



JOURNAL

THE AMERICAN COLLEGE OF TRIAL LAWYERS

Fellows at the College's Annual Meeting in London, England enjoyed a night of pomp, circumstance and color with a performance from the royal Trooping the Colour regiment at the Horse Guards Parade Ground.



JOURNAL

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Something special happens when the College joins forces with our colleagues abroad, especially in England, the wellspring of the common law, the fount of our legal DNA.

Harkening back to the 2006 London meeting, we heard a profound disquisition (later turned into a slim but powerful volume) by the late Lord Bingham of Cornhill on the Rule of Law, nouns that deserve their capital letters. Lord Bingham's presentation highlighted an incredible program that included a charming talk by Chief Justice John Roberts. Fast forward to 2014, the program was no less notable for its currency and breadth. The venues and social events were superb, especially the evening spent at Westminster Abbey, that majestic edifice. Poet's Corner itself is always worth a wander round, as the Brits would say.

Being in London, though, is a marked reminder of the importance of the common historical foundation that underlies our Anglo-American/Canadian justice systems. That is, of course, the Magna Carta. Two of the four extant copies are on display at the British Library, a treasure trove that is also well worth a visit. The Library is gathering all four for an exhibit this year. The Magna Carta is soon to be 800-years-old, having been signed on June 15, 1215. That this document has survived at all, let alone evolved into our Rule of Law, is breathtaking in its scope, something all too easy to forget as we go about our daily business. Yet the majesty of the main terms that survive to this day are so profound that they cry out for periodic reflection and review especially in a time replete with human rights violations occurring all over the globe.

As we heard in a lively discussion by Sir Jeffrey Jowell, QC, now the Director of the Bingham Centre for the Rule of Law, and his panel, the basic principles were these: "no free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land." And the community would decide on those rights and obligations to which everyone, even the King, would be subject. In other words, no one is above the law. These are the lynchpins of both our democratic values and justice system.

In describing the confrontation between King John and the barons as represented on one of the bronzed panels of the U.S. Supreme Court doors, *The Economist* ("The uses of history," December 20, 2014) noted "...both parties would surely have been astonished to know that a treaty between two feudal antagonists—designed to avert civil war in the

FROM THE EDITORS

Andy Coats
and Stephen Grant



Please contact the National Office with contributions or suggestions at editor@actl.com.

13th century—would be celebrated 800 years and an ocean away from the moment immortalized on those doors.”

As lawyers, trial lawyers no less, and citizens of two great democracies, it is thrilling to think that we are the beneficiaries, guardians and torchbearers of these principles, years ahead of their time in forethought and prescience, written 800 years ago. While shortly after the signing the king's supremacy was restored for hundreds of years, the limits to a monarch's power were vanquished finally in the 17th century, and the concept of individual rights as determined by the law of the land was firmly adopted by the American colonists and given significant heft by their enshrinement in the “life, liberty and property” protections of “due process” in the United States Bill of Rights and the Canadian Charter of Rights and Freedoms some time later.

The manifestation of all of this may be seen any day of the week. Wander into the nearest court house—in London, the Old Bailey—and watch justice in action. There juries sit, the jurors perhaps in jeans and T-shirts but present nonetheless, as the work of the barons at Runnymede charge into action and justice is not only done but also seen to be done. What's as thrilling as that which may be seen at the Old Bailey and juries all over North America is the ethnic, gender and cultural diversity of the jurors, something far beyond the contemplation of those same barons and the King but part of our democratic evolution over these eight centuries. Despite the serious challenges facing the civil and criminal justice system, that we carry on this work as legal practitioners can only be considered a privilege and our responsibility.

In this issue of the *Journal*, we bring the best of the London and Paris meeting to you and whether you were there, we trust you will find it fascinating to dip into from time to time if not read cover to cover.

We also look forward to seeing you in sunny Key Biscayne.
Andy Coat/Stephen Grant ■

64TH ANNUAL MEETING HELD IN LONDON, ENGLAND

“Once in a lifetime experience.”

— Fellow Comment

“Another amazing evening at the Horse Guards Parade Ground. To be in that space and experience the marching band was wonderful.”

— Fellow Comment

“I thought that Westminster Abbey at night was magical.”

— Fellow Comment

From September 11 – 14, 2014, the historic Grosvenor House in London, England, hosted more than 1,000 Fellows, spouses and distinguished guests at the 64th Annual Meeting of the American College of Trial Lawyers, the sixth time the College has met in London. New President of the College **Francis M. Wikstrom** of Salt Lake City, Utah was installed and sixty-one Fellows were inducted.

It has become a tradition of the College to periodically return to London, to the roots of the legal profession in the common law world, and to visit another country in Europe afterwards. Fellows continued their European adventure in Paris, France, twenty years since the College held its first meeting there in 1992.

Fellows **Ritchie E. Berger** of Burlington, Vermont, **Susan J. Harriman** of San Francisco, California, **William J. Murphy** of Washington, D.C., and **Stephen G. Schwarz** of Rochester, New York, were installed as new members of the Board of Regents to represent California-Northern, Nevada, District of Co-

lumbia, Maryland, Connecticut, New York-Downstate, Vermont, New York-Upstate, Ontario and Quebec.

On Thursday, the Teaching of Trial and Appellate Advocacy Committee offered a CLE program titled *Trial Practices and Tactics in England and the United States* in the Rolls Building, Central London Law Court, the heart of the London legal community. The program featured a mock trial that displayed the skills of barristers of the Bar of England and Wales and Fellows of the College. The case was *Lynn Rogers v. Metal Fabricators, Inc.* Rogers, represented by English barristers, claimed she was wrongfully discharged because she refused the sexual advances of her boss and former fiancé Alex Goodings. Metal Fabricators, Inc., represented by Fellows of the College, claimed that Rogers was terminated because she was deficient in her job performance.

Participants of the program included: Honorable **Marc T. Treadwell**, U.S. District Judge of the Middle Court of Georgia, Macon, Georgia; **Nicholas Stewart**,

QC of Ely Place Chambers, London, England; **Gavin Kealey**, QC of 7 King's Bench Walk, London, England; **Kathleen Flynn Peterson** of Robins, Kaplan, Miller & Ciresi, L.L.P., Minneapolis, Minnesota; **Stephen Kenny**, QC of 7 King's Bench Walk, London, England; **Christy D. Jones** of Butler Snow LLP, Ridgeland, Mississippi; **Paul D. Bekman** of Salsbury Clements Bekman Marder & Adkins L.L.C., Baltimore, Maryland; and **Jawdat Khurshid** of 7 King's Bench Walk, London, England. Panel discussion moderators included: Past President **Chilton Davis Varner** of Atlanta, Georgia; **Paul Mark Sandler** of Baltimore, Maryland; Past President **David W. Scott**, O.C., Q.C. of Ottawa, Ontario; **Barry Coburn** of Washington, D.C.; and **Kenneth W. Ravenell** of Baltimore, Maryland. Stewart, Kealey and Treadwell were also moderators. The program provided insight into the differences between trials in each country, the skills of each country's trial lawyers and the differences between the judges of each country during the course of a trial.

On Thursday evening President **Robert L. Byman** greeted guests at the traditional President's Welcome Reception at the Westminster Abbey Gardens. Before the reception, a ceremony took place where Byman laid a wreath on the memorial to the Innocent Victims, located in the courtyard outside the West Door of the Abbey, commemorating the thirteenth anniversary of 9/11. A prayer was spoken by the Very Reverend John R. Hall, Dean of Westminster. After, Fellows and guests were allowed exclusive access to explore the inside of the Abbey and speak to the Abbey's canons before enjoying the evening's festivities in the garden.

The College's General Committees met on Friday and Saturday mornings before the General Sessions.

Friday's General Session commenced with an invocation by Past President **Earl J. Silbert** of Washington, D.C.

Past President **John J. (Jack) Dalton** of Atlanta, Georgia, introduced the first speaker, Honorable **Matthew Barzun**, United States Ambassador to the Court of St. James's, who reflected on his time as ambassador.

Past President **E. Osborne Ayscue, Jr.**, of Charlotte, North Carolina, presented The Right Honourable **The Lord Goldsmith**, QC, PC, former Attorney General of the United Kingdom and former Attorney General for Northern Ireland, who spoke on the rule of law, the role of judges and lawyers and their ability to develop as society changes.

Secretary **Bartholomew J. Dalton** announced the Honorable **Stephen G. Breyer**, Associate Justice of the Supreme Court of the United States, who emphasized that lawyers, judges and academics must work together to ensure the rule of law is followed and accepted.

The common law heritage that we, as trial lawyers, share with our British counterparts had its origins in the Inns of Court where, centuries ago, those trained in the law first gained their independence from the Crown and the church and imposed upon themselves a discipline, a set of ethical rules of practice and a form of governance that we inherited and that became a part of our DNA. And so, it is not zeal for tourism that has regularly brought us back to this city. We are instead returning to our professional roots.

The College first visited London in 1957. We have since returned on six occasions and have engaged in a number of legal exchanges, in which leading judges and advocates from the two countries have met to discuss mutual problems and to learn from one another.

On that 1957 visit our British hosts presented us with this maul. A traditional symbol of authority, it has been used ever since by our presidents in place of a gavel. The inscription on the maul reads in part, "Made from a block of *lignum vitae*"—the tree of life—which survived intact the Great Air Raid of May 10, 1941, it betokens the strength and endurance of the common law."

Indeed that wood came from a timber in the ancient Middle Temple Inn. The great air raid it survived is known history as "The Longest Night," a night in which 1,436 Londoners died and more than 2,000 were wounded; a night that marked the last attempt by Nazi Germany to subdue England from the air in World War II.



Frederick T. Davis of Paris, France, gave the introduction for the next speaker, **David Green**, director of the United Kingdom Serious Fraud Office. Green shared the organization's current caseload and its global significance.

Immediate Past President **Chilton Davis Varner** of Atlanta, Georgia introduced Dame **Carol Black**, professor at Newnham College, who spoke on the topic of *Reducing Sickness Absence in the UK: Mandation, Persuasion or Education?*

Past President **Michael E. Mone** of Boston, Massachusetts, presented Honorary Fellowship to The Right Honourable The **Lord Neuberger of Abbotsbury**, President of the Supreme Court of the United Kingdom. Neuberger discussed the differences between the UK Supreme Court and the U.S. Supreme Court.

Pennsylvania State Chair **Robert E. Welsh** of Philadelphia, Pennsylvania, introduced Friday's final speaker, **Ronald K. Noble**, Secretary General of Interpol General Secretariat. Noble spoke on the challenges trial lawyers face when representing clients in front of Interpol.

Friday's night's fete at the Great Room of the Grosvenor House began with the induction ceremony, followed by the banquet, dancing and traditional sing-along.

Steven M. Bauer of San Francisco, California provided the response on behalf of the sixty-one new Fellows. President Byman presided over the installation of President **Francis M. Wikstrom** of Salt Lake City, Utah, who was joined by family members led by his wife, **Linda Jones**. After remarks from Wikstrom, Fellows, spouses and guests hit the dance floor to show off their smooth moves. Those more vocally inclined joined the piano player who accompanied them to songs telling stories of past memories and future dreams.

Past President **Joan A. Lukey** of Boston, Massachusetts introduced Saturday morning's first speaker, art historian **Martin J. Kemp** of Oxford, England who discussed the topic *Leonardo in the Court of Law* and four cases he was involved in where authenticating or attributing a work of art was the subject of legal scrutiny.

Alice E. Richmond of Boston, Massachusetts, set the stage for the panel of Magna Carta experts who discussed *The Magna Carta and its Influence on Constitutional Matters and Humans Right in the 21st Century*. The distinguished line-up included: Sir **Jeffrey Jowell**, KCMG, QC, Director of the Bingham Centre for the Rule of Law, British Institute of International and Comparative Law; Sir **Robert Worcester**, KBE, DL, chairman of the Magna Carta 800th Anniversary



Committee; The Right Honourable The **Lord McNally**, chairman of the Youth Justice Board for England and Wales; and Reverend **Robin Griffith-Jones**, Master of the Temple, the Temple Church.

Past President **Charles B. Renfrew** of San Francisco, California, presented The Right Honourable The **Lord Woolf**, the 2014 Lewis F. Powell, Jr. Lecturer, who shared his thoughts on the state of the legal system in the UK.

Former Regent **Christy D. Jones** of Ridgeland, Mississippi, delivered the introduction for Saturday's final speaker, **Dale Templar**, managing director of One Tribe TV. Templar shared video clips of *Human Planet*, the landmark documentary she produced that focused on different stories of humans living with nature.

The General Session concluded with the recognition and presentation of plaques to the four retiring Regents: **Trudie Ross Hamilton** of Waterbury, Connecticut; **David J. Hensler** of Washington, D.C.; **Jeffrey S. Leon**, LSM of Toronto, Ontario; and **Douglas R. Young** of San Francisco, California.

Afterward, the Board of Regents' reception and luncheon honoring inductees and their spouses and guests

was held at the Inner Temple, one of the four ancient Inns of Court. President Byman presided while Past President Scott explained the selection process to inductees, their invitation to become Fellows and the College's history and traditions.

Saturday night's finale was held at the Horse Guards Parade Ground, located in the heart of London's ceremonial life. Guests were greeted by Foot Guards from the Household Cavalry of the British Army lining the entrance path. The assembly of Foot Guards included Troopers from the Life Guards as well as the Blues and Royals. Mounted Troopers from the Blues and Royals also greeted guests on horseback. Before dinner, attendees saw a performance from the Regimental Band of the Coldstream Guards. It is one of the oldest and best known bands in the British Army, which was officially formed in 1785. The musical program included a combination of English and American tunes, such as *Land of Hope and Glory*, *America the Beautiful* and the regimental quick march *Milanello*. The band also displayed their maneuvers and versatility on the parade ground. The evening included dancing to a live band and enjoying the immense history of an unforgettable gathering.



A | Troopers from the British Army, the Life Guards and the Blues and Royals, line the path welcoming Fellows to the Horse Guards Parade Ground.

B | Trumpeters announce the start of Friday's General Session in the Great Room of Grosvenor House.

C | Belting out a tune to the grand piano

D | The speakers process on stage as the Toastmaster introduces them

E | Past Presidents face the inductees

F | Patricia and former Regent Dennis Suplee, Philadelphia, PA

G | Gina and Fellow Randy Papetti, Phoenix, AZ

H | Regent Mike and Brett O'Donnell, Denver, CO; Susan and Massachusetts Committee Vice Chair James Campbell, Boston, MA

I | Sunny and Inductee Gerald Ivey, Washington, DC

J | Brenda and Fellow Dwight Davis; Past President Chilton Davis and Morgan Varner; Pamela and Fellow Joseph Loveland of Atlanta, GA; Fellow Wick Sollers, Washington, DC

K | Regent David and Margaret Hensler, Washington, DC; Suzanne and Fellow Charles A. Weiss, St. Louis, MO

L | Regent C. Rufus Pennington III and Cristina Johannpeter, Jacksonville Beach, FL

M | Terry and Regent Doug Young, San Francisco, CA; Janet Studley and District of Columbia Chair Bob Trout; Lidia Szako, inductee Steven Bauer, and Federal Criminal Procedure Chair Nanci Clarence, San Francisco, CA

RULE OF LAW AND LANGUAGE: RESHAPING THE STORY

Reflecting on his first year as Ambassador at the College's Annual Meeting in London, United States Ambassador to the United Kingdom of Great Britain and Northern Ireland **Matthew Barzun** declared, "to practice my British understatement, it has not been overly dull."

An internship in the summer of 1989 with then-Senator John Kerry of Massachusetts was a foretelling of Barzun's future career. The Harvard graduate later started his business career at CNET, the website offering technology information and reviews to consumers, where he served as Executive Vice President, Head of Strategy and on the organization's Executive Committee. In 2004 he left the company and became an advisor and investor in internet companies.

Four years later, in 2008, he answered the call from then-Senator Barack Obama to join his presidential campaign. His first foray into politics was a success. He was in charge of what became the most successful solicitation for funding for a presidential race then known. He is the originator of citizen fundraisers, the idea that enormous amounts of money can be raised through the internet in very small amounts.

President Obama named Barzun Ambassador to Sweden, where he served for two and a half years. During his time in Stockholm, Ambassador Barzun initiated outreach programs that took him and the programs of the American Embassy beyond the city and out into the villages and towns of Sweden.

He established the Swedish American Green Alliance, a program where citizens of both countries share their ideas on clean energy and its future.

After serving as National Finance Chair in President Obama's successful 2012 re-election campaign, Barzun was nominated as the United States Ambassador to the United Kingdom of Great Britain and Northern Ireland. He presented his credentials on November 27, 2013, to Queen Elizabeth II.

THE RULE OF LAW: LOOKING FORWARD

Noting the upcoming 800th anniversary of the Magna Carta, Barzun spoke on the notion of the rule of law after a conflict is resolved in countries such as Iraq, Libya and Syria. "Plenty of hard work goes into the military phase, but it is after the situation has faded from the headlines when the really hard work of building capacity in these places begins.

"In fact, President Obama said one of his disappointments, reflecting back, is that after getting rid of Gaddafi, who was so awful, we weren't able as an international community to fill in the void



effectively in terms of capacity building and rule of law. As a relative newcomer to the world of rule of law, I believe one of the problems is that it just sounds so boring. Just the phrases we use, ‘capacity building,’ do not maintain our citizens’ interest, back home or here in the UK.”

Barzun appealed to the Fellows gathered in London: “As incredibly successful storytellers, we need to develop better stories and better language about how we talk about rule of law. Let’s use the Magna Carta anniversary next year not just as a way of looking back but of looking forward and trying to make it relevant to our citizens back home and to the citizens of the UK.”

As ambassador, Barzun makes it a point to get out of London, because eighty-seven percent of Britons do not live in London. In every place he visits, which have included Newcastle, Leicester, Leeds and Liverpool, he meets with high school seniors and holds a workshop with them. At these workshops, he passes a card around which says on the top “Frustrate,” “Concern,” “Confuse” and asks the students to write or draw something that frustrates, concerns or confuses them about the U.S. and the world. After combing through the nearly 3,000 cards from the high school seniors he has met, the word that appeared the most surprised him.

“I wouldn’t have guessed it. I quizzed most of my American friends. We don’t guess what it is. It has nothing to do with foreign policy. We’re all geared

up to talk about Syria, Iraq, Libya, Guantánamo Bay, NSA, drones – that’s the sort of the stuff we’re all amped up to talk about. It was none of those things.

“The word that appeared the most was actually two. We had the word ‘gun’ and the word ‘guns’ split into two different words.”

QUIPS & QUOTES

I am asked a lot to talk about *why*, in terms of why America is doing what it is doing...It really ends up being about *how*. Because I don’t think we have much choice. We have to lead. President Obama has been leading and will continue to lead, and whoever comes after him will continue this decades-long tradition of American leadership. But it ends up being more interesting to say how we lead.

Ambassador Barzun

British students want to talk about guns and, for Barzun, it is a topic he needs to get better at talking about. “It is a really interesting debate and I want to try to help them understand what that’s like in America, to try to explain the difference. America is one hundred percent guns per capita – two-hundred million Americans, two-hundred million guns, while the UK is down at four percent.”

In Barzun’s mind, “words, as you know in your line of work, matter, and I would like to learn some better and more effective ones.” ■



UPHOLDING COMMON LAW, HERITAGE, CAUSES

London program speaker The Right Honourable The **Lord Goldsmith** earned double first class honors in law at Cambridge and a master's degree from University College London. Called to the Bar, Gray's Inn, at age 22, he was made Queen's Counsel in 1987. In 1995, at age 45, he became Chairman of the Bar of England and Wales, the youngest person ever to hold that position.

During the two-year cycle of the 1999-2000 Anglo-American Legal Exchange, in which he was a member of the British delegation, he was appointed by Prime Minister Tony Blair to the House of Lords.

In introducing Lord Goldsmith, Past President **E. Osborne Ayscue, Jr.** recalled that only afterwards did those in the United States delegation to that Exchange realize that they had been watching the beginning of an evolution that would take the highest level of the British judicial system out of the House of Lords by creating an independent Supreme Court and that more than a few of the topics that our British counterparts had asked to discuss indeed anticipated that transition. As a member of the House of Lords, Goldsmith was involved in that transition.

In 2001 Prime Minister Blair appointed Lord Goldsmith to serve as Her Majesty's Attorney General of England, Wales and Northern Ireland. In 2002 he became a Privy Councillor, and at the end of the Blair administration he had become, during trying times, the Labor Party's longest-serving Attorney General.

In 2008, Lord Goldsmith qualified as a solicitor. In the dual British system the barristers were traditionally the trial lawyers, the solicitors the transactional lawyers. Then, reverting to barrister status, he became a partner in an international law firm that traces its roots back across the Atlantic to Wall Street, and he is today Co-Managing Partner of the London office of Debevoise & Plimpton LLP and chair of its European and Asian litigation.



In his presentation, Lord Goldsmith traced the events of the fifteen years that followed the Exchange in which he had been a participant and the issues they raised, reflecting on his experience in government as Attorney General and a member of the House of Lords, and his experience as an international trial lawyer. In a tribute to the enduring nature of the common law, he ended by addressing the role of law and of lawyers, sharing a common legal heritage, in dealing with the issues posed by a troubled world. The second speaker on the London program, his remarks so eloquently set the stage for what was to follow that they are published here virtually verbatim.

“The reference to that first meeting with College members,” Lord Goldsmith reflected, “reminds me of the great events of the past fifteen years since I was first a part of that wonderful delegation, a great gathering of the most senior judges of the United Kingdom, of the United States, accompanied by expert practicing lawyers. We were there to debate differences and similarities in our two legal systems to see if we could learn from each other and find new solutions. I felt myself immensely proud to be participating in those discussions.

THE EVENTS OF THE PAST FIFTEEN YEARS

“But since then . . . the problems have multiplied. That first meeting took place before 9/11, before the atrocities of other terrorist outrages in Bali, in Madrid, in Moscow, here in London, of course, on 7 July, 2005, and sadly in so many other places, [and] before the military actions in Afghanistan, Iraq, Libya. And now [in September 2014], we may well be poised for something in Syria. And [these events took place] before we began to see acts of unspeakable barbarism played out on the television screens in our own homes.

QUIPS & QUOTES

Ozzie, thank you for that introduction. It is quite plain that I can't make up my mind about my career, can I? In fact, after that I went back to being a barrister, so even when I make changes I don't stick to them.

Lord Goldsmith

“For me personally, this was a time, a period, when I found myself intimately involved in anxious debates on how to tackle those issues whilst I had the great honor and privilege to be our nation's Attorney General. In fact, I took office three months to the day before the attacks on the Twin Towers, an event which changed in the course of a few hours the whole focus of our government . . . and certainly my work as Attorney General: tackling terrorism, military responses, new laws to give better protection against attack from conspirators in the Internet Age where would-be assassins no longer plotted in cellars to emerge with smoking bombs under their coats, but using all the sophisticated tools of cyberspace, to plan and execute murderous attacks; about the clash between human rights and security, which I personally believe is one of the most difficult issues of our century; about changes to immigration laws; about detention of people not convicted of any crime; of Guantánamo, on which I had the misfortune to firmly disagree with my good friends in the US administration and, indeed, with a number of my own cabinet colleagues.

“We are still living the consequences and decisions of those days. The controversy rages on about the solutions politicians and others devise to deal with them: black holes, wiretapping, intercept, rendition flights, ▶

the legality of actions which were taken in good faith and in the good faith belief that they were necessary to protect our fellow citizens.

“And so the thought comes to me, particularly as I look across at this gathering of so many distinguished and experienced lawyers, what the role of law and lawyers is to solve those problems. That was a question, as you can imagine, I asked myself in my days of office and which I still ask myself as a continuing member of our legislature. And one particular question that comes to me is whether we are finding enough common ground, enough common rules and standards across nations, to tackle these problems.

LAW IN A GLOBAL ECONOMY

“Indeed, it is not only in the field of security and human dignity that these questions matter. In the world of business, relations have become ever more complicated as more and more commerce is done through international transactions and across borders....In business and private international relations too, the appetite for common standards and rules is intense. I saw that in government. I see it now in my practice as a litigator and adviser working in a law firm. Many of the attempts there to establish common rules have actually met with limited success. For example, the International Institute for the Unification of Private Law was established to formulate uniform law instruments to modernize, harmonize and coordinate private and commercial law. That has produced three editions of its Principles of International Commercial Contracts. But they are not binding; they are, in my experience, of limited influence. I only know of one serious English case that discussed them . . . which looked at them when reconsidering our rules in relation to the use of extrinsic evidence in the construction of contracts.

“Another example closer to home here is the European Union, which has been trying to develop a harmonized contract law for Europe. As long ago as 2009, a study group presented a so-called draft common frame of reference. The European Commission has been pressing that agenda to create a single contract law for Europe, but it has met with considerable criticism in many member states.

“Possibly more successful than the actions of governments and bureaucrats have been the actions of business and lawyers themselves. For example, in the field of international arbitration, many businesses and states are increasingly looking to standardize solutions to litigation issues which they are developing for themselves. For example, if you have a

dispute between parties, one of whom has a familiarity and expectation of U.S.-style discovery to resolve the dispute, and the other has a continental approach under which the parties only produce the documents they want to rely on, how do you resolve that difference of culture? How do you cope with differing expectations as to the use of evidence and how the parties deal with them?

“All litigators here know these are practical, but hugely important, questions when it comes to deciding disputes. Standardization there is beginning to emerge from the widespread use in international arbitration of the International Bar Association guidelines, for example for the taking of evidence in international arbitration. They have no binding force. It is something for the parties and arbitrators to adopt for themselves, but a recent survey showed that almost two-thirds of international arbitrations now do. All that may show is that, as is often the case, the solutions that emerge from the users of a system which are practical and respond to a real need may have more chance of adoption.

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Standardization [in deciding disputes] is beginning to emerge from the widespread use of international arbitration of the international Bar Association guidelines, for example for the taking of evidence in international arbitration. They have no binding force. It is something for the arbitrators to adopt themselves. But a recent survey showed that almost two-thirds of international arbitrators now do. What that may show is that, as is often the case, the solutions that emerge from the users of a system, which are practical and respond to a real need, may have more chance of adoption.

Lord Goldsmith

THE UK, U.S. COMMON LEGAL HERITAGE

“Let me turn then to how we deal and how we use the huge resource of law expertise, intelligence and wisdom in the legal community. I always am humbled in the presence of American colleagues because the United States, as Justice Anthony Kennedy noted, is a system that was inspired by a confidence in law. He said that, ‘When we declared independence, we conceived of our cause, we found our identity, we justified our rebellion in legal terms.’ And of course the



Sir William Blackstone published his *Commentaries on the Laws of England* in the 1760s. It became an instant bestseller because there was a dearth of legal material and, as one commentator has described it, 'there lacked a snappy overview of the common law system.' Sir William Blackstone was obviously the John Grisham or Scott Turow of his day, at least in terms of his earnings from legal writings.

Lord Goldsmith

law in which the Founding Fathers then had confidence was . . . the common law, the English common law brought with the settlers as part of their culture and then adapted to suit the changing economic and social conditions of the colonies.

"I have always been intrigued by the fact that English legal texts were of great importance because there were few indigenous texts, no published case reports in the colonies until after the Revolution. Sir William Blackstone published his *Commentaries on the Laws of England* in the 1760s. It became an instant bestseller because there was a dearth of legal material and, as one commentator has described it, 'a lack of a snappy overview of the common law system.' . . .

"Magna Carta was a key part, played a key role, in the development of the constitutional thinking in America. It had actually largely been forgotten in England by those days. It was Sir Edward Coke who effectively rediscovered Magna Carta. But the idea of written documents protecting individual liberties, which did not take place in this country apart from Magna Carta for a very, very long time, took root early in the colonies. For example, in 1606 the Charter for Virginia included rights as part of its statements.

"And just as the Declaration of Independence in the United States provided inspiration for the greatest declaration of individual liberty of the last one-hundred years through Eleanor Roosevelt and the Universal Declaration of Human Rights of 1948, so too the American Constitution can be traced back in certain respects to the inspiration of that English charter, the Great Charter, over 500 years before, perhaps particularly in the reference to due process, a use of the expression 'due process' . . . in Article 39 of the Magna Carta.

"But it is not only in the love of liberty and freedom that we find the common legal heritage. In all areas of the law and legal relations we find our common heritage, from the laws of contract and torts, through property law, relations between family members. True that there develop many differences

between our systems in many areas, but many of the developments which took place here [in the United States] were then transposed back to the native English legal soil, and though there may be differences and they have grown, that does not obscure the unifying principles and features that flow through both sets of laws: the fact that a man and a woman have a right to own property and enjoy the fruits of their labor; that contracts made in fair dealing and giving effect to the reasonable expectations of reasonable people should be honored and enforced; that those who inflict unjustified harm on others or on the community may be required to make good the loss; that the family is entitled to protection by society and the State; that the welfare of children deserves special protection; that we embrace the ideal of democratic government under law protecting freedom of speech and thought and respecting personal autonomy.



"We perceive, in short, the same basic values. We respect the same basic rights and give effect to them through a shared common law heritage. We have a common bond, and the common law is the glue of that bond. The extent to which this was true was demonstrated in a remarkable series of essays by fifty judges, scholars and jurists from the United States and Great Britain to celebrate the meeting of . . . the American Bar Association, in the symbolic year 2000 and published as a lasting monument to that common heritage.



