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Timothy J. Heinsz

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A Tribute to Judge Elwood L. Thomas

Dean Timothy J. Heinsz*

I appreciate the opportunity afforded by the Law Review to express my abiding respect for the Honorable Elwood Thomas. This essay is fitting because Elwood and I have each published in the Law Review.¹ Perhaps the best description of Elwood is the title of the recent article in our alumni magazine the Transcript which called him "a gentle legal giant."²

Elwood was the quintessential lawyer. He possessed a keen legal mind and was a true advocate in the finest sense. He was devoted to his profession and maintained a sense of duty and passion for justice. Most of all he was considerate and cared about people, especially his family whom he loved so.

Elwood Thomas was one of those individuals who transmitted a genuine, personal warmth that enriched the lives of others. Despite the success that he achieved as a law professor, a senior partner in one of the finest law firms in the country, and Judge of the Missouri Supreme Court, he never took himself too seriously. As the tributes in this volume attest, he was a person without pretense who loved and was loved because of who he was.

I met Elwood Thomas in 1982 shortly after I had joined the faculty and five years after Elwood had returned to private law practice. I had heard

* Dean and Earl F. Nelson Professor of Law, University of Missouri-Columbia School of Law. The author would like to express his sincere gratitude to Bryan Bacon, a second-year law student, for his invaluable assistance.


many stories about this masterful teacher who had accomplished Herculean feats with his students. We were conducting a dean search and rumors abounded that Elwood was considering becoming a candidate. Many of the senior faculty talked with anticipation about the possibility of Elwood coming back to Columbia. As a young turk, I was skeptical about someone who had left academia and was determined to probe him vigorously on his abilities to be an academic leader. We soon met at a social function after a football game. I started my cross-examination and Elwood made a few thoughtful replies; then he asked about me, my goals, and my family. Before I realized it, I was doing the talking and Elwood asking the questions that indicated his interest in me. The next day at our faculty coffee, I heard myself saying to others: "Do you think Elwood would be interested in the deanship?"

Although Elwood did not return to Columbia, I believe that much of his heart always remained at the Law School. Teaching was his greatest joy. He relished the tremendous influence that he had on and through his students, not only ones who were fortunate to take his classes but also ones who came into contact with him throughout his career. Students who had him in the classroom relate that his teaching was electric, no matter whether he was teaching evidence, trial practice, insurance or tax. Professor Thomas would require that he and his students probe every issue to the core. The inquiry was vigorous and fair, never dogmatic. There were no short-cuts. He demanded intellectual rigor, but always in a kind manner. He would spend hours with his students inside and outside of class, to insure that they understood not only legal doctrine but also the meaning of the lives they would lead as counsellors of law. He had an exceptional ability not only to communicate ideas to students but also to make them think through the underlying issues and values in a manner that they would always remember. I believe that this true "thinking like a lawyer" is what enables us to acquire a spirit of tolerance and a bent toward accommodation. As one of his students related, "Elwood taught us by example that there is majesty to the law while at the same time a true humanity."

Elwood taught at the Law School from 1965 to 1978 at a time of turmoil and dissension among students and faculty. His colleagues regularly sought his judgment and valued his advice. He was patient, open and fair with an uncanny knack for lessening divisiveness and discord. Elwood had a gift that Sigmund Freud once described as: "The voice of the intellect is a soft one, but it does not rest until it has gained a hearing." He held his views and argued them persuasively but without antagonizing others.


In practice, Elwood was a lawyer's lawyer. He would tackle the most difficult cases; draft the most demanding jury instructions. One of his partners noted that Elwood was the main presence in any conference on matters of importance. After heated debate, they would turn to him for guidance. This was counsel he also was willing to give to the newest associates or even opposing attorneys. Despite the pressures of a busy law practice, Elwood always had time for people. Roger Geary stated these qualities aptly: "He was a lawyer who was able to balance effective advocacy with a real sense of human decency."5

As member and chairman of the Supreme Court's committee on civil jury instructions for 16 years,6 Elwood Thomas left an imprint on the development of law in our state. An attorney's greatest skills are to take the most complicated issues of law, distill them to their essence, and translate them from legalese into words that every person on a jury can understand and apply to do justice. It was at this task that an expert in the law and a humanist like Elwood excelled.

In a sense it is difficult to assess Elwood’s record as a Judge of the Missouri Supreme Court,7 because this part of his career was cut too short by an uncaring and incurable disease. A review of his opinions and discussions with his colleagues on the bench again indicate Elwood’s powerful intellect and gentle leadership. He was an example of Justice Frankfurter’s observation that a great judge need not necessarily have prior judicial experience but rather should possess a solid grounding in legal analysis and philosophy.8 His teaching and practice experience had given him that foundation and made him a "natural" for the Missouri Supreme Court.

Elwood possessed that most important of traits for any public official, the utmost integrity. He believed judicial decisions were a process of discussion and reflection with his fellow judges and with the lawyers who appeared before the Court. His counsel was often sought by other judges and he gave it willingly and thoughtfully. To his law clerks he served the role of mentor and teacher.

