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Robert Klonoff

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RICHARD NAGAREDA: IN MEMORIAM

*Robert H. Klonoff**

On Saturday, October 9, 2010, as I was leaving my house for a Lewis & Clark Law School wine tasting event, the telephone rang. It was NYU Law Professor Sam Issacharoff. As soon as I heard the tone of his voice, I knew he was about to convey bad news. But I never imagined he was about to tell me that our mutual friend and colleague, Vanderbilt Law Professor Richard Nagareda, had died suddenly. I attended the wine tasting, shocked and devastated, trying to maintain a positive demeanor with friends, colleagues, and alumni. Now, months later, despite the old saying that “time heals all wounds,” I remain as shocked as when I first received Sam’s call.

Richard held the David Daniels Allen Distinguished Chair in Law at Vanderbilt and was the director of the school’s Cecil D. Branstetter Litigation and Dispute Resolution Program. He had been honored with the chair only two weeks before his death. Although Richard was eight years my junior, I looked up to him in many ways: as a quintessential family man, a dedicated teacher, a committed mentor, a brilliant scholar, and a cherished colleague. I learned a great deal from him. He made me a better family member, and he made me a better teacher, scholar, and advocate. I know he did the same for countless others. Having been invited to take his place at this conference, I thought it fitting that I use the opportunity to pay tribute to him.

I.

Richard and I worked closely together for more than five years as associate reporters on the American Law Institute’s (ALI) *Aggregate Litigation* project. We were joined by reporter Sam Issacharoff of the New York University School of Law and reporter Charles Silver of the University of Texas School of Law. The four of us met several times a year and spoke regularly during the long, arduous process of completing the ALI project. (Although five years may seem like a long time for any project, the typical ALI project can take ten years or more.) Our travels during the course of the project took us across the United States and to Italy and China.

Why all the gatherings? Every year we presented our project to a

* Dean & Professor of Law, Lewis & Clark Law School; Member, United States Judicial Conference Advisory Committee on Civil Rules; Associate Reporter, *Principles of the Law of Aggregate Litigation* (American Law Institute 2009). I wish to thank my research assistants, Gabby Richards, Ben Pepper, and Jacob Abbott, who provided excellent assistance.

team of “advisers,” a group of distinguished aggregate litigation experts from the bar, bench, and academy who would critique and offer edits to our latest draft. These individuals were handpicked by ALI Director Lance Liebman, and they knew their stuff. As reporters, we also presented a draft annually to the “Members Consultative Group,” a self-selected committee open to any ALI member who wanted to help shape the project. And every year my fellow reporters and I presented a draft to the ALI Council, the governing body of the ALI. The most stressful part of all was that we also presented drafts to the full ALI membership at the annual meetings, gatherings of hundreds of people.

These various meetings were helpful and constructive but highly stressful. As an experienced appellate attorney, I would compare the experience with my arguments before the U.S. Supreme Court. The questions in both settings were penetrating, tough, and pointed. The preparation for these ALI sessions was no less intense than preparing for an oral argument before a court. Reporters had to review relevant case law and scholarship, and think through every possible question that could arise. But the oral sessions were not the only difficult part. For weeks before our various meetings, and right up until the day of our presentations, we received countless letters and e-mails—sometimes hand-delivered to our hotel rooms—attacking our ideas, our citations, our choice of topics, and even our adherence to technical ALI rules of citation. It was like receiving over one hundred opposing amicus briefs.

Before each meeting, the four of us would gather at a fine restaurant and relax with a leisurely dinner and a bottle of wine.¹ Sure, we talked some about the substance of the project and the questions we were likely to get, but most of the time we just laughed, joked, and exchanged stories about our families, friends, colleagues, and students. In his Vanderbilt Law School eulogy for Richard, Sam described the ALI process as having “the quality of feeling besieged and of having to recognize dependence one on the other.”² As good friends getting ready for a common mission, we enjoyed each other’s company before being fired upon the next day by great minds from around the country.

Through this five-year process, I learned about all the facets of Richard’s remarkable life. Richard’s life was cut tragically short, but in his forty-seven years, he touched more people in more ways than most of us ever will.

1. In his eulogy at the Vanderbilt Law School memorial service, Sam said that Richard had a strict rule: wine *or* spirits, but never both at the same meal. Sam said: “I never found out why, but to this day, if I have both, I’m worried.” *A Celebration of the Life of Richard Nagareda*, David Daniels Allen Professor of Law, VANDERBILT L. SCH. (2010), <http://law.vanderbilt.edu/vulsplayer.asp?vid=128> [hereinafter Nagareda [Celebration](#)] (streaming video).

2. *Id.*

II.

