taxanalysts SALT Shakers

Spangler Offers Perspectives On Four Decades With Idaho, MTC

by Doug Sheppard

SALT Shakers is a column by State Tax Notes *news editor Doug Sheppard that is devoted to viewpoints and interviews with noteworthy members of the state and local tax world.*

When Ted Spangler won the Multistate Tax Commission's 2011 Paull Mines Award, it was the culmination of four distinguished decades in the state and local tax field.

Spangler, who earned his law degree from the University of Idaho College of Law after doing undergraduate work at Boise College (now Boise State University), joined the Idaho state administration in May 1974 after three years in private practice. While technically employed by the attorney general's office, he was assigned to the Idaho State Tax Commission full time, a position he held until retiring as the commission's deputy attorney general on March 30, 2010. During his tenure, Spangler not only argued 25 cases before the Idaho Supreme Court but also served as the chair of the MTC's Uniformity Committee from 1989 until his retirement.

Spangler's MTC affiliation, however, stretches back to the year he accepted a position with the Idaho tax commission, making him one of the longest-serving officials (36 years) in the commission's history. Spangler witnessed quite a few changes during that time, many of which are the subject of this interview.

Perhaps owing to his military background (Spangler retired as an Army National Guard lieutenant colonel in 1991 after 22 years of service that also included a stint in the Army), Spangler has become known for his even-keeled demeanor in a field often marked by spirited debate. That was also the approach of the man for whom the Paull Mines Award is named. As the MTC said when it first bestowed the honor in 2008, the award "annually recognizes an attorney who has made significant contributions to state tax jurisprudence, and who exemplifies Paull's qualities of leadership, legal excellence, and professional integrity in the best traditions of the profession."

Agree or disagree with his views, one would have to say those attributes apply to Spangler, who continues to have an impact as a part-time adviser, mentor, and tutor for the Idaho State Tax Commission.

***State Tax Notes*:** How has the Multistate Tax Commission evolved since you first attended a meeting in 1974 in terms of public perception and its functions?

Spangler: It has evolved from a struggling start-up, battling for its survival, to a mature and respected organization on which many states rely for important services.

In 1974 the *U.S. Steel* case, which would eventually go to the U.S. Supreme Court, was bogged down in massive multistate discovery in a New York federal district court. States were laboring with the document production burden and beginning to question the organization's value. With the constitutionality of its basic compact under challenge, the MTC's auditors could not gain access to taxpayers to conduct audits on behalf of its member states. In many ways, the MTC was virtually paralyzed.

I was a young lawyer with a few years of general practice in a small Idaho town. I had hoped, naively as it turned out, that by joining the state and practicing tax law, I might be part of an environment where lawyers and their professional clients resolved their differences in gentlemanly conducted litigation. (There were not many women in this part of the profession then.)

What I discovered was that the *U.S. Steel* litigation was an emotionally embittered conflict. Parties on all sides, and their legal counsel, felt personally threatened. It was like the most angry contested child support fight I had ever experienced — the sort of thing I was trying to leave behind.

The *U.S. Steel* decision began to establish the MTC's credentials as a legitimate agent through which the states could collectively exercise their sovereign power in a cooperative way, but it took

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Ted Spangler

many years of litigation and some changes in personalities to overcome lingering resentments from that case.

Functionally, the MTC's programs have expanded in number and quality and continue to do so. The MTC's audit authority is rarely questioned and not really questionable. The National Nexus Program extends states' reach into areas that many states would find difficult to accomplish alone. The voluntary compliance program helps states reach out to taxpayers needing to overcome past oversights and become compliant taxpayers in a cooperative way that benefits both sides. It would be difficult for taxpayers to negotiate with states anonymously without a trusted intermediary. The MTC's educational programs, most notably the nexus schools, provide states with cost-effective training opportunities that otherwise would simply not exist.

I've been most closely involved in the Litigation Committee's program for training state tax lawyers. That's a resource and opportunity that is not easily replaceable. Other legal education opportunities available to lawyers who practice state and local tax law — like the excellent one the Georgetown Law Center does — are prohibitively expensive for states like Idaho. The MTC training brings a level of continuing legal education that most states could not match on their own. Anyone inclined to criticize that committee's training activity should pause to consider the consequence of tax administration agencies obtaining legal advice from ill-trained lawyers. Good lawyers often spend as much time cautioning their clients as they do zealously advocating for them.