PRINCIPLES ON WHICH THAT HERITAGE IS BASED

“So as we look forward . . . how do we single out the features of such a system? Is it the value that we attach in our democracies to the freedom of expression, a principle which promotes the self-fulfillment of individuals and enables the truth to emerge from the free expression of conflicting views? As Justice Holmes said, echoing John Stuart Mill, ‘The best test of truth is the power of thought to get itself accepted in the competition of the market.’ Is it the value of equality reflected in the Fourteenth Amendment? I believe that a fair claim could be made for both of those, but I prefer to focus on another, the role of law and judges in both our systems.

“First, the rule of law and due process: . . . [W]e have to find the best ways of expressing that, but it is the very basis of our free society, never, in a sense, put more pithily and more clearly than by Lord Denning, one of our great judges, ‘Be you never so high the law is above you.’

“Secondly, the role of judges and lawyers: Citizens in both countries, when they are unhappy with what the State is doing to them, will turn to their courts and to their lawyers. You need an independent, impartial and competent judiciary; that much is so very, very clear. But we have a different tradition in the way that we choose our judges, both in the Americas and in this country, from many other continental countries. We do not have career magistrates. We have people who have learnt the practice of law so often through its practical application, either in private practice or working in government.

“We have a different way of developing the law. This is the point I want to emphasize. In all our systems decisions in individual cases often proceed on a basis of arguing from analogy case by case, rather than having a single code which answers all the questions for us. And I think that is the source of its enduring strength. There is an enduring tension between the

need for stable, predictable rules and the universal desire for justice in each individual case. The common law has a way of accommodating those dual tensions by enabling individual decisions to be decided by reference to their facts, and only over time do general principles emerge.

“This means that the judges in common law countries acquire and use the same tools of legal reasoning and deduction, finding the ratio or central principle of the case, recognizing points of distinction and reconciling apparently irreconcilable decisions. And it is these shared skills that mean we continue to influence and shape each other’s legal systems. We can find examples in the U.S. Supreme Court and in the House of Lords, now our Supreme Court, that each has borrowed from the traditions of the other.

“And, finally, it is the third feature which is critical, the view, the genius of the common law, the ability to develop as society changes, as economic and social conditions change. And that is why I have confidence that as we move forward, the common law, the lawyers who apply it, the judges who enforce it, will help us find solutions for these terribly difficult problems.

“It is no surprise that the common law, whether it is English law, the law of Delaware or of New York, which is regularly chosen to govern contracts all over the world. In my experience, I know of a case of the choice of English law by two Russian oligarchs in the disputes between themselves. That is a free choice, not something that has been imposed upon them. And that is a great compliment to the common law that we share.

“And so, this meeting in London symbolizes this common tradition. And I hope the continuing work of this College and the continuing work of the participants here will help us to find solutions to these very, very difficult problems.”

E. Osborne Ayscue, Jr.
Charlotte, North Carolina

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We perceive, in short, the same basic values. We respect the same basic rights and give effect to them through a shared common law heritage. We have a common bond and the common law is the glue of that bond.

Lord Goldsmith



NO MAGIC SECRET TO RULE OF LAW

The Honorable **Stephen G. Breyer**, Associate Justice of the U.S. Supreme Court and an Honorary Fellow of the College, addressed the College's 2014 Annual Meeting in London. A graduate of Stanford University, of Magdalen College, Oxford, which he attended on a Marshall Scholarship, and of the Harvard Law School, from which he graduated *magna cum laude*, he served as a law clerk for Associate Justice Arthur J. Goldberg. His career included both professorships at the Harvard Law School and the John F. Kennedy School of Government, focusing on administrative law, and government service as a Special Assistant Attorney General for Antitrust, an Assistant Special Prosecutor under Archibald Cox in the Watergate saga and Special Counsel and then Chief Counsel to the United States Senate Committee on the Judiciary. After serving for fourteen years on the United States Court of Appeals for the First Circuit, the last four years as Chief Judge, in 1994 he was confirmed as an Associate Justice of the United States Supreme Court, where he has served for twenty years. ▶

As **Bartholomew J. Dalton**, Secretary of the College, pointed out in his introduction, Justice Breyer is the author of two books, *Active Liberty: Interpreting Our Democratic Constitution* and *Making Our Democracy Work: A Judge's View*.

Justice Breyer, who has been a guest at national meetings of the College on several occasions, began his remarks with a reference to the fact that when he was being considered for nomination to the Supreme Court, he was invited to go for a morning jog with the President, and that a photograph taken during that run, in which he was wearing an American College of Trial Lawyers t-shirt, a souvenir of an earlier visit to the College, was widely published in the news media. Indeed, his address was marked throughout with the wry humor that is his trademark.

LAW IN A GLOBAL ECONOMY

Picking up on the theme of Lord Goldsmith's presentation, which had immediately preceded his own, Justice Breyer addressed objections sometimes heard to the United States Supreme Court's references to the decisions of the courts of other nations in reaching its own decisions. "Sometimes," he observed, "you hear in the United States, 'Well . . . the Supreme Court of the United States and the other courts, [should not] refer to practices, laws, decisions of law in other countries.' And that, I think, is said in sincerity by people who are worried about American values and their being watered down or somehow overlooked. I understand the motive, which is a good motive, but I don't think it leads to the consequence that they think.

"And the best way to show that," he continued, "... is simply to look at our docket. Look at the cases we are deciding, and look at the cases as they grow, the number of cases involving foreign law or foreign legal practices, all kinds of foreign practices. Look at the number of cases since I've been on [the Court]....Over that span, the number has increased dramatically."

Justice Breyer then proceeded to give examples of cases that raise such issues. "You could walk into our courtroom a year and a half ago and see the first case on the docket, a copyright case. A student from Thailand ... studied at Cornell on a scholarship. His books were awfully expensive, and he could get the same English language text, published by the same publisher, asian edition, in Thailand [for] about half the price. He said to his mother, 'Send me one,' which she did....He said, 'Send a few more,' and pretty soon he was sent quite a few more. He got into a nice business there of selling books, and the publisher sued him for copyright violation. There is a doctrine called the 'first sale doctrine.' Lord Coke created this doctrine ... and he was absolutely right. Once you sell that physical book, [the buyer] can do what he wants with it. Does it [the doctrine] apply to a book brought in

When I went to the White House [called by President Clinton]...we went jogging the next morning and I was able to wear my American College of Trial Lawyers t-shirt, which was duly picked up by the press and the television. No other President has asked me to go jogging. I still use the t-shirt and I mention this for Lord Neuberger's benefit because he's about to become a Fellow. Keep the t-shirt.

Justice Breyer

from abroad? You have to look and see, because the text is rather unclear....My point is that we are told, not just by the publishers, not just by the movie makers, or even the music creators, but by retailers, because every ticket, every label, is copyrighted, there happens to be three trillion dollars of international commerce involved. Indeed, we had briefs filed by the Brits, by the French, by countries from all over the world and their lawyers, because how we decide that case matters. We cannot decide that case without knowing something about how the European Union decides these matters and how the Berne Convention [the Berne Convention for the Protection of Literary and Artistic Works] works, and a lot of other things that are beyond our own shore."

His second example was that of a vitamin distributor from Ecuador who was hurt by an international vitamin cartel which was raising prices on vitamins. That was contrary to American antitrust law, and probably also European law. "He wanted to bring a private suit for damages. And where did he go? To New York. Why New York? The defendants were Dutch. So why New York?" One possible answer, he suggested, was the difficulty of going to Holland to bring the suit. "The other possible reason," he suggested, "is, of course, treble damages. And so the question is, 'Can he bring the lawsuit in New York?'" To answer that question, the Court was again required to absorb the contents of briefs from all over the world.

Justice Breyer then referred to the issues growing out of the U.S. government's confinement of alleged enemy combatants at Guantánamo Bay, which required analysis of various treaties, reflecting that Congress' ability to legislate can indeed be governed by treaty.

He ended this portion of his address by observing, "I could go on for a long time—luckily for you I won't—but I could go on a long time listing cases ... in the last two or three years where this same kind of problem is involved."

HOW THE COURT EXPLORES FOREIGN LAW

Justice Breyer then moved to the question that this new dimension in the law raises the subject of how the Court

goes about learning the law of every nation that has an interest in a particular issue. His answer essentially described this process in the context of America's adversary system. "So," he continued, "how do we find out? We find out, of course, from the briefs, from the lawyers. The government of the United States will often file briefs in these cases. But are we just supposed to take what they say and just say, 'Okay, we'll follow it?' That's not quite our system....Our system is that lawyers from both sides, and maybe from ten sides, get up in the Supreme Court. And luckily, one thing about our system is that our lawyers will say politely—politely until they get out of the courtroom—but politely, 'You're wrong judge. That's not what the law says. You're wrong.' There are systems where it is a little difficult to say that. It is not difficult to say it in the Supreme Court of the United States. In fact, people say it all the time. In fact, I haven't yet heard them say 'you're right.' Nonetheless, you see the point.

"We have to know, and the government of the UK filing briefs is fine. In one recent case the lawyers from the UK filed a brief saying our Government's brief was totally wrong. The same thing is true of the Netherlands; the same thing is true of a lot of places. But systematically we have to be able to reach beyond our shores to find out what is going on in case after case after case.

"The way that I was taught years ago was that our profession consists of three parts, when you look at it from the point of view of the judge. There is the judge who writes the opinion, finally decides the case and writes something that's supposed to make sense. The academics read it and they say, 'It doesn't make that much sense, and this would be better,' but they seriously criticize and bring things together, because they can look at this case over here and that one over there and they can put them together. The lawyers read that, and the lawyers then get better arguments—or maybe worse. They try; the lawyers stay informed. They tell the judges. The judges listen and read what they say from all the different sides, and they perhaps reach better opinions, which are then criticized and brought together by the academics.

"And so it is a circle, but if that link between the three parts of the circle breaks, we can't get the job done. All

we can tell you is: these other kinds of cases are in front of us, and you are part of finding the answer. Don't rely on us; you have to give us the answers, and [if they are] conflicting, fine, perfect. Then we can do what we are able to do, [what] we think best to do."

THE RISE OF RULEMAKING ORGANIZATIONS

Justice Breyer then called attention to a new form of rule-making with global implications, the myriad of treaty-created organizations that make rules. In the early 1970s, there were 242 such organizations in the world, ranging from the World Trade Organization to organizations with a narrow focus, such as the International Olive Commission. They then employed 65,000 civil servants internationally. By 2010, there were more than 2,000 such treaty-created organizations, employing more than a quarter million people around the world. Asking whether the rules these organizations promulgate are binding, Breyer noted that, for instance, our Securities and Exchange Commission helped to write the Berne Rules and has taken the position that companies under its jurisdiction are required to follow them. Like the accounting rules we or our clients may not like, we have to follow them.

"They are," he continued, "excellent organizations, and we must belong to most of them or we can't get the world's problems solved. But if they are going to do everything, or much [of the rulemaking], what happens to Congress' legislative power?" The answer to this familiar question, he went on to suggest, was given in the 1930s, when this same issue was raised and answered with respect to regulation by administrative agencies.

"And, indeed, what are the grander solutions?" he asked. "I don't know....I think it is important to think about because there's something more important going on here ... something where there is no division between France or the United States or the UK. I saw this first-hand, first time, on 9/11 when **Sandra O'Connor** and I were in India. We had just arrived that day. And the Chief Justice of India said, 'Don't change your schedule. We won't have dinners, but we will continue the meeting.' Why? We got a very nice welcoming, because there I saw . . . that the real divisions of the world are not divisions between the EU and

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There is the judge who then writes the opinion, finally decides the case and writes something that's supposed to make sense. The academics read it and they say it doesn't make that much sense, this would be better. They seriously criticize and bring things together because they can look at this case over here and that one over there and they can put them together. The lawyers read that and the lawyers then get better arguments, or maybe worse. They try. The lawyers stay informed. They tell the judges. The judges listen and read what they say with all the different sides and they perhaps reach better opinions, which are then criticized and brought together by the academics. So it is a circle. But if that link between the three parts of the circle breaks, we can't get the job done.

Justice Breyer

some other place, the United States, and so forth. The divisions are between those who believe in a rule of law and those who don't. That's the important division. And we don't know how it will go because it seems to go up and down. . . . We are on the right side of that one, and that is what we're trying to further."

THE RULE OF LAW IN OUR NATIONAL HISTORY

"When the President of the Supreme Court of Ghana comes into my office, as she did, and she wants . . . the rule of law in Ghana and wants there to be more protection of democracy and human rights, and she says to me . . . 'What is the secret? Why is it? Why is it that Americans follow a rule of law?'"

"I could go back to the Magna Carta . . . but I have to keep it brief, and so I go back only to 1840. I only tell her about the time when the Supreme Court said that the Cherokee Indians owned northern Georgia, and Andrew Jackson said, 'John Marshall [the Chief Justice] has made his decision, now let him enforce it.' And he sent troops to northern Georgia, not to enforce the law, but to drive the Indians to Oklahoma along the Trail of Tears...."

"And I tell her about Little Rock, which is a happier story I love to tell. It's the story of a man, I think, who helped a lot to guide us now. Governor Faubus stood in the schoolhouse door in the face of a legal decree which said "integrate the school" in 1957. Remember in 1954, the Court said, 'Do it.' in *Brown v. Board*. By 1957, nothing had happened, and that order came, and it said, 'Integrate.' And the Governor said, 'I have the state police; he's just a judge'. And Dwight Eisenhower said—and it was tough too, because Jimmy Burns, the Governor of South Carolina, and a moderate on race, who had been a member of the Court, said, 'I'll tell you, if you send troops, you're going to have to reoccupy the South. You're going to have to have a second Reconstruction.' [Attorney General] Herbert Brownell said, 'Do it; you have to.' He [President Eisenhower] did; he sent the 101st Airborne into Little Rock. Everyone knew who they were; they were the troops that had gotten hung up in Normandy on the church steeples and been shot down, and they were the heroes of the Battle of the Bulge. In 1957, every American knew who they were. They took those children and walked them into school—a great day for the rule of law. And . . . that was just the beginning."

"... Go look at *Bush v. Gore*. I was the dissenter in that. Harry Reed said that the most important thing about that case is rarely remarked, that is that despite the fact that half of the country thought it was absolutely wrong, and I was on that side, half the country thought it was terrible and wrong—maybe it was a little more than half—but nonetheless the fact is: no bricks in the streets, no killings, no riots."

"And that is 200 years of history. What I am telling you is simply this: there is no magic secret. And don't just talk to the other judges, and don't even just talk to the lawyers, and don't let the lawyers talk to each other about rule of law....[T]he United States has 310 million people in it ... and they're the ones that have to accept that rule of law. Go to the villages and tell them about why sometimes it is worth, indeed, accepting a decision that is important that affects your life that you think is wrong and may be wrong....That's what it [the rule of law] is about."

THE PLAGUE OF EVIL

Noting that many of the College Fellows were going to the Paris Conference in France the following week, Justice Breyer suggested that while there, the Fellows discuss the work of a French writer, rather than talking about Magna Carta, which, though it is not just English, not just Anglo-American, is a large part of our history.

"I like to quote when I am there," he suggested, "Albert Camus . . ." Justice Breyer was referring to Camus' *The Plague*, the story of a city in northern Algeria taken over by the plague, a bacteria carried by rat fleas. "It is a great book," he continued, "and it tells how they survived the plague, but it is really about the Nazis." (*The Plague* is generally understood to be a metaphorical treatment of the French resistance to Nazi occupation in World War II.

At the end of the book, Camus has his hero, the narrator, a medical doctor, explain why he has written this book. He responded, "I wanted to tell the story of the people of Oran, their heroism and their lack thereof, but more than that, I wanted to talk about doctors and how they helped, but more than that . . . because the germ of the pest, the plague, never dies, it never dies. It simply goes into remission, and it lurks. It lurks in the corridors, it lurks in the file cabinet, it lurks in the curtain, it lurks in the attic, it lurks for one day, once again, for the misfortune, for the education of human beings, to send forth its rats again into a once-happy city."

"Read that, that's what we are here to fight. It is not the lawyers alone, and it is not the judges alone and it is not the rule of law alone, but it [the rule of law] is one weapon that human beings have against that plague germ which is always with us. That, I think, is a very basic reason why we are in the rule of law together and why I am very happy you are here visiting a foreign country, Britain, and visiting France as well."

E. Osborne Ayscue, Jr.

Charlotte, North Carolina



CHALLENGES TO EFFECTIVE HEALTHCARE REFORM IN THE UK

A leading voice in British medicine and healthcare policy, Dame **Carol Black**, DBE, FRCP, FMedSci, explored some of the challenges confronted by nationally-subsidized healthcare at the College's Annual Meeting in London.

Dame Black is one of Britain's most powerful women, having served as President of the Royal College of Physicians (only the second female to hold that post since the College was founded in 1518), and the first expert advisor to the British Government on Work and Health. She also is the head of Newnham College of Cambridge University, the sole remaining all-female college in the United Kingdom.

Black was asked to assist the government in tackling the prickly problem of steadily rising disability costs and increasingly prolonged absences from the workforce. The UK's disability claims are among the highest in the Western world, with the United States following not far behind. This problem has carried with it personal and societal problems, loss of productivity, and reduced GDP. According to Black, it has afflicted all UK governments for more than thirty years, irrespective of their political persuasion. It is, said Black, "a history of the unintended consequences of well-meaning governments." And the cost to individuals, families, the

economy and society has been enormous: the annual economic costs of sickness-absence and "worklessness" exceed one-hundred billion pounds. That burden is not sustainable for the United Kingdom, particularly in an era of austerity.

Black has advised the government that the most effective solution would be early, effective intervention and support by employers, health professionals and trade unions. But, as currently structured, the general practitioner as the gatekeeper is immediately plunged into a conflict of interest when he or she is requested by the patient to give a certificate of disability: the physician is tempted to defer to the patient's well-being and her account of her inability to work. Black pointed out that once the patient is in the system, it becomes all too easy to continue certifying subsequent extensions, as opposed to the more difficult task of getting the patient back into the workforce.

According to Black, the British government has thus far attacked the problem through legislation (*e.g.*, allowing the GP to certify "partial" ability to work, an option not previously available), education and training of physicians and employers about the scope of the problem, and a campaign of persuasion. It remains to be seen if these efforts will be enough to reverse the drift into lifelong benefit dependence.

Black's remarks and her experience were a cautionary tale for Americans, who also confront soaring disability costs as they now explore, for the first time, a national healthcare system.

Chilton Davis Varner
Atlanta, Georgia

RESILIENCE, FOCUS VITAL TO SERIOUS FRAUD OFFICE

As director of the Serious Fraud Office (SFO), **David Green**, CB, QC heads one of the most prominent and important prosecuting offices for high-level corporate crime in the United Kingdom. However, this does not mean there is not a lighter side to him.

In his introduction of Green at the College's 2014 Annual Meeting in London, Fellow **Frederick T. Davis** of Paris, France, shared what he read in an interview where Green was asked about his favorite occupation. Green answered, "Enjoys fishing and not just for fraudsters." The same article also inquired on what car he drove, and he responded, "Thinks he drives a Honda but is not quite sure."

A graduate of the University of Cambridge law school, Green spent twenty-five years at the bar prosecuting and defending criminal cases. He was then named the first head of the Revenue and Customs Prosecution Office. He returned to the bar and became head of the Serious Fraud Office in 2012.

Green is supervising the SFO during a time of great change and legislative activity. Two years ago, the United Kingdom adopted the UK Bribery Act. "Superficially it looks like America's Foreign Corrupt Practices Act, but it has some really innovative differences, including the so-called corporate crime and the establishment of compliance as a legal defense, not just a discretionary mitigation factor. Just this year, legislation went into effect that creates a very specific procedural framework for Deferred Prosecution Agreements," Davis said.

Green spoke to the College on the SFO's current caseload and what that says about the organization's importance.

HANDLING COMPLEX CASES

"The cross-section of cases says quite a lot about what the SFO is for or at least what I think it's for and where it is now.

"LIBOR is an ongoing investigation into the manipulation of the London Interbank Offered Rate, a measure that is used in the setting of interest rates around the world....Forex, which concerns the alleged manipulation of the foreign exchange market. Barclay Bank and Qatar is an investigation that began in 2012 into the circumstances surrounding Barclays GDP eight billion recapitalization in 2008. Rolls-Royce concerns allegations of bribery carried out by local agents in return for orders in various markets, touching several divisions of Rolls-Royce business activity. GlaxoSmithKline, this is an investigation into allegations that bribes were paid in order to increase business in several jurisdictions.

"G4S and Serco, this concerns allegations of fraudulent claims for payment under contracts for the provision of services to the UK government. GPT, this investigation concerns a subsidiary's business relationship with the Saudi National Guard. As someone said to me recently, 'Good luck with that one.' Alstom, this is an ongoing investigation into the use of British subsidiaries to dispense bribes in several jurisdictions in order to secure large infrastructure projects. Charges have already been laid against subsidiaries. The Sweett Group,



this investigation concerns allegations of bribes paid in return for building contracts. And, finally, mark in this cross-section, an ongoing money laundering investigation concerning an old-regime Ukrainian politician in which we have frozen twenty-three million U.S. dollars in funds in London.”

These cases are all from the top tier of fraud and bribery work. The complexity of the cases “demands the use of the SFO’s operating model, unique in this jurisdiction, in which investigators, prosecutors, sector specialists, forensic accountants, computer experts and trial counsel work together from the outset in dedicated case teams under a case controller, shaping and driving the investigation. Of course, top level fraud, including bribery, is the singular priority to which the SFO is dedicated. We have no competing priorities.”

ENORMOUS DEPTH AND BREADTH

Because these cases concern blue chip UK companies, companies whose performance is imperative to the UK economy, “SFO investigations involving British enterprises do not enhance our popularity and some people feel a certain tension between wanting the law enforced but also wanting our companies to prosper.”

The investigations carry with them “an international dimension, with conduct being carried out abroad, impacting abroad or money sent or held abroad.” Due to the cross-border implications, SFO has established a close working relationship with the U.S. Department of Justice over the last two years, based on the principles set out in the 2007 agreement between then Her Majesty’s Attorney General, chief legal advisor to the UK, Lord Goldsmith and then U.S. Attorney General Alberto Gonzales.

These cases require “resilience and focus on part of the investigating team” because of the vast quantities of digital data that need to be obtained, uploaded, searched and assessed and witnesses who need to be identified and traced. “Those we investigate are well resourced and heavily lawyered up. Claims of privilege under English law principles can transcend extravagance and amount to a strategy of deliberate obstruction, a strategy we will always challenge and will litigate if it becomes necessary to do so.”

Investigations are large. Green offered the example of the LIBOR conspiracy, where seventy SFO staff members are engaged in the investigation. All cases undergo scrutiny before their adoption by the SFO. “Understandably, whenever the media or those in politics pick up a suggestion of suspected significant financial wrongdoing they want to know what the SFO is doing about it and where is the fabled dawn raid that gets people so excited. On reflection, they will, of course, remember that as director of the Serious Fraud Office I cannot open a criminal investigation unless and until I am satisfied, on reasonable grounds, that the conduct may involve serious or complex fraud or bribery.”

IMPROVEMENTS AID EFFICIENCY

Changes in process and enhancements in intelligence capability have provided the SFO the tools to accomplish its mission more effectively.

“From this autumn we will start to see cases adopted by the current SFO management under our recalibrated focus on top tier fraud coming to trial... The delay between charge and trial of big fraud cases in this jurisdiction is a frustrating fact of life. We have much in the pipeline. I think the size of the white collar criminal legal sector, both British and ▶



Headquarters of The Serious Fraud Office



QUIPS & QUOTES

That is what the SFO is for: visible and demonstrable independence is crucial to judicial confidence, to business confidence in London as a level playing field, and to public confidence in the investigation and prosecution of major economic crime involving even our flagship enterprises.

David Green

American, servicing the city of London, what I call, I hope not too pejoratively, the Bribery Act industry, is evidence in itself that there is a lot more work out there for the SFO to do and I am anxious to do it.”

The intelligence enhancements will enable “sectoral analysis, project development with our national intelligence agencies and, in cooperation with the National Crime Agency, the investigation of crime as it is happening, rather than just of historic events. We are also fully equipped to deal with whistle blowers and those who wish to supply information.”

Earlier in 2014, SFO gained the prosecutorial tool of Deferred Prosecution Agreements.

“Our DPA framework differs from the U.S. model in that it is statute based. It is only available to corporates and is subject to judicial consent and scrutiny throughout, applying the test of whether a DPA is in the interest of justice and the terms are fair, reasonable and proportionate.”

Green said the SFO has cases now where DPAs are likely to be considered the proper outcome, “but you will have to watch this space. I have always found the adverse comparison of SFO performance against corporate with the rather more spectacular DOJ performance in that area rather difficult to deal with. The reason, I think, is the U.S. principle of vicarious corporate liability as against our requirement for the prosecution to prove that the controlling mind of the corporate, usually at board level, was complicit in the relevant criminality. That makes it obviously much harder to prosecute the corporate here.

“In addition, that difficulty is bound to act as a break on a company seeking a DPA here. Some might say, ‘Well, if it’s so difficult to prosecute me, why should I enter a DPA?’ In response I have suggested that section 7 of our Bribery Act might be amended so as to create an offense of a corporate failing to prevent acts of economic crime by its associated persons or employees subject always to the defense of adequate procedures.”

With the right people and adequate resources in place, SFO’s mission is clear and its presence is vital. “Frankly, what we need now is results from the cases that are coming to trial.”



QUIPS & QUOTES

So I say this—read my lips—no cooperation, no DPA.

David Green

AWARDS & HONORS



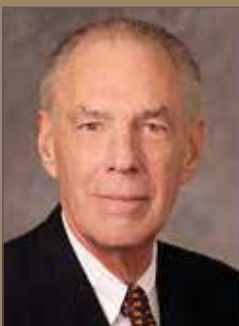
Benjamin H. Hill III of Tampa, Florida has been recognized as recipient of The Fellows 2015 Outstanding Service Award, an award given annually to a Fellow of the American Bar Foundation who has, in his or her professional career, adhered for more than thirty years to the highest principles and traditions of the legal profession and to the service of the public. The award will be presented during The Fellows 59th Annual Awards Banquet in February 2015. Hill has been a College Fellow since 1995 and has served as chair of the Florida State Committee and currently serves as Vice Chair of the Legal Ethics and Professionalism Committee.



Marc S. Moller of New York, New York was named recipient of the Seventh Annual Cecile S. Hatfield Award for Excellence in Aviation Law or Aviation Insurance. Recipients of the award, who are members of the aviation law and insurance industry, have demonstrated career achievements that represent the highest standards and goals of the industry. The award was presented at the Aviation Law and Insurance Symposium in January 2015. Moller has been a Fellow since 2005.



Michael A. Pope of Chicago, Illinois has been recognized by Best Lawyers in America 2015 for his work as a defense lawyer in the areas of mass tort litigation and class action defense. This recognition is given each year to only one lawyer in this specialty in the Chicago metropolitan area. Pope has been a Fellow since 1990 and has served as Chair of the Sandra Day O'Connor Jurist Award Committee and Vice Chair of Judiciary Committee.



W. Scott Welch of Jackson, Mississippi was presented with the Mississippi Bar's Lifetime Achievement Award, an award given to an individual who has demonstrated devoted service to the public, profession and the administration of justice over the span of a professional career. Welch has been a Fellow since 1994.



HONORARY FELLOW LORD NEUBERGER UK SUPREME COURT VS. US SUPREME COURT

In 1952, the College granted its first honorary fellowship to a member of the English Bar, the Honorable Sir **Geoffrey Russell** KC. Since then, Fellowship has been granted to more than twenty members of the English Bar, a sign that the College recognizes the role members of the English bar have as guardians of the rule of law.

At the College's 2014 Annual Meeting in London, honorary fellowship was conferred on The Right Honourable the **Lord Neuberger** of Abbotsbury, the second President of the Supreme Court of the United Kingdom.





Called to the Bar at Lincoln's Inn in 1947, Lord Neuberger became a Queen's Counsel in 1987. Thereafter, he was appointed a judge of the High Court in the Chancery Division in 1996 and later Lord Justice of Appeal in 2004. He became the Master of the Rolls, the second highest position in the English judiciary in October 2009. Following the creation of the Supreme Court, his rise to the Court of Appeals and then the House of Lords was one of the quickest in recent history. At the time of his appointment, he was the youngest sitting Law Lord. He became the second President of the Supreme Court of the United Kingdom at the beginning of the judicial year in October 2012. He serves as the permanent judge of the Hong Kong Court of Final Appeals. He recently spoke in Hong Kong to the Hong Kong Foreign Correspondents Club about the rule of law and how it relates to Hong Kong and to any jurisdiction. "He said that the rule of law is fundamental to any civilized society and the rule of law means, at the very least, that society is governed by laws which are properly enacted, clearly expressed, publicly accessible, generally observed and genuinely enforceable," said Past President **Michael E. Mone** of Boston, Massachusetts, in his introduction of Lord Neuberger.

Lord Neuberger had prepared a presentation on the rule of law and democracy "but having heard what Justice Breyer, what Mr. Mone and what Lord Goldsmith said I was rather brought back to my days at the Bar when my opponent produced arguments that I had not expected at all and had to think on my backside and then on my feet when I go up." He chose instead to speak on the UK Supreme Court, comparing it and its functions to its counterpart in the U.S.

QUIPS & QUOTES

For me the trip to Westminster where the UK Supreme Court is situated was a round trip because as Lord Goldsmith mentioned I was at school at Westminster...In our last term at the school there were the examinations for Oxford and Cambridge and I was told that the headmaster, who taught me history for two terms during my time there and had been headmaster throughout my five years there, was in the yard with the names of those boys who had gotten into Oxford where I was trying for. I went out into the yard and there was a gaggle of boys around the headmaster. Eventually I got to the front and said, "Sir, sir, is my name on the list?" and he looked at me and he said, "Who are you?" So I went through school perhaps without leaving a trace. I hope now I've gone back to Westminster in a somewhat different capacity, I believe something of a trace, but I hope it is a good trace.