Judge Thomas was a judicial craftsman who could work through the most complex issues and draft opinions with painstaking care. He had an affection

5. A Gentle Legal Giant, TRANSCRIPT 4 (Fall 1995).
for the hard issues and wrote pellucid opinions on tax, evidence, and jury instruction matters. For instance, in *Rolla 31 School Districts v. State*, he analyzed a number of statutory and constitutional provisions in determining the appropriateness of the General Assembly requiring local school districts to provide educational assistance to pre-school handicapped children. He brushed aside the state’s argument that under separation-of-powers doctrine the court had no jurisdiction to review such an appropriation statute. Citing applicable precedent, including *Marbury v. Madison*, he aptly concluded: "Determining the constitutionality of such a statute is not only the prerogative but also the duty of this Court." While acknowledging that the state could direct local school districts to make educational services available to pre-school handicapped children, he nevertheless concluded that the state could not constitutionally shift the costs of the new program to school districts. In straightforward, succinct reasoning Judge Thomas cut to the heart of the difficult questions raised in the case and reached a conclusion in accord with both the myriad of statutory and constitutional sections involved and a sound public policy.

9. See, e.g., Board of Health Ctr. Trustees v. County Comm’r, 896 S.W.2d 627 (Mo. 1995); Harper v. Director of Revenue, 872 S.W.2d 481 (Mo. 1994); Beelman Truck Co. v. Board of Equalization, 861 S.W.2d 557 (Mo. 1993); Rolla 31 Sch. Dist. v. State, 837 S.W.2d 1 (Mo. 1992); PoPeople, Inc. v. Labor & Indus. Relations Comm’n, 830 S.W.2d 403 (Mo. 1992), cert. denied, 113 S. Ct. 325 (1992).

10. See, e.g., State v. Silvey, 894 S.W.2d 662, 664-69, 672 (Mo. 1995); Tune v. Synergy Gas Corp., 883 S.W.2d 10, 14-15 (Mo. 1994); Egelhoff v. Holt, 875 S.W.2d 543, 550-52 (Mo. 1994); State v. Nolan, 872 S.W.2d 99 (Mo. 1994); State v. Jones, 865 S.W.2d 658, 660-61 (Mo. 1993); Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 860-65 (Mo. 1993); State v. Peters, 855 S.W.2d 345 (Mo. 1993), cert. denied, 114 S. Ct. 887 (1994); State v. Grim, 854 S.W.2d 403, 405-16 (Mo. 1993), cert. denied, 114 S. Ct. 562 (1993); Stacy v. Truman Medical Ctr., 836 S.W.2d 911, 922-23, 925-27 (Mo. 1992); High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 502-03 (Mo. 1992).

11. See, e.g., State v. Silvey, 894 S.W.2d 662, 669-70 (Mo. 1995); Tune v. Synergy Gas Corp., 883 S.W.2d 10 (Mo. 1994); Egelhoff v. Holt, 875 S.W.2d 543, 546-50 (Mo. 1994); State v. Nolan, 872 S.W.2d 99, 100-05 (Mo. 1994); State v. Jones, 865 S.W.2d 658, 661-62 (Mo. 1993); Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 858-60, 872 (Mo. 1993); State v. Peters, 855 S.W.2d 345, 349 (Mo. 1993), cert. denied, 114 S. Ct. 887 (1994); State v. Grim, 854 S.W.2d 403, 416 (Mo. 1993), cert. denied, 114 S. Ct. 562 (1993); Rogers v. Bond, 839 S.W.2d 292, 293-96 (Mo. 1992), appeal after remand, 880 S.W.2d 607 (Mo. Ct. App. 1994); Stacy v. Truman Medical Ctr., 836 S.W.2d 911, 923-25 (Mo. 1992); Haynam v. Laclede Elec. Co-op, 827 S.W.2d 200 (Mo. 1992), appeal after new trial, 889 S.W.2d 148 (Mo. Ct. App. 1994).

12. 837 S.W.2d 1 (Mo. 1992).

13. 5 U.S. (1 Cranch) 137 (1803).

His opinions demonstrated a lifetime of knowledge and wisdom gained from his love affair with the law. This was most evident in his decisions concerning jury instructions. Rogers v. Bond is a clear and powerful opinion about the rationale of Missouri's adoption and use of uniform instructions, many of which were refined during his tenure on the committee on Missouri Approved Instructions. In two pages of the opinion, he managed to clarify mysteries that often confound litigators as to the differences between evidentiary and ultimate facts, how to avoid multiple submissions on the same issue, what constitutes a roving commission, and how to keep instructions simple, brief and free from argument. He realized that the instructions teach juries the law they must apply to the complex situations of life presented to them for final and just resolution. Above all, he believed that these guidelines must be both understandable and applicable in order to be fair.

More than anything, Judge Thomas fused rigorous legal reasoning with compassion. In Dial v. Lathrop R-II School District the plaintiff teacher had been employed on a part-time basis for 13 years by the school district and had advanced every year on the pay level to step 19. In the 1991-92 school year the board offered her a full-time contract but placed her at step 1 of the pay level thereby ignoring her prior years of experience. While the school district had a statutory argument that might technically defend its position, Judge Thomas went beyond the technical application of the law and considered the expectations of the parties concluding that, regardless of whether a teacher was full-time or part-time, the practice had been to advance the teacher one step on the salary schedule for each year of satisfactory performance. Judge Thomas would not allow the school board to treat "arbitrarily" an employee who had devoted her career to teaching children in its school district. In cases like Rolla 31 School Districts where the education of pre-school handicap children was involved or Dial where fair treatment of an individual was the key issue, one can almost hear Elwood asking, "But how will this decision affect people?" He never lost the idea that, above all, the law is a human institution meant to serve the public and not vice versa. If I were called to account for some behavior that was

15. 839 S.W.2d 292 (Mo. 1992).
16. Id. at 294-95.
17. In this opinion, he stated:
"The MAI instruction system is one of the most significant improvements in the civil litigation system of Missouri in recent years. The use of simple, brief, non-argumentative language is its most salient feature."
Id. at 295.
18. 871 S.W.2d 444 (Mo. 1994).
19. Id. at 450.
challenged, I would want a person like Elwood Thomas on the bench to hear my case because I know that a fair decision would result.