Richard was first and foremost a family man. Nothing on the planet brought him more joy than his son, Evan, and his wife, Ruth. They were a regular topic at our pre-meeting dinners. At the Vanderbilt memorial service, Dean Chris Guthrie recounted telling Richard that he and his wife, Professor Tracey George, were expecting a child, and confiding in Richard about his fear at the thought of being a father. Richard responded reassuringly about his own experience upon seeing Evan for the first time in the hospital shortly after Evan's birth:

It was as if all the motion and tumult in the world had suddenly stopped. I had never experienced anything like that in my life.

In the fall of 2009, Richard wrote to me from NYU, where he was visiting. He spoke about NYU as an impressive institution with fascinating people. But he was homesick, so he arranged to fly home to Nashville every Thursday night and return every Monday morning. Some visiting professors might have used their weekends to savor the sights, culture, and cuisine of New York, but not Richard. His family came first. As he put it in a note to me, “[t]ravel is a downside, but I must say that I really do enjoy being with my family.”

III.

Richard loved teaching, and he won multiple teaching awards. He lit up talking about new approaches to courses he had taught many times. He was never satisfied with his courses, no matter how strong his evaluations.

A key part of teaching for Richard was mentoring students on the craft of research and writing. As Vanderbilt Law Professor Suzanna Sherry noted in her eulogy, “his comments on student papers were as long as the papers themselves. And sometimes longer.”³

The many tributes by Richard's students on the Vanderbilt Law School website⁴ attest to his extraordinary gifts as a teacher. For instance, Camille Cantrell ('07) said that “Professor Nagareda had the most profound influence on my legal education and my time at Vanderbilt.” Natalie McLaughlin ('07) recalled that “[a]s students, we loved him because he made the law interesting and alive, and because he always pushed us. He challenged us every day, not to scare us or overwhelm us, but to make us better.” Brent Culpepper ('10) observed

3. *Id.*

4. *Richard Nagareda Tributes*, VANDERBILT L. SCH., <http://law.vanderbilt.edu/alumni/richard-nagareda-tributes/index.aspx> (last visited May 18, 2012).

that “[h]e fostered in me a curiosity for the law I did not know I possessed. However, as I begin my legal career, his most important lesson to me was the importance of family and loved ones and cherishing every moment I get to spend with them.” Andrew Gould (’10) noted that “I take solace knowing that, though Richard has left this world, his legacy will endure in each of us who had the amazing fortune to have known him.” Troy Covington (’02) recalled, “[h]e had a unique way of linking concepts he was teaching with pop culture references from *South Park* to *The Godfather* in a way that made learning the law fun and memorable. But above all else, he was a warm and caring man who took a genuine interest in his students and who wanted them to succeed.” My favorite was the posting by Jaime Muscar (’07):

Early during my 2L fall, I turned to him for advice about which law firm I should choose for my 2L summer given my interest in complex litigation. Being a huge fan of the comic strip “Bloom County,” I remember being instantly put at ease in his office after seeing the stuffed Opus sitting near his desk. Instead of staying behind his desk, he moved to the chairs by his *Simpsons* chessboard. We had an honest talk, and he helped steer me to the law firm where I still practice.

One of his former students, Harvard Climenko Fellow Maria Glover, described Richard the mentor, comparing him to a voice teacher:

In my former—and to some degree current—life, I studied and performed opera As any opera singer will tell you, the most valuable asset she possesses is her voice. But she’ll also tell you that having a gifted vocal coach is *tied* for first place, for it is the talented coach who nurtures and strengthens the voice [She] does all of this in a tireless effort to help you find *your* best voice.

. . . I am grateful and proud that I had Richard as my “voice teacher.” . . . One of the last things he said to me . . . was “ultimately Maria, you have to write about what makes you want to get up in the morning. You should think on things about which you are passionate. My role is to help you develop *your* voice.”⁵

Richard worried not only about substance but also about appearance. Although he was the butt of many jokes about his manner of dress,⁶ his wardrobe in the classroom was sheer perfection: nothing but nicely tailored suits. Maria Glover recounted Richard’s explanation for his manner of dress: “Students are paying \$36,000 a pop to listen to me; the least I can do is wear a nice suit.”⁷

5. Nagareda [Celebration](#), *supra* note 1.

6. Harvard Law School Professor John Goldberg, in his eulogy for Richard, captured the jokes with the following comment: “I thought galoshes had gone the way of the rotary phone.” *Id.*

7. *Id.*

IV.