Lord Neuberger

NUMBER AND JURISDICTION

"The Supreme Court is one of the few areas, one of the few institutions, where the United States can claim far more experience and tradition than the United Kingdom. We've only had a Supreme Court for not even five years. Before that, there were the Law Lords, but as an institution they do not go back formally as far as the US Supreme Court does."

The UK Supreme Court has twelve justices whereas the United States, with five times the population, has nine. During a case, the UK Supreme Court normally sits with five justices, "sometimes seven, sometimes even nine on very big and difficult cases." ▶

The court also has an “unusual jurisdiction ... a hang-over from the days of the British Empire, we have an international reach.” The Law Lords in the role of the Privy Council heard appeals and were the final Court of Appeal from Canada, New Zealand, Australia, Hong Kong, Singapore and India.

“Now we have the vestiges of that power because small islands in the Caribbean and elsewhere in the world, which perhaps do not have sufficient size to have a full-time Supreme Court, still come to us for final appeal.... We do have this international dimension which sometimes involves very small cases that come to us because the threshold is very low. That is actually a valuable and enlightening experience. Judges tend to be sometimes too parochial in their outlook because they are sitting, particularly in a Supreme Court, in one place. They cannot be appealed. Having variety in one’s diet is, I think, very valuable.”

POPULATION AND DIVERSITY

The appointment of judges, originally, “was made by the Lord Chancellor, who occupied a very high office of state, but now is simply a name. He’s no more than a Minister of Justice, doesn’t sit as a judge and has very limited, if any involvement, with appointment of judges, other than formal involvement. We have committees of appointment. To get to the Supreme Court there is a committee which I chair, there’s one other judge and three lay people. We make a recommendation which we would expect to be accepted save in the most unusual circumstances. Ultimately it goes via the Prime Minister to Her Majesty the Queen and she formally makes the appointment.”

Judges are selected from the higher echelons of the judiciary of England, Wales, Scotland and Northern Ireland. Occasionally, a member of the Bar is promoted immediately to the Supreme Court. “Possibly as a result of this we are very weak on diversity compared with the Supreme Courts in Canada and the United States. We have one woman and eleven men. We are all white. And I think eleven out of twelve of us went to public school.”

The legal profession in the UK “is very favorably adjusted to men.” Lord Neuberger observed that upon entering the legal profession it is about an equal ratio of men and women “but as you go up the ladder the proportion of men increases and the proportion of women decreases. That in part is due to the fact that as you go up the ladder you’re looking further back in time in terms of recruitment, but it is also because, at least here, in this country, is it unforgiving to people with other responsibilities.”

A better representation of women, ethnic minorities and people from poorer backgrounds can be found in the junior judiciary, “but it is an area where the United States Supreme Court, the Canadian Supreme Court, and the Australian High Court are way ahead of us.”

DURATION OF SERVICE, ROLE OF A CONSTITUTION

In terms of retirement, the UK has a compulsory retirement age. “It is seventy for judges appointed in 1996 and after, such as myself, and seventy-five for those appointed before 1996.” Lord Neuberger noted that in 1995 the government reduced the retirement age for judges. “I think there’s a powerful argument for increasing it in this country, but there are various competing arguments. Not having a requirement age is a sign of complete independence for the judiciary, but you do get difficulties in (a) as it were, bed blocking; and (b) when people ought to go but don’t.”

While the U.S., like almost every country in the world, has a constitution, the UK does not. “Some people say we do in documents such as Magna Carta, the Bill of Rights and constitutional conventions. But these are merely a collection of principles and provisions which have developed somewhat haphazardly to deal with specified historical events or historical crises. In a way, all of the provisions of Magna Carta and the Bill of Rights, all constitutional conventions can be revoked or altered by a simple majority in Parliament. Indeed, Magna Carta in 1215 had about sixty separate provisions. Over the years all but three have been repealed by Parliament. As a former ex-officio Chairman of the Magna Carta Trust, I would be the last person to call its importance into question, but it is wrong to see it as a constitution.”

The UK now has a “quasi constitution.” The UK signed on to the European Convention on Human Rights in 1951 and incorporated it into domestic law in 1998. Through it, judges in the UK can now give effect to many of the fundamental rights which were enshrined in other people’s constitutions. “We didn’t have freedom of speech written into our system expressly. We didn’t have rights of privacy written into our constitution. We still, despite having human rights as part of our system, have parliamentary sovereignty. We can’t override a statute because it is unconstitutional. The most we can do—and this is very recent—is to say under the Human Rights Act that a particular statute passed by Parliament does not comply with the Human Rights Convention. We certify it....Our certification does not make the statutory provision in question unlawful. It merely hands it over to Parliament to decide what to do.”

Lord Neuberger pointed out that, unlike the U.S. where the democratically elected Senate and democratically elected House pass a bill which is then approved by a democratically elected President and then quashed by an unelected Supreme Court, in the UK “that would be unthinkable, even in relation to gun control, abortion, and so on. That is all for Parliament.... It does not mean that we are subservient as a court to Parliament, but our role is more limited. But we are, not only because of human rights, slightly almost sleepwalking into a constitutional role, because another feature of the United Kingdom which I’ve touched on briefly already is the devolution. And when there are issues as to the powers of the Scottish Parliament, the powers of the Welsh Assembly, those have to be decided by the Supreme Court. And to that extent we are drifting into becoming a constitutional court.”

JUDGMENTS, DISSENTS, JUDICIAL CONFIDENCE

The UK and U.S. Supreme Courts do share the same problems. “Should there be a single judgment or lots of judgments? On that issue, I think a judgment on a point of practice or statutory construction is probably satisfactory if there’s only one judgment. If there are two or three judgments agreeing, the chances are one of you clever lawyers will work out a difference between two apparently agreeing judgments to raise a new point to argue about. I prefer if there is only one judgment or if there’s dissent, fine.” He advised that vanity judgments, those written even if the judge agrees with the main decision, of which he has written his fair share, “one should write if one wants to and then put it in the drawer.”

Dissents and disagreeing with the majority are important, as “it’s your duty to say so, your judicial oath requires it. But I do try to encourage judges, my col-

leagues, to be polite with each other. You can disagree without insulting. Last term one of my colleagues sent around a draft judgment in which he said, ‘I find the decision of the majority completely extraordinary.’ I persuaded him to tone it down to ‘some people might find the decision of the majority somewhat surprising.’”

QUIPS & QUOTES

Dissents, disagreeing with the majority. Those are important and if you disagree then it’s your duty to say so, your judicial oath requires it. But I do try to encourage judges, my colleagues, to be polite about each other. You can disagree without insulting. Last term one of my colleagues sent around a draft judgment in which he said, “I find the decision of the majority completely extraordinary.” I persuaded him to tone it down to, “Some people might find the decision of the majority somewhat surprising.” Remembering what the Ambassador said about British understatement I felt that was more in keeping with our style.

Lord Neuberger

The creation of UK’s Supreme Court was not something new. “It was simply taking, for public perception purposes, the highest court out of the House of Lords, out of what was part of the legislature, and giving it independence ... the purpose was partly symbolic. It has given it a breath of fresh life, a degree of confidence.”

Lord Neuberger worried that the move might make the judiciary overconfident or move too quickly to become a constitutional court, “this new building, giving us a new name, giving us a new status might have resulted us in going too far too fast.

“I would like to think that my predecessor ensured that didn’t happen and I hope that it doesn’t happen. But equally we have to move with the times. We live in interesting times and we have to do interesting things. I hope at the moment we are managing to get it right.”

QUIPS & QUOTES

Yes, I did say that the Supreme Court was conceived over a glass of whisky by the Prime Minister and then Lord Chancellor. I think it was conceived in a hurry. How I got to saying it was conceived over a glass of whisky, I haven’t the faintest idea. Nobody has cross-examined me about it. The only consolation I take is that nobody has ever denied it.

Lord Neuberger

THE CHALLENGES OF REPRESENTING A CLIENT IN FRONT OF INTERPOL

As Secretary General of Interpol, **Ronald K. Noble** has one-hundred ninety sovereign nations looking to him and his organization as the only neutral, multi-lateral law enforcement agency in the world.

“This is someone that the world can look to when there’s something very important to do, something that calls upon incredible diplomacy, hard work and skill,” said Pennsylvania State Chair **Robert E. Welsh** of Philadelphia, Pennsylvania, in his introduction of Noble at the College’s Annual Meeting in London. Welsh worked with Noble in the U.S. Attorney’s Office in the early 1980s, where Noble established a reputation for being someone who was “called upon when there are very difficult situations, where an institution is in great need in times of crisis.”

Noble was appointed Interpol Secretary General in November 2000 where he started to make it an organization that operates twenty-four hours per day, seven days per week. Eleven months, later September 11 happened and everything changed. Seventy member countries from Interpol lost citizens on that day. Because the terrorists were financed by countries throughout the world, it demonstrated the need for a much broader response. “As a result, Interpol has stepped up its game and has provided additional means of communication,” Welsh said.

Noble was appointed Undersecretary for Enforcement of the U.S. Treasury Department under President Bill Clinton. He oversaw a vast array of law enforcement organizations including the Secret Service, the Customs Service and the Bureau of Alcohol, Tobacco and Firearms. Noble came into office on the heels of the Waco, Texas, Branch Dravidian incident where federal agents assaulted a group of fundamentalists that resulted in around eighty deaths, including twenty children.

“He led an unflinching, searing examination of this agency’s conduct during the raid, which took place before he was sworn in. In many ways, he has been credited with actually saving the agency in question, the Bureau of Alcohol, Tobacco and Firearms, which is an extremely important law enforcement agency,” Welsh said.



BUILD THE RECORD, BUILD A CASE

Noble shared with the College that “the record, the record, the record” were words that were drilled deep into his psyche when he served as senior law clerk to the Honorable A. Leon Higginbotham, Jr. of the U.S. Court of Appeals for the Third Circuit. Building the record piece by piece, “through discovery of various forms, through pleadings, evidentiary battles, witness interrogations, physical and testimony evidence, ultimately at trial. Building the record I would persuade the finder of fact or ruler of law to decide a case in your favor. It remains a painstaking process for lawyers throughout the world.”

The importance of a record and how it is built have remained the two most important elements of his development as a leader and head of a police organization. For trial lawyers with cases in front of Interpol, the challenge is huge.

There are two ways one’s client can be wanted for detention or arrested by Interpol. The first way is through a diffusion, which is similar to a ‘Be on the Lookout’ (BOLO) or All Points Bulletin (APB). As of December 2013, Interpol had more than 70,000 diffusions in circulation, and around 21,000 of them had been issued in that year.

The second way is through an Interpol Red Notice. Currently, there are more than 52,000 red notices in circulation; in 2013 over 13,000 were issued. “Only Interpol sovereign member countries and certain international tribunals have arrest authority. Interpol does not have and never has had power to issue or enforce arrest warrants. Interpol red notices are just what they’re called, notices. They put countries on notice that the named person is wanted for arrest or questioning.”

The difference between a Red Notice and a diffusion is that a Red Notice is issued by Interpol headquar-

ters after reviewing the submission and ensuring it is in compliance with the organization’s data processing and constitution, “a judicial-like function.” A Red Notice needs to be supported by an arrest warrant issued by a judicial body of the requesting country. “When a country requests a red notice it assures a law enforcement agency anywhere in the world that if they go to the trouble of arresting and detaining the person the requesting country will seek his or her extradition.”

NAVIGATING A FORMIDABLE SYSTEM

Among the 190 member countries within Interpol, “there are countries that do not trust one another, do not believe the other respects the rule of law and do not want to enforce anything at their request.” Noble used the example of the first World Trade Center bombing on February 26, 1993. The convicted mastermind of that bombing entered the U.S. carrying a stolen Iraqi passport, and at that time Iraq and the U.S. were enemies and were not sharing information.

“Interpol has a completely independent commission for the control of Interpol’s files, a data protection agency if you will. They review diffusions and red notices to make sure that they are in compliance with Interpol’s rules. The lawyer has a choice of proving to the Secretary General or to the independent commission for the control of Interpol’s files that the rules of organization don’t support the red notice or the diffusion in place.... We have a constitution that says we can’t be involved in any matters of racial, religious, military or political nature. The origins for that took place during World War II when Interpol was actually taken over by the Third Reich.... After that, Interpol decided we can’t get involved in any matters of political, racial or religious nature. The commission that controls Interpol’s files is difficult for lawyers, especially American lawyers, to understand and accept. They only work on written submission.”

During Noble's fourteen years in his position, only two cases were allowed to come in and make an oral argument. "There are really no visible set of rules or regulations that explain to lawyers what they should do, how they should do it, what the various standards are, timing, which is very, very difficult for American lawyers, and most lawyers, to embrace."

Another challenge is the diffusion or Red Notice may have been issued by any one of Interpol's 190 member countries. The country could have a completely different legal system, a completely different set of criminal laws, different standards for discovery and could use languages other than English. Noble used the example of Papua New Guinea, which has 800 different languages. "Imagine your difficulty in finding out whether there was a factual basis to support the crime with which your client has been charged in Papua New Guinea." Different legal systems present the challenge of which country has detained a client versus the country seeking the arrest. The country that has detained a client may limit one's access, sometimes keeping the person without allowing him or her to see anyone for an indefinite amount of time.

ple stay trapped in a country where they've been given asylum or where they happen to be residing."

INTERPOL IN ACTION

Noble mentioned the case of Wikileaks founder Julian Assange as an example. In November 2010, at the request of the Swedish authorities, Interpol published a red notice for Assange. He was charged with having committed sexual offenses against Swedish nationals in Sweden, an "ordinary law crime." In 2012, Assange was arrested in London and the Swedish authorities immediately issued an extradition request to the UK. He was released on bail and the Ecuadorian government granted him asylum. "Interpol has publicly confirmed that the red notice for him exists even though he's in self-forced custody. And if he does leave, then the Interpol red notice can be acted on in order to detain him and have the country in question allow Sweden to seek the extradition process."

Another example was Manuel Zelaya in 2009, the ousted president of Honduras. A red notice was requested based on charges that included misuse of authority and treason. "This is a request that Interpol denied because the charges were, on their face, deemed to be of a prominently political nature with no ordinary law prime element to it."

The last example was Edward Snowden, who was charged by the U.S. with theft, unauthorized communication of national defense information and willful communications of classified communications intelligence information to an unauthorized person, according to the complaint filed in the U.S. "The last two charges were brought under the 1917 Espionage Act. As a matter of law Interpol considers espionage cases, like cases of treason, to be predominantly political in nature and thus in violation of our constitution. The Snowden case is particularly interesting because the U.S. has never sought Snowden's arrest via Interpol's channels. Apparently, it recognizes that Article 3 of Interpol's constitution would prohibit our involvement in seeking Snowden's apprehension."

Noble called on the College to think of how to improve Interpol and its work.

"We need to make sure that lawyers, you and your colleagues, are able to gather the information that allows you to develop the case so that the finder of fact, the decider of law can make the appropriate decision. There is no other way for that to happen. We also need to signal to you how decisions were made, what rules apply procedurally and substantively. And, finally, the commission needs to articulate why it decided what it decided, so that the law, the jurisprudence of Interpol decisions, can be developed."

QUIPS & QUOTES

Imagine your difficulty in finding out whether there was a factual basis to support the crime with which your client has been charged in Papua New Guinea. The country in question needs only to have one language that you do not understand or read in order to make it difficult and very expensive for you to represent your client appropriately.

Ronald Noble

Noble emphasized that Interpol only issues the notifications. "The decision to detain, prosecute or extradite is made by the country where the defendant has been detained or arrested, based on a review of the requesting country's warrant, supporting evidence and extradition documents, generally handled on a bilateral basis.

"Interpol diffusions and Red Notices have a chilling effect on the ability of wanted persons to travel freely internationally. Such wanted persons need to worry whether their crossing a border could trigger a trip wire alerting the country concerned that the person in question is wanted for arrest. This country might detain the person, and a very long process to obtain his or her freedom could begin."

Interpol also does not provide any advance advisory opinion to travelers stating that they believe the matter does or does not fall within the organization's rules, regulations and constitutions. "As a consequence, peo-

COLLEGE UPDATES

STRATEGIC PLANNING RETREAT SURVEY

President **Fran Wikstrom** is convening a Strategic Planning Retreat in the summer to discuss and plan for the future direction of the College. A survey was sent out in December 2014 to various Fellows in order to gather their input on the planning process. Throughout the years, many have expressed views regarding a variety of issues concerning the College. Aware of these issues, the Retreat Planning Committee has formed five Task Forces to address them through the following general topics: (1) Admission to Fellowship; (2) Activities of the College; (3) Governance; (4) Future Mission of the College; and (5) National and Regional Meetings.

COLLEGE LOGO

The Board of Regents approved the following statement on use of the College Logo at its fall 2014 meeting:

Statement on American College of Trial Lawyers Logo Usage

The College's Logo is trademarked and cannot be used without permission. The College will vigorously protect its intellectual property rights to the Logo.

Individual Fellows may identify themselves as Fellows and use the Logo on their individual website pages if the page is dedicated solely to the Fellow and not to any other persons in the Fellow's firm; the Logo cannot be used on other website pages of the Fellow's firm, nor may the Logo be used in any way that could be construed as an endorsement by the College of a firm.

To maintain the integrity of the Logo, Fellows who wish to use it should request an official copy from the National Office rather than making a copy from the College's website or some other source. The Logo should be used in its entirety and not be altered in any way, including color, element, and type.

The Logo is for use exclusively by Fellows and should not imply endorsement of a Fellow's partners or firm,

nor should it be used in any way that suggests that the College endorses a particular event or cause.

The Logo may be used on a Fellow's individual webpage; but it should not appear on or be linked to other pages on the firm's website.

The Logo may be used as part of an individual Fellow's email signature, or on a personal Facebook or LinkedIn profile where it is clear that the Logo applies to the individual and not generally to the individual's partners or firm; but it should not be used on firm letterhead, business cards, firm brochures (except where the brochure has a dedicated page for the Fellow – the paper equivalent of an individual webpage), or other materials where it is ambiguous as to whom the Logo applies.

Even where it is clear that the Logo applies to the individual, it should not be used where it could be construed that the College endorses particular events or causes, unless approved in advance by the National Office.

Any questions regarding usage can be addressed to the National Office.



LEARNING RESOURCES AT YOUR FINGERTIPS

The Teaching of Trial and Appellate Advocacy Committee has three programs available for Fellows to use and share.

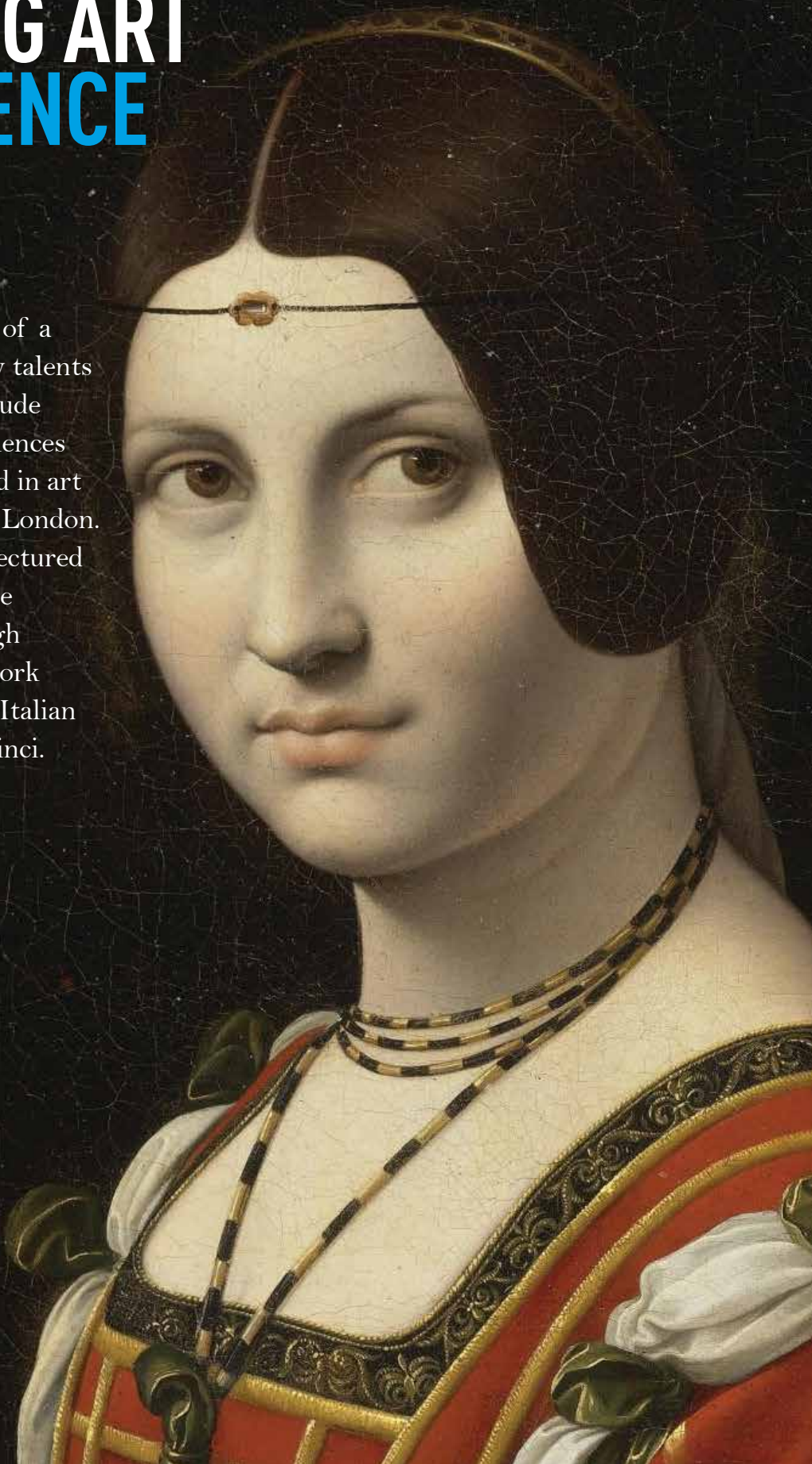
Taking and Defending Depositions, which is now available on a flash drive, is a video program that presents a mock deposition, showing some of the problems that may arise in taking a deposition and defending the deponent. It includes a discussion of how effective the counsel was in dealing with the problem and alternative approaches that might have worked better. The video is supplemented by study materials on key subjects, which are also included on the flash drive.

The two other programs available for Fellows are *Persuasive Advocacy Through Effective Writing*, which comes on CD/DVD, and the mock trial presentation of *NITA Housing Authority v. LaDonna Johnson*, which is available on a flash drive. The mock trial was prepared with the assistance of Stetson University School of Law.

The *Taking and Defending Depositions* flash drive will be sent to all State and Province Chairs. Additional copies can be purchased through the College by contacting the National Office at nationaloffice@actl.com

ASSESSING ART WITH SCIENCE

Martin J. Kemp fits the bill of a Renaissance Man. His many talents and areas of knowledge include being educated in natural sciences at Cambridge University and in art history at the University of London. Kemp has also written and lectured on imagery in art and science from the Renaissance through today, including extensive work on the leading figure of the Italian Renaissance, Leonardo da Vinci.





Kemp, the author of close to twenty books, one titled *Leonardo* which came out at the same time as Dan Brown's *The Da Vinci Code*, spoke to the College at the 2014 Annual Meeting in London on works of art that ended up as the subject of litigation. A member of the American Academy of Arts and Sciences based in Cambridge, Massachusetts, he has served as guest curator at the National Art Gallery in Washington, D.C., and has lectured at Harvard University, Princeton University and the Getty Research Institute in Los Angeles. Kemp spoke on four different cases that involved attributing or authenticating an art piece.

Authentication is a slippery business, and “deciding who did a work of art ... can make a difference between something being worth a few thousand pounds and being worth multi-millions of pounds. The courts have difficulty with attribution, understandably, but so do art historians. Not only do the courts find this slippery business of attribution problematic, but the situation in the profession, particularly in the light of scientific analysis, is pretty disgraceful.”

JUDGMENT BY EYE

The first case he spoke on was *La belle feronnière*, which is also known as *Portrait of a Woman*. The painting was inherited by a French woman who married Harry Hahn, a U.S. citizen who lived in Kansas City, Missouri. Hahn, who believed it was a painting by da Vinci, tried to sell the picture to the Kansas City Art Institute for \$250,000 U.S. in 1920. A reporter in New York called Sir Joseph Duveen, a well-known British art dealer at the time, and asked what he thought about the sale of the Leonardo picture. Without having seen the picture, “Duveen said, ‘Oh, it is not a Leonardo. The Leonardo is in the Louvre.’

QUIPS & QUOTES

It is interesting that the way in which the cases I've been involved with, on the whole, the courts move the issue of attribution away from the center of it and get it into areas which they feel they can deal with.

Martin Kemp

Harry Hahn sued Duveen for wrecking the sale because the Kansas City Art Museum wasn't going to pay out a quarter of a million dollars if somebody as authoritative Duveen said it was not Leonardo.” The case was tried in a New York court. Duveen assembled experts, including Bernard Berenson, an American art historian who was considered a great authority on the subject, to support him. “He came in with this kind of connoisseurly arrogance and basically said, ‘I know what Leonardo looks like and this doesn't look like Leonardo.’ Now, for a lawyer, this is not a very convincing way to argue. And the New York lawyer dismembered the testimony of these connoisseurs. It also later emerged that Berenson was actually paid by Duveen to testify in Duveen's favor.”

Kemp described “connoisseurship” as judgment by eye and noted “there is a defense to make of connoisseurship,” but these experts did not make it. “They had never been asked to make it. They basically had their reputations. They could say, ‘Ah, I know what Leonardo looks like and this is not Leonardo.’.... It is a wonderful example of forensic deception and the business of connoisseurship, which they did not justify.” The jury was unable to decide if it was a Leonardo, thus making the picture unsellable. ▶

In 1963, Kemp examined the painting through various technical methods. His conclusion was the painting was done by one of the top seventeenth century painters in service to the Royal Collection and not Leonardo. The same painting sold at Sotheby's in 2010 after scientific examinations confirmed it was from the seventeenth or eighteenth for 1.5 million dollars. "People want things to be by Leonardo; they're either Leonardo or they're rubbish. There's no kind of middle ground."

ETHICS AND ART HISTORY

The second item was for what was claimed to be a Michelangelo model for the David statue. Fred Hartt, a distinguished American art historian and expert on Michelangelo, saw the model and agreed to write a monograph on the model for a percentage of the sale price, five percent of the object, "which is not an ethical thing to do." The object was to be sold to the National Gallery of Art in Washington, D.C. However, *The Independent* newspaper in the United Kingdom published a story that implicated Hartt was "lining his own nest in a way which was not ethical," and Hartt decided to sue the newspaper.

Kemp, who was chair of the Association of Art Historians at the time, was called in by *The Independent* to state whether Hartt's behavior was ethical. Before Kemp testified, there was an interim ruling "to say that the *Independent's* article meant that Hartt had been reckless in his attribution. Not that he had mis-



attributed it, but this was the court making it into something that they would be comfortable with, this notion of being reckless in an enterprise. It was almost impossible to demonstrate, because what you do, you get one expert who comes along and says it is not by Michelangelo and somebody else comes along and says it is by Michelangelo, and that doesn't get you anywhere."

Kemp intended to testify that Hartt's actions were not ethical, but ended up saying the attribution was reckless. Hartt won on a technicality but was "absolutely dismembered by the judge who said....Hartt has been, in my judgment, justifiably exposed as a person who, despite his great eminence as a Michelangelo scholar, has prostituted his genuinely held, scholarly held, opinion of the statuette for a disreputable joint commercial venture," which was the implication, to my mind, of the *Independent* article, not that Fred Hartt didn't believe in this attribution." The decision prompted Kemp to write professional guidelines for art historians who previously had none.

IMPORTANCE OF SCIENTIFIC EVIDENCE

The third case was the missing painting of the *Maddonna of the Yarnwinder* by Leonardo da Vinci, which was stolen from the Duke of Buccleuch's Drumlanrig Castle in Dumfries and Galloway in Scotland. The painting was taken by two men who went to the castle, overpowered a female guard and seized the painting. Local police called Kemp and asked him how they would know if they had recovered the real Leonardo painting and not a copy. At the time, Kemp was working on his book *Leonardo*, and told police he had unpublished, technical examination information, and "no forger, faker or replicator is going to know it." Kemp was referring to infrared reflectography, which shows under drawings of paintings and how an artist such as Leonardo may have evolved a painting. The stolen painting was recovered after the police posed as loss adjusters.

The last case involved *La Bella Principessa*, a picture of ink and colored chalk on vellum. The painting went up for sale at Christie's in 1996 and was sold as a German Renaissance object for around \$21,000. The painting was submitted for sale by Jeanne Marchig of Geneva, Switzerland. Twelve years later, Marchig discovered the drawing was actually by Leonardo da Vinci. Marchig sued Christie's. "The case was eliminated on the statute of limitations....



Madonna of the Yarnwinder by Leonardo da Vinci



La Bella Principessa by Leonardo da Vinci

Her lawyers said she could not have claimed it was a Leonardo earlier because it was only when we did the research on it that we showed it was.”

Christie’s changed the frame before Marchig gave consent so the lawyer then focused on the frame. “It came with a very eccentric and strange frame which Christie’s had said disappeared. They then began to take action on the frame. Christie’s realized this was becoming very detrimental to them in the public domain and they settled.”

QUIPS & QUOTES

Any profession worth its weight should be able—and the law profession has years of doing this—to evaluate different kinds of evidence and say: this evidence has that kind of status in this and this evidence has other kinds of status.

