

OHIO STATE JOURNAL OF DISPUTE RESOLUTION SYMPOSIUM:

A Memorial to Chris Fairman

ROBERTO L. CORRADA¹

As we begin, I wanted to thank a few people for inviting me here and allowing me to pay homage to my old friend Chris Fairman and to strike a personal note of opening to this symposium. First, thanks to Garry Jenkins, now the Dean at Minnesota, for reaching out to me after we saw each other last year at Chris's memorial service in Austin. I would also like to thank Professor Sarah Rudolph Cole for reaching out to the broader community immediately after Chris's passing away. Finally, I'd like to thank the students of the JDR for pulling this symposium together and dedicating it to Chris's life and his work, particularly Corey Martinson, Jedidiah Bressman, Robbie Southers, and Brooks Boron. Chris loved working with students above all else and I know he would have appreciated your efforts.

To be honest, it's more than a little strange to be here. I absolutely would not have imagined that I would outlive Chris, my high school mentor and friend, probably because as I was thinking about it, Chris was always larger than life to me. Many of you who have gotten to know Chris here at Ohio State probably know what I mean. Chris did not dilly dally. He was always focused and firmly believed in his positions, which were always based on substantial research and experience. He had an unparalleled work ethic. Even in high school, I always felt that Chris had an amazing sense of self. He exuded confidence, but was also a very human person.

Chris and I attended a medium sized and not very notable public high school in Austin, Texas, Sidney Lanier High School, at a time when Austin was a much smaller town than it is now. When I was on the debate team, it consisted of four debaters, Chris and his partner James were the top, more experienced team, and Tracy Hester and I were the junior team. If not for Chris, there would not have been a debate team at Lanier High School. We had no coach, and no teacher

¹ Mulligan Burselson Chair in Modern Learning and Professor of Law, University of Denver Sturm College of Law.

who even wanted to be the debate coach. The biggest club at our high school was FFA (Future Farmers of America), it was very much an agriculture and vocational education-type of school. Chris convinced one of the new English teachers at the school to agree to be a figurehead coach if Chris did all the work. So, in addition to being a top student, and a top debater, Chris was also our de facto coach, handling not only the substantive coaching duties but dealing with all of the administration of the team. He handled tournament registration, receipts, all budget issues, transportation, etc.

For probably three of his four years of high school, Chris was one of the top debaters and extemporaneous speakers in the entire state of Texas. He won many of the most prestigious tournaments in both categories. During our junior year, I watched him perform brilliantly to win debate tournaments at San Antonio's Jefferson High School and at Corpus Christi King High School. These were tournaments with hundreds of debate teams competing. In Corpus Christi, Chris and James won the final round over Houston Bellaire's top team, headed by David Dow (now a law professor at the University of Houston). Chris's accomplishments were all the more amazing given our resources versus the resources of the other schools. Chris regularly won over teams from Houston Bellaire or Dallas Hillcrest or Houston Memorial, the Texas powerhouses who not only had established coaches and assistant coaches, but also college debaters helping train their teams. Remember, Chris not only had to compete himself but also manage logistics for our team. Chris won the Texas State High School Debate championship his senior year and went on to compete at High School Debate Nationals. I understand he also won some national invitational debate tournaments that year. All of this while, by the way, serving as the high school's student council president.

I will tell you that Chris was so smart in high school, I believe he could have taught law school classes then better than many actual law professors. The way he structured arguments and conducted cross examination was brilliant. He was a natural. I know because I would watch him debate and see what he could do with the same evidence that we had. He was just very sophisticated, and had outstanding judgment. Aside from all of his victories, he was an outstanding coach and mentor to me and Tracy. He listened to our speeches and gave us great feedback. He introduced us to other people, debaters and coaches, in the

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Texas debate community. I personally developed confidence in my own debate and argument ability because of Chris's insights. In addition to giving us substantive coaching about arguments, Chris also motivated us to do better. I am a law school professor today because of what I learned from Chris on the debate team. Three of the four debaters in that school went on to become law school professors.