Elwood’s battle with Parkinson’s disease was an example of courage and equanimity that was remarkable but not surprising. I never once heard him complain as this affliction ravaged his body (but not his mind). As always, Elwood would attend Law Day and other law school functions despite the pain and difficulty of walking or moving. The kindness and assistance shown to him by the other judges on the Court as he began to lose motor skills will always be an example of love and respect.

In September of 1993 the Law School presented then-Chief Justice Ann Covington the Citation of Merit Award and Pat McLarney the Honorary Order of the Barrister Award at our Law Day ceremonies. It is customary that the recipients choose someone they admire to present the awards. Not surprisingly Ann and Pat both asked Elwood to make the presentations. As the time for the ceremony came and the audience filled the courtroom, there was no Elwood. A University police officer came and told me that a man had fallen outside and was asking for me. I came out and there was Elwood on the ground, bruised and dishevelled, but assuring all of those around him that he was all right and had to get into the courtroom. As I helped him to his feet and asked if he was sure that he wanted to go in, he answered: "Tim, this illness causes me to fall but I always get up and keep going." To me, Elwood Thomas, lawyer, professor, judge, will always be a person who ran the race to the finish—overcoming all obstacles—and who smiled and kept going.

James E. Westbrook

Elwood Thomas distinguished himself as a judge on the Missouri Supreme Court, as an outstanding practicing attorney with Shook, Hardy & Bacon in Kansas City, and as a principal architect of Missouri’s civil jury instructions. I remember him primarily as a friend, a faculty colleague, a great teacher, and a strong supporter of the law school. Although he left the law school in 1978, he returned regularly for visits during the rest of his life.

Elwood and I joined the law faculty in 1965. As I think back over those early years, I remember a group of us sitting together for Tiger football games. I remember trips that Elwood, Grant Nelson and I took to the Kansas relays and the NCAA track championship in Des Moines, Iowa. I remember countless committee and faculty meetings that were more productive and easier to sit through because of Elwood’s balanced judgment and calm demeanor. As I search my memory, I see a man without pretense who didn’t
seek special treatment and who tried to treat everyone the same, regardless of wealth or position. I see a man who carried himself with natural dignity and who didn’t seem to be trying to impress others. I see a man who enjoyed himself and didn’t take himself too seriously. He seemed comfortable with himself; I think that is one of the reasons we enjoyed his company so much.

Elwood enjoyed immediate and dramatic success as a teacher. It is not an exaggeration to say that he became a legendary teacher. I believe that the personal characteristics that made him such a pleasure to be around explain some of his success as a classroom teacher. His students liked and respected him because of the type of person he was. Elwood made an important contribution by serving as a model of how to conduct oneself as a lawyer and how to live a life. But there were other reasons why he was an outstanding teacher. He taught with energy and enthusiasm. I remember the sweat stains on his shirts when he finished a class. Teaching a class was both a mental and physical workout for him. He and Grant Nelson were the best I have ever seen at explaining complex materials in a way that students understood and remembered. He combined mastery of the subject with realism and common sense. He demanded a lot from his students and from himself. I remember the long hours and the great concentration he devoted to grading bluebooks. He cared deeply for his students and the law school.

Elwood made important contributions. To me, the most important was the impact he had on the law students who had the good fortune to have him as a teacher. I can understand how he continues to influence those former students because I carry a store of memories which influence me. My memories of Elwood inspire me and give me pleasure. They continue to influence the way I teach and the way I conduct myself. Some say that our lives are like stories. If that is so, then Elwood’s story is one of my favorites. I will always be grateful that my story overlapped his for a time.

Grant S. Nelson*

As I write this almost five months have elapsed since Elwood’s passing last summer. This passage of time has not softened my profound personal sense of loss. Elwood, after all, was not only the Godfather of two of my children, he was my closest friend and confidante. A day does not go by that I do not think about him and about how much I miss him. Nevertheless, this intervening period has afforded me additional insights into Elwood’s life and its impact on one of the institutions he deeply loved, the MU School of Law.

* Earl F. Nelson and Enoch H. Crowder Professor Emeritus of Law, University of Missouri-Columbia School of Law; Professor of Law, University of California-Los Angeles School of Law.
Elwood undoubtedly was the strongest and most loved teacher in the modern history of the law school. This is not an easy claim to make because during Elwood's tenure the law school was blessed with an outstanding teaching faculty. Indeed, the school continues in that tradition of teaching excellence. What set Elwood apart, however, was his uncanny ability to translate extremely difficult and often arcane subject matter, such as Evidence and Federal Tax Law, into language that law students and lawyers alike could readily comprehend. One former student recently confided in me that "Elwood taught Tax Law like the leader of a jungle safari—patiently and carefully leading his students through the thicket of the [Internal Revenue] Code and Regulations." Another former student recently wrote me that Elwood's "friendly demeanor melded with an exacting legal mind" and provided a model to be "emulated throughout my career. I have thought back a number of times to my law school days and one face and one personality stands out far and above all the rest—and that was Elwood Thomas."