Martin Kemp

Kemp observed that characteristics of the painting proved it was drawn by Leonardo. “He was left-handed and he used his right hand to blur the paint to create this very soft effect....Infrared evidence came in, using a very new technique where you can get out layers. The iris in the picture was done in full before Leonardo or the artist laid the eyelid over the iris. It was very characteristic of Leonardo to think about structure.”

Kemp raised the issue of whether Christie’s performed its due diligence in examining the picture. “After two weeks I knew this was a good chance of being Leonardo just by doing simple things. And they didn’t do it because the head of drawings, François Bourne said, ‘Oh, it is not Leonardo. It is German nineteenth century’ in this arbitrary way.”

There is no “systematic way of evaluating the relative merits and strengths of these different kinds of evidence....scientific evidence, evidence of content, evidence of style....The situation in attribution is shameful...and I’m working on this problem.

“The courts are not good in handling attribution, which is understandable. Art historians are not good at handling attribution which is not understandable because it is part of our job....The best scientific evidence requires a lot of what I call judgment by eye. The more definitive scientific evidence doesn’t help in a very systematic way. You still have a lot of connoisseurship or judgment by eye applied to the x-rays. It needs sorting out.”

PROFESSIONAL PROGRAM: THE INFLUENCE OF MAGNA CARTA

A CLE panel at the College's 2014 Annual Meeting in London presented a program titled, *The Magna Carta and its Influence on Constitutional Matters and Human Rights in the 21st Century*. Four experts on Magna Carta – two Knights, one Baron and the Master of the Temple Church – shared their thoughts on the importance of the document, as the document reaches its 800th anniversary.





Fellow **Alice E. Richmond** of Boston, Massachusetts set the tone in her introduction of the panel when she shared a quote from President Franklin D. Roosevelt in his 1941 inaugural address, “in the shadow of World War II after the Nazis had invaded Czechoslovakia but before the United States actually entered the war. It really resounds for us as further evidence of the importance of the rule of law, ‘The democratic aspiration is no mere recent phase in human history. It is written in Magna Carta.’”

MAGNA CARTA'S PLACE IN HISTORY

The first panelist was Sir **Jeffrey Jowell**, the Director of the Bingham Centre for the Rule of Law and a practicing barrister in Blackstone Chambers. He was knighted in 2011 for his service to human rights, democracy and the rule of law. A graduate of the University of Cape Town, Hertford College at the University of Oxford and Harvard Law School with both an LL.M. and an S.J.D., Jowell was the Dean of University College of London's law school for ten years. He went on to be the vice provost and the head of the graduate school at University College. He has served on the Royal Commission on Environmental Pollution, as chair of the British Waterways Ombudsman Committee, and as a director of the Office of Railroad Regulation.

Sir Jowell said the panel was selected “to discuss the significance of the agreement made in a soggy meadow near Runnymede Green on 15 June 1215...it was a peace treaty between a despotic and corrupt King John and the great aristocrats of the land, desperate to protect their feudal rights.”

The document was originally called Articles of the Barons, and “most of the sixty-three chapters are not exactly riveting. They deal not only with matters such as taxes, but with matters such as fish wares, Jewish

money lenders and even blood feuds. It is a document that would not please modern day feminists.”

Shortly after the document was sealed by King John, it was annulled by the pope. Two years later, the deal was reaffirmed by Henry III and it was then referred to as Magna Carta the Great Charter. In 1297, Edward I's Magna Carta was given statutory status.

“Its great significance is that it was the first legally binding document to limit the power of the King over his subjects. Chapters 39 and 40 even today quicken the blood, providing that ‘No free man shall be taken or imprisoned or outlawed or exiled or in any way ruined, nor will we go or send against him except by the lawful judgment of his peers or by the law of the land.’ And, ‘To no one will we sell, to no one will we deny or delay the right of justice,’” Sir Jowell said.

Magna Carta's greatest champion was Sir Edward Coke in the seventh century, a former Chief Justice. He regarded it “as the principal grounds of the fundamental laws of England.” In turn, this sentiment inspired generations of settlers heading for the new world. In 1765 the Massachusetts Assembly declared the new taxes to be against the Magna Carta and against the natural rights of Englishmen, referring to the provisions in Magna Carta outlawing scutage or taxation in chapters 12 and 14. Eleven years later, the American Revolution began and the Declaration of Independence itself echoed chapter 39 of the Magna Carta, in articles 1 and 8 of the Declaration of Independence; article 8, ending with the words that ‘no man be deprived of his liberty except by the law of his land and the judgment of his peers.’

Sir Jowell noted that one aspect of the Magna Carta is particularly significant “for those constitutions or agreements in transitional societies, which are often full

Paul Saunders reminded me that Tom Bingham's book cites an American author who, in 1991, calculated that more than 900 federal and state courts in the United States had cited Magna Carta, and that in the half century between 1940 and 1990 the Supreme Court had done so in more than 60 cases. It is remarkable how our common values, common law are united by these source principles set out in that soggy meadow almost 800 years ago.

Sir Jowell

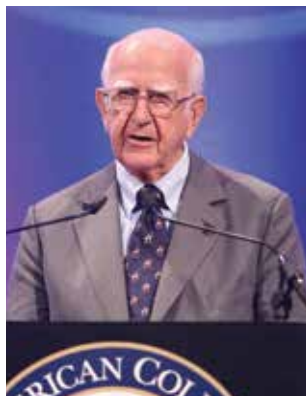
of rights and promises but have little hope of ultimate enforcement. The Magna Carta, in chapter 61, has its own built-in enforcement clause through twenty-five barons who could, if the King did not comply, seize his castles, land and possessions. Although, tolerantly, they could not seize his Queen or his children."

Today in England, only three clauses of the Magna Carta remain in the statute book: those guaranteeing the freedom of the church, ancient liberties in the city of London and the famous chapter 39 which, in its later incarnation...in Edward III's statute in 1354, lays down the idea of due process of law which, of course, found its way into the Fifth Amendment of the United States Constitution in 1791."

WHY COMMEMORATE MAGNA CARTA AT ALL?

The next panelist to speak was Sir **Robert Worcester**, Deputy Chairman of the Magna Carta Trust and Chair of the 800th anniversary of the Magna Carta. A Kansas native and graduate of the University of Kansas, Sir Worcester moved to London with his family in 1960 and founded Market and Opinion Research International or MORI. In his role as a pollster, Worcester advised every British Prime Minister from Harold Macmillan to Margaret Thatcher. He is a well-known media commentator, especially about voters' intentions in British and American elections. Knighted in 2005 for outstanding services rendered to political, social and economic research and for contributions to government policy and program, Worcester became Chancellor of Kent University in 2007, a position he held until early 2014.

Sir Worcester recalled his visit to Britain while serving as an officer in the American Army



Corps of Engineers. The first day he was discharged from service he planned to visit to the British Museum to see the Magna Carta and the Rosetta Stone because "the rule of law and communication outside the village were the principal icons, as we call them now, of a civilized society." Twenty-one years later he became a trustee of the Magna Carta Trust.

"A special relationship exists between my two countries, Britain and the United States. As President Obama said in a speech to Parliament in 2011, 'Our relationship is special because of the values and beliefs that have united our people through the ages. Centuries ago when kings, emperors and warlords reigned over much of the world, it was the English who first spelled out the rights and liberties of man in the Magna Carta.'"

Despite the many myths that surround it, Magna Carta was "the beginning of the spread of modern democracy...the beginning of representative democracy. No taxation without representation. Which lawyer and which American hasn't head that phrase before? But did you know that Americans abroad were disenfranchised when I arrived in this country? We still had to pay taxes, but we had lost the right to vote. Some Congressman put a rider on a tax bill once that said because we were living overseas and were not employed by the Federal Government that we had lost the right to vote."

In response, together with Democrats and Republicans abroad, Tax Equity for Americans Abroad (TEAA) was formed. "It was not the first or the last of the Tea Parties. As a result of representing TEAA, I carried a tea bag in my pocket for about three years. That tea bag was brought out for a photograph in *Time Magazine* that was bringing to the attention of the Congress that there was a bill that we had introduced by Claiborne Pell and that bill was stuck."

When I mention Magna Carta to lawyers anywhere in the world their eyes light up. Nobody is against Magna Carta. There are many myths which surround it. It was only a fight to settle a fight, a peace contract between the barons and the king. It was certainly that and that failed. But it was not only that. It was the beginning of the spread of democracy.

Sir Worcester

Years later the organization secured a few minutes to speak with Tipp O'Neill, Speaker of the House of Representatives and third in line to the presidency. Worcester was the group spokesman. "I said, 'Mr. Speaker, we have to pay taxes. We represent Tax Equity for Americans Abroad. But we have lost the right to vote. And there's that phrase 'No taxation without representation from the Magna Carta'. And he said, 'You've lost the right to vote? That's outrageous.' I said, 'Yes, Mr. Speaker.' I pulled that tea bag out and said, 'And if you don't give us the vote we're going to come and dump tea in your harbor.' You will remember where Tipp O'Neill was from. Yes, Boston."

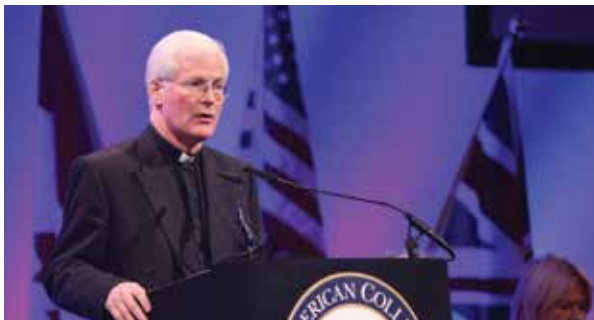
The document "on which all democratic society has been constructed" is recognized throughout the globe. "Described by the former German ambassador to Great Britain, 'Everybody in Germany knows the Magna Carta. It is precisely the foundation of democracy.'"

Worldwide events will take place to celebrate the document and its significance: the British Library and Library of Congress will host exhibitions; a symposium in Warsaw University will be held to discuss the document's relevance in Eastern Europe in the twenty-first century; Trinidad and eleven Caribbean countries will offer academic symposia and lectures.

The document matters today because "it is the foundation stone supporting the freedom enjoyed today by nearly two billion people in over 100 countries. It enshrined the rule of law.... For centuries it has influenced constitutional thinking worldwideThe Magna Carta is England's greatest ever export."

THE HEART OF LONDON'S LEGAL LIFE

Reverend **Robin Griffith-Jones** is a priest of the Church of England, whose official title is the Valiant Master of Temple Church at the Inns of Court. He is a graduate of Westminster School and New College at Oxford. After working at Christie's auction house for many years following college graduation, he resigned to move to Calcutta, India, to work with Mother Teresa. He returned to England and began working with the long-term homeless. His first parish after ordination was in a modern housing project. Griffith-Jones returned to Oxford where he became the chaplain at Lincoln College. He later wrote the first of his three books in the same study that John Wesley used during the formation of the Methodist faith.



In 1999, Reverend Griffith-Jones was appointed Valiant Master of Temple Church, which he describes as "the Anglican Minister, the priest, who looks after the Temple Church which is in the middle of the Temple compound owned by the Knights Templar in the Middle Ages and today the home of Inner and Middle Temples, two of London's ancient and historic Inns of Court.

"The Temple is home to England's lawyers, located fifty yards from the Royal Courts of Justice and a half mile from the Old Bailey, London's central criminal court. It is absolutely at the heart of London's constitutional and legal life. That is one reason for us to celebrate Magna Carta in itself."

QUIPS & QUOTES

The hero of the hour at Runnymede was William Marshall, Earl of Pembroke, the most powerful man in the realm, loyal to the King, but he insisted that the King seal the charter. As Regent to Henry III, William Marshall re-issued the charter under his own in 1216 and 1217. He ensured the charter's survival. Buried in the Temple Church is William Marshall, Earl of Pembroke, his effigy is lying there to this day.

Reverend Griffith-Jones

In 1214 and 1215, the temple was King John's London headquarters and was where the Templars kept him safe from assassination. It was also the place where "a delegation of barons confronted the king and, for the first time, demanded that the king acknowledge his own allegiance to a charter. They demanded the king's subservience to a written law. It will not surprise you to know that the negotiation was a disaster."

Middle Temple and Inner Temple, the home of the common law lawyers, in the seventeenth century was "the home of Cooke, Seldon and others who resisted the incipient despotism of the Stuart kings. And every single time in every single debate pleading for Parliament's rights and dignities, Edward Cooke and John Seldon invoked Magna Carta. In those very same decades it was members of Inner and Middle Temple, Drake, Raleigh,

Gosnal, and Amadeus, who were leading the expeditions across the Atlantic to Virginia, while back home in Middle Temple, Hall, Cooke and Hopham were drafting the Virginia Colony Charter. What an extraordinary thought. American lawyers con-

tinued to come to London to be trained for 150 years. There were five members of the Temple who signed the Declaration of Independence and seven members who signed the Constitution.”

Griffith-Jones said he looked forward to welcoming the many visitors to the temple but posed these questions to College: “What is going to be stronger in the rule of law by the end of next year for the fact that we have celebrated Magna Carta? If we divide the world into two parts, there is the free world to which you and are privileged to belong. If I am honest, in this country the real active heft of Magna Carta probably came to an end in 1689 with our glorious revolution and perhaps in your country largely in 1791 with the Bill of Rights. At that point what Magna Carta really had to offer was built into constitution or statute.

“But there are other jurisdictions which enjoy no such blessing. One group of jurists visited us last year from Romania in central Europe, until recently under the tyranny of the Ceausescu regime. I have good news for you from Romania. If you are now an advocate and you appear in a case against the government you no longer thereby put yourself or your family in physical danger. That, apparently, is a striking improvement.... I would like to know how everything that we will be doing ... in this country, Warsaw, America, around the world, how are these celebrations going to make a difference to those brave and honorable and beleaguered attorneys in Romania.”

THE SPIRIT OF MAGNA CARTA

The Right Honourable The **Lord McNally** was elected to the House of Commons in 1979 as a labour MP. He became a Baron in 1995. In between that time, he was political adviser to England’s foreign secretary, James Callaghan. When Callaghan was elected Prime Minister, McNally became the head of the Prime Minister’s political office. In 2004, he became a member of the House of Lords and was the leader of the Liberal Democrats. From 2010 through 2013, Lord McNally was the Minister of State for Justice. He is now the

Chair of the Youth Justice Board and a member of the International Trade Council.

“I believe the American legal profession has nurtured the memory of Magna Carta with far more concentration and consistency than we have.” McNally shared the memory of his first trip to the United States in 1970. Visiting as a guest of the State Department, he went to the state capital of California and was presented with a book, *Basic Laws of the State of California*.

“I can always remember opening that book and on page one was Magna Carta. And it brought home to me the enduring importance of Magna Carta in the United States and the way that you have kept faith with it.”

As part of the generation “to be really motivated by the internationalism and the ‘never again’ motivation which generated those who came back from the Second World War...and self-confidence that our values were and should be universal,” McNally expressed the following concerns.

“What worries me a little, and it is one of those problems that I would like to throw to you as lawyers, is that the post-war settlement so motivated by the spirit of Magna Carta is coming under pressure not only abroad but in our own countries. Are we facing twenty-first century realities? Can the rule of law be sustained against terrorist states, organizations and individuals who recognize none of the precepts by which the rule of law is sustained? Can the use of torture, rendition, detention without trial ever be justified when faced with a real and present danger? How far can the use of technologies be justified for benign purposes when they also offer the state and its agencies the power to infringe civil liberties, including the right to privacy? Do we have to accept that certain states will deny what we see as universal rights to some of their citizens, for example women, on the grounds of their culture or their religious beliefs? Can similar groups within our own societies claim exception from the law of the land because of their cultural or religious beliefs? Can we manage the movements of both political and economic

migrants in a way which keeps faith with our international obligations?

“My pebble in the pool for this distinguished gathering is to ask if that spirit of Magna Carta still drives our policy making or if we are having to accept darker, harsher realities? I hope the answer is ‘no,’ but I thought it would be a waste of a distinguished gathering not to pose the question.”

QUIPS & QUOTES

When I came into politics there was a certainty about what we stood for both in terms of international order and domestic politics and much of the ground rules for that consensus was what Tom Bingham rightly called the spirit of Magna Carta.

Lord McNally





KEY BISCAYNE

THE 2015 SPRING MEETING PREVIEW

61ST ANNUAL SPRING MEETING OF THE AMERICAN COLLEGE OF TRIAL LAWYERS

FEBRUARY 26 - MARCH 1, 2015
THE RITZ-CARLTON KEY BISCAYNE
MIAMI, FLORIDA

President **Fran Wikstrom** looks forward to welcoming College Fellows, their guests and spouses to Key Biscayne for the 2015 Spring Meeting.

President-Elect **Michael W. Smith** has planned an impressive program of distinguished speakers addressing timely and interesting topics.

A Continuing Legal Education panel will feature a debate between two advocates who are at the forefront of exploring the policy questions, legal bases and social consequences of the NSA Surveillance that has been discussed in the press, on Capitol Hill and in the courts since Edward Snowden revealed the government's broad program of gathering and analyzing Americans' personal phone records. Participants include College Fellow and renowned civil rights attorney **Lawrence S. Lustberg**, who will serve as moderator; attorney **Alex Abdo**, who has been lead counsel in the ACLU's most significant constitutional and statutory challenge to the NSA program; and **Stewart Baker**, formerly First Assistant Secretary for Policy at the Department of Homeland Security and General Counsel of the National Security Agency itself, and a staunch supporter of the program.

CONFIRMED SPEAKERS INCLUDE:

Frank Cerabino, News Columnist, The Palm Beach Post

Thomas F. Farrell II
Chairman, President and CEO, Dominion Resources, Inc.

William C. Hubbard, FACTL
Partner, Nelson Mullins Riley & Scarborough, LLOP
President, American Bar Association

The Honorable William J. Kayatta, Jr., FACTL
Judge, U.S. Court of Appeals for the First Circuit

Gordon B. Mills, M.D., Ph.d.
Co-Director, Institute For Personalized Cancer Therapy (IPCT)
Chairman and Professor, Department of Systems Biology
Wiess Distinguished University Chair in Cancer Medicine
University of Texas MD Anderson Cancer Center

Dr. Samantha Nutt, Founder, War Child

Kathleen Sebelius
Former Secretary of Health and Human Services
Former Governor of Kansas

Donna E. Shalala, President, University of Miami

THE RIGHT HONOURABLE THE LORD WOOLF FORMER LORD CHIEF JUSTICE OF ENGLAND AND WALES PRESENTS THE 2014 LEWIS F. POWELL, JR. LECTURE

The Lewis F. Powell, Jr., Lecture Series was established in recognition of The Honorable **Lewis F. Powell, Jr.**, who served as the twentieth President of the American College of Trial Lawyers. In 1972, Powell, a distinguished and skilled lawyer of national distinction, became the ninety-ninth Justice to sit on the Supreme Court of the United States, where he served with honor and eminence until his retirement in 1987. Honorary Fellow The Right Honourable The **Lord Woolf**, former Lord Chief Justice of England and Wales, presented the 2014 Lewis F. Powell, Jr., Lecture at the College's 2014 Annual Meeting at the Grosvenor House in London, England.

I'm delighted and honored to have this opportunity to speak to my fellow Fellows of the College of Trial Lawyers in London. My pleasure is greater having been introduced by **Charlie Renfrew**, who I'm proud to say is a treasured friend. Note I do not say "old friend" I know Charlie well enough to know that you can never use the word "old" in relation to him. The years pass and he gets greater and different responsibilities but he retains the same elegance and style that he had when we first met. And that style was amply displayed when he tried to justify the honor that was being done to me in allowing me to give a lecture under the title of Lewis Powell.

Lewis Powell was an extremely distinguished jurist. He's credited as saying – I quote from his lawyer's handbook – 'the basic concept of freedom under law, which underlies our entire structure of government, can only be sustained by a strong and independent bar. It is plainly in the public interest that the economic health of the legal profession be safeguarded. One of the means towards this end is to improve the efficiency and productivity of lawyers.'

Those are sentiments which I strongly endorse and, indeed, they are central to what I'm about to say. We all know, of course, the aphorism of George Bernard Shaw that the U.S. and UK are two nations divided by a common language. There are also significant differences between our legal systems. However, despite this, I'm confident that the members of the legal profession in each country are firmly linked by the same commitment to the principles inherent from the rules of law and the values of the

common law which distinguished predecessors have been discussing so ably under the mantle of Magna Carta.

This consensus is not in the least surprising having regard to the extent to which our different jurisdictions have a common historical source. Certainly, I am confident that Justice Powell's comments are as applicable in this country as they are to Canada and the States.

Against this background, I would like to start by warmly acknowledging the contribution made by the College and its Fellows to the commitments we share.

In advance of our meeting today I re-read the College's mission statement. It is a magnificent call for action by the eminent leading figures of the legal professions that make up the fellowship of the College.

My legal career commenced, as you just heard, in about 1956. It was followed by a practice extending over 20 years as a common law barrister.

During this period it was only a barrister who could properly describe himself in this jurisdiction as a trial lawyer. After all, it was only after legislation in 1990 that the other half of the profession, the solicitors, was able to obtain a certificate that gives them the right of audience in the senior courts. Even today the bar remains the primary training ground of the majority of British trial lawyers. Consequently – and this is important – it also remains the recruiting ground of the major members of the senior judiciary.



During my period at the bar, the greatest majority of barristers only had a single specialty and that was how to conduct litigation. The professional and ethical standards were those which were laid down and under the control of the bar's institutions, the Inns of Court and the Circuit. When I joined it was a tiny profession indeed. There were about 1,000 members, but they played a huge part in the administration of justice. They also had to be members of chambers, but they weren't, and still aren't, allowed to be partners and your success depends entirely on your own efforts. It also explains, what I've just said, the independence of our bar, which is so important.

You know your contemporaries very well and you're continuously under scrutiny. If you adopt other than the highest standards, your reputation suffers and your prospects are, at the bar, dim indeed.

If I may, I will try to give you a flavor of life at the bar at that time because I'm afraid it is receding into history. I was on the Oxford Circuit and one of our circuit towns was Abingdon. Abingdon had a court in a beautiful medieval town hall. It was a beautiful building, but it had a particular shortcoming that you had to learn to adjust to, whether you was there as a defendant, as someone accused, or if you were there as a recorder. Its roof was held up by two pillars which were strategically placed; it seems, to try to prevent the judge from seeing the prisoner and the prisoner from seeing the judge. But that did not interfere with the way matters preceded in those days.

And I can remember conducting before the recorder, who was a part-time judge, a case for a very salacious young man who was constantly in trouble. And on this occasion, he was more in trouble than usual. He hadn't been sent to prison before, but I knew, first of all, that despite anything I could do he was going to be convicted; and, secondly, that he was going to have a severe sentence imposed. But that proved true except there was a rather exceptional statement by the recorder in passing sentence. He said to this young man, 'I hope you learn from your experience before this court and I hope that I will never

see you again.' And then he realized that was a bit hard so he added, 'except socially of course.' Since those days the position of the bar has been transformed. It is now, particularly in its most successful parts, a highly specialized body. Part of its success depends on the fact that for any part of our law or, indeed, many overseas countries' laws, there will be a barrister who knows the subject intimately, knows it in a way where no firm of lawyers, no matter how big, could provide a specialist providing that range of expertise. And that has been of great value to it in the days when its restrictions against competition have been swept away. To change from being a solicitor to a barrister

QUIPS & QUOTES

We all know, of course, the aphorism of George Bernard Shaw that the U.S. and UK are two nations divided by a common language. There are also significant differences between our legal systems. However, despite this, I'm confident that the members of the legal profession in each country are firmly linked by the same commitment to the principles inherent from the rules of law and the values of the common law which distinguished predecessors have been discussing so ably under the mantle of Magna Carta.

Lord Woolf

ter and vice versa is the simplest of processes. A public Crown Prosecution Service and a defender service with wide rights of audience have been established, both services providing competition for the independent lawyer.

However, a substantial proportion of litigation and, therefore, income of the bar depends on legal aid. One of the areas in which I was particularly proud when I was growing up as a lawyer in this jurisdiction was that the Legal Aid Act 1949 introduced what was described by one of the great pillars of post-war welfare state namely our Legal Aid Act. It was based on a simple formula: subject to a litigant's means not exceeding the limits, if a lawyer certified you had a reasonable prospect of success in litigation

you would normally obtain legal aid. The drawback of the scheme, as far as the government was concerned was that it was demand led without a cap on the funding costs. It is therefore not surprising it was not popular with recent governments. They attempted to limit the scope of the circumstances in which legal aid is available.

The act's restrictions on legal aid for criminal and family case is most worrying. Of late, the income of lawyers doing this work has generally, at best, been frozen. There's been a particularly acute dispute over fees between the government and the bar as to the fees payable in very long and complex, high-cost criminal cases. This resulted, for a time, in the senior barristers needed for trial of these cases withdrawing their services. Fortunately, eventually, a compromise solution was found but long-term damage, in my view, has been done by creating a most unfortunate precedent. This action on behalf of the bar is quite out of accord with the ethics of the bar and I, for one, having been privileged to see some of the documents passing between the bar and the government, feel that the bar's actions were understandable.

The problems which were more acute in relation to criminal and family cases also apply to civil cases. At the same time as I was implementing my civil justice reforms, which Charlie has just referred, the same government that invited me to make that report and, in fact, accepted my recommendations, introduced in an effort to control legal aid, conditional fees. Conditional fees were designed, it was hoped, to avoid some of the excesses that we felt could be seen in contingency fees which you long had in the States. Instead of giving lawyers the right to share in the damages recovered by a litigant, a lawyer was entitled to recover uplift on his fees if he won in return for no fee if he lost.

claimant. So this scheme was re-g geared to make it more evenly balanced.

In addition, there has been an increased emphasis on mediation, of which I am a strong advocate, which does again reduce the income of the bar. The government claims that the changes it has made are in the interests of economy and efficiency. The profession is not happy about some of the measures. There are merits on both sides and this is not the occasion for attributing blame.

However, an undoubted and, therefore, contributing cause is the unprecedented financial crisis from which this country and most Western governments are just beginning to emerge. In the States and Canada, there are no doubt similar issues. We had what I regarded as a Rolls Royce system which, in the contemporary world, provided financial assistance for publicly funded work on a scale which it was said we can no longer afford. Even in private work it has been said throughout my career by those within and outside the profession, the independent bar's days are numbered.

My response was its future depends on whether the bar provides a service for which there is a market. Judged by that test the bar has proved itself. Instead of withering, it has flourished, at least in the commercial and specialist sides of civil litigation. This is a huge tribute to the profession's expertise and ingenuity. It has developed a massive export service achieved because of its hard-earned reputation for excellence.

However, that leaves open whether the government has taken the right action to make economies. I believe it is unlikely that the private sector of the bar and the whole of our justice system can avoid being contaminated by the unintended consequences of the demise of legal aid. There has been a lack of appreciation of the importance of not undermining the independence of the bar and, consequently the independence of the judiciary. We need to have the ability to attract recruits of the highest caliber who will, in due course, produce judges who share independence of mind and the undoubted incorruptibility of the present judiciary. These qualities explain why judges, such as myself, when we retire have no difficulty in supplementing our pensions. This is often by working abroad where our justice system is still much admired.

I've already pointed out the contribution made by commercial barristers and judges; but it is my belief they cannot preserve the reputation of our legal profession by themselves. I fear that in time the whole system will succumb to the consequences of the publicly funded part of our justice system being on its knees and restricted as to the service it can provide for the proper conduct of criminal and family work.

If my fears are justified, this is unfortunate indeed, because it is not only this jurisdiction that will suffer but it is those jurisdictions that look to this country for an ex-

QUIPS & QUOTES

We all know, of course, the aphorism of George Bernard Shaw that the U.S. and UK are two nations divided by a common language. There are also significant differences between our legal systems. However, despite this, I'm confident that the members of the legal profession in each country are firmly linked by the same commitment to the principles inherent from the rules of law and the values of the common law which distinguished predecessors have been discussing so ably under the mantle of Magna Carta.

Lord Woolf

To make the scheme viable, it proved necessary in stages to enable a claimant who was successful in litigation to receive repayment of an insurance premium as well as the uplift which he had to pay to the lawyer if he won. This proved to be very unfair to defendants. It made the conditional fee arrangements heavily weighted in favor of the

ample as to the standards they should apply in their country. Some of them, as you've heard, like Romania, who are doing their best to do so, but with great difficulty.

It is unfortunate that the state of our economy has required economies on an unprecedented scale at the same time as the recent constitutional changes of our justice system occurred. It has made us ill-equipped to the changes involved. The changes are those which refer to the role of the Lord Chancellor who, until a decade ago, was the peak of our justice system. Until the changes, the Lord Chancellor combined, quite contrary to separation of powers, the role of being a senior member of the government, speaker of the House of Lords and political head of the United Kingdom judiciary. He was always a senior lawyer who was a member of the bar. As a member of the Lords, he had no prospect or interest in further political preferment. Although of the government, he could adopt, at the same time, a position which was above the political fray. From that position he could have brought home to the government as a whole the danger of making some of the changes that have occurred and that are still proposed, but there's no evidence our current new style, non-lawyer chancellor has attempted to do this.

Instead, he has focused on the primacy of the fees of the profession which should be reduced but not reduced to such an extent that it damages the independent structure of those professions.

In case you think I am crying wolf without a sufficient justification, may I draw your attention to what two commentators recently said in *The Times* newspaper. They fit in again with the discussion we've heard about Magna Carta.

