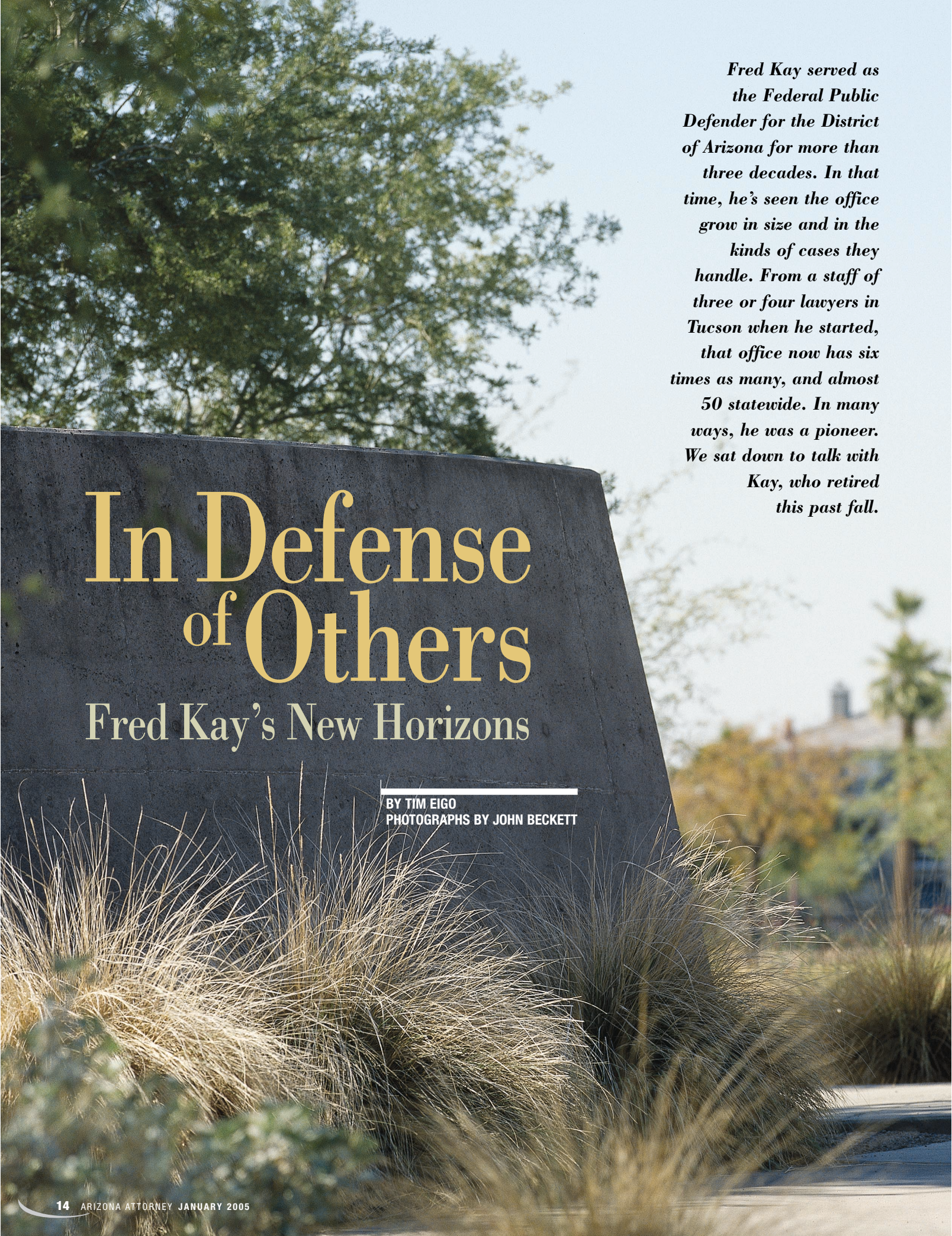


In Defense of Others

Fred Kay's New Horizons

Fred Kay served as the Federal Public Defender for the District of Arizona for more than three decades. In that time, he's seen the office grow in size and in the kinds of cases they handle. From a staff of three or four lawyers in Tucson when he started, that office now has six times as many, and almost 50 statewide. In many ways, he was a pioneer. We sat down to talk with Kay, who retired this past fall.

BY TIM EIGO
PHOTOGRAPHS BY JOHN BECKETT

Arizona Attorney: What drove you to become a lawyer? Are you from a family of lawyers?