I stood in awe of his teaching ability each time I watched him perform. What was so impressive about Elwood in the classroom was that his pedagogical brilliance betrayed not a hint of the arrogance that infects the performance of too many outstanding teachers. Even though Elwood demanded excellence and was a rigorous grader, students were uniquely attracted to him because their intuition told them correctly that he was on their side and wanted them to succeed. I learned so much about teaching from Elwood and continue to incorporate his ideas in my classes. Every time I grade bluebooks I reflect on the "Elwood Thomas—Ed Hunvald" method of evaluating student answers to essay questions. I have used the method for 28 years and continue to encourage young teachers to adopt it.

In addition, Elwood was a brilliant scholar. His long and tireless effort to create the Missouri Approved Instructions made Missouri the leading force in the nation on jury instructions. His articles and other scholarship not only bristled with insight and clarity, they were immensely valuable to both the theoretically inclined academy and the practicing bar alike.

Moreover, during his tenure on the law faculty, Elwood played an invaluable law school and campus leadership role. This is because students and colleagues naturally trusted Elwood. And this trust was not misplaced. While Elwood was guided by deeply rooted principles—there was not a Machiavellian bone in his body—he was, above all else, governed by an abiding sense of fairness and equity. Thus, during the divisive turmoil of campus unrest during the late 1960's and early 1970's, Elwood served as Chair of the UMC Student Conduct Committee. While the decisions of his committee were not always popular, the campus community knew that they were the product of Elwood's deeply ingrained insistence on fairness and full due process.

Elwood also played an important healing role at a critical juncture in the law school's history. The campus unrest of the Spring of 1970 unfortunately
spilled over into the law school and caused what was surely one of the most divisive episodes in its history. While the controversy was bound up in both principle and personality, the crisis threatened to destroy the law school’s sense of community and collegiality. The faculty sharply divided. Friendships frayed and consensus shattered. While Elwood made it perfectly clear where he stood, those on the other side knew that he reached that position because of deep conviction and not self-interest. Even in this partisan setting, Elwood’s abiding decency prevailed. His warm hand of friendship to those on the other side hastened the healing and recovery process. While this crisis left many scars, Elwood’s strength of character and mediating role diffused what easily was the law school’s most difficult and potentially destructive modern crisis.

Finally, what the foregoing illustrates more than anything else is that Elwood loved the law school deeply. On several occasions the law school attempted to lure him back. Each time he went through personal agony in making his decision to stay with Shook Hardy and the law practice. He looked forward to returning on Law Day and other special occasions. Quite frankly, he cherished his role as a law professor at MU and never really left it.

I also want to share a few personal thoughts about Elwood and our 28 year friendship. While these recollections do not deal directly with Elwood the teacher, scholar, lawyer or judge, they bring Elwood alive for my family and place him permanently in our hearts.

Elwood had a special relationship with automobiles. I vividly remember in 1967 Elwood picking me up for a golf game in his late 1950’s yellow Volkswagen Beetle convertible. This car was uniquely "Elwood." After that there was a red 1966 Chevy Malibu convertible. There was also a slightly battered World War II vintage Jeep which made Elwood a special sight in his neighborhood.

Elwood loved tinkering with automobiles and had considerable skill as a mechanic. Indeed, in 1971 Elwood and Fred Davis, an MU colleague, took a night course in Automobile Mechanics at Hickman High School. As a result, Elwood’s garage and front driveway became the focal point for his friends to bring their cars for tuneups and oil changes. It was a sight to behold and sometimes proved to be too much of a sight for one or two of his neighbors. But these were good times for his friends—some of the best.

Elwood also had a thing about travel trailers. Elwood’s pride and joy was a 1960’s vintage "Wolf." It was hardly a name brand—Elwood was aware of only one other in existence. During summer vacations, Elwood and his family toured most of the United States and Canada with his Wolf. I will never forget the summer of 1971, when the Thomas and Nelson families planned to meet in Glacier National Park to do some serious hiking. While traveling through southern British Columbia, over a thousand miles from home, we inadvertently came upon Elwood and his family on the side of the
highway attempting to repair the Wolf and the car towing it. This image is indelibly etched in my heart and mind. Later we did get to hike in Glacier and had a marvelous time. I should point out that we never succumbed to Elwood’s continued attempts to get the Nelsons to acquire a travel trailer.

Elwood was proud of his Iowa rural roots—justly so. In 1975 I had the good fortune to accompany Elwood to Mount Pleasant, Iowa to visit his mother and brother, Duane. Elwood loved farms and delighted in going to his brother’s farm. That stay provided a clear insight into the shaping of Elwood’s character and personality. His good judgment, warmth, compassion, caring and lack of pretension all have their origin in Elwood’s childhood as a Methodist preacher’s kid in numerous Iowa small towns.

Perhaps because of his Iowa rural roots, Elwood loved planting and tending his annual vegetable garden. For several years, Elwood and Jack Edwards, then the law school’s assistant dean, would use Jack’s back yard for the garden. When that yard proved too small for their ambitions, Elwood and Jack rented a larger space in Columbia. These gardens produced in abundance. Faculty colleagues and friends of Elwood and Jack were showered with tomatoes, corn and lettuce.