The first was on *The Times* of 24 July 2014 by Professor Slapper, Director of the New York University's campus in this country. He reminded us clause 40 of Magna Carta provides "to no one will we deny justice." Yet from 1950 to today we've gone from a position where, in the 1950s, eighty percent of the population was eligible for legal aid. The situation today is less than thirty percent are eligible. He refers to a case in which I was an advocate appearing for the government in 1970, a case, I may say, which I lost, in which Lord Denning cited the aphorism of Dr. Fuller, "be you never so high the law is above you." Today's changes made by Parliament last year may mean — and I quote the professor "huge areas of civil legal provision have been removed so, in practice, there's no access to justice." He concludes, "If a monarch were to seal a new Magna Carta in 2050, its central inalienable and most cherished principle would be no one is below the law."

The other article was by Francis Gibb, leader of *The Times*, as recently as September 8, 2014. In it she draws attention to the concern expressed by my current successor of the

job of Lord Chief Justice, Lord Thomas, as to the increase in unrepresented litigants over the last twelve months.

And the Chief Justice has announced that he has to allocate judges to take on the job of being specially trained to handle cases where the litigant should be represented but are not. Why I think changes of this sort are misconceived is because anyone who has practical experience of how courts work, as the trial lawyers here today will no doubt be able to corroborate, knows that if a judge does not have the assistance — especially in our judiciary where there's not the support of your American law clerks to the extent as you have in the States — it is more expensive and less efficient to try the case than if somebody is represented, because the lawyers help the administration of justice.

If Justice Powell was alive today I feel he would share my concerns. In view of the quotation I gave you from him I would believe he would agree that there were better ways in which we could have improved the productivity and efficiency of our lawyers than decimating the availability of legal representation for the less worthy members of the community.

That was what I was really going to say. But I can't resist, in view of the mention by one of our speakers of what happened on an occasion when they were required to speak. I'm referring to Tom McNally who I'm bound to say did magnificent work, bearing in mind that he wasn't a lawyer, to protect the position of the legal system in this country when he was in the House of Lords.

What I am going to tell you was about a lecture which a fellow judge was going to give in Manchester. It was late judge Alan King Hamilton, who was going up to Manchester in the winter. The weather was appalling and he got a phone call from the chairman of the lecture, playing the part of Charlie for me today, who said to him, "Judge, you don't want to come up to Manchester on a night like tonight, on such a day. It really isn't worth your while. I'll explain to your audience and you won't need to worry about not being there."

But Alan was made of stern stuff and he travelled to Manchester. What he didn't know was that on that night Manchester City were having a replay with Manchester United in a vital cup match. When he was in the car travelling to the venue the chairman said, "I'm sorry, Alan, I have a very important appointment which I have to attend so I won't be able to accompany you, but I am taking you to the hall and I am sure you will find things are all to your liking."

Well, Alan went into the hall he found one other person there. So he gave his talk and when he finished he started to step down from the platform. And the one member of the audience said to him, "Judge, would you mind staying a few minutes?" And Alan said, "Why?" He said, "I'm the other speaker." ■

THE GREAT HUMAN HERITAGE, INTERTWINED WITH NATURE



Dale Templar is appropriately named. Her surname draws immediate connection to the legendary Knights Templar, the wealthiest and most powerful of the Western Christian military orders. Templar knights were among the most skilled fighting units during the Crusades. Described as fearless, secure on every side because his soul is protected by the armor of his faith, just as his body is protected by an armor of steel, a Templar knight feared no demon or man.

In her introduction of Dale Templar at the College's Annual Meeting in London in September 2014, Former Regent **Christy D. Jones** of Ridgeland, Mississippi, said, "She is a woman of boundless energy who has travelled to the far reaches of the earth; experienced great adventures and lived the life, no doubt with fearless abandon, that many of us have dreamed about."

DOCUMENTING STORIES IN THE WILD

Templar ran her first marathon when she was fifty. Her long-distance running skills have been put to the test in various locales, including dodging land mines in Angola, prodding through the bush in South Africa and scaling volcanos in Rwanda. Templar has seen the charge of elephants and the chase of Tasmanian devils. In the midst of her adrenaline-pumping adventures, she has produced an award-winning body of work displaying an endless curiosity about wildlife and the human experience.

After completing her post-graduate degree in journalism, Templar joined BBC News in the Current Affairs department. She then worked in both the science and documentary departments of the organization before eventually joining the prestigious National History Unit.

Over the course of twenty-two years, she produced many prime-time programs, but she specialized in film-

ing in remote locations around the world with both humans and wildlife. She has trekked to more than sixty countries and filmed on all seven continents, including Antarctica. Her credits include the *Pacific Abyss*, *Eaten Alive*, *SAS: Are You Tough Enough?* and *Vet Safari*.

Templar's most famous work is the landmark documentary series *Human Planet*, which focuses on human beings. The documentary has been sold to more than fifty countries and is the subject of a book co-authored by Templar. It has received critical acclaim, including eight nominations for awards from the British Academy of Film and Television Arts (BAFTA), winning one for cinematography and one for editing. Three years ago, Templar left BBC to form One Tribe TV, a production company that expands her reach as a producer and filmmaker.

HUMANS AS HEROES

Human Planet, which took four years to complete, resulted in an eight-part show that was co-produced by the Discovery Channel and narrated by John Hurt.

Templar shared that few people are given the opportunity to work on, let alone, run a landmark documentary series. Landing the gig was "a mixture of experience, because I'd actually worked in all the eight environments that we looked at in the series; and, of course, it is sometimes just being in the right place at the right time."

When Templar became series producer, the BBC Natural History unit had been running for fifty years and never turned the camera "on the animal that looks us in the mirror, that great, super intelligent ape, the *Homo sapiens*.... At a time when there is so much division and negativity in the world, I wanted to turn humans back into heroes. I wanted to make a series that showcased how brilliant, how extraordinary we can be as a species, embracing human differences but also celebrating our similarities."

In her presentation, Templar shared various clips from the documentary. The first one showed the Dorobo people of Kenya. It showed three tribesman working together to obtain meat for a Sunday by scaring off a pride of fifteen hungry lions who had just killed a wildebeest. “If you fancy getting your next Thanksgiving dinner from the bush, you just have to remember that confidence is everything. You’ll all be fine. As a bunch of lawyers, I know that shouldn’t be a problem for any of you.”

Human Planet filmed over seventy-five stories in some of the most remote corners of the globe. It totaled \$15 million USD, a sum that required a “leap of faith” and approval by the TV Commissioners. The concern, aside

from the price which could be the budget of a small movie, was the question of why a mass audience in the United Kingdom and the United States want to watch a series about other humans who do not speak English and live with nature in far removed places. “I heard myself say time and time again, ‘It is essential that *Human Planet* is made now because in ten years we won’t be able to make a series like this because there simply will not be these stories for us to find...you might be thinking this was just the crazy rantings of a TV producer, but there were some very good reasons for my urgency. We wanted to film stories about people who still live directly with the natural world and depend on the natural world for their survival.”



Templar's *Human Planet* features the relationship between the Maasai Mara children in Kenya and the bird aptly named the honey guide



“During our four years in production two major human landmarks were reached....The human population hit the seven billion mark. If the species keeps expanding at this pace, there very soon won't be any natural world left for us to film in. The second one, however, you may not know. In 2010, we reached a significant cultural tipping point when it was announced that over half of the population of the world now lives in the urban environment. For me, that was a crucial reason for making this series straightaway.”

She is not opposed to the “warp speed growth of our urban Eden, but urbanization has led to a homogenization of humanity. As new urban environments reach maturity they turn into corporate-led, globally branded, fast-food-chain carbon copies of each other.”

QUIPS & QUOTES

The marvelous thing for me is that I know that you all have a genuine appreciation for other people, other cultures and other places. Let's hope that in ten years' time....we can still make another series like Human Planet with the same incredible diversity of human ingenuity, wisdom and wonder.

Dale Templar

CO-EXISTING WITH NATURE

Human Planet sought out the remarkable stories of the people who still live and work with the natural world, “displaying the very best of human ingenuity, adaptability and collaboration.”

Templar's next video clip showed collaboration and partnership in Laguna, Brazil. In May, the mullet fish arrive close to shore because of the murky estuary waters. Because of this, it is almost impossible for local fishermen to know where to cast their nets. “What they've done, which is very, very clever, is they have collaborated with the most intelligent marine mammal on earth – the dolphin.” The dolphins herd the mullet towards the beach and give a signal to the fishermen to cast their nets. The dolphins benefit from the school of fish being broken up, making it easier for them to catch.

Another clip told of the partnership between the Maasai Mara children who live in Kenya and a very special feathered friend. “Like children all around the world, these youngsters love a sweet treat. But unlike our kids and our

QUIPS & QUOTES

If we agree that humans have been around in some form or the other for over 200,000 years and we look at our human journey as a single hour in time, it has taken less than half a second for us to urbanize the planet.

Dale Templar

grandchildren, they can't go to the candy store to go and get a sweet treat. So what they do is they go for a natural sweet treat, honey. The problem with honey is it is hidden in trees in the bush, spread all around. What these children do is they use a little bird called the honey guide.” The Maasai children can not only speak to the honey guide but the honey guide speaks back to them. The relationship, built over thousands of years, works because the honey guide smells the honey produced from a beehive, flying throughout the bush with the children following suit. The children pacify the bees, get the honey out and leave a sweet reward for the bird.

The fourth clip showed how humans solve the problem of finding shelter in extreme environments, such as the Canadian Arctic. A group of mussel hunters set off on barren sea ice to collect mussels, which involves climbing under the sea ice at low tide. “What is incredible is that, unlike any other complex mammal, we have managed to adapt and survive and thrive in almost every type of environment that has confronted us.”

The last clip was from the jungles episode, highlighting the Funai, one of the few remaining uncontacted tribes living in the jungles of Brazil. “Only a few uncontacted tribes now remain on Earth and those that are left are under huge risk from commercial expansion, especially those living in the Amazon rain forest.” To film the tribe, Templar said stabilized aerial cameras with powerful lenses were used, allowing the camera to stay about one kilometer above the ground. “When I first saw that footage I literally was in tears. It just seems incredible to me that in 2014 there are people living an Iron Age existence.”

On a final note, Templar called on the College to think about the actions that are taken before the homogenized world “wipes away our great human heritage.”

FELLOWS TO THE BENCH

The following Fellows have been elevated to the bench in their respective jurisdictions.

Cathi Compton
Little Rock, Arkansas
Effective January 1, 2015
Circuit Judge
Sixth Judicial Circuit
Third Division Circuit Court

J. Mark Coulson
Towson, Maryland
Effective August 2014
Magistrate Judge
United States District Court for the
District of Maryland



Suzanne Côté
Ile des Soeurs, Quebec
Effective December 1, 2014
Puisne Judge
Supreme Court
of Canada

Laura K. Stevens
Edmonton, Alberta
Effective October 2014
Judge
Provincial Court
of Alberta

The College extends congratulations to these newly designated Judicial Fellows.

COLLEGE COMMITTEES: OPPORTUNITIES TO SERVE

The College's work is accomplished, in large part, by its thirty-five general committees and sixty-one state and province committees. General committees each have a specific mandate that guides their work, while state and province committees focus on local outreach and the nomination of new Fellows. The work of the committees is the backbone of the College.

Each summer, the President-Elect and Treasurer begin the process of appointing members to the College's committees. Committee members typically serve for five annual terms unless there is a specific reason to remain longer on a committee.

Fellows are encouraged to inquire about serving the College through committee participation. A list of the College's committees and their mandates is available on the website, www.actl.com. If you are interested in committee work, please email the National Office for more information, nationaloffice@actl.com.

CORRECTION/ERRATA

In issue 76 of the *Journal* an article titled, "College Encourages Next Generation of Litigators," incorrectly identified the law firm that provided a cash award to one of the semi-finalist teams in the National Trial Competition. Polsinelli PC, not Polsinelli Shugart, PC, provided the \$1,500 given to the Moritz College of Law.



**INDUCTEE
LUNCHEON
REMARKS:
DAVID SCOTT**



Inductees, spouses and their guests were honored with a recognition luncheon at the Inner Temple, one of the four Inns of Court, located in the London's legal quarter. Attendees enjoyed the Georgian style of the main banquet hall with its oak-panelled walls, the displays of various coats of arms and historic paintings.

Past President **David W. Scott**, O.C., Q.C., offered remarks to the attendees, where he quipped, "I am privileged to have been asked by President **Bob Byman** to perform this pleasant task today. My good fortune has undoubtedly been dictated by the fact that we are in England, Canada is a Commonwealth nation and I am, so far, the only Canadian Past President!"

Scott provided "empirical evidence" of the College's stature, listing many distinguished Fellows, who were in "many cases, Officers of the College: **Leon Jaworski**, founder of the celebrated Texas law firm of Fulbright & Jaworski and the legendary Watergate prosecutor; The Honorable **Lewis F. Powell, Jr.**, distinguished Associate Justice of the Supreme Court of the United States; The Honorable **Griffin Bell**, Judge of the Fifth Circuit Court of Appeals and the Attorney General of the United States under the administration of President Jimmy Carter; The Honorable **Charles B. Renfrew** of San Francisco, distinguished retired judge of the Federal Court of the Northern District of California and now a recognized expert in international arbitration." He also recognized distinguished Canadian barristers including "**John J. Robinette**, Q.C., of Toronto, the pre-eminent Canadian counsel of his generation; and **Gordon F. Henderson**, Q.C., of Ottawa, the foremost advocate in the world of intellectual property litigation."

Past President Scott also spoke about the process to become a Fellow of the College.

"Having survived this ordeal, you and your family may consider that you are unquestionably and eminently qualified for Fellowship in the College, that you are an outstanding trial lawyer as defined in the Bylaws, and that you are considered the best in the practice of your craft in your state or province. Not just that you are competent or that you are good, but that you are the best.

"You may also assume that with the vigor with which the College's investigation is conducted, you are found to be a professional of high ethical and moral standards and, most important during this lunch, a person of good humour and collegial appeal. If you have difficulty accepting this description of yourself, you may feel free to use Mark Twain's measure ... 'I am a nobody, and nobody is perfect, therefore I am perfect.'

"Having been admitted to the Fellowship, may I, on behalf of my colleagues in the College, invite you to make a pledge to come back to our gatherings, to assume an active role as a member of the College by joining Committees and by attending state and province events. You will find participating in active Fellowship extraordinarily fulfilling. You will have an opportunity to meet some wonderful people. Reach out for your colleagues who are Fellows, they are anxious to meet you. They know of your appeal as a skilled advocate and want to help with your integration into this very special organization.

"In conclusion, ladies and gentlemen, a final comment: The American College of Trial Lawyers is without question the most preeminent assembly of trial lawyers in North America. To say so is not a conceit. The College's reputation goes before it. Thus, the privilege which has been awarded you for your singular achievements – Fellowship in this family.

"With the privilege comes an important obligation to preserve and advance, by your life as advocates, the luster of the College. As leading members of the profession, we are well-acquainted with the central components in your professional life ... integrity, civility and loyalty. As has been noted by others, integrity requires no need of rules, civility bears with patience the injustices of others and loyalty is to one's self, to the client and to the administration of justice. Your command of these qualities is critical to the future of both society and the College. You are our freshest faces and will thus have an opportunity to extend our enviable reputation. You will achieve this by the vigorous pursuit, in a difficult time, of access to justice, and your energetic participation in the affairs of the College, the most significant of which is our effort to protect the interest not just of our own clients, but every citizen in our communities under the rule of law." ■

2014 PARIS CONFERENCE



The community and camaraderie from the Annual Meeting in London continued at the Paris Conference, held September 14-17, 2014.

The gathering began with an optional Sunday evening tour of Montmartre, a historic hilltop neighborhood, and the Sacré-Cœur Basilica that overlooks the City of Lights.

Monday evening's reception, dinner and entertainment were held at Les Pavillons de Bercy, an old wine storage facility transformed into a magically themed venue. The carnival games, rides and curious objects delighted and amused guests.

Tuesday's General Session took place in the Opera Ballroom of the InterContinental Paris Le Grand.

Past President **Mikel L. Stout** of Wichita, Kansas introduced the session's first speaker, author, filmmaker and literary tour master **David Burke**. Burke spoke on writers who had lived in Paris and his role as a literary detective.

The next speaker was businessman, author and Holocaust survivor **Jack Kagan**, who was introduced by **Scott N. Richardson** of West Palm Beach, Florida. Kagan told the unbelievable tale of his resilience and bravery in escaping from the Nazis when they occupied his hometown of Novogradok in Belarus.

Terri L. Mascherin of Chicago, Illinois, introduced **Bernard Vatier**, who discussed France's long history of linking justice and religion.

Former Regent **Paul S. Meyer** of Costa Mesa, California, introduced the professional program participants, whose discussion was titled *Suppose You Are Dominique Strauss-Kahn and Get to Choose*



Left: The professional program takes the stage in the Grand Ballroom of the Intercontinental Paris LeGrand.

Right: Linda Jones and President-Elect Fran Wikstrom, Salt Lake City, UT

“I am so fortunate to be a member of a group that sets such high standards of professionalism and congeniality. The planning of this Conference was nothing short of exceptional.”

— Fellow Comment

“Absolutely incredible. Le Palais Garnier was one of the most memorable evenings in my life”

— Fellow Comment





Your Venue: Where Do You Like? **Frederick T. Davis** of Paris, France, was the moderator and the participants included: **Antoine Garapon**, Secrétaire Général de l'Institut des Hautes Etudes sur la Justice; **Daniel Soulez Larivière**, of Soulez Larivière & Associates; and former Regent **John S. Siffert** of New York, New York.

Past President **David J. Beck** of Houston, Texas, introduced the final speaker, The Right Honourable The **Lord Robertson of Port Ellen**, former Secretary General of NATO, who gave a rousing speech titled *How Can We Make the World a Safer Place?*

The conference ended with a red-carpet affair at Les Palais Garnier, home of the Opéra national de Paris. Attendees were treated to surprise performances from soprano Catherine Manadaza, tenor Jean Goyetche and baritone Marc Souchet and dinner served throughout the opera house's elegant foyers. A viewing was also allowed of the ornate five-level auditorium with its crystal chandelier, red and gold adornments and ceiling painted by artist Marc Chagall, which consists of twelve panels and a round central panel.

Left:

Frescoes painted by Isidore Pils grace the Opera House ceiling.

Right:

- A** | Inductee Gerald and Rosemarie Gleeson, II, Troy, MI
- B** | The grand staircase, built of white marble from Seravezza, Italy, hugs the curve of an onyx balustrade with a base in green marble from Sweden and 128 balusters in antique red marble.
- C** | Fellow Richard and Beth Galperin; Delaware State Vice Chair John and Cathy Balaguer, Wilmington, DE
- D** | *Voilà! Dinner is served.*
- E** | *Taking a ride on the foot-powered carousel.*
- F** | Carol and New Jersey State Chair Frank Allen, Haddonfield, NJ
- G** | Missouri State Chair Robert and Deborah Henderson, Kansas City, MO
- H** | Fellow John and Tania Conti Pittsburgh, PA
- I** | Anne and Fellow Anthony Patterson, Lebanon, IN
- J** | *Enjoying the outdoor mood at the entrance of the Museum of the Fairground Art.*
- K** | *Theatre du Merveilleux is ready for the revelers.*



NO ORDINARY MAN: HOLOCAUST SURVIVOR SHARES UNFORGETTABLE STORY

Jack Kagan has a story only he can tell. The businessman, author and Holocaust survivor spoke to the College at the Paris Conference in September 2014. He shared the tale of when the Nazis occupied his hometown of Novogrudok, Novogrudok, now in Belarus, after the Soviets occupied the village in 1939, and his daring escape from the labor camp.

Scott N. Richardson of West Palm Beach, Florida, said in his introduction of Kagan that in 1947, Kagan spent a week in a hotel in Paris. “If you walk out the doors of this hotel where we are meeting, you’ll be in the very area where Jack spent that week in 1947. It is very fitting that we have the privilege of hearing Jack speak within yards of where he started before settling in London. One more remarkable fact, he was seventeen years old at that time. He’d survived.”

Today Kagan ensures the stories of all those who survived are preserved for many years to come through the Holocaust exhibit at the Imperial War Museum in London, which he helped create and fund. He is also a member of the Prime Minister’s Commission on the Holocaust which will make recommendations to the Prime Minister on how to ensure that Britain has a permanent and fitting memorial to the Holocaust and education resources for future generations.



NOVOGRUDOK

Kagan opened his presentation by describing the horrors that came to his hometown at the advent of World War II.

“It took them exactly twelve days to reach Novogradok, and they reached Novogradok while your parents were celebrating your American independence ... the fourth of July ... after the entrance of the German army, atrocities against the Jews started.”

It started with orders to restrict and control: yellow stars were to be sewn on their clothing, then Jews from twelve to sixty-five were not allowed to walk on the pavement. “In other words, we became stateless ... If somebody kicked you or somebody came into your house and said ‘I like the table you’re sitting on, I want it,’ you couldn’t stop him.” Ten days later, on a Friday, one hundred Jews were ordered to assemble in the marketplace and the SS put them in two rows. “The army band started playing music while they shot these fifty-two people....Women, they’re in the streets to wash the blood from the cobblestones.”

Trucks arrived and an order was given for each family to stay together. When the soldiers arrived, “you had only two questions to answer – your profession and number of children ... some other people were taken three kilometers outside of town. They were ordered to get off the lorries and were beaten, undressed and ordered to put their clothes in proper order. They lay down in the bitter cold in the snow. From there 5,100 people were killed.”

The remaining residents moved to a ghetto of thirty houses one kilometer outside of town. Kagan’s father came out one day and spoke to the guards. “He found out that this lunatic Hitler declared war against America, and that was in December 1941.”

DEPLORABLE CONDITIONS

Life in the ghetto “was miserable,” Kagan recounted to the Fellows, with twenty people forced to live in one room. Food was rationed to one-hundred fifty grams, one slice of bread per day.

In March 1942, it was ordered that all Jews from the surrounding villages and towns would be brought to Novogradok. “It meant they brought in another 4,000 Jews into this ghetto which currently had 4,300....It was not possible to stay. The conditions were becoming extremely difficult and we knew something was going to happen.”

On August 7, 500 people who were working at the workshops were collected and marched out. Kagan, who had a permit to accompany his father to the workshop, was part of the group. “When we arrived in the courthouse, we were immediately surrounded by Belarussian police... they knew there was going to be a massacre. By the evening, they had collected all the people who stayed in the ghetto, around 4,500. They took them across the road and massacred them....Out of 11,000 Jews living in the area, there were only 500 left in the barracks working for the German army and 500 in the courthouse who were specialists.”

That night, they were called to stand in a line at the courthouse. The SS selected children from the line. “I put on my father’s long trousers. I can’t remember whether I stood on a stone or not to increase my height. The SS men...passed by me and I stayed with the men.” All the children from the line were taken to the slaughter place and killed.

ESCAPING THE LABOR CAMP

From then on, the ghetto became a labor camp. “Barbed wire was placed around the buildings, wires were placed

in between the barbed wire fence, then a six-foot wooden fence was put up so nobody from the outside world could look into the camp. Five towers were built, machine guns and a very big searchlight were put on the towers.” The nightly evening siren signified curfew time, and if anybody was caught moving during curfew, “he would be shot.”

With more people living in limited space, conditions got even worse. Thirty-six people inhabited a room—“three bunks, six people on a bunk, three bunks on one side, eighteen people on one side, eighteen people on the other side....There was no water at all. Every day four parties of ten people were bringing water for drinking and just washing the hands and face. There was no bath, no shower, nothing. We became dirty, full of lice. ”

Thoughts of escaped were bolstered when word spread of a partisan group, formed by the Bielski family in nearby Stankiewiczze, living in the forest. However, the uncertainty of where to hide after escaping and fears of surviving the brutal, minus-thirty centigrade winter, the “Polish Siberia,” made fleeing difficult. Despite the harsh conditions, Kagan’s cousin, Berl, who survived



Modern day map shows the location of Novogrudok, Kagan’s hometown

the first massacre while his parents did not, escaped in November with Kagan’s help. “We went to the back of the toilets where I lifted the tops of the barbed wire and he managed to crawl out.”

After his cousin’s escape, Kagan decided he, too, would attempt an escape. “I talked to my parents and they gave me their blessing. They said, ‘If you can escape, do so, because none of us will remain alive.’” Kagan saw that his shoes were completely torn so he went to the warehouse and asked the prisoner working there for a pair. “Stealing from the Germans meant hanging if you

are caught....But the man decided because he lost a son he would help me and so he gave me a pair of boots.”

When Kagan saw his friend, who was also planning to flee, put on a heavy jacket on December 23, 1942, he realized that was his day of escape. Kagan went back to the workshop where he lived to put on his boots. He saw a German lorry bringing in raw materials. “The driver must have felt so cold that he drove the lorry halfway through the gate and he ran quickly to the guardroom to warm himself up. While I saw the lorry stuck at the open gate, I tore off my yellow star from the front and back... My number was 334...and I just walked out. I didn’t look left. I didn’t look right. I came uphill and found there were about ten or twelve people who escaped during that day. We started walking as soon as darkness fell.”

The walking was difficult because of the heavy snow that was waist deep. The group was headed toward a nearby town to rendezvous with the partisans at midnight. They came to Britanka, a small river “that was fast-flowing water. And it doesn’t matter the temperature, it doesn’t freeze properly.” When Kagan tried to cross, the ice gave way and he fell into the river. He struggled to get out and his felt boots were soaked. The group did not wait for him, but Kagan knew where they were heading. He made it to town where they planned to rendezvous where a woman saw his condition and gave him some hot soup. She would not give him shelter because her husband and children were afraid, but she told him to go with the others and stay in the forest until the partisans come again in three days.

Because of his impaired condition, Kagan made the unimaginable decision to return to the labor camp. A messenger who was heading to camp on a sled took him the center of the town where he hid and waited until a group came from camp. A party of ten came to fetch water, saw him and handed him a bucket to make it look like he was part of the group and took him back to camp.

BACK AT THE CAMP

Kagan continued relating the riveting story to the Fellows, describing how his father had to cut his boots into pieces to get them off. Kagan laid for about five days as his flesh started to rot. The dentist in the camp came to examine him because the only doctor in camp, also a prisoner, had been shot in the knee when he lit up a cigarette after curfew. The dentist looked at Kagan and then went back to the doctor to explain what he saw. The doctor relayed that Kagan’s toes would need to be cut off. Kagan lost all his toes in four days. “It wasn’t painful at all for the flesh because it was all rotten. But when it came to the bone, you couldn’t shout because if you shouted the guards would come in.”

With his toes gone, Kagan believed he had signed his death sentence. “If you don’t work, you don’t get 125 grams of bread.” The pain he suffered was “unbelievable.” With no bandages and no medicine, “the thing which came was bugs. The bugs crawled in the rags and bit my feet. Every time I scratched I didn’t let it heal.”

TUNNELLING A WAY OUT

A young 23-year-old man, Yesilevich, finally came up with a plan: because the Germans didn’t go into the camp because of the filth and lice and because the Russian police only guarded the outside, he suggested they build a tunnel to escape. The young man arranged with one of the Jewish police officers a way to get the men to help dig the tunnel, collecting the gold to buy bread from the guards to feed those digging. The man asked two engineers to make tools designed for digging the tunnel. The engineers agreed to help, but the tools would need to be sharpened every day. The next day the head tailor came to Kagan’s bunk, took his blanket and stitched it into bags to hold dirt. In the last building, they placed the bunk on hinges, broke through the floor and started to dig. They planned to dig a tunnel one-hundred meters long to the other side of the barbed wire into a field of growing wheat.

we dug further, 250 meters. The decision was to escape on September 26, 1943.”

The twenty-sixth came and everybody lined up in the tunnel. “It was the darkest night that anybody could imagine. The wind was blowing the metal roof. There was tremendous noise.” By that time, Kagan was able to walk with the help of insoles in his shoes to compensate for his missing toes. Kagan stood near the end with three others who had rifles. At nine o’clock, he felt cold air coming in, indicating they broke through the other side, and the line began to move quickly. But the sound of shots being fired started, “from all five machine guns... We had left a light on in the tunnel. The people who came out from light in such terrible darkness lost their way. Instead of going right and in front, they turned to the left and came back to camp. When the guards saw movement, they opened tremendous fire.”

When he came out of the tunnel there was shooting all over the place. Kagan and his friend, who had also lost his toes from one foot, ran like mad. “When bullets are whistling above your head, you’re propelled like a jet. We saw people being shot but we didn’t stop.” They managed to run up the hill, crossed the highway and finally made it to the same river where he had fallen in before. They crossed without any trouble. “His feet were bleeding and so were mine, but we didn’t want to take off our shoes in case we wouldn’t be able to put them on again.”

The group walked at night and stayed in the forest during the day. On the third morning in the forest, they came to the edge. They stopped to rest and saw a horse and cart approaching. When it came closer, they heard Yiddish. These were the Jewish partisans returning from a mission to the Bielski camp. “You can walk a long time in the forest and never find somebody. Here on the third morning we found partisans.” The group told them other escapees had already reached camp and they were to go there.

Kagan went to the fighting camp “where the 180 fighters from Bielski go out every night on various missions to blow up bridges.” He was reunited with his cousin, who was part of the fighting group. Kagan was later moved to the family camp where he stayed for three days. After, an order was given where 800 people from the family camp would be moved to Naliboki, the dense forest, an area measuring forty miles by forty miles. It was October when they reached the area.

Regrettably, Kagan had to end the story here as time did not permit him to continue describing how he eventually made it to Paris where the Fellows were gathered. A full version of his extraordinary story is recounted in his book, *Surviving the Holocaust with the Russian Jewish Partisans*.

