MAY IT PLEASE THE COURT: EFFECTIVE ORAL APPELLATE ADVOCACY

In 1986, by a 3-to-2 vote, the Utah Supreme Court, in *State v. Long*, overturned a conviction based on an eyewitness identification, citing the trial court's failure to give a cautionary instruction where the eyewitness identification was central to proof of guilt. Thereafter, *Long* instructions became routine in Utah trial courts.

In 2001, the Utah Supreme Court suggested that expert testimony was appropriate in situations where the eyewitness identification was key to the state's case, but it left its admission to the discretion of the trial courts. Trial courts generally exercised their discretion to exclude such testimony and simply gave a *Long* instruction. This brings us to Deon Clopten.

In 2008, the Utah Court of Appeals affirmed Deon Clopten's murder conviction for shooting a rival gang member outside a club. Eyewitness identification was central to the state's case. Clopten contended his cousin was the shooter. He argued witnesses who identified him were confused by the similarity of the red clothing the two wore, and he sought to introduce expert testimony about the unreliability of eyewitness identifications. The trial judge declined to admit the expert evidence, based in part on the state's argument that there was a trend against admitting such evidence when a *Long* instruction was given.

Following Clopten's conviction, the Utah Court of Appeals held that the trial judge did not abuse his discretion in excluding expert testimony. The court's opinion, however, marshaled post-*Long* case law from other jurisdictions and scholarly studies suggesting that cautionary instructions were inadequate to address the problems inherent in eyewitness identification. The court affirmed only because the Utah Supreme Court's decision appeared clear that the trial court had broad discretion on the issue.

Michael Zimmerman, a Fellow of the American Academy of Appellate Lawyers, who had authored *Long* while on the Utah Supreme Court and was now in private practice, took the case pro bono, obtained a grant of certiorari and briefed the matter.

In Austin, Texas, on Friday, June 23, 2017, this case was the basis for a program called "May It Please the Court: Effective Oral Appellate Advocacy." It was presented to public interest lawyers by the American College of Trial Lawyers and the American Academy of Appellate Lawyers – the first time these two organizations have collaborated.

Developed by the College's Teaching of Trial and Appellate Advocacy Committee, chaired by **Paul Mark Sandler**, and the College's Access to Justice Committee, chaired by **Barry Abrams**, in conjunction with the American Academy, the entire program was videotaped. It will be available for state and province committees to use as a

The program "May It Please the Court: Effective Oral Appellate Advocacy" was presented by the College and the American Academy of Appellate Lawyers at the University of Texas School of Law. The entire program was videotaped to be used as a training tool for public interest lawyers.

training tool for public interest lawyers in their communities. Here is how the program, with its stellar cast of participants, proceeded:

After a brief welcome by Abrams on behalf of the College, a lecture was given on how to prepare for and present an appellate oral argument. Immediately thereafter, the case was argued twice to a panel of three mock (one was real) judges. Past President **Chilton Davis Varner**, and a Fellow of the American Academy, led off as appellant. After that argument was over (complete with sharp questioning from the bench), Former Regent **Dennis R. Suplee**, presented a second argument as the appellant, again to much questioning from the bench.

Michael Zimmerman then discussed the actual oral argument, using PowerPoint clips of some of the questioning by the Utah Supreme Court. and explaining his thinking and goals in presenting the argument in the manner he did. The program ended with a spirited panel discussion on how to handle appellate oral arguments and various strategic issues that can arise in them. It was moderated by Abrams and **Sylvia H. Walbolt**, a former President of the Academy and a former Chair of the College's Teaching of Trial and Appellate Advocacy and Access to Justice and Legal Services Committees. In the remaining time, the panel responded to questions from the audience. Starting at 8:00 a.m., it concluded right on time at noon.

All participants in the program contributed considerable time to make it happen as successfully as it did, as well as covering their own out-of-pocket expenses. The Foundation paid half of the video cost. Abrams was indispensable in the final weeks of preparation, dealing with a multitude of logistical issues. The University of Texas School of Law provided the courtroom and important supporting staff assistance.

Given the resounding success of this program, it may be just the beginning of a productive collaboration between the College and the Academy in developing and presenting appellate advocacy programs to public interest lawyers. And, hopefully many State and Province Committees will present programs using the video.

So – how was *State v. Clopten* resolved? Five to zip for reversal.

Sylvia H. Walbolt
Tampa, Florida