Richard was a pioneer in the field of aggregate litigation. His myriad articles, his path-breaking book on mass torts,⁸ and his innovative casebook⁹ have all played—and will continue to play—a major role in how courts, scholars, and practitioners think about aggregate litigation. According to Google Scholar, Richard’s articles have been cited hundreds of times by other scholars. Additionally, courts have relied on Richard’s scholarship in some of the most important class actions in modern times, including the Wal-Mart sex discrimination case,¹⁰ tobacco litigation,¹¹ asbestos litigation,¹² and Fen-Phen litigation.¹³

In his articles, Richard often explored recent decisions and the need to refine current procedures to adapt to the changing nature of mass litigation. For example, in one article Richard argued in favor of a hybrid procedural device that would allow for suits that blend characteristics of class actions with those of a one-on-one lawsuit.¹⁴ In other articles, Richard explored the viability of settlements of mandatory class actions to resolve liability for punitive damages;¹⁵ the public and private dimensions of class actions in an increasingly complex administrative state;¹⁶ the difficulties of defining and enforcing the “adequacy” requirement of class action certification;¹⁷ and the role that aggregate proof should play in class certification.¹⁸

Richard’s book, *Mass Torts in a World of Settlement*, received widespread critical acclaim. It represented the culmination of more than a decade of thinking about ways of administering mass tort settlements and addressing the conflicting interests of present claimants and future claimants (i.e., those whose injuries had not yet manifested

8. RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (2007).

9. RICHARD A. NAGAREDA, *THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION* (2009).

10. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2541, 2550–52, 2556–57 (2011).

11. *In re Simon II Litig.*, 407 F.3d 125, 134 (2d Cir. 2005).

12. *Georgine v. Amchem Prod., Inc.*, 83 F.3d 610, 618 n.2 (3d Cir. 1996), *aff’d*, 521 U.S. 591 (1997); *In re Joint E. & S. Dist. Asbestos Litig.*, 929 F. Supp. 1, 5 (E. & S.D.N.Y. 1996).

13. *In re Diet Drugs Litig.*, 582 F.3d 524, 531, 545 n.41 (3d Cir. 2009).

14. Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105 (2010).

15. Richard A. Nagareda, *Punitive Damage Class Actions and the Baseline of Tort*, 36 WAKE FOREST L. REV. 943 (2001).

16. Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603 (2008).

17. Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287 (2003).

18. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2009).

themselves).¹⁹ In that book, Richard argued that parties have moved away from litigation and toward administrative procedures to resolve mass tort claims, necessitating a more formal structure to accommodate this shift. As Professor David Marcus wrote in his book review, Richard “masterfully craft[ed] an analytical framework from a variety of doctrinal materials to explain the mass tort system and assess its successes and failures.”²⁰ Professor Marcus noted that Richard’s book “should become required reading for scholars, judges and mass tort practitioners alike as they search for just and efficient paths to peace.”²¹

Always ahead of his time, one of Richard’s last articles focused on the growth of class-action litigation throughout the world.²² In that article, he discussed the emergence of aggregate litigation devices in Europe. With his trademark humor, Richard closed the article by observing, “what is likely to emerge is not the exceptionalism of the U.S. experience but, instead, a striking lack of exceptionalism—McDonald’s on the Champs-Elysees, but with its Quarter Pounder famously restyled as a Royale with Cheese.”²³

Not surprisingly, journalists regularly contacted Richard to shed light on major class actions. He was frequently cited in the *New York Times*, the *Wall Street Journal*, and other publications as an expert on mass torts and class actions. One reporter called him “a journalist’s dream, never failing to return phone calls and always answering every last question . . . with patience, respect and an exacting clarity.”²⁴ The same reporter noted that Richard’s knowledge of large-scale litigation “was vast and impressive, and his commentary never failed to be thoughtful and nuanced.”²⁵ Illustrative of his comments to the media were Richard’s analysis of litigation in the aftermath of September 11th²⁶ and his analysis of litigation arising out of the BP oil spill.²⁷

Sadly, Richard did not live to see the Supreme Court’s landmark opinion in *Wal-Mart Stores, Inc. v. Dukes*.²⁸ Richard would have been

19. For earlier work on these issues, see, for example, Richard A. Nagareda, *Turning from Torts to Administration*, 94 MICH. L. REV. 899 (1996).

20. David Marcus, *Some Realism About Mass Torts: A Review of Mass Torts in a World of Settlement*, 75 U. CHI. L. REV. 1949, 1950 (2007).

21. *Id.* at 1952.

22. Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1 (2009).

23. *Id.* at 52 (borrowing the phrase “Royale with Cheese” from the movie *Pulp Fiction*).

24. Ashby Jones, *Vanderbilt’s Richard Nagareda*, WALL ST. J. L. BLOG, (Oct. 12, 2010), <http://blogs.wsj.com/law/2010/10/12/law-blog-obituary-vanderbilts-richard-nagareda/>.