QUIPS & QUOTES

As the beatings and killings continued, my father prepared two nooses. We planned to hang ourselves if someone tried to escape, because if people escaped and they caught us alive, they would beat us to death.

Jack Kagan

“Nobody can imagine how much earth was going out from the tunnel, which was only sixty-five centimeters wide and seventy centimeters high. The plan was to dig until August when the wheat was growing and the prisoners could use the tall stalks as cover.

In July 1943, a German soldier came with Kagan’s father into his room and his father told him he was being taken to a different camp. Kagan never saw his father again.

A decision was made to escape on August 8, the “darkest night and start of the new moon.” The next morning everyone panicked because a tractor was brought in to cut the wheat. “We were extremely lucky we did not escape because the Germans formed what they called Operation Hermann. They brought 53,000 SS soldiers to the town to combat the partisans. If we had escaped, we would have come right in the middle of 53,000 soldiers which, of course, nobody would have survived. So

UPHOLDING LEGAL, DIVINE JUSTICE

Bernard Vatier has been a defender and proponent of the rule of law throughout his career. Before he turned fifty, Vatier was elected *bâtonnier* of the Paris bar in 1996. At the time he was elected, Vatier was the youngest *bâtonnier* to hold the position.

An accomplished litigator with an expertise in insolvency matters, Vatier is known by colleagues as “being very kind to his fellow lawyers” but also as someone who is “so often running from obligation to obligation and in a hurry, he has earned the nickname of ‘Touch and Go,’” said **Terri L. Mascherin** of Chicago, Illinois, in her introduction of Vatier at the College’s 2014 Paris Conference in September.

After his presidency of the Paris Bar, Vatier went on to other leadership positions. He served as head of the French delegation to the European Bar (Conseil des Barreaux de l’Union Européenne) from 1998 to 2002, then as President of the European Bar until 2005.

During his term as president of the European Bar, he spoke out during the trial of Saddam Hussein in Iraq, calling for the proceedings to be moved to a neutral location and for the state of Iraq to protect the defense counsel. He also voiced concern about the increasing tendency in Europe to adopt case-by-case terrorism legislation which does not always preserve human rights. In the aftermath of the death of Diana, Princess of Wales, and Dodi Al Fayed, Vatier called for the introduction of global privacy laws. Vatier sought for reforms in the role of investigating magistrate judges under French law amid claims in a

series of cases that police officers had fabricated confessions by extracting them through violence.

TIES THROUGHOUT HISTORY

Vatier told the assembled Fellows that one of the reasons he accepted the invitation to speak in front of the College was to celebrate the anniversary of two historic events: one-hundred years of the beginning of the first World War and seventy years since the beginning of the Normandy landings. “By taking the floor I would pay homage to the role of the American Army and celebrate the very close links between American and French people, especially between today French lawyers and American lawyers.”

In France, the link between justice and religion has a long history. The Palais de Justice (Palace of Justice), the former palace of the French monarch, was the site where the justice of the state had been handed down since medieval times. “Because the justice of man is nothing without divine justice,” King Louis IX decided to build a special church within the palace, Sainte-Chapelle. Lawyers at that time were organized in a religious brotherhood called the Brotherhood of St. Nicholas. “The dean, who was the oldest member of the brotherhood, was a chief and had a particular role. He had to bring the banner of St. Nicholas in the procession. At the top of the flag pole was the



effigy of St. Nicholas. A small flag pole can be called baton, and that's why the head of the Paris Bar was called *bâtonnier* because he holds the baton. As you can imagine, wisdom is not the privilege of age."

Vatier noted the relationship between the church and the bar was close until the nineteenth century. A crucifix was hung on the courtroom walls and "the legal opinion of the year was a religious event that all judges and lawyers attended together with great pomp in the high chapel of Saint Chapelle." It was known as the Red Mass because of the red robes that were worn. Although the Red Mass is no longer an official practice of the legal community in France, Vatier observed "it is necessary for the lawyers to have a reverence to the divine justice."

Another difference he noted was "how it is possible for you to plead before the civil jury....In Europe, we have a jury only in criminal matters."

TWO CULTURES, SIMILAR CONCERNS

However differently the legal systems may have evolved between the two countries, both face similar issues.

"It is a fact that today the cost of justice is less and less accessible by the public and all the states have to reduce their expenditure. All the bar have to recall that justice is a main pillar of the democracy and that justice is a main pillar of the rule of law. We have to face the lack of judges, the lack of time for

examinations of the cases, the lack of financing for the legal aid. But we have also to take into account the new technologies and the necessity to modernize our methods. The effort must be done by states but also by our bars. That is a challenge, and I think this issue is the same everywhere in the world.

"Because of globalization, the issues we are facing are not national issues, they are international issues, and we need to develop a common cooperation in order to preserve the rule of law. Today we have to face with new regulations the fight against money laundering and the financing of terrorism."

Another critical issue is the question of protecting personal data. "It is more and more difficult to preserve the confidentiality for the common law and the professional security for the civil law....we have the same fight, the same responsibility and it is very important to work together."

Vatier may have retired from political life, but he continues to work in defending the core values of the legal profession. As Secretary General of the International Organization of la Francophonie, he has a special focus in Africa. "In Africa, also everywhere in the world, we have to help take care of security. We have to fight against the corruption of judges. We have now a growing economy in Africa, in Asia and the lawyers have a huge responsibility because the lawyers have to create a respect for the rule of law." ■

HOPE, VIGILANCE KEYS TO A SAFE GLOBAL FUTURE

Service to community and country is a family tradition for **Lord Robertson** of Port Ellen. His grandfather was a policeman. His father, son and nephew are policemen. Lord Robertson, who was born in Scotland, found his call to serve in public office.

He was elected to the British Parliament six times. After the Labour Party won the 1997 general election, former Prime Minister Tony Blair appointed him Minister of Defence. In that position, he pushed through a widely praised moderation of the British Armed Forces.

In 1999 he became Secretary General of the North Atlantic Treaty Organization (NATO). He was the first head of NATO to invoke the organization's mutual defense clause, which says in its opening sentence: "The Parties agree that an armed attack against one or more of them in Europe or North American shall be considered an attack against them all." He did so after the September 11, 2001, terrorist attacks on the United States.

President George W. Bush presented Lord Robertson with the United States Presidential Medal of Freedom, America's highest civil honor and one that is rarely given to citizens from another country. The U.S. isn't the only country that has recognized the outstanding service of this Scotsman - he has received the highest national honors from Belgium, Germany, Italy, Poland, Portugal and Spain.

"Winston Churchill said, 'What is the use of living, if it be not to strive for noble causes and to make this muddled world a better place for those who will live in it after we are gone?' Had those words not been spoken in 1908, one could argue that Winston Churchill may have had in mind Lord Robertson and his many accomplishments," said Past President **David J. Beck** of Houston, Texas, in his introduction of Lord Robertson at the College's Paris Conference in September 2014.



Lord Robertson began his presentation by pointing out an interesting fact about himself. “As trial lawyers, you’ve probably never been addressed by a war criminal. I have a conviction. I was convicted in 1999 by the Belgrade District Court of war crimes and sentenced to twenty-five years in jail. After Milosevic was removed, the first post-Milosevic foreign minister of Yugoslavia came to see me at NATO headquarters to complain about what was happening to Serbs in Kosovo. I said, ‘Mr. Goran Svilanovic, hang on a minute. I’ve still got a conviction for war crimes. There are still wanted posters of me at Belgrade Airport. You better do something about it.’ I got a letter a couple of weeks later saying, ‘Don’t worry, Mr. Secretary General, we have appointed attorneys on your behalf.’ I pointed out that the consequence of that would probably be an invoice from the said attorneys and a claim that they’d reduced the twenty-five years to fifteen. In any event, the conviction was quashed and the letter indicating the quashing was received on the 11th of September, 2001. It, therefore, got very little attention in the world press.”

Lord Robertson’s topic for his speech was *How Can We Make the World a Safer Place?*

“What’s good about the world today is we no longer have the threat of nuclear war, of mutual assured destruction. There is no existential threat to our countries, no Soviet Union, no Imperial Japan, no Nazi Germany. We are not faced with the horrors that Holocaust survivor Jack Kagan so vividly illustrated. Conflicts in the world are down by eighty percent since the end of the Cold War. The number of casualties per conflict in the world has gone down

by something like seventy percent. In the twenty-first century, it is likely that twice as many people will die in car crashes as compared to the twentieth century, the bloodiest century in human history. So we live in a time, especially in the West, where we are unlikely to face the draft and unlikely ever to be faced with a global war.”

QUIPS & QUOTES

What we need is a vision and the architecture for the future to take us forward.

Lord Robertson

ISSUES CROSS INTERNATIONAL BORDERS

However, with the good also comes “the not good side.”

“There is a sense of vulnerability and apprehension for events that can take place a world away. Driven by twenty-four-hour news and multiple channels airing what looks like horrors and terrors, “despite the fact that we are much better off than previous generations were, we still get nervous at times as well. The shockwaves of fear and of panic can emanate from very small incidents way beyond the area that is affected. And one of the problems in the world today is as the problems have gone global, the politics have gone local. We’re shrinking in on ourselves despite the fact that the problems that I’m going to outline require international global action if they’re going to be addressed.”

As a Scot, Lord Robertson referenced the impending vote in his native land where “the Scottish people ▶

will decide whether the United Kingdom, the most successful of nations in human history, after 300 years, is going to play cop, and Scotland becomes a separate state in the world today.... The effects of the breakup of the second military, diplomatic and political power in the West would be dramatic and fundamental. The world after [a vote to separate] would not be the same again. I venture to suggest that in the Kremlin and in some of the caves in the Tora Bora and in some of the planning cells of the Islamic State in Iraq and Syria, it would bring a smile to their faces.”



QUIPS & QUOTES

One of the great strengths of NATO that I supervised for four years was that it brought together forty-six countries, not just the nineteen that were in NATO at the time, but forty-six countries in the Euro Atlantic Partnership Council known as the Partnership for Peace, stretching from Vancouver right across to Vladivostok. I had to chair some of the meetings, whether it was forty-six ambassadors or forty-six ministers of foreign affairs or even forty-six presidents and prime ministers. It was a supreme effort to say awake while they all read, long prepared speeches. And I kept saying to myself, ‘Stay awake, George. It’s better than World War III.’

Lord Robertson

The world today is “seeing these horrors and threats, videos of beheadings of captives; men, women and children being buried alive; mass killings by an organization that has suddenly burst on the world scene, organized, financed, brutal, merciless, the embodiment of evil in the Middle East today. We’ve seen in recent months the appropriation of the territory of a sovereign nation state by Russia after a fake referendum. The first piece of territory that has been taken in Europe since the end of the Second World War. We have Chinese claims to territory in the South and East China Seas.” The rise of extreme religion are “providing the lightning conductor for hate.”

There is a proliferation of weapons from handguns to chemical, biological, radiological and even ballistic missiles carrying nuclear weapons as indicated by the regime in North Korea.

“We have in the globe today a host of failed and fragile states spilling instability over their borders into surrounding areas. Look at Syria, imploding on itself, putting millions of people to death and casting millions into the countries surrounding it, into Turkey, Lebanon, Jordan.”

Population shifts caused by climate change, “the extremities of weather, of desertification and of flooding simultaneously happening in the world today, rendering borders almost meaningless” are being seen in the United States, Mexico and Europe.

A system of financial interconnectivity, where a salesman in the southern U.S. can sell mortgages to people who can’t afford it can cause an international system to go into meltdown. “There are no islands left in the world today, as we’ve seen.”

Pandemics are on the rise. “In Africa today, the Ebola virus is taking off and moving from country to country. At the end of the First World War, the Spanish flu epidemic took six months to annihilate more people than had died in the First World War.... whereas the SARS virus traveled to four continents in twenty-four hours, and we worry about Ebola in our world today.”

Lastly, “the rise of organized crime permeating every element of our societies, bigger now in the global scene than the petroleum industry” is making meaningless international boundaries. That same politician from Serbia, Goran Svilanovic, when he came to NATO headquarters he spoke to the press and said, ‘Ladies and gentlemen, — can I ask you this question? How wealthy would the Balkans be today if we politicians had the same degree of inter-ethnic cooperation as the criminals?’ And isn’t that speaking to an audience of lawyers absolutely true and valid as well?”

ACTIVELY PAVING THE PATH OF THE FUTURE

Despite these many downsides, Lord Robertson is an optimist, a conditional optimist, but still an optimist. “I think that as a father and as a grandfather, I’ve got to do something in the world today to make sure that all trends, the negative trends, the not-good trends, don’t become the picture for the future as well. I

believe in the world today. The biggest enemy is not our opponents. It's not Russian expansionism or Chinese enlargement. It is not ISIS or Al Qaeda. It's complacency.

"We've seen the enemy. The enemy is us. Us, who are too relaxed. Us, who are too mean. Us, who are too short sighted. Us, who are too insular to see what's needed. And us, who have so little vision that we're not establishing the roots of the future that is safer for our future generations. What's lacking, I believe, is a global leadership that tells the people the truth, faces them with the facts, and tells them what needs to be done. And it won't be comfortable and it won't be cheap. It will require courage to face populations and electorates with a brutality of reality that up until now, frankly, so many people have been unwilling to do."

The generation after the Second World War said they would never again allow the horrors of the Holocaust and what happened in Germany take place again. "They created the United Nations, the European Union, NATO, the IMF, the World Bank, the World Trade Organization, all multilateral global institutions that brought the world together, forced people to sit down, established something that made people think about the problems, and also to find solutions to them. And that is why I believe we need to do the same again for the future as well."

The decrease in conflicts after the Cold War was due to interventionism and a belief in activist diplomacy. "We believed that you should set up groups for every conflict in the world, whether it was under the Secretary General of the United Nations or under the auspices of the European Union or as we did in NATO as a whole addressing the issues, finding solutions, battering away at a series of problems in order to find solutions."

Lord Robertson called for an investment in security and the power of deterrent. "One of the reasons why there will not be another global war is because we have nuclear deterrents, and that has prevented countries, countries constantly and previously at war with each other knowing that there is unacceptable

damage, that would come from pushing into conventional warfare. So we end it with nuclear deterrents."

PARTNERSHIPS FOSTER PEACE

His last solution to solve current global issues was to create new global structures that bring people together. During his time at NATO, forty-six countries and cities stretching from Vancouver to Vladivostok came together to form the Partnership for Peace. While sitting in on one of the meetings, "it was a supreme effort to stay awake while they all read long, prepared speeches. I kept saying to myself, 'Stay awake, George, it's better than World War III.'" These committees created a NATO in the Partnership for Peace and discussed every imaginable issue connected with security. "It was a whole congress of people meeting almost endlessly. They couldn't have a war because they were all at NATO committees. And there's a lesson there for all of us as well."

"I think that there is hope in the world with leadership from the front, with leadership that involves telling the truth, with leadership that involves people in the future, then we can give hope to future generations as well. I've got a motto on my coat of arms. I'm one of the sixteen Knights of the Thistle, one of the oldest orders of chivalry in the world today, chosen personally by her Majesty, the Queen. You have to have a motto. I thought long and hard about it. It's in the Gaelic language and it says *dóchas agus forairdeall*, the words for vigilance and hope. In other words, don't panic but stay alert."

QUIPS & QUOTES

It was a whole congress of people meeting almost endlessly. They couldn't have a war because they were all at NATO committees. And there's a lesson there for all of us as well.

Lord Robertson

Lord Robertson ended his presentation with a quote from Charlie Chaplin. "He's an interesting man to quote. But he once said this and I think it's very profound: 'I have a great interest in the future because that's where I intend to spend the rest of my life.'" ■

PROFESSIONAL PROGRAM: SUPPOSE YOU ARE DOMINIQUE STRAUSS-KAHN AND GET TO CHOOSE YOUR VENUE: WHERE DO YOU LIKE?

A four-person panel spoke on the fundamental and cultural differences in criminal procedure between France and the U.S. at the College's Paris Conference in September 2014. Using the Dominique Strauss-Kahn case as a starting point, the panel explored those differences through a hypothetical case where a prominent American, the head of a large international organization, is arrested in France.

Fellow **Frederick T. Davis** of Paris, France, was the panel moderator. The other panelists included: **Daniel Soulez Larivière**, whose practice in Paris includes matters of international intrigue and finance; Fellow and former Regent **John S. Siffert** of New York City, New York; and **Antoine Garapon**, a judge and expert on the differences between French and American procedure and the Secretary General of the Institute for High Judicial Studies in France.



Excerpts from the discussion follow:

THE ROLE OF A WITNESS

DAVIS: We're going to start by turning to Daniel. What is the procedural context in which you're found and how do you start developing a strategy of defending your client?

SOULEZ LARIVIÈRE: The DSK case was a surprise in France because this case would, perhaps, never have happened at all [in France]. This case would have been treated completely differently.... You have different characters and different roles. The victim means a witness complaining about something wrong, the victim has a precise role in French procedure, called a *partie civile*. If the prosecutor doesn't choose to open and develop an investigation, the victim can file the complaint and oblige the prosecutor to ask an investigating judge to be in charge of the case. That's a very important power. The victim is not a witness, the victim is a party. The victim could have talked to a lawyer and the lawyer will have advised her to file a complaint. After three months, an investigating judge would have been appointed. As far as the defendant is concerned, if it would have been possible to arraign him, to subpoena him or to talk to him, then he can immediately have a lawyer with him if he's in custody and if he's not either, if he is a witness, he has no lawyer. If he's in custody, he's a witness but he has a lawyer. And if he's charged, then he has a lawyer with a judge. The procedure is completely different. The DSK case ended very quickly in the States. That's not understandable for us.... Once the judiciary has charged somebody in France, it's perhaps more difficult to get rid of the charge and to avoid indictment.... That means that we will have done work before arresting, longer work, than it has been the case in the U.S.

POWERS OF THE PROSECUTION

DAVIS: In the Strauss-Kahn case, the prosecutor, by himself, made a decision not to prosecute. Would you approach the prosecutor in France and try to persuade him or her to not prosecute?

SOULEZ LARIVIÈRE: The prosecutor has his own powers. That means that ninety-nine percent of the cases he is investigating himself. He chooses to appoint an investigating judge when the case is complicated or when it's a special crime, which means you have other offenses that are crimes in France. Ninety-nine percent of the cases are treated by the prosecutor, and then the defense can actually go and see him and discuss. We are going to reorganize this phase of the procedure because sooner or later the investigating judge in France will disappear because everybody thinks there's going to be an end to this kind of investigating procedure.

QUIPS & QUOTES

We have an inflation of charges and indictments in France and as far as the conviction is concerned it's rather deflation. That means that we are prosecuting much more cases than you do in the States. But when the prosecution is finished and the case is sent to trial, usually the decisions are lower, much lower than what happens in England or in the States. It's a different evaluation of the rule of criminal law and criminal courts.

Daniel Soulez Larivière

DAVIS: During the actual Strauss-Kahn investigation things started to come out about what, in America, we call prior bad acts. Namely, there's a woman named Tristane Banon who came out and testified that she had ▶

been approached, for want of a better word, by Strauss-Kahn. This was a young writer who had previously testified that a person she did not name harassed her, and everybody was pretty sure it was Strauss-Kahn.

After this came out she testified that it was, in fact, Strauss-Kahn but that she'd been dissuaded from going to the public because her mother was a prominent member of the Socialist Party and it would be bad for her career. We later found out that the mother had an affair with Strauss-Kahn too. But we have bad acts. John, in that circumstance would you have moved to keep those bad acts out?

SIFFERT: Yes. Under American law, a prior bad act, as it's called, at least in the federal system, it is not admissible if it tends to prove that just because someone did it before he did it again. That's not a permissible basis to offer a prior bad act. But you can prove prior bad acts when it comes to situations where the evidence would show *scienter*, that is to say this is no mistake. When the question is of the defendant's intent, prior bad acts may be relevant, also for other purposes like the identity of the person who did it if it's a signature crime.

RULES OF EVIDENCE

DAVIS: Fifteen years ago I came to France before I moved here. My wife was then a Supreme Court Justice in New York. We lined up a meeting with her counterpart, a woman who tried criminal trials in France. We watched a trial and then went and had a long meeting with the judge. It was fascinating; the trial was a bank robbery. We were talking with the judge, and the judge says, "There's no doubt about guilt because they did it before, right?" And my wife said, "Do they move to exclude the evidence?" And the judge literally didn't understand the question. The notion of excluding evidence isn't a French concept. It comes up, but there are no rules of evidence as such in France, certainly in the way we have them.



QUIPS & QUOTES

[In France] there are jury trials for high crimes, and if there's an acquittal or a conviction, the losing side can appeal and then there's another jury trial in the appellate level. It's pretty amazing.

Frederick Davis

SIFFERT: I think that the American system has a fundamental difference because the way we look at the criminal charge is that we have an extreme distrust for authority. The fact of the matter is that our whole system of government with the checks and balances would probably make Jefferson have tears of joy for the grid-

lock in Washington. In the criminal law context, we have . . . a presumption of innocence, a presumption not founded in evidence. It just is a presumption. It can't be overcome unless the government proves it beyond a reasonable doubt. They have to be able to do that by a certain type of evidence. That evidence includes non-hearsay. Hearsay is not allowed. It has to be subject to cross-examination. Expert testimony is really doubted, lay opinion is never permitted, and it has to be proved to a jury, and the jury has to be unanimous, and the jury is common people. The French system of a case being decided by a magistrate judge, an expert who's tried to discern whether it really happened as opposed to what the admissible proof is, would give a lot of Americans pause.

DAVIS: Daniel talked about when an investigating magistrate is brought in. Virtually any case that anybody in this room would handle. High-level corporate crimes, corruption, anything really serious would be done by that process which means the investigating magistrate investigates, who is neutral. He or she is not a prosecutor.

In the text of the [French] Code of Criminal Procedure, that person is formally required to look into exculpatory as well as incriminating evidence and to determine what the truth is, to determine what happened. The magistrate will investigate until he or she determines that they figured out what happened. During which they're building the dossier, which is the file, and everything goes in there, exculpatory evidence, inculpatory evidence, witness statements and so forth. The investigating magistrate says, "Okay, I determine or I don't determine that there's enough to bind the person over for trial." That file is not even a question of admissibility, that's the point of departure in the trial. Antoine gave the example that an American trial, to his stupefaction, all the counters are at zero. You start with nothing happening. The curtain goes up and you learn about what's going on in the trial. The prosecutor makes an opening statement. In a French criminal trial, that file is already there. The judge will have read it beforehand, and it's not admissible. What the trial is really about is for the two sides, the prosecutor and the defense counsel, to say, "I question that piece of evidence, I want to hear such-and-such a witness," or it doesn't amount to a legal hill of beans. In a sense, the record has already been established.

SOULEZ LARIVIÈRE: The problem with the investigating judge is . . . he is a hunter at night and during the day should be a judge. He has an investigation power. But at the same time, when you are in charge of justice, those two activities become more and more difficult to reconcile.

A LOOK AT JUDGES

DAVIS: When you appear before judges, are they former colleagues of yours? Are they lawyers like us who have been in firms? Who are the judges?

SOULEZ LARIVIÈRE: Judges are educated in a school with very tough competition to be successful. They attend the courts to understand what happens. They sometimes have to spend some time with lawyers too. The problem we have is that there is no continuity between the culture of the lawyer, of the defense lawyer, or the lawyer representing the victim that is another prosecutor. In fact, you have a public prosecutor and you have a private prosecutor representing the victim. But those populations are completely different. They don't know each other very well, they don't understand each other, and this is one of the problems we have with our system.

TALKING TO WITNESSES

DAVIS: In the actual Strauss-Kahn case we know that there are a number of witnesses who could have been witnesses for the prosecution or the defense. Would you find it normal to hire an investigator or yourself go talk to them and try to develop what the proof was?

SIFFERT: It would be malpractice not to. One point I think is interesting, we're talking about similar acts, other bad acts. The one area where the American system does not favor the defense is in sex crimes where the law has changed over the last thirty years so that the prior behavior of a victim, which used to be admissible, is no longer admissible, except if the prior sexual conduct of the victim had to do with the defendant. That's the only time when it is admissible, at least in New York.

DAVIS: Daniel, would you feel comfortable going to talk to witnesses? You learn the investigating magistrate is out there talking to A, B, C and D. Would you go talk to them?

SOULEZ LARIVIÈRE: It's an offense to talk to a witness. But it's not always considered like that by judges. It's true that the idea of preparing your witness is something that is not confessed by lawyers in France, as it is completely accepted in the U.S. This comes from the fact that at the beginning when they started to exist after the revolution, criminal lawyers were only speaking. Suddenly, they succeeded in coming into the office of the investigating judge, and that was in 1897. After another hundred years you had the possibility to ask for an investigation from the judge, but he is not doing the investigation himself. If he is taking his car and having a tour to see all the witness in the case to ask questions, he'll be prosecuted. He cannot do the investigations by

himself. It's a completely different culture of the Rule of Defense.

DAVIS: What Daniel just said has an impact on doing what we Americans think of as an internal investigation. You represent a corporate client that may or may not have done something. You want to make a presentation to the Department of Justice, for example. There are articles written in France saying that doing that is illegal. A lawyer cannot talk to people and, most importantly, a lawyer cannot turn over information to the prosecutor. The client cannot waive what we would think of as the attorney/client privilege in France.

THE NOTION OF NEGOTIATION

DAVIS: Daniel, would you approach the prosecutor and talk about a deal of negotiating a plea, negotiating a deferred prosecution agreement?

SOULEZ LARIVIÈRE: We approach prosecutors. It's perhaps sometimes easier than approaching judges. Once I asked a question to a very famous investigating judge in a symposium. I asked him, "What are you expecting during your investigations from a lawyer?" And he said, "Nothing." Why? Because there is nothing written in the code concerning the relationship between a judge and a lawyer.

QUIPS & QUOTES

The glass metaphor reminds me of the story of the pessimist and the optimist. The pessimist sees the glass half empty and the optimist sees the glass half full. Well, there is the realist, who thinks the glass is twice as big as it needs to be.

John Siffert

DAVIS: What about negotiating?

SOULEZ LARIVIÈRE: There is nothing to negotiate. For instance, in an economic case or corruption cases, we don't have this system. We have a guilty plea but it's a very primitive guilty plea. Are you guilty? Yes. Are you accepting this sentence? Yes. And then it goes to the judge, who says, "Okay." That is completely different from what could be the negotiations with the Department of Justice on a case. Sometimes you can negotiate with the supposed interests of the investigation because you give information to the judge. You explain that you should go the other way, he should investigate

on this part, and you have the legal possibility to ask him to do things.

DAVIS: From an American perspective, there's really no plea negotiation here. I sometimes note to French audiences that ninety-some percent of our cases end in negotiated pleas. Most people are astonished. The judges find that abhorrent. But negotiation, you don't negotiate over the truth. There's nothing to negotiate.

SOULEZ LARIVIÈRE: Sixty percent of the cases in Germany also end with reconciliation. But it happens in front of the judge.... We discuss together with the prosecution and try to find an arrangement. France, zero.

RIGHTS OF THE CLIENT

DAVIS: Final question for Daniel. Let's say your client is asked to appear before the investigating magistrate and is questioned. Does your client have a right to silence? Does he, as a practical matter, exercise it, and if he does what happens?

SOULEZ LARIVIÈRE: The inquisitorial system, by comparison to your adversarial system ... relies on a relationship between the judge, or the policeman, and the client. The evidence is coming from the body of the client....But the idea is still the same. How can we have the guy explaining his wrongdoing? It's so much easier if he can say it, if he can tell it, rather than to find complications....But now the culture is changing ... and the right to remain silent has already been passed in our French law for some years. With the new directive in Europe we are going to have to develop the culture and lawyers to do this....And that includes not to confess when you are in custody but to stop talking from the beginning to the end, even when you are sent to trial.

VIEWS ON TRUTH

DAVIS: A word about Antoine.... When we first met, he said, "Fred, I'm really not a lawyer. I'm really an anthropologist of the law." Can you give your views on what we talked about?

GARAPON: First, the important thing is culture. Don't pay too much attention to legal text because the important thing is culture. If I take my example, when I say to an American colleague, "I'm a judge, but what I do has nothing to do with what an American judge does." When I ask my colleagues, "But what is an American judge?" The answer is always, "Look, it's like an umpire." But as I come to understand the rule of baseball, I cannot understand what an umpire is.... For example, the word credibility. John, you spoke about credibility. It's a French word, *crédibilité*. It triggers nothing to a French lawyers, it's not a problem because of the process of a

trial, which is not a trial. It is not based on credibility.... We spoke about the *juge d'instruction*, investigating magistrate. I think that the correct translation into English would be an independent prosecutor. Let me underline a basic difference....What you understand by truth is not our approach to truth....A key sentence to understand common law is justice comes before truth which explains, by the way, exclusionary rules of evidence. It's very difficult to understand because a French approach would be the truth is the truth. The glass is a glass. To understand our approach to truth you must understand that we rely on a very Catholic idea of there is one single truth. There is not such a fight of narrative as you think in the U.S. There is one single truth, and the judge has to approach and to find this truth....The truth, for the French culture, is an external truth. It's what happened. What is important is what happened before. For you the truth is what happens in the trial....It's an internal truth depending on witnesses and credibility. For us truth is a correspondence between how to retrieve what happened. For you, it's more of consistency, coherence, of due process.

DAVIS: The Fifth Amendment has another provision. It gives a defendant the right to be indicted. In other words, before a prosecutor can indict and charge someone with a crime, a defendant has a right to have twenty-three of his peers listen to the case and decide that there's reasonable doubt. There's nothing comparable here I assume.

QUIPS & QUOTES

There is one single truth and the judge has to approach and to find this truth....you must understand how much the French civil trial relies on experts, a single, court-appointed expert, not an expert witness as in the U.S.