Elwood was also a good athlete. Not only was he a football player in college and a good golfer, he was an avid runner. He learned to become a proficient skier in his early 50’s. His running skills go back to 1969, when Elwood, Jim Westbrook and I took part in an MU Medical School study on the effects of diet and exercise on blood cholesterol. We began running at that time and have never stopped. I will never forget the Summer of 1977 when Elwood and I were both visiting professors at the Brigham Young School of Law in Provo, Utah. Several times in a Fourth of July 10K race, I fell significantly behind Elwood and considered dropping out. Each time he spurred me on. I finished the race considerably behind him, but I finished nevertheless. During the late 1980’s Elwood frequently visited Columbia and the law school. Invariably, during these visits, we would run together. He especially loved Columbia’s Katy Trail. Running with Elwood was a time for reflection about our families, the law, politics, and, sometimes, the meaning of life. More important, it was simply a time to nurture our friendship.

My fondest memories of Elwood are also the most recent. In September, 1993 I persuaded Elwood to consult a leading neurologist at UCLA about his Parkinson’s affliction. As a result, Elwood spent three days with us in Malibu. Even then he was able to make it around a neighborhood track three times. My son John, especially, will always remember Elwood standing on the sideline cheering him on in his soccer playoff game. We treasure those three days with Elwood.

My final time with Elwood was in early July last year when I stayed overnight with Sue and Elwood in their beautiful new house overlooking Jefferson City and the Missouri River. It was a marvelous time. We talked about the law. It was a bittersweet experience listening to Elwood’s brilliant
legal mind at work, a captive of a body that was increasingly failing him. More important, we talked about family. We talked about how Sue and he met while both were college students working in Rocky Mountain National Park. We talked about Mark, Sandra and Steven and how proud he was of them. We talked about how much he loved being with his granddaughter, Elisabeth.

Please indulge me in a few concluding observations. The State of Missouri and the country feels the profound loss of an outstanding and unique judicial talent. This "gentle giant" has placed an irrevocable mark on Missouri jurisprudence and the UMC Law School. More important, we all mourn the passing of a warm, caring, compassionate and courageous friend. The State of Missouri and each of us, in our own way, are deeply indebted to him. We are all so much better for having known him. Elwood, in our loss for words, perhaps the best thing we can say is that we love you deeply.

John C. Dods*

His title, "Judge," never came easily to our lips.

Not that he wasn't widely acclaimed as an ideal selection by the Governor to sit on the Missouri Supreme Court. Nor not that such honor wasn't a fitting culmination of a professional career bridging nearly four decades and spanning academia, private practice in both a small and one of the largest firms in the region, and finally as a judge on the Bench in the highest court in our state.

Our problem was that in spite of the recognition and honor the profession gave him, to us who knew him so well and so long, he was always just Elwood.

That's because he himself never pretended to be more that what he was. His name reflected the kind of man he was. Unpretentious, with more that a hint of midwestern rural values and manners.

Down-to-earth, country plain and country honest. Straight, true and unaffected in style and speech. We knew him to be solid in his reasoning, accurate in his grasp of the facts, and able to express the most complex of legal issues in simple, clear and understandable terms. But always without pretension.

Elwood came to the firm from being a professor at the law school. During his first few years he sometimes struggled with his decision to leave the university to come into private practice—teaching was a siren that kept calling him back. His contribution to Shook, Hardy & Bacon was considerable, ranging from his part in establishing the Bacon-Thomas lunches,

* Shook, Hardy & Bacon, Kansas City, Missouri.
reflecting his belief that lawyers should break bread together, as colleagues, to his undisputable role as master of complex legal issues and mentor about instructions for trial lawyer.

It was, perhaps, that siren song of teaching that prompted him to go to the court, where he could grapple with the law in pure terms, not as advocate but as interpreter and scholar.

All of us will remember him for different things—the help he gave us with knotty legal problems, the ability to strip down to the bone a complex issue, the well told stories over lunch, or the warm and friendly conversation about life in general. Even after his appointment to the court he kept a special relationship with the firm and enjoyed the company of the lawyers and staff with whom he had practiced so long.

Our profession will miss Judge Thomas. We will miss Elwood.

Richard E. McLeod *

Several years ago, Elwood was skiing in Colorado with some of the usual gang. Bill Colby was there, and Neil Sprague, and I don’t know if Chuck Wall or Jim Newsome or Paul Wickens or the other usual suspects were there, but it came to be afternoon, and Neil and Elwood were on the same slope, and they came together. Head first to head first. Elwood got the worse of the collision, and he was knocked down and bleeding from what turned out to be a minor head cut. Anyway, the ski patrol came and were somewhat worried by the blood, and one of them leaned over Elwood and said, "Sir, what’s your name?" And Elwood looked up and said, "I’m Elwood. The only one on the mountain."

Just over 16 years ago, not far from here, I spoke to my class, and I talked about the law school we all owed so much and loved so much. And I talked about what we had to do to keep our best faculty from leaving, and I talked about our beloved Elwood Thomas’ departure from the faculty to join Shook, Hardy & Bacon. And I told the audience—with some apology—that I, too, was about to join Shook, Hardy & Bacon. But I assured them that Elwood would have as great a teaching challenge tutoring me for years as he would with several graduating classes. And I set out to prove that correct, and probably the luckiest thing in my career was when Shook, Hardy & Bacon expanded to a new floor, and I got the office next to Elwood’s. On the other

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* The McLeod Law Firm, Kansas City, Missouri. Originally, this eulogy was delivered at the memorial service for Judge Thomas, August 2, 1995. This work is reprinted, in a slightly modified form, from a collection of tributes to Judge Thomas published in the Transcript’s Fall 1995 issue. See A Gentle Legal Giant, TRANSCRIPT 4, 5 (Fall 1995).
side of each of us were two corporate lawyers, Jay Newcome and Fred Beihl, and that made me the target of opportunity. Elwood would come out of his office, needing research done or an evidence problem to talk over or just to BS, and he would look at the corporate lawyers on either side and wander into my office. And that's how I became Elwood's friend. And those of you who have visited our house in the last decade or so know that Vivian and I have a five-foot high teddy bear in a chair in our living room, wearing a night cap and a nightgown, reading a book, and his name is Elwood.