Fred Kay: No. My degree is in business, and I used to do some process serving down in Tucson. I'd get the pleadings, the process, I'd serve them, and then I'd often go look at the files at the courthouse—in those days, you'd just walk in and they allowed me to take the file right out of the cabinet, there was no security at all. And then I'd often watch trials and stuff. I would see these lawyers and I thought to myself, "I can do that."

AzAt: Process serving must have been hard work.

Kay: It paid pretty good; it was interesting. And for a couple of years, I knew a lot of lawyers. Back in those days, I think I probably knew every lawyer in Tucson—not personally, but through my work.

AzAt: So you knew you wanted to do trial work?

Kay: I didn't know what I would wind up actually doing. I didn't really have a plan. I sort of fell into criminal [practice]. Once I got into it, I really loved it. I stayed with it until the bitter end.

AzAt: Did you clerk in criminal work?

Kay: I clerked for the [Tucson] City Attorney for a short period of time until I passed the bar, and then they hired me in the prosecutor's office. I stayed there for about three months.

In those days, nobody seemed to stay very long. And you could do private practice, too, and I did a little private practice on the side. Then the Pima County Public Defender's Office opened on January 2, 1970, and Howard Cashman, who had been named the Defender, asked me if I'd like to go to work there, and I told him I would.

There were five of us in those days, and that was it.

AzAt: How long were you with Pima County?

Kay: Almost two years, and then I shifted over to the Federal Public Defender in Tucson; Tom Karas hired me. At that time, Jo Ann Diamos and Gilbert Veliz were the two attorneys in the office. I was the third attorney to be hired. There were probably about four in Phoenix at that time; they included Tom O'Toole, who later became the Defender and is now on the Superior Court [for Maricopa County].

AzAt: When was the Federal Public Defender created by statute?

Kay: The Criminal Justice Act, I believe, was around 1965. And Tom Karas was working up here on a Ford Foundation grant in Phoenix, sort of out of his hip pocket, I think; I don't think he had an office. And then [U.S. District] Judge [Walter] Craig asked him to become the Defender in Arizona. He did, and he hired some people in Phoenix; they opened an office in Tucson within months after that. The office opened up in Arizona in 1971.

Incidentally, Arizona had the first Federal Public Defender in the nation, kind

of by a trick.

A couple of them were getting ready to open. A guy named Jim Hewitt was going to open in San Francisco; he had sent out invitations, and it was a big deal. [U.S. District] Judge [Carl] Muecke, who was on the bench at that time, was a good friend of Hewitt's—I think they had prosecuted together years before in the Department of Justice—and when he saw these invitations, he called Karas and said, "Karas, get over here right now. I'm gonna swear you in; we're going to beat Hewitt." And he did. So Tom Karas was the first in the nation.

AzAt: What made it appealing to join the Federal Public Defender?

Kay: It was just something different. It was another opportunity. Gilbert Veliz is a good friend of mine, and I had shared an office with him in Pima County and he later became a superior court judge and is now retired. But Gilbert went over to the Federal Defender, and he told Karas about me, so I went over there. And I'm glad I did; it was a fascinating change of life.

AzAt: How did your practice change?

Kay: We didn't get the ordinary street crimes like you do in the state system. In the federal system you get a lot of border activity, particularly in Tucson. So Tucson got eventually to be almost exclusively drugs and immigration.

But we'd get bank robberies and tax cases and murders and assaults off the reservation, and threats on the president. We used to get a lot of threats on the president. Early on, they were pretty regular.

One of the people in the office got one that was kind of funny. The defendant was in the Pima County Jail, and he decided that he would rather be in the federal system. So he made a threat on the president. He was charged in federal court, and he got into federal prison.

AzAt: Prisoners doing their own forum shopping.

Kay: It was.

AzAt: What was law practice like when you began?

Kay: I think it was a lot different. I started practicing in 1969, and I was starving for some kind of book or treatise on criminal law, and there weren't any. I think the book I relied upon was one from the Practising Law Institute, a little paperbound thing that was a seminar book. I used to do my research in *Corpus Juris Secundum*; it was a laborious task to use the digest. Nowadays there's all kinds of treatises, so that's a big change.

We had a lot of trials, too, back when I started and for many years afterwards. Today, at least in federal court, the trials are down to very small numbers. The reason is the mandatory sentences and the sentencing guidelines. There's a penalty to go to trial; you take a big risk. Most people aren't willing to take that risk.