Public perception is harder for me to gauge. Folks from both the taxpayer and the practitioner communities regularly attend MTC meetings and participate in teleconferences. They seem to want to hear what the states have to say. The MTC's staff members are frequently invited speakers for other groups who see their opinions as valuable. We see more interest in public participation in the MTC's uniformity processes. Its activities are reported in tax media like yours. That suggests to me that the MTC is perceived to be an organization that matters.

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Having said that, it is important to remember that the MTC is not an entity separate and apart from its member states. In the past, I've heard suggestions that states simply follow the lead of the MTC's staff. That was never really true, but there seems to be a more public recognition of that fact today. I think that understanding contributes to a healthier public perception and better relationships.

***State Tax Notes*:** What value does the MTC provide to a state like Idaho?

Spangler: I touched on some of that above. The audit and nexus programs and the revenue they produce are obviously important. They more than pay the costs of a state's participation. Particularly for smaller states like Idaho, those programs extend the state's compliance activities and thereby contribute to encouraging voluntary compliance.

The MTC is the agency for maximizing the synergies of interstate cooperation. I know that phrase sounds like somebody's latest buzzwords, but I'm trying to describe the intangibles involved. I've mentioned the value of the MTC's training program. There are also the shared experiences and contacts. The fact that I can call a lawyer in another state who I know through the MTC and discuss similar problems is an invaluable contribution to my ability to give better legal advice to my client. By choosing to participate actively in the MTC, smaller states can be more influential in national discussions of issues affecting the state than our size might otherwise permit.

Remember that as a sovereign state, a small state like Idaho must still develop as complete a body of

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tax law as the largest states. Almost everything that gives rise to a tax issue in a state like California also happens here. Movies are made in Idaho; we have a port. Those things don't happen as often and the tax amounts may be smaller, but we must still have answers to all of the same issues when they arise. We simply don't have a large dedicated staff of lawyers, accountants, and economists to devote to that task. The ability to draw on the experiences of sister states (which sometimes suggests taking a different approach) is one way to meet this challenge with our limited resources.

In this way, the MTC's uniformity work product has shaped Idaho's tax laws in profound ways. Idaho has adopted many of the MTC's regulatory and statutory recommendations. The collected wisdom gathered from many states cooperating and taxpayers commenting is reflected in most of those recommendations in ways that cannot be replicated in one small state. The positions we have advocated to Idaho courts have been shaped by our MTC experiences. Many have been accepted by our courts and therefore form integral parts of the structure of our tax laws and policies.

Without all that, Idaho would have a different — I think not as good — tax environment. It would be much more underdeveloped than it is today. The biggest difference for taxpayers would be an inability to predict what the tax consequences of their business decisions might be. We need to be able to do more for our taxpayers, and MTC participation is one of the ways to accomplish it.

***State Tax Notes*:** How has the perception of the MTC by business taxpayers changed — or not changed — during your tenure?

Spangler: It seems better today than in the past. The folks at the Council On State Taxation are talking and participating much more. That's an improvement. But I don't think there is a single business perception of the MTC.

How businesses react to the MTC seems to vary by business, by industry, by issue, and even by individual. Sometimes interests converge, and cooperation toward a joint solution contributes to positive perceptions of the MTC and its member states (which are, remember, the same thing). I've mentioned the voluntary compliance program, which seems to have been well received by taxpayers and practitioners.

Sometimes states believe it is their duty to take actions to enforce tax compliance and choose to use the MTC as the organization for that action. That brings adverse perceptions. We should expect that taxpayers and tax collectors will have differences — sometimes strongly held ones. There are fewer — but still too many — individuals on each side who impugn the underlying motives of the folks on the other side. We need to work on getting over that.

***State Tax Notes*:** The *U.S. Steel* case is obviously important in the MTC's history in establishing its constitutionality. What was its immediate impact in 1978 and the impact over the long term?