I'm probably the only one here other than Mark and Sandy and Steven, who has been scolded by Elwood. We were working on a case, settlement negotiations were going on, and I had called the defense lawyer and made a demand. Elwood asked me if I had specific authority from the client to make the demand, and I told him no, but it was within the range we had discussed. He said, "Rich, don't you ever again make an offer for a client unless the client has specifically authorized it." I don't now if Elwood even raised his voice, but I never did it again, and for the rest of my days I won't forget how I felt when I earned Elwood's disapproval.

Kim Ross, Elwood's right hand paralegal for years, shared these memories: "Elwood never put anyone above anyone else. No matter who walked onto his office, he was glad to see them, glad to hear their problem, glad to help them." A Yugoslav proverb says, "If you wish to know what a man is, place him in authority." And with all of his status, prestige, reputation and power, Elwood never put anyone above anyone else.

I talked to Randy Collins last night. Randy was 17 when he broke his neck in a high jumping accident, and Elwood represented him. The case was eventually settled, in a way that Randy says let him have a life. Randy is married now, and has a 21-month-old son. I asked Randy what he remembered most about Elwood. Randy said the one thing that jumped out was when the time came for him to file his lawsuit, and our advice was that he should sue his small-town high school and his own coach. That was hard for him to consider, he said. But Elwood took him aside and comforted him. That's the word he used. And how many times has Elwood done that for those of us in this room. Comforted us.

All of us who have been around Elwood have been there when he was on the phone to one of his family. And whether it was Mark, Steven, Sandy or Sue, we all heard him say, every time, just before hanging up, "I love you." It didn't matter who was there. He was not embarrassed. He meant, "I love you." And he said it.

Elwood asked a lot of his partners at Shook Hardy, "Should I apply for the Supreme Court?" Most of us said, "Elwood, don't do it for the money." Elwood never did anything for the money. He decided to apply at the last minute for an opening thinking he wouldn't get it, but he wanted to see how he felt about it. The rest is history, and Elwood became the 106th judge in the 170-year history of the Missouri Supreme Court. And everyone of us in
this room was so proud of him, and of Governor Ashcroft for appointing him, that we could burst.

My mom knew Elwood, and she knew I was to come here today and talk about Elwood. She gave me these words to share with you, words that you may have heard before, and that all of you know are about Elwood:

_Do not stand at my grave and weep_
_I am not there_
_I do not sleep_
_I am a thousand winds that blow_
_I am the diamond glints on snow_
_I am the sunlight on ripened grain_
_I am the gentle autumn rain_
_When you awake in the morning's hush,_
_I am the swift uplifting rush of quiet birds_
_in circling flight_
_I am the soft star shine at night_
_Do not stand at my grave and cry_
_I am not there_
_I did not die_

I’m terribly tempted to urge all of us to do what Elwood would do, when we are faced with an ethical, moral or intellectual question. But we can’t do that. If we could, we would be Elwood. And we’re not. He was Elwood. The only one on the mountain.

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_Director Edward D. Robertson, Jr._*

There is a curse we have all felt these last few days—the curse of words that do not do their work, words that are too shallow or too few or just not quite right to say what we feel about Elwood, what we knew of him, how he will be missed.

And yet words are where we begin to tell each other the special place he lives within our hearts. But not just words.

Eyes, too. Eyes that glow with memory, and glisten with missing, and glance toward places we used to see him and find him gone.

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* Judge, Supreme Court of Missouri. Originally, this eulogy was delivered at the memorial service for Judge Thomas, August 2, 1995. This work is reprinted, in a slightly modified form, from a collection of tributes to Judge Thomas published in the Transcript’s Fall 1995 issue. See _A Gentle Legal Giant_, TRANSCRIPT 4, 6 (Fall 1995).
And touches—hugs and handshakes that celebrate his life by renewing the bonds between us and the commitment that we will not let his memory go from us.

For all of us, Elwood was a teacher. A gentle teacher. Elwood knew that teaching is far more important than passing information to another person. It is giving the soul; it is exposing the heart; it is eyes lit with experience and words colored with the excitement of seeing others take what is given for a useful purpose deep within themselves.

Elwood taught all of us that giants sometimes come in unexpected packages. I had heard of Elwood Thomas—his name falling in reverence from the lips of his students—students who almost mocked those of us who had not spent time at his knee, from lawyers who called him for advice and got it, from judges who had finally figured out why they said "sustained" or "overruled" because of the clarity of understanding he had bestowed on them at a judicial college as a gift, unearned but sorely needed.

Yes, I had heard of Elwood Thomas long before I met him.

I met him on an elevator in the Supreme Court Building. It was a meeting orchestrated by chance. I was already a member of the court. He had come to conduct an instruction committee meeting.

From what I had heard of him, I expected six foot two, perfectly tailored clothing, silver hair, razor cut and perfectly in place. The elevator door opened on the second floor. He got in, deep in thought. Just the two of us there now as the doors slid closed. I had no idea who he was. I introduced myself. "I'm Elwood Thomas," he said.