Antoine Garapon

GARAPON: The real nature of the grand jury is much more than the judgment jury. When the French audience saw Strauss-Kahn in the perp walk, it was a shock for a lot of people ... because it fits with the Protestant idea of the fall. He was the most powerful man before entering the hotel and then he was not. It was very hard for French public opinion to understand that the prosecutor is really independent. In France, there would be a lot of pressure at the beginning of the process to delay the investigations, but at the end of the day we live in a democracy. There is independent media, it would have been charged and *juge d'instruction* would have been appointed. But the *juge d'instruction* is independent and it's not a matter of credibility in France. At the end of the day he would have been convicted for that because it's not a problem of credibility against you.

STEPPING INTO THE LITERARY HISTORY OF PARIS



David Burke arrived in Paris in 1986 for what he thought would be one year. Twenty-eight years later, he considers himself a literary detective of the city.

Burke, a documentary filmmaker, former *60 Minutes* writer and producer and graduate of Yale University, spoke to the College at the Paris Conference in September 2014. In addition to writing several travel guides on Paris, he also guides a walking tour, David Burke's Writers in Paris.

As a literary detective, Burke has examined the history of various writers who have lived and worked in Paris, which resulted in a book *Writers in Paris, Literary Lives in the City of Lights*. "He has an exhaustive knowledge of the lives of the famous writers who have lived and created in Paris, their artistic struggles, their miseries and complicated lives, where they lived, including the address and the bedroom window, and when they were here gracing the City of Lights," said Past President **Mikel L. Stout** of Wichita, Kansas, in his introduction of Burke.

"A magnet, a mecca, an incubator, a hothouse for writers, all these things Paris has been called, and rightly so," Burke began. "No other city has attracted so much literary talent, launched so many illustrious careers and produced such a wealth of enduring literature. From the medieval ages of poet-thief François Villon to his twentieth century counterpart Jean Genet, Rabelais to Henry Miller, from Molière to Samuel Beckett, from the Madame de La Fayette to George Sand, Colette, Gertrude Stein, Simone de Beauvoir, Marguerite Duras, Paris has nurtured countless poets, novelists and play-

wrights. These are not only among the finest of their periods but the most intriguing personalities."

In Burke's opinion, literature and law have a connection. He used the example of two literary figures, Gustave Flaubert and Charles Baudelaire. In January and August of 1857, both were indicted for offending the public and religious morality and for offending good morals. Flaubert went on trial for his novel *Madam Bovary*, and Baudelaire for *Les fleurs de mal* (The Flowers of Evil), his volume of poems.

Flaubert was acquitted with a severe reprimand and not awarded costs for the trial. Baudelaire, however, lost his case and six of his poems were censored until 1949.

Place de la Contrescarpe is one of Burke's favorite places to take people on literary walks. "Writers have been coming here for centuries, back to the Middle Ages," and one of the earliest and most notorious was poet, thief, priest-killer and doctor of theology, François Villon, "who came to raise hell in the taverns."

Burke described his work as a "literary archaeological dig" because of how he links these literary lives to distinct places and different centuries. Walking tour participants are able to see the place where the writers lived or where certain literary characters were said to have inhabited or visited.

"Just as our writers were enriched by living in Paris, our appreciation of their lives and their work and, indeed, of the city itself, is heightened by following them from place to place in our imaginations or, even better, in our walking shoes." ■

COLLEGE ELECTS NEW LEADERS

The following slate of Regents and Officers were elected to serve the College during the 2014-2015 term.

2014-2015 EXECUTIVE COMMITTEE

PRESIDENT	Francis M. Wikstrom	Salt Lake City, Utah
PRESIDENT-ELECT	Michael W. Smith	Richmond, Virginia
TREASURER	Bartholomew J. Dalton	Wilmington, Delaware
SECRETARY	Samuel H. Franklin	Birmingham, Alabama
IMMEDIATE PAST PRESIDENT	Robert L. Byman	Chicago, Illinois



Samuel H. Franklin

Inducted in 1992 at the College's Annual Meeting in London, England, Franklin has served as Chair of the Alabama State Committee, Chair of the Regents Nominating Committee and Regent to the states of Alabama, Florida and Georgia. During his tenure as Regent, he was Regent Liaison to the Attorney-Client Relationships Committee, *The Bulletin* Editorial Board, *The Bulletin* Committee and the Outreach Committee. Franklin practices in Birmingham, Alabama, where he focuses on directors' and officers' liability; appellate; business litigation; product liability; securities and shareholder disputes; class actions; NCAA compliance and investigations; and professional liability litigation. He was a founding partner of his firm in 1990. He is a former President of the Alabama Defense Lawyers Association and is serving as President of the Alabama Law Foundation.

Franklin and his wife, Betty, live in Birmingham, Alabama.

NEW REGENTS



Ritchie E. Berger serves the Fellows of Connecticut, Downstate New York and Vermont. His area of responsibility also includes the National Moot Court Competition and Public Defenders Committees. He previously served as Vice Chair and Chair of the Vermont State Committee. Berger was inducted at the College's 2001 Spring Meeting in Boca Raton, Florida. His practice area concentrates on the defense of complex civil litigation throughout Vermont and New England. He and his wife, Amy, live in Shelburne, Vermont.



Susan J. Harriman is Regent to Northern California and Nevada, as well as the Federal Rules of Evidence and International Committees. She has served as Vice Chair of Northern California and has been a member of the Outreach and Federal Civil Procedure Committees. Harriman was inducted at the College's 2010 Spring Meeting in Palm Desert, California. She has handled a wide range of complex business litigation and has tried state and federal cases involving commercial disputes, real estate and wrongful termination. Harriman lives in San Francisco, California.



William J. (Bill) Murphy serves as Regent to the District of Columbia and Maryland, and the Federal Criminal Procedure, Federal Legislation, and Special Problems in the Administration of Justice (U.S.) Committees. He has served as Vice Chair and Chair of the Maryland State Committee. Murphy was inducted at the College's 2002 Spring Meeting in La Quinta, California. His practice has focused on complex civil litigation, with an emphasis on the representation of lawyers and law firms in defending allegations of professional malpractice, securities fraud and professional misconduct. He and his wife, Patricia, live in Baltimore, Maryland.



Stephen G. (Steve) Schwarz is Regent to Upstate New York, Ontario and Quebec, as well as the Canadian Competitions and Special Problems in the Administration of Justice (Canada) Committees. Schwarz was inducted at the College's 2005 Annual Meeting in Chicago, Illinois. His legal practice focuses on personal injury and business litigation, including medical malpractice, serious auto accident cases, product liability and toxic tort and environmental contamination case in both state and federal courts. He and his wife, Patricia, live in Fairport, New York.

RETIRING REGENTS



The four new Regents replaced the following retiring Regents:

David J. Hensler
Washington, D.C.

Douglas R. Young
San Francisco, California

Trudie Ross Hamilton
Waterbury, Connecticut

Jeffrey S. Leon, LSM
Toronto, Ontario



SIXTY-ONE INDUCTED AT THE ANNUAL MEETING IN LONDON

CALIFORNIA – NORTHERN

San Francisco

Steven M. Bauer
Michael T. Lucey

DISTRICT OF COLUMBIA

Washington

Peter J. Biersteker
Christopher M. Curran
Gerald F. Ivey
Stephen D. Raber
J. Robert Robertson
Grace E. Speights

FLORIDA

Sarasota

Theodore C. Eastmoore
William E. Partridge
West Palm Beach
Gregory Barnhart

GEORGIA

Athens

James B. Matthews, III

ILLINOIS - DOWNSTATE

Peoria

Paul C. Estes

ILLINOIS - UPSTATE

Chicago

Sheryl M. Arrigo
Kevin Joseph Burke
Thomas A. Durkin
James F. Hurst
Roger Littman

IOWA

Des Moines

Frederick W. James
Bernard L. (Jerry)
Spaeth, Jr.

KENTUCKY

Carrollton

James M. Crawford
Louisville
Robert M. Connolly

LOUISIANA

New Orleans

James R. Silverstein
Paul M. Sterbcow

MARYLAND

Baltimore

Andrew D. Freeman

MASSACHUSETTS

Great Barrington

Lori H. Levinson

MICHIGAN

Lansing

Eric J. Eggan
Frank Harrison Reynolds
Southfield
Joseph C. Smith
Troy
Gerald J. Gleeson, II



MINNESOTA

Minneapolis
James P. Carey
James K. Langdon
Gregory J. Stenmoe

MISSOURI

St. Louis
Timothy J. Gearin

MONTANA

Kalsipell
Mikel L. Moore
Great Falls
J. David Slovák
Helena
Joseph E. Thaggard

NORTH CAROLINA

Winston-Salem
J. Dennis Bailey

NEW YORK

Albany
Arthur J. Siegel
New York
Robert J. Cleary
Robert J. Gunther, Jr.
Paul H. Schoeman

OHIO

Cincinnati
Doreen Canton

OKLAHOMA

Tulsa
Oliver S. Howard
William S. Leach

ONTARIO

Toronto
Hank Goody
Jessica Kimmel

OREGON

Portland
Joel A. Mullin
Thomas C. Sand
Julie R. Vacura

PENNSYLVANIA

Philadelphia
Dennis Cogan
Pittsburgh
John C. Conti

PUERTO RICO

San Juan
Enrique J. Mendoza-
Mendez

QUEBEC

Montreal
Giuseppe Battista, Ad. E.

SOUTH CAROLINA

Charleston
Richard A. Farrier, Jr.
Conway
John B. McCutcheon, Jr.

VERMONT

Burlington
Kurt M. Hughes
Richard H. Wadhams, Jr.

WASHINGTON

Seattle
Michael S. Wampold

WISCONSIN

Milwaukee
Timothy Trecek

WEST VIRGINIA

Morgantown
William E. Galeota

INDUCTEE SEES FELLOWSHIP, LEGAL CAREER AS BEING PART OF SOMETHING BIGGER

Following the introduction of new Fellows, **Steven M. Bauer** of San Francisco, California responded on their behalf. In his speech, Bauer recognized three distinct groups of people: family and friends; mentors and those “who apparently held their punches and showed grace” when they were called during the selection process. He also shared some of the valuable lessons he has learned.

His remarks follow.

I'm particularly delighted to have been asked to be the responder, though, as a lawyer we all know that words matter and I'm a little troubled by that word. Why responder? It makes some of us nervous, particularly after we hear whiffs of this vetting process that has apparently happened without us knowing. What exactly are we to respond? One theory is, being a naturally pessimistic person, maybe everyone else is going to be inducted and we're going to keep this one guy out. Mr. Bauer would you care to respond? My other theory is none of us are getting in and this is an elaborate hoax. It's one of those investment scams; you get something in the mail if you send \$1,000 to these people and then travel to London there will be a special prize waiting for you. The people who are most susceptible to those scams are those who are buffed up and a little full of themselves and therefore think they actually deserve an award like that. I'm sure I'm not talking about anyone in this room, right?

But as it turns out good fortune has smiled and everybody got in, including me. So as I understand the tentative ruling is in my favor, I should just sit down and shut up now.

EVERYONE HAS A NATALIE

Let me begin, as is traditional, with thanks. I want to thank three groups of people. First of all I want to thank on behalf of the inductees all of family and all of our friends. None of us has come to this lightly. There are no shortcuts to becoming a good trial lawyer. If there were, we would have figured them out. We've had this passion, we've had this obsession, we've worked for our clients, worried about them, it's consumed us and you as our family, friends and companions have had to deal with that as well. It's our passion but we couldn't do it without you and you had to suffer the pain for it. So for all of you, companions, spouses, what people sometimes refer to as non-lawyers I'd like to thank you.

Unfortunately my wife, Denise, was not able to make it here to London. Today, as many as you know, it's a federal case to send your oldest daughter off to college and that's what they're doing this weekend. In our situation it is actually a federal case because my wife is now serving as an ambassador in Brussels and so Katharine, my daughter, needs to move from the embassy in Brussels to Chicago and that involves Homeland Security, Customs, people talking into an earpiece. It is literally a federal case so they couldn't make it here.

While we're speaking about ambassadors, I did enjoy listening to Ambassador Barzun today talking about the parallels between diplomacy and trial law, which is a topic in our house quite a bit. The reason I'm missing my wife and older daughter is they are the people who

are always telling me that I'm great. We were talking last night about how no matter how long you do this business, at least for some of us pathetically so, we still need that positive feedback, we need somebody to tell us that we're good. Now at home with us is our younger daughter Natalie. Natalie doesn't feel compelled to give me positive feedback.

QUIPS & QUOTES

I thought I was doing a pretty good job, laying it on right, so much so that an associate who was working with me at some point started crying during the closing. I have to be honest with you we had been working her pretty hard. There's a possibility she had been crying a few hours earlier and I didn't notice.

Steven Bauer

My best Natalie story is from when I was trying a case against the SEC, a securities fraud case. She and the family came to watch. I did a closing and I was getting pretty dramatic. I was talking about the Fifth Amendment, the flag and the sanctity of the market, and their job as jurors. I thought I was doing a pretty good job, laying it on right, so much so that an associate who was working with me at some point started crying during the closing. I have to be honest with you we had been working her pretty hard. There's a possibility she had been crying a few hours earlier and I didn't notice.

I finish with my big thing. The packed courtroom is quiet. I get up and dramatically walk down the aisle, see my loving family in front there and my older daughter says, "Yeah Dad, you nailed it. That was great." And there's nine-year-old Natalie who hasn't quite understood the big girl, inside voice/outside voice concept yet. In this quiet courtroom, she says to me, "Well Dad, you're clearly pretty comfortable up there. You talk to those jurors like you talk to us at dinner time. But you know it wouldn't hurt you to be a little better organized and maybe speak in complete sentences like you tell us to do." So, I want to thank my family and all of our families for being there.

OTHERS ON THE THANK YOU LIST

The second group of people that I want to thank is our mentors. I have two who were my main mentors. One was my dad. He was an Air Force pilot who turned into a college humanities professor. Any time I would get myself a little too pumped up he would sit me down, and he had this theory. "You know, Steven, I've got to tell you, you have to remember there are two levels of smart in the world. There are people who are pretty smart and there are those people who maybe aren't quite so swift. But the way you distinguish yourself is by how hard you

work, how much you concentrate and how much you care.” I’ve carried that with me to this day.

The other mentor I had was Judge Pamela Ann Rymer. She was a great believer in her job and in justice and she’d drill into me that you’re part of something much bigger than yourself. We’re all part of something much bigger than ourselves, so when you deal with anybody, as a judge or as a lawyer, you’re representing the justice system. That means act with dignity, don’t fudge cites, don’t fudge facts, try to help people have a positive experience with justice system. I hope that thus far in

my career I have been able to live up to that and I hope that all the other inductees here are making their mentors proud of themselves tonight.

There’s a third category of people that I wanted to thank. I haven’t seen all the responder speeches

that have taken place for sixty-seven years but I have a feeling this group hasn’t been thanked properly. This goes back to the vetting process that you all currently have. If you try a lot of cases you don’t necessarily make a whole lot of friends, and you don’t necessarily have every judge love you. When I heard about this vetting process, I thought, “This is great, this is an award I will never get.” It’s like a Nobel Prize. I’m not going to get a Nobel Prize. I want to thank those people on behalf of all the inductees who apparently held their punches and showed some grace.

DOING YOUR BEST UNDER THE CIRCUMSTANCES

One principle I got from my dad is that you have to understand that, generally speaking, people are doing the best they can under the circumstances. As I’ve gotten older I’ve really come to understand that and it’s meant a lot to my law practice. You can have this constant stream of people that come through our offices that made a mistake or have fudged something that they shouldn’t have fudged or just have been in the wrong place at the wrong time or approved a contract that they shouldn’t have approved or didn’t due their patent diligence the way they wanted to. They come into

your office and their career is passing before their eyes. Just remember that, under the circumstances, they were probably doing the best they can. That’s motivated me because my proudest accomplishment is the list of people in the back of my mind who I’ve dealt with in my career that I know I’ve helped. If they’ve made a mistake, it hasn’t been their last mistake.

Our system can really crush people in many different ways. If we can help people by doing the best we can for them, that’s a way you can make a career. One of the things that makes me excited about this organization is I think it’s going to give me and all of us inductees a chance to do the best we can. To have a platform like the College to work on issues that we all face in the justice system is great. My personal belief is that the best tool ever invented for finding the truth is cross-examination with full disclosure of facts in front of an impartial jury. Maybe folks don’t agree with me, but I believe that and I think we have to thank Britain for that. If you believe that, if you think that is true, then all of these things that make trials harder and less available, sort of de-grade the process, are like a step away from truth. I would love to be in a position where I could help that truth-seeking function in some way other than just if a case happened to come past my desk.

One thing I tell clients all the time is that no day is ever as good or as bad as it seems at the time. Regression to the mean is real. You all know this from trials. You have a good day of cross examination, you scored some points, walking out of trial and all of a sudden your clients say, “We’re pulling out all settlements off the table. We’re taking this to verdict Steve.” I’m like, “No let’s keep those on the table.” And they’re like, “Oh no, we’re crushing them, this is great.” You know no day is as good or as bad as it seems. Tomorrow might not be such a good day. The converse to that is clients who get indicted, their names in the front page of the paper, they get arrested they have some bad article about them, they just get so down. They call you and I say, “Look no day is ever as good or as bad. We’re going to get through this together.” To me that applies very much to today. Tomorrow there may be global warming, we may have ISIS, we may have Russia and the Ukraine, there may be hearsay in federal courts, there may be an overly loud nine-year-old in your court room, but today of all days is a very good day. We’ve been admitted to the American College of Trial Lawyers. On behalf of all the inductees, I want to thank you for making this a very wonderful day.





TEXAS FELLOWS SPONSOR LITIGATION ACADEMY

Each year thirty public interest and legal aid attorneys in Texas benefit from a litigation academy sponsored by the Texas Fellows of the American College of Trial Lawyers and the Texas Access to Justice Commission. Held at the University of Texas School of Law in Austin, Texas, dozens of attorneys around the state apply to the Commission to be selected as participants. The program's popularity is such that many more apply than can be accepted, especially as the Commission pays the participants' expenses during the week-long training. These attorneys seek practical advocacy training they can use to better represent individuals and public interest groups who need competent courtroom advocates.

Over thirty Texas Fellows serve as faculty for the Academy each year. The Fellows typically participate for either one half or one full day. Approximately sixty different Texas Fellows have participated as faculty since the Academy began in 2006. In even-numbered years, there is a Trial Academy during which Fellows present lectures on various aspects of trial advocacy and conduct demonstrations on all aspects of a jury trial. The participants in the Trial Academy conduct exercises in which they have the opportunity to select a jury, present opening statements, examine fact and expert witnesses and make closing arguments. The Fellows critique the participants' exercises and provide

valuable insights to enhance the participants' trial advocacy skills. In odd-numbered years there is a Pre-Trial Academy, during which Fellows present lectures and demonstrations on discovery, evidence, summary judgments and mediation. Participants in the Pre-Trial Academy conduct their own mock depositions, witness examinations at pre-trial hearings and a mock mediation, with the Fellows providing their feedback. Between preparation, class attendance and mock exercises, most participants put in at least as many hours as if they were at work.

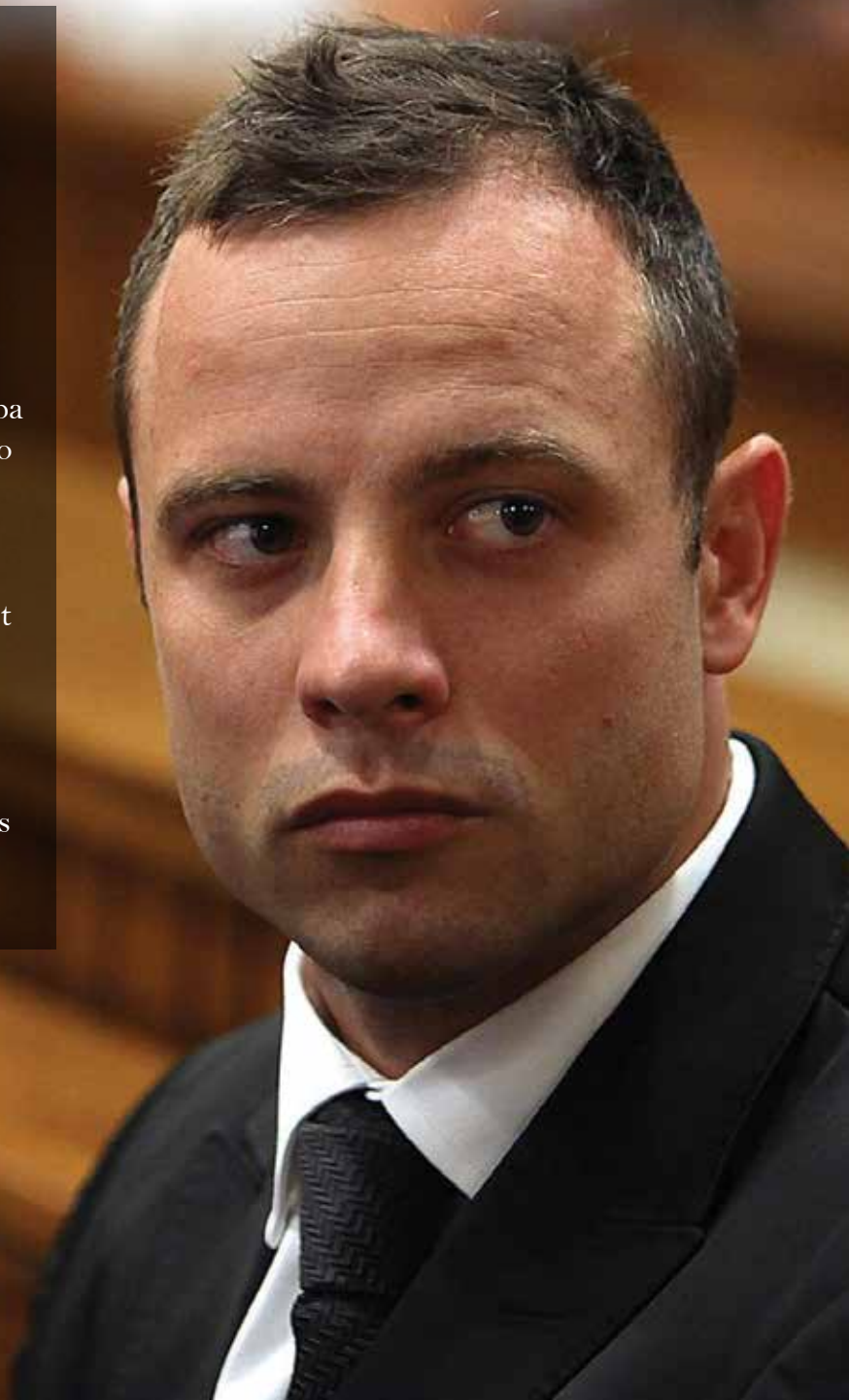
The Texas State Committee of the American College of Trial Lawyers and former State Bar of Texas president and Texas Fellow **James B. Sales** played a significant role in the creation of the Academy. Texas Fellow **Reagan M. Brown** has been the course director of the Academy since 2010 and has given hundreds of hours to this project over the last five years. As any one of the many Texas Fellows who have served as faculty can attest, the Academy is a rewarding experience for the Fellows, the public interest and legal aid attorneys who attend and participate, and the clients these young lawyers represent in the courtroom. If other Fellows are interested in conducting a similar venture in their jurisdiction, contact Brown at reagan.brown@nortonrosefulbright.com.

David N. Kitner
Dallas, Texas

CROSSING THE LINE: THE TRIAL OF OSCAR PISTORIUS

A Canadian Perspective on South African Justice

On September 12, 2014, Oscar Leonard Carl Pistorius, the Olympic and Paralympic athlete known as the Blade Runner, was found not guilty of premeditated murder, but guilty of culpable homicide in the shooting death of his former girlfriend, Reeva Steenkamp. In a decision drawn out over two days, Justice Thokozile Masipa of the High Court of South Africa also found Pistorius guilty of one count of discharging a firearm without good reason. He was acquitted of a second count of discharging a firearm without good reason and an additional charge of careless storage of ammunition. On October 21, 2014, Pistorius was sentenced to five years imprisonment on the homicide charge and three years concurrent on the weapons charge.





The trial was controversial, shining a harsh light on several features of the criminal justice system in the Republic of South Africa, including the staggering number of women killed every year by guns fired by men. The trial judge's verdict of culpable homicide, the equivalent of manslaughter in Canada, was criticized by some as inconsistent with the evidence called by the state that proved premeditated murder. Independent witnesses from the gated community surrounding Pistorius' home testified that they heard the sound of a woman screaming before and during the reports of gunfire coming from the house, suggesting Pistorius and Steenkamp were involved in a heated argument at the time of her death. Further, many observers felt that Pistorius' story did not stack up. How could he have not known that Steenkamp walked into the bathroom and was behind the door? If Pistorius had been yelling at the perceived intruder, as he claimed, would she not have called out in distress?

Others assailed the court's verdict as legally inconsistent with the trial judge's factual acceptance of Pistorius' testimony that he shot in fear that there was an intruder in his bathroom whom he honestly but mistakenly believed posed a threat to his life. If the court accepted that Pistorius shot in genuine self-defense, how could he be guilty even of manslaughter?

UNFAIR TRIAL

Whatever one thinks of Pistorius and his ignominious role in the shooting death of Steenkamp, viewed from the perspective of the Canadian criminal justice system, Pistorius' trial was unfair. First, Pistorius was tried for murder on an indictment that the prosecutor loaded with three other firearms offenses that were causally and temporally remote from the Steenkamp shooting. To prove these counts, the state called several of Pistorius' former friends to testify against him, thereby establishing a body of evidence that had the overall effect of making Pistorius appear to be a prickly, self-obsessed gun fanatic. There should have been an order of sev-

erance, splitting the firearms charges from the murder indictment and into separate trials.

Second, the state prosecutor Gerhard (Gerrie) Nel's cross-examination of Pistorius was inflammatory, abusive and incendiary. Judged against Canadian legal standards, the prosecutor's cross-examination breached several well-established rules of evidence which, at least cumulatively, would warrant an order for a new trial. Most significantly, Nel's cross-examination violated the fundamental duties that should guide a public prosecutor in dispassionately, but rigorously, presenting the state's evidence against an accused in a criminal trial. Lastly, as an illustration of courtroom etiquette and civility, the prosecutor's cross-examination was an exemplar of lost professional ethics.

If such a prosecution was subject to appellate review in Canada, the toxic combination of the overloaded indictment and the prosecutor's prejudicial cross-examination would certainly result in an order directing new and separate trials. It should not be understated that the costs of such an order are always profound: the increased financial burdens on the criminal justice system caused by the need to repeat a lengthy proceeding; the extended emotional stress for the victim's family; the additional stresses and costs of a retrial on the accused; and, not insignificantly, the loss of respect for the administration of justice in the eyes of the immediate community and, in this case, the millions of people who monitored the proceedings through the international television, print and internet media.

BACKGROUND

In the early morning hours on Valentine's Day 2013, Pistorius discharged his nine millimeter Parabellum handgun loaded with Black Talon hollow-point bullets into the locked lavatory door off the main bedroom of his home located inside a gated community in the city of Pretoria. Tragically, Steenkamp was behind the door ▶

and received the devastating impact of all four shots. The immediate cause of death was a bullet that penetrated her skull causing a catastrophic brain injury.

Testifying in his own defense, Pistorius stated that he woke up in the middle of the night and heard suspicious sounds coming from the bathroom. He thought Steenkamp remained sleeping in the bed and that the noises were caused by an intruder who must have climbed through the bathroom window. Pistorius testified he was terrified that the intruder posed an immediate threat to his and Steenkamp's safety. According to Pistorius, as he called out for Steenkamp to dial the police (but did not receive a response), he grabbed the pistol that he kept beside his bed, entered the bathroom area and, within seconds, emptied four bullets into the lavatory door. Moments later, Pistorius realized that he had killed Steenkamp. In his distraught testimony, Pistorius claimed that the shooting of Steenkamp was not intentional, but rather a horrific accident caused when he fired his pistol in primal fear of being attacked by the perceived intruder.

The trial, an international media spectacle, commenced in March 2014 and continued sporadically over forty-one days throughout April and June. Much of the proceedings were televised, including the delivery of the verdicts in September, which was streamed on the internet and broadcast live by the BBC and its affiliates around the world.

At the trial, prosecutor Nel called several witnesses who testified variously to the facts that underpinned the different charges. Almost without exception, none of the witnesses to the firearms offenses had any material evidence to offer regarding the murder charge. Similarly, none of the state's witnesses on the murder charge had any material evidence to offer on the weapons charges.

FAILURE TO ORDER SEVERANCE

Pistorius should not have been tried simultaneously for murder and three unrelated firearms offenses. If Pistorius had been tried in Canada, it is certain that the trial court would have exercised its discretion to make an order "in the interests of justice," severing the unrelated firearm counts into separate trials. The murder count would be tried alone. This is because there were no legal or factual connections between the different types of charges.

When measured through the lens of probative value versus prejudicial effect, the form of the indictment was stacked heavily against Pistorius' interests. After all, Pistorius was charged with the most serious crime known to the South African *Criminal Law Amendment Act*. There should have been a heightened awareness of the need to stringently apply the principles for severance in favor of the accused. Given that the prosecutor could not maintain that the prior discharge offenses had any probative value in determining whether Pistorius intended to kill Steenkamp, the court should have immediately severed the firearm charges from the indictment.