Spangler: The *U.S. Steel* decision did not end the dispute over the MTC's legal authority to audit on behalf of its members. Several more years of hard-fought litigation followed. The MTC's first general counsel, the always colorful and sometimes controversial Bill Dexter, coordinated lawsuits in a number of states. Bill should get most of the credit for moving the *U.S. Steel* case forward and for the ultimate victory in the Supreme Court. His willingness to speak unpopular opinions publicly has obscured his real skills and qualities as a lawyer. He accumulated an impressive string of victories.

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The legal strategy the states chose was to issue subpoenas under the authority of the Multistate Tax Compact and then file state court actions with the MTC as the plaintiff to enforce the subpoenas when taxpayers did not fully comply. States volunteered to take the lead in regard to different taxpayers. Our experience in Idaho illustrates the short-term events after the *U.S. Steel* decision.

Coincidentally, Idaho had the job of enforcing the MTC subpoena issued to U.S. Steel, and I acted as Bill's local counsel in the case. U.S. Steel's counsel removed the case to federal court, and the federal district judge kept the case, dismissing our motion to remand. He felt that under the state tax injunction act, U.S. Steel had no "adequate remedy at state law" since the MTC sought to audit for several states, and no one state court could fully address the issues for all the states.

As it turned out, that was about the last favorable ruling U.S. Steel received in the case. U.S. Steel appealed various rulings requiring the production of records for MTC audit to the Ninth Circuit two or three times (none of which resulted in reported decisions), but ultimately, in our case, the MTC's authority to conduct these audits was affirmed. Other cases had similar results.

That was the immediate impact. The longer-term results were not as litigious. *U.S. Steel* meant the MTC had constitutional legitimacy. MTC audits became more common and routine; so did the relationships with the taxpayer community. That encouraged more states to participate in its programs, though not always as full compact members.

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Greater participation allowed the MTC to grow and mature as an organization.

The resulting synergies professionalized both the MTC staff and those of the participating state tax administration agencies. Much of the credit goes to a combination of a strong leadership from the MTC Executive Committee and its chairs, the energy of then-new Executive Director Dan Bucks, and legal leadership in the hands of first Alan Friedman and then Paull Mines.

The Court's approval in *U.S. Steel* of an interstate compact as a legitimate tool for state tax cooperation also encouraged states to experiment with compacts in other areas. The International Fuels Tax Agreement originally drew inspiration from the existence of the MTC's compact. The Streamlined Sales and Use Tax Agreement is another example. Without the assurance that states can constitutionally share sovereign powers through a compact, states may not have been comfortable enough with the concept to undertake either effort. Various regional compacts may have drawn similar encouragement from *U.S. Steel*.

***State Tax Notes*:** Moving ahead a couple years, what are your memories of the worldwide unitary battle of the early 1980s? What effect did it have on the implementation of combined reporting and/or corporate taxation?

Spangler: I don't think of it as a battle. It was simply an example of our political processes working out issues. Politics are not always pretty, and the results are usually something less than a full victory for anyone. That's what happened.

It began when the Reagan administration asked the Senate to ratify some revisions to the U.S.-U.K. tax treaty. States discovered that the proposal included a prohibition on states applying their worldwide combined reporting regime to companies with U.K. operations. (I don't remember the full details — whether it was only U.K.-headquartered companies or more than that.) Only a few states actually were doing that. California, of course, was the most notable, but Idaho was another.

Imposing restrictions on states' taxation authority by treaty was an unprecedented act, and states — even those not using worldwide combinations — reacted protectively. Under the leadership of Senate Foreign Relations Committee Chair Frank Church of Idaho, the Senate reserved that provision from the treaty before ratifying the remainder. From the state's point of view, the procedure used — negotiating treaty provisions adverse to state interests without even consulting with state authorities — was at least as objectionable as the substantive restrictions on state sovereignty that would have resulted. As far as I know, that point has stuck, and no such treaty provisions have been proposed since.

As to combined reporting, the story does not end there. President Ronald Reagan appointed a special committee, headed by Treasury Secretary Donald Regan, to review the matter and make recommendations. The committee recommended that states should limit their use of combined reporting to domestic operations (the "water's edge") but that the federal government should facilitate states' ability to protect their fisc. One recommendation was better disclosure through what came to be called a 51-state spreadsheet.