Fumbling for words, startled at the shallowness of my expectations, concerned that I might say something stupid in the presence of this man so revered, I immediately started apologizing for an opinion I had written on comparative fault the previous year. He smiled. "Nothing wrong with that one," he said. But there was. And after Governor Ashcroft appointed him to the bench, he helped me correct it in another case.

When vacancies occur on the court, rumors begin. People call. Names fly about like gnats circling at a picnic. "Have you heard?" they say and offer a name.

Most of the time the caller would say "Oh. Do you really think he should?" But when Elwood’s name came up, the conversation changed. "Do you really think he would?" they’d say. "Wouldn’t that be great?"

One member of the appellate judicial commission asked candidates, "Who do you think should get the appointment to the Court?" Most supplicants would say they should. Or suggest someone dead who wouldn’t be any competition—Moses or Hamurabi or Learned Hand. But one person answered Elwood Thomas. That answer along with other attributes, proved so true, so obvious, so revealing of both men that both were eventually appointed to the Court.
For most of us, appointment to the court meant standing a little straighter for a while, buying a new suit or two, and acting smart. Smart people don’t have to act smart. They just are. That’s another of Elwood’s lessons.

One day a former United States senator and I flew into St. Louis. Starched shirts, silk ties, real dignitaries, I supposed. We started walking toward a waiting car that would whisk us to a meeting. An important meeting.

Elwood had just been appointed to the court.

As we walked, I saw a herbicide ad on vacation standing against the wall at Lambert Field. Baggy overalls. Scruffy work boots. Shirt tail hanging out. Red seed corn hat right at home on hair that would not quite be tamed.

And under the bill of the cap, those eyes. Soft. Brighter than they had any right to be. Inviting eyes, that told you the mind never rested but that you were welcome there. Elwood’s eyes. The eyes we are all missing now. The eyes we will always miss.

I introduced the senator. Elwood laughed, explaining that he had a license to spread lawn fertilizer chemicals—nothing to do with practicing law for those of you making an obvious connection—and that he had to take continuing chemical education to keep the EPA license. He explained that he didn’t want to look out of place with all the other people at the seminar who spread fertilizer for a living.

I suppose that’s why he wore a tie to work, too. I can see him now sitting around the conference table at the court. Oddly, that same picture is the one the other judges with whom I have spoken keep of him.

Gently arguing reasons for taking a case, wanting badly for the opinions of the court to be as well done as possible, suggesting alternatives that maintained the peace where disagreements led us to the border of hostility, understanding that his expertise was not the only expertise around the table, listening carefully, wanting to learn, constantly wanting to learn.

And later frustrated as his motor skills began to diminish, but bearing the frustration with a courage that we shall remember and to which we shall turn for inspiration.

I did not know Elwood Thomas before he had Parkinson’s disease, a disease I have come to hate. But it was my privilege to know him as he fought it, as the greatness of his character, the depth of his compassion, the tenacity of his spirit became obvious to everyone.

In that struggle there was grace and beauty that disease could never humble. And never, ever did that wonderful mind flag. He knew the law, and he knew the law until the end.

And so we celebrate today a life. A teacher. A husband, father and friend. And for six of us, a colleague on the bench. Someone who treated us as equals though we could not have earned that place.

Some of us called him Elwoodius Maximum. For that was what he was to us. The best, the highest. A goal for which we could reach.
We have had a rare privilege, those of us who served with him as judges. He made us better than we were, and his example will make us better than we are.

And on nights when the moon sleeps and the stars crack the darkness open so that we can see the glory that lies beyond them, that old building in which Elwood worked and in which we will continue to work will give a deep sigh and remember that for nearly four years, far too short a time, a gentle giant walked its halls, touching it with goodness and grace, with a commitment to the purpose for which it stands, and with footsteps that were born for the life he led shaping minds and the law.

On those nights the building will call his name. For like us, the highest court will feel a hole left by his passing. For like us, it knows that it will be a long while before another like Elwood passes our way again.

God Bless you, Elwood. And keep you.

Judge Lawrence G. Crahan*

I am honored to have the opportunity to participate in this tribute to my teacher, mentor, colleague and friend, Judge Elwood L. Thomas. It is difficult to imagine anyone more deserving of our respect and commendation or who contributed more to the training, development and growth of Missouri’s lawyers in the course of his distinguished legal career.

Although he distinguished himself as a trial lawyer, a professor of law, a prolific author and draftsman and, all too briefly, as Judge of the Missouri Supreme Court, Elwood Thomas was first and foremost a teacher in the most classic and comprehensive sense of the term. Although he was highly regarded in the academic community, no one who knew him well would ever characterize him as an "academic" type. He was never pedantic. Rather, Elwood was possessed of that special sort of genius that enabled him to explain complex concepts in a simple way so that those of us who lacked his prodigious intellect could understand and remember them.

The breadth of Elwood’s intellect was reflected in the variety of the courses he taught at the law school. During my attendance, he was teaching Evidence, Trial Practice and Advanced Tax. It is a testament to his teaching abilities that the latter course was extremely well subscribed and attended. Most of us took the course only because he taught it.

My fondest memories of law school came from Elwood’s Trial Practice course. I particularly recall his first lesson on the art of cross-examination. At that point in our education, most of what we "knew" about cross-examination was gleaned from watching episodes of Perry Mason. To us,

* Judge, Missouri Court of Appeals, Eastern District.
cross-examination was the point in the trial where the brilliant lawyer forced the witness to admit he had been lying all along. Inspired by these vivid images from television, we eagerly awaited the opportunity to demonstrate our prowess.