Chris attended college at the University of Texas with a degree in Government, graduating with highest honors and as a member of Phi Beta Kappa. Before studying law, Chris had a very distinguished 9-year career as a high school teacher, most of that time at McCallum High School in Austin, Texas where he was recognized several times as an outstanding teacher. His former students there still talk about him with great reverence. Chris attended law school at the University of Texas where he had about as distinguished and successful a law school experience as anyone can have. He graduated Order of the Coif, was an associate editor of the law review and selected outstanding associate editor. Oh, he was also Moot Court Champion, and had the best brief. He was proud to be a prized student of Charles Alan Wright who was a strong advocate for Chris's candidacy as a law professor. Chris clerked after law school at both the Texas Court of Appeals and then the United States Court of Appeals for the Fifth Circuit. Then, he served a short time as an attorney at Weil, Gotshal in Dallas.

I caught up with Chris again, after being out of touch for a while, in 1999 at the national law professor recruitment conference in Washington, D.C. I was on the appointments committee for my law school. Knowing we didn't really have a shot at Chris, I settled for a long dinner with him in Georgetown. It was great catching up, and I remember we traded stories about our respective daughters. He was so proud of his daughter Mallory. At the time, I remember he was very interested in civil procedure and pleading and supplemental jurisdiction in particular.

Chris became professor at Ohio State Michael Moritz College of Law in 2000 and made an indelible mark as a scholar, a teacher, and eventually also as an administrator. His early work at Moritz was in the area of pleading and supplemental jurisdiction. A series of important articles, two published in the Texas and Arizona Law Reviews, shed light on the fact that FRCP Rule 8 on notice pleading had been gravely diluted by heightened pleading requirements in a number of areas of the

law.² His Arizona article is a tour de force as he carefully delves into numerous different areas of law to prove his point.³ His prescriptive, creative solutions to issues with notice pleading are well developed and defended.⁴

He made a most notable contribution in the area of first amendment with his article and book about the subject of word taboo and the history, law, and overall significance of the “F-word.”⁵ He had been the “go to” scholarly resource on word taboo, and was a highly sought after commentator on the Supreme Court decision in *Fox v. FCC*.⁶ I must say that I was not surprised by this turn in his scholarly agenda. In high school, Chris loved words, wordplay, and the etymology of words. He was obsessed with words and their sounds and meanings. I think taboo words were significant to him in the heart of Texas in the mid-1970s because of their raw power. The F-word was only one of many words of this ilk that were of interest to him. On the broader subject, though, I remember him coming into debate class with the word, “myriad.” He loved saying the word, and he suggested we look for it in evidence because in the roots and definition of the word he had discovered it quite literally meant 10,000.⁷

² Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003) (“*Myth*”).

³ See *Myth*, 45 ARIZ. L. REV. at 1011-1059.

⁴ *Id.* at 1059-1065.

⁵ Christopher M. Fairman, *FUCK*, 28 CARDOZO L. REV. 1711 (2007). I learned at the Ohio State symposium in Chris’s honor that Chris was quite serious about using the word fuck as much as possible to help strip it of its power. As Chris explains in the very first sentence of his article, “Oh fuck. Let’s just get this out of the way. You’ll find no f-word, f*ck, f-- k, @\$!%, or other sanitized version used here.” Still, I could not bring myself to use the word in public as I begged forgiveness of the symposium audience and reminded Chris’s spirit that I remain today the wimp I was in high school.

⁶ See Christopher M. Fairman, *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation*, Ohio State Public Law Working Paper No. 193 (Feb. 25, 2013); *Critics Say US TV Obscenity Ruling Out of Touch*, Reuters Online, Market News, Apr. 28, 2009; Leigh Kamping-Carder, *FCC Indecency Policy Could Be F’d Before High Court*, Law 360 Blog, Lexis-Nexis, Aug. 8, 2011.

⁷ See, e.g., Merriam-Webster Dictionary online, merriam-webster.com (2017) (Definition of “myriad,” 1: ten thousand, 2: a great number). Chris would say that if ‘myriad’ was in your evidence and the other team asked you in cross-examination, “OK, the evidence says myriad, but how many is that specifically?” According to Chris you could say without hesitation, “It is specifically 10,000.”)