Not very much ever came of the recommendations relating to federal support of state tax programs. However, the recommended water's-edge combination became the object of a state-by-state lobbying effort that resulted in changes to many states' statutes to either require it or permit it as an election. That remains the lasting consequence on state taxation. Combined reporting states have learned to live with the results, although suspicions still exist in many tax administration agencies about sheltering income through international unitary operations.

***State Tax Notes*:** During your tenure as chair of the MTC Uniformity Committee, it created industry-specific uniformity provisions related to financial institutions, broadcasting, and Public Law 86-272. Which one or ones would you say were the most meaningful, and why?

Spangler: My effort as chair was to facilitate and enable the efforts of the state representatives who make up the membership. The inspirations and the efforts came from them with the help of the MTC's able and dedicated staff.

If I were to pick only one outstanding result of the MTC uniformity process, it has to be the financial institution apportionment formula.

If I were to pick only one outstanding result of the MTC uniformity process, it has to be the financial institution apportionment formula. Although it now suffers from some — to use a loaded term from another arena of state taxation — economic obsolescence, it was a breakthrough at its time. It required several years of work, during some of which I was not yet chair. Reaching the result required not only compromises between state and industry interests but also between the interests of those states viewed as money centers and the rest. It remains important as an example of a cooperative solution brought about under the patient prodding of MTC General Counsel Alan Friedman.

As I recall, about 20 states adopted it in whole or with small modifications, and it has served for a number of years. The financial industry's more recent structural changes create a need to adjust some

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of the formula, and new negotiations are underway to accomplish that. I continue to have hopes for them.

More recently, the committee developed models for separate entity states seeking to move to a combined reporting regime. The model represents the collected experience of states that have relied on combined reporting for years and should be helpful for its intended purpose.

***State Tax Notes*:** How has federalism evolved since the 1970s? Some tax officials believe, for example, that the federal government has become increasingly hostile to states' views on tax matters. What's your take?

Spangler: It is better not to generalize about such complex relationships. There is a tendency to focus on matters relating to corporate taxation and overlook how federalism and cooperation have improved between the states and the IRS relating to individual taxation. Our state now receives the bulk of individual returns and payments electronically. State and federal tax returns are filed simultaneously through a joint state-federal process. State and federal cooperation permit mutual offset of tax refunds against outstanding and unpaid tax assessment — something that would have been thought unlikely back in the 1970s. Information exchange between the IRS and state tax administrators is more effective and efficient. In another example, Congress statutorily charged the MTC with developing a method of sourcing telecommunications taxes on wireless transmissions. That was successfully implemented.

With facilitation efforts by both the MTC and the Federation of Tax Administrators, working relationships between state tax administrators and the IRS have improved greatly since the 1970s.

On the other hand, it is also true that in every recent Congress, there have been an increasing number of state-tax-related proposals. Most propose restrictions on existing state tax practices. Although a few have passed, most have not. It remains to be seen whether this represents increasing hostility by more than a minority.

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I also hold a view not popular with some of my state friends. I think that occasionally, states invite federal intervention by failing to take care of legitimate taxpayer concerns, leaving them with little choice but to look to Congress for relief. Some (not all) of the complaints behind the current mobile workforce proposal result from states failing to adequately address some real issues relating to their nonresident individual income tax payers and their employers. A fair and uniform tax policy addressing these issues — like the proposal recently developed by the MTC Uniformity Committee — would do much to deter otherwise unwarranted congressional interventions. In fact, the Multistate Tax Compact was created for just such purposes in reaction to threatened congressional intervention.

***State Tax Notes*:** In 1992 the Supreme Court decided *Allied Signal Inc. v. N.J. Director of Taxation* and *Kraft General Foods, Inc. v. Iowa Dept. of Revenue*. That year, an MTC spokesman said that the two decisions "point the states more and more toward using combined reporting based on the unitary business principle" and that states failing to recognize the trend "may find that their state corporate income taxation is subject to many manipulations and games." Whether directly linked to those cases or not, the number of states with combined reporting has increased. But to what extent has the other point regarding "manipulations and games" been borne out? Did states' victories in the *Wrigley* and *Barclays* cases around the same time mitigate those effects?