We had a lot of trials, and I think a lot of successful results. I didn't keep an exact number, but I think we had around a 50 percent acquittal rate, which I think is pretty high.

It was a lot of fun. We were friendly with the prosecutors; it was like a smaller family. We'd even socialize with them a little bit, and I think that's faded away. It's much more serious nowadays, much more rigid. And the prosecutors don't have the discretion that they used to have themselves. They're very much guided by the Sentencing Guidelines and guidelines within their own office, and from the Department of Justice. So they're kind of stuck in what they can do and what they can offer.

AzAt: Do the Sentencing Guidelines take some of the enjoyment out of the practice?

Kay: Absolutely. Judges are hamstrung, and they don't like it. The way I've always looked at it, judges are vetted and appointed as the best person around, and then they're not allowed to do their job. In more recent years, it's been made even worse: If they deviate from the strict sense of the Guidelines, they are reported, so to speak, to the Department of Justice and the Attorney General. It's like they've been neutered. The prosecuting agencies now have the power that the judges should have.

The Guidelines don't look at any of the human factors, which a defense lawyer of course looks at. Usually it's pretty rigid: You're processing numbers; you become a bean counter in a lot of ways.

AzAt: Do prosecutors also feel hamstrung?

Kay: I think a lot of them don't enjoy the system. It gives them a lot of power in the sense that they can say, "I have no discretion; these are the Guidelines." So they don't have to deal with your complaining or make you as good an offer as they might otherwise.

I think they would prefer, like any

lawyer would and should, to use their own discretion, when discretion is needed. They don't have it.

AZAT: Why did you stay at the Defender's Office for 33 years?

KAY: I enjoyed it. And frankly, the time slipped away. Before I realized it, I was getting gray hair and I was one of the older guys, and I was always one of the younger ones. We just kept so busy, and the years just slipped away. Nothing ever came up that would lure me away.

AZAT: What part of the job was most challenging?

KAY: You're dealing with people who have some serious trauma and tragedy in their lives. Some of them were not nice people, and some of them were very nice people. It was rewarding to help them to try to get a good result. Occasionally, you get somebody who is just innocent. Those were the cases that really made you nervous, because most people are guilty of something to some degree, but when you get one that you felt was innocent, I used to get kind of nervous about it.

AZAT: And the people you worked with?

KAY: We had so many people that later became judges—it's got to be at least a dozen from my term.

I think if you talk to judges, they will tell you that probably the best federal criminal defense lawyers are in the Federal Public Defender's Office, though there are some excellent lawyers on the outside.

AZAT: Do you ever hear from former clients?

KAY: Yeah, I do. In fact, I got a call from a guy about six months ago. I didn't remember him because the case came and went very quickly. But now I see that guy around at his business in Tucson.

AZAT: Criminal law is a very personal practice.

KAY: It's very personal.

AZAT: So do you hear from people for good or ill?

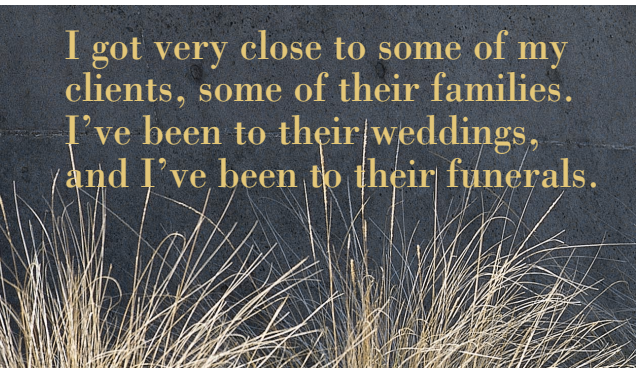
KAY: Well, a lot of criminal defense clients, they didn't hire you, you were appointed and foisted on them. And a lot of them are very distrustful. But in my experience after I had represented someone, most of them were satisfied and felt that they had got good representation. And I think that's true of most of the lawyers in the office.

I got very close to some of my clients, some of their families. I've been to their weddings, and I've been to their funerals.

I've seen their kids born. Through the years, I've seen quite a bit.

We've had a lot of Indian clients, and to me they were always very enjoyable, because they tended to be much more candid and honest than non-Indian clients, and they had a sense of humor, too, a lot of them do. It's very subtle, and very funny.

I'm quite close to a family on the White Mountain Reservation that I represented a guy on a murder case. And I got to know his family very well, I got to know his children. And I would stop when I went through Whiteriver. A couple of years ago I attended his father's funeral, which was an interesting experience; I had never been to a Native American funeral.