This symposium relates in substantial part to Chris's work in the area of dispute resolution and ethics. In particular, Chris's scholarship on collaborative law has had quite an impact. I remember reading an article in the ABA Journal in 2006 about collaborative law with Chris once again front and center.⁸ It's fitting that the JDR is dedicating this symposium to Chris as he developed his ideas on these points in this Journal's very pages. Two of his key articles, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads*, a 2003 contribution to the Journal and *A Proposed Model Rule for Collaborative Law*, a 2005 piece in the Journal, both work together to show both why ethical rules should change in the collaborative law Alternative Dispute Resolution ("ADR") context and how those rules might change with his proposal and defense of a model rule.⁹ In his first piece "Why Put Old Hats on New Heads," Chris poses the question, "should ADR have its own ethical rules?"¹⁰ He answers that question early in the article: he says emphatically ADR should.¹¹ In 1983 when the Model Rules were promulgated, ADR was essentially unknown in all but a few narrow practice sectors, including the most prevalent forms, arbitration and mediation.¹² As he explains, the Model Rules were forged to reflect the dominant paradigm—lawyers as advocates in an adversarial system.¹³ In Chris's article, he notes revisions to the model rules and explains how they are inadequate in the context of different types of ADR and the different possible roles of lawyers within those types.¹⁴ Chris notes the paradigm shift central to the process of collaborative lawyering away

⁸ Jill Schachner Chanen, *Collaborative Counselors: Newest ADR Option Wins Converts, While Suffering Some Growing Pains*, 92-JUN A.B.A. J. 52, 54 (2006) (quoting Christopher Fairman, Associate Professor of Law at Ohio State University). *Collaborative Law in Legal Education: No Time Like the Present*. Available from:

https://www.researchgate.net/publication/228223318_Collaborative_Law_in_Legal_Education_No_Time_Like_the_Present [accessed Apr 5, 2017].

⁹ Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505 (2003) ("Old Hats"); Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73 (2005) ("Proposed Rule").

¹⁰ *Old Hats*, at 507.

¹¹ *Id.* at 508.

¹² *Id.* at 508-512.

¹³ *Id.* at 508-509.

¹⁴ *Id.* at 512-520.

from the adversarial model to one of problem solving.¹⁵ The win-lose dynamic is essentially replaced with a team approach. Chris concludes, “the best way to preserve collaborative law’s fundamental principles and prepare for future expansion is with development of its own ethical standards.”¹⁶ Even though Chris explains in his conclusion that undoubtedly others will weigh in, he obviously decided that he should take up the mantle himself and two years later published his next article on the subject again in JDR, “A Proposed Model Rule for Collaborative Law.”¹⁷ In “A Proposed Model Rule,” Fairman begins by setting out the basic collaborative law agreement, “everyone agrees in advance that the lawyers participate solely for settlement purposes and cannot represent either party in litigation.”¹⁸ Fairman then goes on to explore the value of professional ethical rules, especially in the context of collaborative law, next he looks at collaborative law practice and claims of its success, and finally he examines the ethical demands of collaborative law.¹⁹ Concluding there remains a need for ethical guidance, he puts forth a proposed Model Rule 2.2—The Collaborative Lawyer.²⁰ I won’t go into the details but the Model Rule defines and explains collaborative law, discusses the lawyer’s obligations to disclose information to the client, discusses requirement of confidentiality and then what to do if settlement is not reached or if one or more of the parties chooses to litigate.²¹ Again, Professor Fairman comprehensively and meticulously lays out all the arguments, just the way he learned how to do it in high school debate those many years ago. I look forward to hearing further elaboration on those points in this symposium. Thank you.

¹⁵ *Id.* at 522-524.

¹⁶ *Id.* at 528.

¹⁷ *Model Rule*, at 73.

¹⁸ *Id.*

¹⁹ *Id.* at 78-96.

²⁰ *Id.* at 115-121.

²¹ *Id.*