First of all, Dad never had any interest in being a trial court judge. He would always say, “I would rather be in the game instead of being an umpire.” It was different, though, when the opportunity to serve on the supreme court arose. I believe it was Fred Hughes from Saint Cloud and Justice Walter Rogosheske who encouraged him to apply. Also, by this time his children were raised, and I think that he saw it as an opportunity to indulge his scholarly bent. Dad loved courtroom work, but I think he was even more drawn to legal research and writing.

What Dad loved about the appellate court was not only the collaborative decision making, but also the opportunity to participate in the development of the law. He was always a history buff—so he spent a lot of time thinking about where the law had been, where it was now, and where it was going. He really enjoyed this aspect of the law, and boy he really was not ready to retire from the court when he had to because of his age. He would say, “Oh

gosh, I am just at that spot where I know where the law is going.”

Even though the trial court is much different than the appellate court, there were certain things I learned from Dad that I carried with me to the trial court. For example, Dad always had a great empathy for and understanding of the human condition. It seemed as though he always knew the right thing to say to somebody who had suffered some unspeakable loss. He was always sending notes to people. I do not think that he ever misspoke when a kind or sympathetic word was required. And when he spoke it was completely genuine. He was a soft-hearted gentleman. So when I think about what I carry over to the district court bench, it is that I have a concept of empathy. When I first started, if there was ever any doubt in my mind, particularly when sentencing, I gave everybody every break that I could. I decided that if mistakes were inevitable, I would err on the side of mercy.

Dad always had such great respect for the court, both judges and lawyers. During my first couple of years on the bench, when I would come home after a particularly difficult day, I would sometimes call him and say, “Oh, that lawyer was terrible.” And Dad was hurt by such a comment. He would say, “Really!” as though he just could not believe that a lawyer would act that way: “. . . a lawyer?” he would respond. But then he would always say, “Remember, Martha, when you do not know what to do or if you have had a particularly bad day, lawyers are officers of the court, it is their job to help you, they will help you; all you have to do is to ask the lawyers the right questions.” And I carried that wise advice with me.

Justice Paul Anderson: Thank you Martha. You would fill your father with pride if he were present to hear your comments today.

We have one more segment left to present during this part of the program. We want to have John Simonett speak to you in his own words about the art of judging. So we have a handout for you, and our plan was to have Tom and me read John’s comments to you, but we are running out of time so I will only share a couple of them with you. You will have to read the rest of them for yourselves.

Here is what John had to say about interpreting statutes. I really love this one. On the meaning of statutes: “[E]veryone knows a statute does not mean what it says until a court says it

means what it says.”²

I now want to find a comment on the standard of review because we all know that when you come to the court it is important that you know the standard of review. On the standard of review in a family conversation: “It has been my practice, except when home alone with the family and once at my wife’s insistence at her high school reunion, never to express an opinion without first stating the standard or scope of review.”³

Finally, I want to direct you to John’s comments on the use of a three-pronged standard of review for determining whether a story is funny. Basically John says that I am the judge, I get to decide whether a story is funny.

Before we end I need to thank my judicial assistant, Alayne Svec, for all her help. We were literally taking the materials hot off the press as we started the presentation. Please acknowledge Alayne’s contribution by giving her a round of applause. There she is in the back of the room trying to look invisible.

Thank you all. I hope that after this part of the program you leave here with a bit of perspective on what a marvelous man John Simonett was and how he practiced the art of judging.

Tom Boyd: Thank you very much Justice Anderson, and thank you the entire panel, it was wonderful. Thank you very much, Alayne, for all that you have done, and thank you for getting us all these materials. I have two additional items for you before we move into this next panel, in addition to the materials that Justice Anderson provided for you.