Spangler: States that use combined reporting adopted it because they think it is a superior way of measuring the amount of income a taxpayer earns in their state. The cases you cite and others like them, such as *Container*, allow states wanting to move to combined reporting with confidence that they may do so without constitutional risks. To that extent, the Supreme Court decisions undoubtedly cleared the way for states to confidently make separate decisions about their own tax policies.

As to "manipulations and games," generalizations are dangerous. Those words need to be carefully defined, so my personal choice is not to use them. Administrators in combined reporting states generally think that separate entity regimes offer ways for taxpayers to reduce their tax liabilities below what a fair apportionment should achieve. I don't label a taxpayer's choice to use an option that a state's laws permit as manipulations and games. If someone believes, as I do, that the unitary business principle coupled with combined reporting is the best available method for fairly apportioning income, it follows that other methods are less desirable. I think states that move to combined reporting adopt a better tax policy because it does a better job measuring the extent of a taxpayer's income earned in that state.

Not all tax planning is inappropriate. Much of it is legitimately taking advantage of benefits lawmakers intended to provide. Some tax planning simply takes a taxpayer-favorable view of unresolved uncertainties in the law. When the law is clarified, as the Supreme Court did in *Wrigley*, some taxpayers find themselves on, from their point of view, the unfortunate side of the clarification. I don't classify that as manipulations and games either.

Nevertheless, inappropriate — even illegal — tax planning practices abound. Adopting combined reporting changes the legal environment in which these practices try to work. Older methods of planning around taxes are foreclosed, so clever planners

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try to find new ones. States will be forever chasing them. It is an endless Sisyphean task that stretches from the beginnings of government into the unknowable future.

> ***States' victories, like those in* Wrigley *and* Barclays, *do mitigate some deficiencies in a state's tax regime but open the door for new ones.***

States' victories, like those in *Wrigley* and *Barclays,* do mitigate some deficiencies in a state's tax regime but open the door for new ones. That is not to say that state legislatures or tax administrators can or should tolerate known inappropriate practices. If they do, their tax revenues — that lifeblood of essential government — will drain away. So keeping as closely behind the planners as possible is a matter of importance.

***State Tax Notes*:** On a related note, what has the Supreme Court's relative reluctance to take up a state tax case since the mid-1990s or so meant for state tax enforcement?

Spangler: It allows federalism to work in a positive way. For example, by declining to accept cases from petitioners advocating a physical presence nexus standard for income taxes, the Court allows state courts and lower federal courts to better develop a body of jurisprudence that examines whether an economic nexus standard does or does not burden interstate commerce in ways that offend the commerce clause. These cases develop the law in many differing factual contexts.

So far, the majority answer in most contexts seems to be no. This experience will better inform the Court if or when it elects to accept such a case. It may also encourage the Court to simply leave the whole matter for state courts to resolve. Common law processes work slowly; that's one of its strengths. It sometimes leaves unhappy litigants in a temporary state of uncomfortable uncertainty. The long-term result is usually a better constitutional standard. The situation counsels patience.

***State Tax Notes*:** At a July 2000 MTC meeting, you cited *People v. Williams*, the third case of the Idaho Territorial Supreme Court, as an example of why states do provide benefits to out-of-state companies. In the debate over nexus, the issue of benefits hasn't gone away. Do you think the case is still relevant in the ongoing debate? If so, why hasn't it been cited more? (For prior coverage of the July 2000 meeting, see *State Tax Notes*, Aug. 7, 2000, p. 362, *Doc 2000-20665*, or *2000 STT 151-25*.)

Spangler: One of my favorite cases! In a strictly legal sense, the case is not really a tax law precedent. I like the case because it can illustrate a point with a bit of drama; it appears to have stuck with you.

John Williams was charged with highway robbery. I always imagine a classic western stagecoach holdup, but the details are not that clear. Our territorial supreme court upheld the trial court's dismissal of the charge. At the time of the alleged robbery in September 1863, the Legislature of the new territory of Idaho had not yet met to enact new laws. The congressional act creating the territory neglected to say that the laws of any of the prior territories from which it was formed (mostly Washington Territory) remained in effect. So no statute, no crime, and Williams went free.