Our expectations were dashed when we were given the details of the exercise. The canned problem we were given involved not a murder but an automobile collision at the intersection of two country roads. The witness we were to cross-examination was not even one of the parties; he was merely the photographer hired by one of the parties to photograph the scene and to testify that his photograph was a fair and accurate representation of the scene of the collision. We were given two days to prepare our cross-examination, which would be conducted before the entire class at the next session.

After swallowing our initial disappointment, we quickly convinced ourselves that it must be a trick. Every spare moment was spent exchanging hypotheses with classmates: the witness must not really be a photographer, he must be related to a party; the photograph does not depict the actual scene; there must be something hidden in the photograph (a view of an intersection and some bushes) that will prove one of the parties is not telling the truth, etc. Otherwise, there could be no point in cross-examining the witness.

On the appointed day, all of these outlandish hypotheses and more were tested and refuted as, one by one, we demonstrated to our classmates that we had learned nothing from the great Perry. At the conclusion of this individual and collective humiliation, someone asked Elwood whether the lesson was supposed to illustrate that it is not always necessary or appropriate to cross-examine a witness. Although he readily acknowledged that precept, Elwood said that this particular lesson was not intended to illustrate it. He then proceeded to demonstrate proper cross-examination by questioning the witness.

Elwood first had the witness explain his craft, focusing in particular on how the selection of lenses, lighting, film speed and perspective could affect the resulting photograph. The photographer conceded that opposing counsel had specified in some detail the type of photographs he wanted. Although the witness continued to maintain that the photographs were fair and accurate, he conceded that the precise techniques he employed were not necessarily those he would have selected if the choices had all been left to him. Because the photographs were black and white, the witness could not identify the exact colors of objects depicted in the photographs. He agreed that he had color film and developing capabilities, that the use of color would have been more accurate, and that he had used black and white film at the instruction of opposing counsel. Opposing counsel also specified the perspective from which the photographs were taken but did not specify the lighting conditions. Thus, the witness had no knowledge of whether the shadows and light conditions depicted in the photographs would have been the same as at the time of the accident. Nor could the witness say whether the foliage depicted in the photographs was the same as at the time of the accident. Finally, the
witness testified to the amount of his fee and conceded that he had been retained by opposing counsel on numerous occasions. Throughout his examination, Elwood’s tone was friendly, never confrontational or accusatory. His manner was consistently respectful and calculated to elicit agreement, which was readily forthcoming.

Although my description of Elwood’s demonstration does not begin to do it justice, I have included it to illustrate a number of points about Elwood’s teaching style. He always preferred to teach by example, and his examples nearly always contained lessons on more than one level. As Elwood vividly demonstrated that day, most witnesses are telling the truth as they see it. Their perception, however, may be colored by biases or assumptions the may not even be aware of. Thus, quite often what the cross-examiner must listen to most carefully is not what the witness says, but what the witness hasn’t said. As long as the witness is attempting to be truthful, there is no reason to be confrontational. Further, even if the information elicited may seem perfectly innocuous by itself, the fact that it was not disclosed on direct, or reflects a conscious choice or direction of one’s opponent, may be used to cast doubt upon the value of the information offered on direct. Finally, cases usually are won in small steps and subtle impressions. Cross-examination of a single witness will rarely, if ever, be as dramatic as is often depicted on television, but even the most innocuous witness may offer the opportunity to score a few points with little risk.

There is certainly nothing in the preceding paragraph that good advocates wouldn’t discover for themselves through experience or that wouldn’t be found in a variety of books on the subject. That does not diminish the power or the value of the lesson Elwood delivered that day. The simplicity of the example enhanced the power of the message and our ability to understand, remember and apply it. I don’t recall a single instance when I prepared for a deposition or cross-examination without remembering that lesson and attempting to apply it to the situation at hand. Nor can I recall an instance in which a moment’s reflection on that lesson failed to suggest a fruitful line of inquiry.

This simple and direct approach to complex lessons was characteristic of Elwood’s teaching methods and his dealing with students generally. There was nothing pompous or artificial about Elwood. Given a choice, he’d ask for a beer. He would ditch his coat and loosen his tie at the first opportunity. His best jokes were always at his own expense. He always had time to visit with students after class.

Elwood’s enthusiasm for the law was genuine and contagious. To those who shared his passion for the law, his loyalty was unwavering. I could not begin to count the number of times he wrote letters of recommendation and support for me or my classmates. He was a tireless supporter of the law school and its alumni and, when necessary, a thoughtful critic.
These same qualities were the hallmark of Elwood’s brief tenure on the Missouri Supreme Court. Always his own most formidable critic, Elwood welcomed criticisms of his drafts and even published opinions. I once asked him why one of his opinions had not relied on the analysis set forth in another recent case and he candidly replied that he hadn’t considered it. He later modified the opinion on the court’s own motion, confirming once again that he was more interested in getting it right than protecting his ego.

In an age when we could find ourselves wondering what has happened to the bar’s tradition of professionalism, we need look no further for a model than Elwood Thomas. He was a devoted husband and loving father. He respected and admired lawyers in general and the profession of law. He was scrupulously honest in his dealing, loyal to his colleagues and dignified in adversity. He did his utmost to pass on these enduring qualities to a generation of Missouri lawyers, who will miss him greatly.