JOHN SIMONETT: THE ART OF JUDGING IN HIS OWN WORDS

On the use of a three-pronged standard of review:

In judging . . . legal humor, . . . I [use] a three-pronged standard: 1) Is it funny to me? 2) Is it funny to my wife? and 3) Is it funny to my law clerk? For example, I think John Cleese’s “Fawlty Towers” is the funniest show on television; my wife can’t stand it; and my law clerk never heard of it. Under my three-pronged test, “Fawlty Towers”

2. John E. Simonett, *The Footnote as Excursion and Diversion*, 55 A.B.A.J. 1141, 1141 (1969).

3. John E. Simonett, *Juris-Jocular* . . . , BENCH & B. MINN., Aug. 1989, at 27, 27 (reviewing JURIS-JOCULAR: AN ANTHOLOGY OF MODERN AMERICAN LEGAL HUMOR (Ronald L. Brown ed., 1989)).

gets a top 10 rating on the theory that judging is a lonely business, the court is infallible because it is final, if you can't stand the heat get out of the kitchen, and, to quote my old Army infantry manual on night patrols, a scout is never lost although he may temporarily lose his sense of direction. In short, no matter how many prongs there are, humor is a very personal thing.⁴

Citing Justice Holmes on the common law:

Justice Holmes observed that the life of the common law is experience, not logic. Undoubtedly he had [the common law of] Morrison County in mind.⁵

On criminal law:

If the common law of Morrison County is ever put in print, there should be a separate volume entirely on criminal law. . . . I do not mean the lackluster offenses of armed robbery, murder and white slavery, but real criminal law—crimes of passion[,] such as driving a car under the influence of liquor; crimes of revenge, such as non-support; and crimes of premeditation, such as shining deer.⁶

On personal injury law:

[A] Morrison County jury is never influenced by sympathy for an injured plaintiff unless the defendant is insured. Since the Minnesota Supreme Court has held that it is prejudicial error to disclose to a jury that a litigant has liability insurance, local law has established the presumption that all defendants are insured. This is an irrebuttable presumption because it is usually objectionable in Minnesota to tell the jury that the defendant is not insured.⁷

On the absence of footnotes:

Every lawyer knows in his bones that the text that flows on serenely, without the ripple of a footnote now and then, is not to be trusted⁸

On the many uses of footnotes:

Footnotes can be useful as ornamentation, as a means of

4. *Id.*

5. John E. Simonett, *The Common Law of Morrison County*, 49 A.B.A.J. 263, 263 (1963).

6. *Id.* at 264.

7. *Id.*

8. Simonett, *supra* note 2, at 1141.

evidencing sobriety of intent and precision of thought, or even as a means of distinguishing the case that is not distinguishable. But the most delightful footnote of all is the excursionary footnote, which adds that fascinating sidelight to the dry topic under discussion.⁹

A rule of thumb about footnotes and the soundness of legal writing:

The rule may be put that the soundness of legal writing is in direct proportion to the number of footnotes it contains.¹⁰

Footnotes as a cul-de-sac:

After following the cul-de-sac to its end, the reader returns to the main road, backtracks to regain his bearings, then proceeds on past the footnote to the next one. This is one step down for every three steps forward. One never quite gets into any one gear.¹¹

The footnote as penny on the railroad track:

But the penny on the railroad track is the essay footnote, the commentary that competes with the main text, where the author undertakes an excursion on some tangential point, interesting in itself if not essential to the text.¹²

The essay footnote as excursion:

An "excursion" is defined as "a short trip taken with the intention of returning to the point of departure; short journey for health or pleasure," and this is precisely what a good essay footnote should accomplish.¹³

Conversational footnoting:

Excursionary footnotes lend themselves more readily to speaking than to writing. Justice Frankfurter had this knack in conversing. Appellate courts inflict great psychic harm on lawyers who are addicted to conversational footnoting by limiting oral argument to thirty or sixty minutes.¹⁴

On the temptation of footnotes:

[T]here is something tempting, irresistibly inviting, about the asterisk or offset digit. It flags attention, a momentary

9. *Id.*

10. *Id.*

11. *Id.* at 1141–42 (footnote omitted).

12. *Id.* at 1142.

13. *Id.* (footnote omitted).

14. *Id.* (footnote omitted).

hesitation follows, the eye drops down to the foot of the page, and then, of course, all is lost.¹⁵

There are no substitutes for the footnote:

Substitutes for the footnote have been tried, of course, but with little success. “Chapter notes” are a bother. . . . An “appendix” is simply an excuse to write an additional chapter. The Restatements’ use of the “comment” is a patent evasion. And most dissonant of all is the parenthetical phrase in the text itself.¹⁶

The remedies?:

I would argue that what is needed is a renewed sense of purpose. . . .

Is there a loss of collegiality? Then we need to develop new ways of getting together. . . .

Is there a bottom-line mentality? Then we must remember who we are. . . . We are officers of the third branch of government, entrusted by the people with the administration of justice and implementation of the rule of law.