The case illustrates the value of a state's legal system. Could a remote seller or direct marketer do business with customers if its products were not protected from theft (for example, from a modern-day John Williams) or the business could not enforce its contracts? Would there even be an orderly market in which to safely make sales? The point is that the market state provides many significant and valuable governmental services that benefit a remote marketer who purposely avails himself of the market in that state.

Requiring a properly apportioned tax in return for those protections is neither unreasonable nor unfair. It's a policy point as much as a constitutional one. It leaves plenty of room for discussion about issues like proper proportionality and de minimis nexus. But to say a market state's government provides no benefit to businesses that lack physical presence except to business with parties in that state is just wrong. *People v. Williams* demonstrates why. For those inclined to look it up, it's at 1 Idaho 88.

***State Tax Notes*:** How have corporations' tax planning strategies evolved over the past 30 years? Where do you see them going in the future?

Spangler: The trend has always been and will continue to be toward complexity. Our economy is more complex, changing from mostly goods-based to mostly services and intangibles. Markets are more complex with new products and services, like digital goods. Corporate taxpayers are bigger and more complex, using new and constantly changing business structures. Tax laws are more complex as lawmakers try to address how the laws can work within all of that complexity. And to address all this change, tax planning is more sophisticated and complex.

Tax administration agencies have had to grow, expand, and become more sophisticated too. As much I would like to see tax reform that broadens tax bases, reduces rates, and simplifies by eliminating many deductions, credits, exemptions, and exclusions, I think it is unlikely. I would like to be

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wrong about that, but it seems more likely that ever greater complexity will remain the challenge of the future.

Thirty or 40 years ago, state and local tax law was something of a legal backwater. Two particular trends were beginning to create greater conflict. Because of public demands for better governmental services on many fronts, states were expanding their duties and responsibilities. That required expanded revenues. At the same time, more businesses were expanding into interstate and international markets. Those expanding businesses found themselves subject to the difficulties of complying with the complexity of multiple and disuniform state tax systems.

States, aware that their old tax systems were inadequate to this new business environment, looked for newer and better practices. They found answers like the Uniform Division of Income for Tax Purposes Act and the Multistate Tax Compact. As businesses became more aware of both their state tax liabilities and the associated compliance complexities, they looked for better ways to manage and limit these expenses. That created the opportunity for a growing specialty of tax practitioners to meet that need. The result has been three decades of dynamic turbulence for both states and tax professionals. It has provided an interesting and challenging professional environment to work in. That's one of the reasons I stuck around so long.

***State Tax Notes*:** Finally, what are your memories of the man for whom the award you just won is named, Paull Mines?

Spangler: My enduring picture of Paull has him sitting — a bewhiskered presence who somehow seemed to me to be a bit larger than he was — at the corner of the table in a Uniformity or Litigation committee meeting just listening intently to all sorts of debate and commentary. Finally, he would speak. When he did he often left me wondering how a roomful of smart people did not see something so obvious until Paull's explanation made it obvious. It was a simple practice of his. Come well prepared but listen first, then think, then speak only if you have something useful to say. It is a wonderful recipe for making a reputation for wisdom. I've wished I could do it as well as Paull did.

Mines was a lawyer's lawyer. That's why it is so appropriate to name an award for lawyers after him and an honor to receive it. He was a legal scholar, a practical lawyer, a gentleman, and a friend to many. Paull's professionalism should remind everyone who knew him that good lawyering is not about being a lawyer; it is about serving clients. He served his client, the MTC, well, but what made him important to the rest of us as lawyers for states was how he helped us to serve our clients well — or at least better. He could be a resource, a teacher, a mentor, an ethical guide, a source of wisdom, a sounding board for ideas (good or bad — he never hesitated to tell you which, but never condescendingly), a partner for brainstorming, and a friend. Often all at the same time.

He never told anyone what to do, but his gentle prodding often pushed folks (for example, those of us on the Uniformity Committee) away from bad ideas before it was apparent to the rest of us that they were bad ideas. I especially remember one particular phrase from a memorial to him: "a light to new ideas and forgotten ideals." A number of excellent lawyers have been MTC general counsels, but Paull is the role model by which many of us measure our own service to our respective state clients. ✰

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