25. *Id.*

26. See Mireya Navarro, *Effort to Settle Sept. 11 Lawsuits*, N.Y. TIMES, Feb. 5, 2010, at A1.

27. See Michael Cooper, *Two Funds, Same Goal: Compensate*, N.Y. TIMES, Aug. 22, 2010, at A14.

28. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (reversing the Ninth Circuit’s en

proud that the debate between the majority and the dissent on the meaning of Rule 23(a)(2)'s "commonality" requirement²⁹ turned mainly on the interpretation of Richard's article, *Class Certification in the Age of Aggregate Proof*.³⁰ It is rare for the Supreme Court to rely so heavily on a law review article in construing a federal rule. Its decision to do so in *Dukes* speaks volumes about Richard's reputation—not only in the academy but also among the Justices on the Supreme Court.

V.

Richard played a major role in drafting the ALI's *Principles of the Law of Aggregate Litigation*. He was the principal author of Chapter 2, which addresses aggregate adjudication. His ALI work on class certification, issues classes, choice of law, preclusion, and interlocutory review will likely guide judges and scholars for years to come. Richard also provided significant input on Chapters 1 and 3. Each time I circulated a draft of my chapter (Chapter 3 on aggregate settlements) to my co-reporters, Richard fired back insightful and detailed comments. I sometimes thought that he worked as hard on my chapter as he did on his own.

I mentioned at the outset that presenting a draft at an ALI session was like delivering an oral argument. There was, however, one major difference: at ALI meetings there were four of us on stage to field questions. Richard regularly rescued the rest of us when we were hit with penetrating questions, offering answers that showed the flaws in the questioner's premise or that identified common ground that could be incorporated into subsequent drafts.

I recall one colloquy in which torts scholar and law firm partner Victor Schwartz suggested that the draft could eviscerate the Rule 23(b)(3) predominance requirement and thus "radically change [the] law on class actions with respect to chemicals, drugs, tobacco, and other things"³¹ Without skipping a beat, Richard responded:

What we see in the case law right now are courts struggling to meld

banc decision upholding class certification and finding that the class failed under FED. R. CIV. P. 23 in a putative nationwide class action alleging that Wal-Mart had engaged in sex discrimination).

29. FED. R. CIV. P. 23(a)(2) (requiring that all class actions have at least one common question of law or fact).

30. 84 N.Y.U. L. REV. 111 (2009). See 131 S. Ct. at 2550–52 (majority opinion); 131 S. Ct. at 2566 (dissenting opinion). Both the majority and the dissent also cited Richard's article, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149 (2003). 131 S. Ct. at 2556 (majority opinion); *id.* at 2562 (dissenting opinion). The majority also cited Richard's NYU article in a separate portion of its opinion that addressed FED. R. CIV. P. 23(b)(2) (classes seeking declaratory or injunctive relief). 131 S. Ct. at 2557.

31. Transcript of 2006 American Law Institute Proceedings at 99.

[issue classes under Rule 23(c)(4) with predominance under Rule (23)(b)(3)], and what we are trying to do in this document is to give that a bit more precision, so we are not getting rid of predominance, I can state that categorically.³²

Of the four of us on the project, Richard most enjoyed the art of making sure that we followed proper rules of cite form and grammar. In our final round of editing, he double-checked with the executive editor of the Vanderbilt Law Review to make sure we were using hyphens properly on a particular cite. The verdict, which he recounted to the three of us and to the ALI's internal editor, was as follows:

[N]o hyphen between "quasi" and "class"; a hyphen between "class" and "action"; and a hyphen in "multi-district." We clearly train our students well to focus closely on such hotly contested questions in the law!

Richard relished taking the ALI project into his classroom, and he encouraged debate and criticism from his students. One third-year student chose to critique the ALI's treatment of non-class aggregate settlements.³³ Richard was delighted to receive a hard-hitting analysis from the student, and he reported to his co-reporters:

Just passing along FYI, the first (still rough) draft of a paper prepared by one of the students in my 3L civil litigation "capstone" seminar that presents a critique of our ALI proposal regarding the aggregate settlement rule. I clearly have not impressed upon this quite talented young man the force of my personality. He thinks we're way off in our proposal. In all seriousness . . . [,] the draft does give a flavor of what a thoughtful and genuinely respectful critique of our position might have to say . . .

I always enjoyed hearing Richard's reactions to the avalanche of critical letters, e-mails, and oral comments on our various drafts. In one instance, an ALI member proposed several amendments to our text. Richard read the searing attack and then wrote to his three co-reporters:

Like I said: Murder on the Orient Express. And in such strict formation, with each would-be stabber proceeding sequentially through the document.

* * *

This brief essay can only touch the surface of Richard's rich life as a family man, teacher, and scholar. Despite his untimely death, he has had a profound impact on the law and on hundreds of students who

32. *Id.*

33. *Principles of the Law of Aggregate Litigation instead of Aggregate Litigation add (ALI 2009).*

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represent the future of our profession.