. . . .

Is there client instability? Then we must educate the public and our clients through proper advertising and wise counseling that lawyering is a profession of civic governance; that civility of manners is not a sign of weakness in an advocate, but a measure of true competence and effect[ive] representation.¹⁷

On ethics and etiquette:

[I]n out-state Minnesota where I practiced law, if the jury brought in a verdict against you, it was considered good form to call the lawyer on the other side and congratulate him on his victory. These are real character building telephone calls. I might add it was also considered good form to tell the other lawyer you were thinking of probably taking an appeal.¹⁸

15. *Id.* at 1141.

16. *Id.* at 1142.

17. John E. Simonett, Remarks at the Eighth Circuit Judicial Conference: Professionalism and the Occasions of Sin (July 24, 1992), in *THE JUDICIAL CAREER OF JOHN E. SIMONETT* ch. 3, at 5–6 (Marvin Roger Anderson & Susan K. Larson eds., 1998).

18. *Id.* at 2.

On the pace of judging:

After practicing law for 29 years, in the fall of 1980 I became an appellate judge. It is a different pace. I set deadlines now rather than meet them.¹⁹

The opportunity of an appellate judge to maneuver:

There is much room for state appellate judges to maneuver.²⁰

Relevancy as competency:

[W]e need . . . the will to restore relevance to its traditional role. We need to remember that relevancy focuses attention on what is important in a lawsuit, and that it is an aspect of competence. . . . Competence breeds respect, and respect breeds civility.²¹

On dealing with troublesome issues:

The Court . . . rejected both arguments summarily. (Which is the best way to deal with troublesome issues.)²²

Reasoning vs. precedent:

Reasoning is more important than precedent unless the reason for having precedent is what is important.²³

Some types of argument of varying worth:

- (a) Analogy—make sure the analogy cannot be turned back on you
- (b) Assertion—simply to assert something is so does not make it so.
- (c) Pandora's Box—overused, invites skepticism, use sparingly.
- (d) Crying Wolf—be sure there is a wolf.
- (e) Floodgates, opening thereof—overused, invites skepticism, use sparingly.
- (f) There but for the Grace of God—this is a jury argument.²⁴

19. John E. Simonett, Remarks at the National Conference of Commissioners on Uniform State Laws (Aug. 2, 1985), in *THE JUDICIAL CAREER OF JOHN E. SIMONETT*, *supra* note 17, ch. 3, at 1.

20. *Id.* at 3.

21. John E. Simonett, *The Growing Irrelevance of Relevance*, BENCH & B. MINN., Aug. 1992, at 11, 13.

22. John E. Simonett, *A Corporation's Soul*, BENCH & B. MINN., Sept. 1997, at 34, 34.

23. John E. Simonett, *Oral Argument*, HENNEPIN LAW., Nov.–Dec. 1985, at 10, 11.

24. *Id.* at 22.

The two best legal arguments:

The two best legal arguments are: (1) Fairness—The law must be fair and treat like cases alike; and (2) Reasonableness—The law seeks reasonable means to achieve reasonable ends.²⁵

When a lawyer's argument can make a difference:

In some cases, there is a right way to decide the case and a wrong way. The more common instance, and the more difficult, is when there is no one right way but all options are apparently equally acceptable or unacceptable. Here is where persuasion may make the difference.²⁶

What is a great oral argument?:

[G]reat oral argument . . . concisely defines the issue on appeal[,] . . . goes for the jugular, . . . wastes no time doing so[,] and . . . suggests that fairness lies on [one's] side.

. . . .

The appellate court decides on the merits of the case, not on who made the best argument. . . . Sometimes it takes a good oral argument to disclose where the true merits of the case are. Oral argument may not affect whether the appeal is affirmed or reversed, but it may affect the reasons for affirmance or reversal. . . .

If you want to win an appeal, have a good case. If you want to help the justice system, make a good oral argument.²⁷

Lawyering:

[L]awyering is a profession of civil governance and . . . civility of manners is not a sign of weakness . . . , but a measure of true competence and effective representation.²⁸

25. *Id.*

26. *Id.* at 11.

27. *Id.* at 10, 22.

28. 1992 *Judicial Conference*, 11 EIGHTH CIRCUIT NEWS, no. 1, Fall 1992, at 1, 2 (quoting J. Simonett).