AZAT: Jon Sands is the new Federal Public Defender.

KAY: He is. Jon is a brilliant lawyer who publishes and teaches and tries more cases than anybody could possibly do. I don't know how he does it.

He's a very productive and brilliant guy, an amazing person. I'm really happy that he's able to have the job; I hope he enjoys it as I did.

AZAT: Compensation is not such an issue in the federal system, but at the county level, defenders still can see significant differences between their pay and that of prosecutors. What does that do to morale?

KAY: I think in the state system the defenders are finally getting equal or at least more equal with the prosecutors, but I'm not sure that it's 100 percent.

I just can't imagine how you can pay someone who's doing defense work less than you can pay a prosecutor. In my mind, defense work is so much more difficult. It's easy to be a prosecutor. I always jokingly say, All you've got to do is call the police officer to the stand and say, "And what happened next?" But if you're a defense lawyer, you've got to search for a defense, and you've got to get out and beat the bushes and find the witnesses and develop a theory.

When you're a prosecutor, you do that to some extent, but for the most part the law enforcement officers bring it to them on a platter.

AZAT: Fred, in the last year, you and your family have had quite a terrible setback. Can I ask you what happened?

KAY: Well, my youngest son Joe is a very good basketball player. He plays for Tucson High School. And they were playing Salpointe High School, which is always the team in town to beat.

They had a really tough game, and the gym was full. Tucson High won the game, and my son did very well. At the end of the game, the fans rushed on the court, and my son was caught under the pack, so to speak. He suffered a torn carotid artery, a dissection of his carotid artery, which in turn caused a stroke.

He couldn't get up off the floor. I went back into the locker room with him, and they took him to the hospital. He could not move the right side of his body. He couldn't speak. It was a very serious injury. He turned 18 years old in the emergency room.

It's been about nine months. He's now walking again. He has a little bit of a limp. He can kind of jog after a fashion—not like he could before; he was just a beautiful, graceful athlete before. He can move his right arm, but his right hand is very limited. He's been in therapy all this time. We've been living in Phoenix, and he's been going to outpatient therapy here. We're going to end that in this month, but before we get back to Tucson, we're taking him to a clinic in Birmingham, Alabama, that has a reputation for doing some good things with people trying to get their hand to work again.

In January, he's going to enroll in the University of Arizona—not take a full load. He's going to live in the dorm, and hopefully in the fall, he will go to Stanford, where he had a scholarship and was admitted. We hope things are going to work out.

AZAT: He excelled in more than one sport, didn't he?

KAY: Well, he played basketball and volleyball. He got a volleyball scholarship from Stanford, which is a difficult thing to get. Even if you have the athletic skills, you've got to have the grades.

AZAT: And he's no slump in that area either.

KAY: That's right. He's a National Merit Scholar. Fortunately, his brain seems to be working pretty good. But he's taking a calculus class right now at Phoenix College, and it's been very hard for him, whereas before, it was just a piece of cake.

AZAT: What's his prognosis?

KAY: Well, I think he's going to be able to go to school. I don't think he'll ever be the same. We hope he gets enough of his hand back that he can use it. Those are your small muscles, and they're very hard to bring back. I hope he can live a productive life; I think he's going to have disabilities that he wouldn't have had before.

This guy was a tremendous athlete and scholar. I hope that he can carry on his life and be the scholar that he once was. That's yet to be known.

AZAT: I heard of kind words and acts by many people toward your family, but one from your own office intrigued me.

KAY: Everyone has been very gracious and very outstanding. And Jon Sands in my office came up with this idea to sell bobblehead dolls with my face on it. They sold them nationwide, and he raised over $5,600 for Joe.

I can't say enough about the outpouring we've had from the community. The Governor's Office has called and offered to help. [Ninth Circuit Chief Judge] Mary Schroeder has been very kind.

It's been unbelievable: Judges, lawyers, people in the community, everybody.

AZAT: Fred, do you suspect you'll take well to retirement?

KAY: I haven't had time to think about it. I've just been so busy.

I'm looking at other things. I don't know that I'll go into the practice of law as such, but I may do something involving law.

AZAT: So by the middle of December, you and your family will be back in Tucson.

KAY: Yeah. And then by January, Joe will be in school. And things will be starting to go in a direction they haven't yet.

AZAT: We wish you good luck.