On the other hand, the "bad character" nature of the prior careless discharges created the potential for serious prejudice to Pistorius' fair trial interests. The evidence relevant to the prior discharges posed the clear and present danger of making Pistorius appear like a narcissistic, reckless and trigger-happy cad who might be inclined to shoot his girlfriend. This form of propensity evidence would have been the proverbial elephant in the room at the trial. Although there was no jury, given the nature of the evidence, it is reasonable to infer that the trial judge would have had some difficulty disassociating the evidence solely relevant to the homicide from the evidence related to the careless discharges. Notably, if an order of severance had been granted, none of the evidence related to the firearm charges would have been admissible at the murder trial.

The overloaded indictment also allowed Nel to aggressively weave an unfair theme throughout the trial, and particularly his cross-examination, that the defendant



The victim, Reeva Steenkamp



The prosecutor, Gerhard (Gerrie) Nel

was someone who “refused to take responsibility” for anything, including killing Steenkamp. This line of argument would not have been available to the prosecutor if severance had been granted. As it was, the prosecutor’s improper line of questioning compounded the already significant prejudice caused by the failure to sever the counts.

In summary, there were several cogent factors at play in the Pistorius trial that mandated an order of severance, including: the lack of any factual or legal nexus between the charges; the risk of overwhelming prejudice to Pistorius on the murder charge posed by the bad character evidence related to the gun charges; the overall complexity of the evidence that related to four unconnected events; and whether Pistorius may have intended to testify on the murder charge, but not the others. From the perspective of trial fairness, the indictment was built to fail.

UNFAIR CROSS-EXAMINATION

Nel was well-known in South Africa for his aggressive courtroom tactics in high profile cases, earning himself the nickname the “Pitbull.” As Nel stood up to commence his cross-examination he declared that he was about to cross-examine “one of the most recognized faces in the world.”

Over the next five days, Nel unleashed a savage cross-examination. His questions achieved the intended effect of belittling Pistorius in the eyes of the court and the international gallery, mocking his answers and sensationalizing the evidence. Nel did not shrink from exploiting graphic photos of Steenkamp’s bullet-ridden body, displayed on the large screen in the courtroom, as he admonished Pistorius for killing her. Nel was aggressive, dismissive, demeaning and interruptive. He frequently shouted and talked over Pistorius, often badgering him to answer the question. Nel expressed opinions about Pistorius’ credibility and guilt, called him a liar to his face on multiple occasions, and demanded that Pistorius comment on the veracity of other witnesses’ testimony. Nel even asked Pistorius about privileged communications with his own lawyer and demanded that Pistorius explain why his defense team did not call certain witnesses or ask certain questions in cross-examination of state witnesses.

By way of illustration, within one minute of starting his cross-examination, Nel introduced, without prior notice to defense counsel, a video from the internet showing Pistorius firing guns at watermelons at an outdoor firing range. He was with friends. The event occurred months before the Steenkamp shooting. Over strenuous defense objections, Nel was permitted to cross-examine Pistorius on the video, and the words Pistorius said to his friends could be overheard in the background:

Q: Can you now recall what happened there Mr. Pistorius?

A: ...I was at a shooting range where [my friend]....I was at his shooting range. I was shooting at a watermelon.

Q:...You said, “It is softer than brains.” Who else has got brains?

A: My Lady ... in that whole sentence I was referring to a Zombie.

Q: ...Now, but what we can see there is the effect the ammunition had on the watermelon. It exploded. Am I right?

A: That is correct, My Lady.

Q: You know that the same thing happened to Reeve’s head? It exploded. Have a look.

By Canadian standards, the cross-examination by Nel on the shooting range video was spectacularly improper. It was a scandalous attempt by the prosecutor to sensationalize the record and inflame the trier of fact and the public against Pistorius. Nel effectively suggested that Pistorius would shoot a human head as casually as he would shoot a watermelon at target practice. Nel took it a step further, egregiously suggesting there was a connection between the watermelon and Steenkamp’s brains: “You said, “It is softer than brains.” Who else has got brains?” Nel then continued to goad Pistorius into looking at the photograph of Steenkamp’s skull as he intoned loudly: “Have a look there, Mister.”

While each aspect of the prosecutor’s conduct was completely off-side, the overall prejudicial effect of the video and Nel’s questioning was overwhelming. By Canadian standards, this line of cross-examination would be considered so abusive, demeaning and disturbing as to justify, without more, either a mistrial or a new trial.

There was no probative value whatsoever to either the video or the prosecutor’s abusive questions that could have assisted the trier of fact in determining whether Pistorius intended, months later, to shoot his girlfriend. The sole purpose of Nel’s cross-examination on the video was to demonize the defendant in eyes of the court and its international gallery. In other words, Nel sought shock value for shock value’s sake.

THE ROLE OF THE PROSECUTOR

In the Canadian criminal justice system, the classic statement of the role of a prosecutor was made fifty years ago in the landmark decision of *Boucher v. The Queen*. The Supreme Court of Canada emphasized that the role of the prosecutor is not to “obtain a conviction.” Rather, it is to present before the trier of fact “credible evidence relevant to what is alleged to be a crime.” In ▶

carrying out their roles as ministers of justice, prosecuting Crown counsels “have a duty to see that all available legal proof of the facts is presented.” The role of prosecutor excludes any notion of winning or losing. Rather, his or her function “is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.” The prosecutor’s role is to be efficiently performed “with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”

A Crown prosecutor is free to conduct an aggressive cross-examination, probing the relevant facts and the credibility of the accused, in an effort to prove the Crown’s case and demonstrate that the accused has not told the truth. That is entirely proper and the community expects no less. However, it is outside of a prosecutor’s function to abuse any witness, and in particular the accused, or to flagrantly breach the well-accepted rules of evidence that govern criminal proceedings. If the prosecutor violates those duties in a manner that is perceived to cause significant prejudice to the fair trial interests of the accused, the result will be an order for a new trial.

In the case of Nel’s cross-examination of Pistorius, the obligation on the prosecutor to conduct himself fairly was honored exclusively in the breach. During the remainder of Nel’s cross-examination, in addition to continuing to relentlessly badger, interrupt and harass Pistorius, Nel contravened what would be regarded in Canada as several well-known rules of evidence.

For instance, Pistorius was repeatedly asked to comment on whether other witnesses were telling the truth. At other times, Nel demanded an explanation for why the evidence of other witnesses was different than his own. In Canada, this form of questioning has been roundly criticized as improper. Asking an accused to comment on the credibility of other witnesses, to account for whether others witnesses are lying or to require an accused to explain away the testimony of other witnesses (all of which Nel did), undermines the fundamental principle of the presumption of innocence by shifting the onus from the prosecution to the accused. It is for the trier of fact to determine which testimony the court accepts, not for the accused to explain who is right and who is wrong.

Nel also accused Pistorius of tailoring his evidence to make it fit to information contained in the disclosures made by the state to the defense. In Canada, an accused person has a constitutional entitlement to disclosure of all relevant non-privileged evidence in the possession of the state so that he can know the case to meet and then make full answer and defense. Disclosure cannot become a trap for the accused. It would turn the right of disclo-

sure into a sword in the hands of the prosecutor. As the Court of Appeal for Ontario stated in reviewing such a line of cross-examination at trial, “[W]here any such suggestion seeps into the cross-examination of an accused, it must be eradicated by the trial judge.”

Nel also invaded the solicitor-client relationship between Pistorius and his counsel. A prosecutor should not be able to compel an accused to waive privilege during cross-examination. However, Nel cross-examined Pistorius on the decisions his legal team made in conducting cross-examinations of certain state witnesses, and even put to Pistorius that his own lawyer made a mistake. In Canada, such forms of questioning have been ruled inadmissible and unfair: the burden should never fall on an accused person to “explain why certain witnesses were not being called” or why his own counsel chose to ask (or not ask) certain questions. Leaving aside that the question pits an accused against his own professional advisors, how would he know the answer?

CIVILITY IN CROSS-EXAMINATION

Leaving aside the breaches by Nel of his overarching duties as a prosecutor to present the evidence against Pistorius fairly and the violations of the rules of evidence that were committed during Nel’s lengthy and abusive cross-examination of Pistorius, Nel’s actions raise serious questions about his role as an officer of the court. If the trial had occurred in Ontario, the *Rules of Professional Conduct* of the Law Society of Upper Canada would apply. Rule 5.1-1 states:

“When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.”

In the commentary to the rule, it is emphasized that, in adversarial proceedings, a lawyer has a duty to “raise fearlessly every issue, advance every argument and ask every question” that the lawyer believes will assist his or her cause, but that, at all times, the lawyer must discharge this duty “by fair and honorable means, without illegality and in a manner that is consistent with the lawyer’s duty to treat the tribunal with candor, fairness, courtesy and respect.”

Unfortunately, in the matter of *The State v. Oscar Leonard Carl Pistorius*, these duties were ignored by the prosecutor in his untrammelled zeal to win at any cost.

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A full version of this article with footnotes is available on the College website, www.actl.com.

2015 ANNUAL MEETING IN CHICAGO

The 65th Annual Meeting will be held October 1 – 4, 2015 at the Fairmont Chicago Millennium Park.

The following speakers are confirmed for the meeting:

Erskine Bowles, former president of the University of North Carolina, former White House Chief of Staff

James Comey, Director of the FBI

The Honourable Mr. Justice Clément Gascon, Canadian Supreme Court Justice

Registration materials will be available by July.



COLLEGE TIES, SCARVES AVAILABLE

Celebrate your Fellowship with a College bow tie, tie or ladies' scarf. It includes an original hermit and horse design created by former Regent John S. Siffert. The bow tie and tie come in red and blue, while the ladies' scarf is only available in blue. These articles are sold at cost with a small increment going entirely to the Foundation. The cost for each item is as follows: ACTL tie, \$150; ACTL bow tie, \$90, and ACTL ladies scarf, \$250.

If interested in purchasing, contact the National Office at nationaloffice@actl.com.



PRO HAC VICE: WILL TRAVEL FOR WORK?



The current state of *pro hac vice* is poorly suited to the modern day practice of law. Today's highly mobile society warrants a more liberal *pro hac vice* system, one that holds counsel accountable, and one that does not restrict a client's choice of counsel. The U.S. federal courts have taken such an approach. "For this occasion," (a translation of *pro hac vice*) should not be used to deny and limit a client's choice of counsel. It should be expanded to recognize the skill set borne by years of experience as a trial lawyer.

PRO HAC VICE

Under the current *pro hac vice* system, rules or statutes governing *pro hac vice* appearances in state courts vary greatly from one jurisdiction to the next. The *pro hac* numerical limitations span a continuum that ranges from a generous allowance of several appearances per year to restricting appearances to only two *pro hac vice* appearances in the course of an attorney's entire career.

In addition to numerical specifications, many states also require attorneys to jump through a number of procedural hoops prior to judicial approval of a *pro hac vice* application. Some states require a formal association with a local attorney as counsel of record. Others demand a showing that the attorney possesses expertise not available in-state, or evidence of a correlation between the facts of the out-of-state case and the attorney's home state.

THE NEED FOR REFORM

These limiting *pro hac vice* rules and statutory schemes pose two primary problems. First, the rules fail to account for the multistate, evolving nature of the modern day practice of law. Second, the rules deny a litigant's access to justice by denying one's choice of counsel. Query: wherefore art thou, Interstate Commerce clause?

PRO HAC VICE RULES DO NOT REFLECT THE REALITIES OF TODAY'S LEGAL MARKET

Chief Judge Marcia S. Krieger of the United States District Court for the District of Colorado explained that the *pro hac vice* regime is a vestige of a time during which information was not readily accessible. Decades ago, the difficulties of obtaining information created a stark divide between local attorneys and out-of-state attorneys. Outsiders needed insiders in order to access local rules and learn about jurisdictional idiosyncrasies. Today, there is no such thing as a "pro hac vice" admission in the District of Colorado. The local rules permit lawyers – regardless where licensed (and they must be in good standing, of course) – to apply for admission in the District of Colorado. The rules for admission (and continuing to remain admitted) are fully delineated on the court's publicly accessible website.

The justification for *pro hac vice* limitations is long gone. The practice of law has changed drastically since the era of limited access to information. Business and technology grow more globalized. Complex civil litigation traverses borders. Clients conduct regular business across state lines; products are designed in one location, manufactured in another and distributed in a third. In today's legal field, fewer claims involve issues, evidence and parties all within the same state. Single-jurisdiction

matters, strictly speaking, are a thing of the past. The numerical limitations and procedural hurdles of many states' *pro hac vice* rules are incompatible with the multi-state characteristics of the modern day practice of law.

PRO HAC VICE LIMITATIONS RESTRICT ACCESS TO JUSTICE

More importantly, the *pro hac vice* statutory schemes restrict a litigant's ability to retain counsel of their choice.

Modern civil cases—such as product liability or class actions—are more complex and high-value than before. With the increase of highly technical cases in modern litigation comes an increase in the need for highly specialized legal representation. As a result, in certain cases, only certain attorneys across the country might possess the trial expertise and skill required to competently handle such high stakes litigation. Decades of experience and specialization may make one particular attorney the best fit for a case, especially where individuals or corporations face extraordinary exposure, or seek significant recovery.

Perhaps a client has a long-standing relationship with an attorney; maybe a particular law firm came highly recommended. Irrespective of the reason, litigants should be permitted to seek and retain counsel of their choice. Geographical happenstance should have no impact on whether a litigant's choice of counsel is realized. Moreover, the practice of a trial lawyer—standing before a jury, examining witnesses, making arguments—is a specialty and skill recognized by the College. It is that very skill and experience that should not be arbitrarily denied to a client simply because of a state boundary line.

THE FEDERAL SOLUTION

The state *pro hac* system warrants an overhaul and recognition of the modern litigation system. Under the District of Colorado model, attorneys may apply for admission. They are screened for admission. They have to follow the rules of the District of Colorado. They pay money for the privilege of admission. They are accountable to the judges they appear before. But they do not need to make separate requests for admission on a case-by-case basis. Once admitted, they are free to appear in any case in the District. The District of Colorado's admission-based practice provides greater accountability.

A modest *pro hac* reform movement may be the following: reconfigure the *pro hac vice* rules to provide what the federal courts have already installed, an admission-based requirement, not a case-by-case requirement, and the following: payment of a reasonable and appropriate fee commensurate with the number of cases in which the out-of-state attorney enters an appearance; proof of

a valid out-of-state license in good standing; a provision to satisfy the continuing legal education requirements and ethical standards of the state of original licensure and the ability to be disciplined by any state in which the attorney practices. Additionally, the highest court of each state, rather than the local trial court, should be tasked with ruling on *pro hac vice* admissions in order to take the litigation strategy out of the decision. Fees can be proportional to the frequency of the admitted counsel's appearance (e.g., \$250/per entry of appearance or more) to cover the additional administrative costs of such a program.

The counters to this proposal are recognized: states control the right to practice law within their boundaries; admission requirements are in place to assure the citizens of that state the competency of its lawyers; such a "national" admission approach would diminish that state's competency standards (In other words, if one can't pass the bar, move next door, and then just "admit in" later); local counsel know the state and local rules and statutes; and states do not want outsiders taking business from in-state lawyers. This last reason is the least supportable.

On balance, the federal system (admission, not *pro hac*) provides the courts with instant and constant supervisory control over counsel who are admitted, regardless of the state of their original licensure. Decisions are not made on the basis of a particular case. They are made on the basis of the applicant's qualifications. There is still plenty of work to go around for local counsel. We all have and will serve in that role. There is an advantage to being from the hometown, but there is a decided prejudicial effect to clients when having a base in the hometown is at the root of restrictive *pro hac vice* rules. The federal model of admission would seem to be the correct and fair way of the future. Certainly, requirements for length of time in practice might be a reasonable condition of admission. Most lawyers would always affiliate with strong local counsel because it also serves their clients' interests.

In sum, lawyers in good standing with no disciplinary history and an active practice should be liberally permitted to appear in other states. Reformation of the *pro hac vice* scheme should be characterized by flexibility and freedom of choice, so long as the attorney's practice is active, ethical and accountable. The system should be able to accommodate litigants' choices of counsel irrespective of state lines.

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A full version of this article with footnotes is available on the College website, www.actl.com. ■

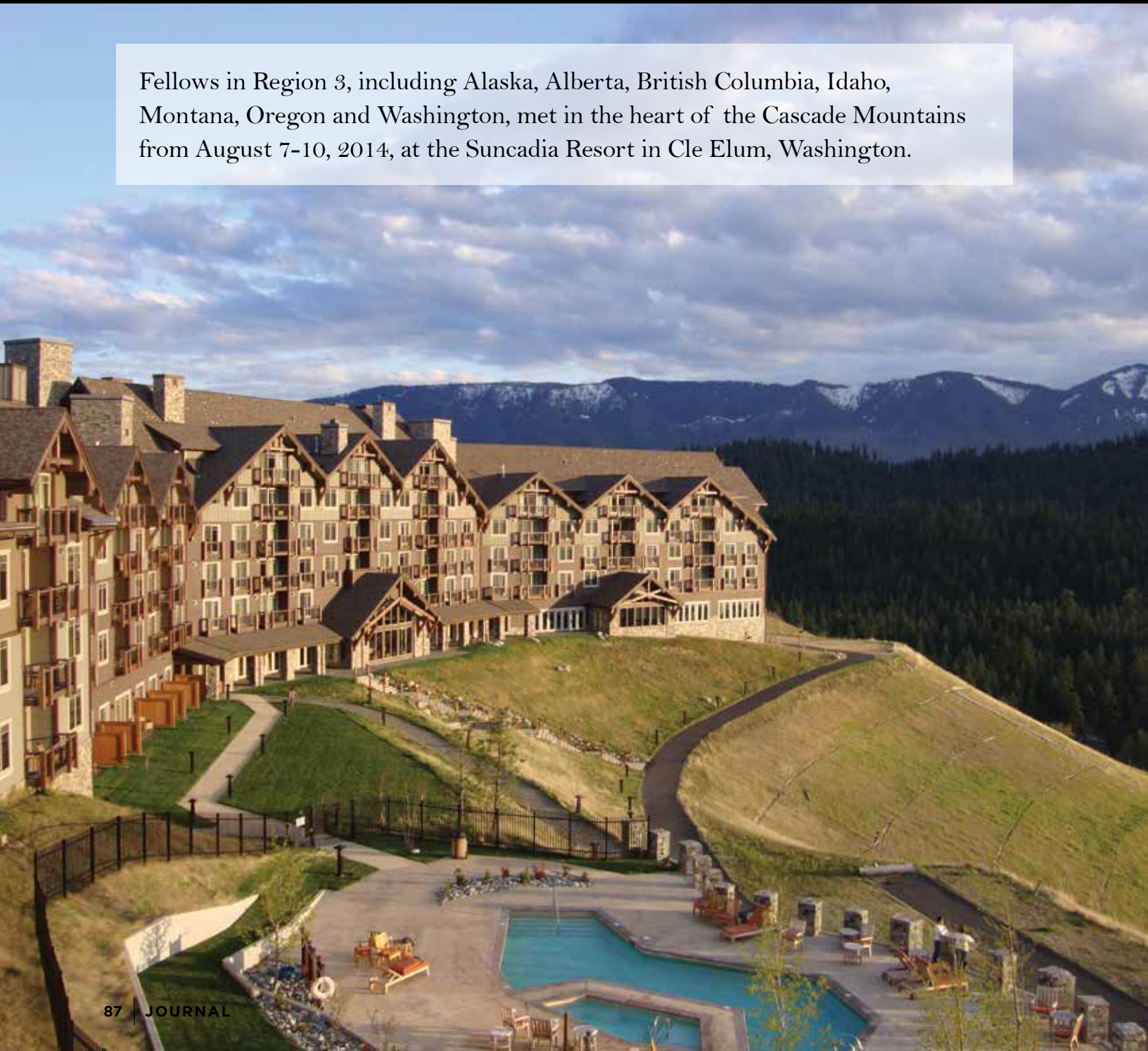
Alaska, Alberta, British
Columbia, Idaho, Montana,
Oregon, Washington

August 7-10, 2014

Cle Elum, Washington

REGION 3 MEETING

Fellows in Region 3, including Alaska, Alberta, British Columbia, Idaho, Montana, Oregon and Washington, met in the heart of the Cascade Mountains from August 7-10, 2014, at the Suncadia Resort in Cle Elum, Washington.





The Friday program started with Judge **John Coughenour** of the Western District of Washington, who gave remarks on judicial security. He was followed by **Sean Carter**, a Harvard Law School graduate, who left the practice of law to become a humorist at law.

Washington Attorney General **Bob Ferguson** spoke on the current initiatives in his office. The final speaker of the day was Dr. **Boaz Levi**, a scientist in the molecular networks group at the Allen Institute for Brain Science. The Allen Institute, founded in 2003 with the mission to do “Big Neuroscience,” completed its first task of creating a molecular atlas of the mouse brain. Since the public release of the initial atlas in the journal *Nature* in 2007, “the Allen Institute has produced a collection of gene expression atlases including: mouse spinal cord, developing mouse brain, non-human primate brain, and both developing and adult human brains,” Levi said. “These gene expression atlases provide significant insights into the biology of the brain, and have rapidly become essential resources to basic and disease-oriented neuroscientists.”

As part of a ten-year project launched in March 2012 to understand the neural code—how brain activity leads to perception, decision making, and ultimately action—the Allen Institute has created

a set of large-scale programs to understand the fundamentals of the brain through its components, computations and cognition.

The Regional Meeting continued on Saturday, opening with **Alison Holcomb**, Criminal Justice Director of the Washington ACLU and principal author of Washington’s Initiative 502, the proposition which legalized recreational marijuana in Washington, and **Chris Marr**, a member of Washington’s three-member Liquor Control Board, which is charged with regulating the pot trade. Holcomb said her motivation for legalizing recreational marijuana was not for personal benefit but rather to address the social problem that has criminalized and stigmatized an inordinate percentage of our population. A question-and-answer session followed the presentation.

Fellows also heard presentations from Dr. **Gail Jarvik**, head and professor of the Division of Medical Genetics at the University of Washington; **Dan Laster**, General Counsel of PATH, an international nonprofit organization saving lives and improving health through vaccines, drugs, diagnostics, devices, and system and service innovations; and **Lisa Olstein**, an accomplished poet who teaches creative writing at the University of Texas at Austin. ■

Delaware, New Jersey,
Pennsylvania

May 30-31, 2014

Wilmington, Delaware

REGION 13

THIRD CIRCUIT REGIONAL MEETING

Fellows from Delaware, New Jersey, and Pennsylvania began the annual 3rd Circuit Regional Meeting with a welcome reception on May 30 at the Wilmington Club. The coat-and-tie affair included United States Senator from Delaware **Thomas R. Carper** introducing the new Chief Justice of the Delaware Supreme Court, The Honorable **Leo E. Strine, Jr.**, who welcomed Fellows.





INTERSECTION OF MANY INTERESTS

The opening speaker for Saturday's General Session was the other U.S. Senator from Delaware, **Chris Coons**, who was elected in 2010 to fill the seat previously held by Vice President Joe Biden and, subsequently, by Ted Kaufman. As a member of the Foreign Relations, Judiciary, Budget and Appropriations committees, Coons is at the intersection of many controversies that consume Washington and the national debates.

Coons brings to his position eight years as an in-house counsel for a materials-based science company as well as years in the nonprofit sector, having worked for the I Have a Dream Foundation and in Africa. As Chair of the Africa Subcommittee on Foreign Relations, Coons noted there are many challenges and issues facing the continent "not just in terms of the famines and the wars in some countries, and the enormous opportunities in others, but also in the process of developing a really advanced modern legal system in many of the countries across the continent."

A large focus of his work as chair of the Subcommittee on Courts and Bankruptcy is "the sustainment of the vitality of our courts, their operations, their funding, the confirmation of capable, qualified outstanding judges for the federal judiciary, the process by which we make all of these happen." In his opinion, "the government shutdown that happened for no articulable reason ... should have really shaken the country more profoundly than it did."

One of the drivers behind these issues, according to Coons, is "the impact of money on politics....We are now on a trajectory to absolutely no regulatory framework for the limitations on individual contributions... because every amendment is possibly the amendment


that brings in out of left field a multi-million dollar attack-ad campaign that you can't see coming and you can't predict."

QUIPS & QUOTES

What was fun about 2010 was to call back a lot of those max donors and have them say, 'Oh, yes, yes, Chris, I love you, I'll be a max donor.' And then I have to pause for a moment and say, 'In the interest of full disclosure, do you realize that's \$5,000 now?' And there was often this sort of sharp intake of breath. 'I like you but not that much.'

U.S. Senator Chris Coons

Despite Congress appearing to be more divided, Coons is cautiously optimistic for the future of government. "I have found the senators with whom I serve to be smarter, more patriotic, more capable and more interested in doing something substantive together than you would ever imagine from the two-dimensional cutout view of Congress that you would get from Fox or MSNBC or whatever your flavor for the month is."

As an example, Coons spoke of the *Politico* editorial he and Senator Rand Paul published on the current Supreme Court cases involving smartphones and Fourth Amendment protection. "There is real value in finding an issue, whatever it is, that I can work with every Republican on....It has taken me almost four years to find something like this that I can do with Rand....it is a window into private and civil liberties where we are beginning to see some very interesting liberal and Tea Party partnerships." 

COMPLEXITIES OF SURVEILLANCE

Following Coons' speech, a panel of experts on civil liberties, homeland security, constitutional law, and the legislative and political processes discussed the surveillance operations of the National Security Agency (NSA).

QUIPS & QUOTES

One problem of tethering constitutional rights to executive or legislative grace is that when new exigencies arise the only thing standing between the government and all of this data will be political will, not fundamental protections of the constitutional guarantees.

Alex Abdo

The panel included: **Alex Abdo**, a staff attorney in the American Civil Liberties Union (ACLU) National Security Project and counsel in *ACLU v. Clapper*, the ACLU's challenge to the NSA's telephony-metadata program; **Stewart Baker**, a partner in the law firm of Steptoe & Johnson in Washington, D.C., the first Assistant Secretary for Policy at the Department of Homeland Security from 2005 to 2009 and General Counsel of the National Security Agency and of the commission that investigated weapons of mass destruction intelligence failures prior to the Iraq War; **Reid Cherlin**, a political writer based in Brooklyn, New York, who was a press aide on Capitol Hill, a spokesman and staff writer for the Obama campaign in 2007 and 2008, and then worked as an Assistant Press Secretary in the White House for the first two years of the Obama administration; **Carrie Cordero**, the Director of National Security Studies and Adjunct Professor at Georgetown Law who served in national security related positions with the Department of Justice from 2000-2010, most recently as Counsel to the Assistant Attorney General for National Security; **Lawrence Lusteberg**, chairman of the Criminal Defense Department of Gibbons P.C. and the long-time director of the firm's John J. Gibbons Fellowship in Public Interest and Constitutional Law, which litigates historic, cutting-edge civil rights and civil liberties cases; and **Ted Schroeder**, Chief Counsel for U.S. Senator Christopher A. Coons, who is a member of the Judiciary Committee and Chairman of the Subcommittee on Bankruptcy and the Courts.

Cordero identified three major events that changed the way the U.S. conducts surveillance. "In October of 2001, the U.S.A. Patriot Act passed. Included in the Pa-

triot Act was Section 215 which covered the authority for the FISA Court to approve business records applications.... The second thing that happened after 9/11, which is important to keep in mind, was the implementation of what is called the Terrorist Surveillance Program, which was a limited program outside of the FISA Court approval process that the President authorized specifically with respect to conducting national security surveillance relative to our conflict with Al-Qaeda... Legislative debate took place in 2006, and in 2007, that led to the passage of the FISA Amendments Act of 2008. This brings us to the 702 Program, a legal framework under the FISA Act that enables the government to conduct surveillance of non-U.S. persons, outside the United States, for foreign intelligence purposes, without having to get an individualized court order, but enabling the FISA Court to approve the procedures and the rules under which that surveillance takes place."

Abdo spoke on the reason for the ACLU's lawsuit upon disclosure that the Foreign Intelligence Surveillance Court (FISC) ordered Verizon Business Network Services, a subsidiary of Verizon, to hand over to the NSA on an ongoing, daily basis the call detail records or the phone records of the telephony metadata for all of its customers for the next ninety days.

QUIPS & QUOTES

The Third-Party Doctrine is based on a fundamental truth about human nature, which is if you share your secrets, the person you share them with can do anything with them that they want...As Ben Franklin said, 'Three can keep a secret if two of them are dead.'

Stewart Baker

The ACLU challenged the order, which has now become known as part of the Bulk Collection Program of the NSA or the Bulk Telephony Metadata Program, for the following reasons: "This program is not actually authorized by the statute that it is based on.... We argued that to allow that sort of collection, bulk collection, read the word 'relevance' out of the statute. If relevance means anything, it means the investigation has to be targeted. We argued next that it violated the Fourth Amendment, that phone records, particularly when they are collected in bulk, are extraordinarily sensitive and can reveal a lot of information about private conduct, and that it therefore violates the Fourth Amendment." The case is on appeal in the Second U.S. Circuit Court of Appeals in New York.

Baker observed that something fundamental happens when “you let go of data and give it to somebody else.... There really is no reason to think that judges on the Supreme Court are better gauges of what the reasonable expectations of privacy of Americans are than Americans themselves deciding what they are going to share and by looking at what Congress says... That is really the right way to make these decisions, to recognize that when we give away data it changes the nature of our relationship with that data, and if we don’t like the outcome we can turn to Congress and ask it to make new rules.”

Schroeder brought up the topic of when Congress was faced with the question of email in the 1980s and the Electronic Communications Privacy Act was created. “Under those rules, it made sense in 1986 to have protections against the government, without a warrant, searching your email. But those protections don’t extend to email that’s over 180 days old... I think there is just an area that politically, without these Snowden disclosures, it has been almost impossible to actually move legislation because the national security imperative is so powerful... It might be constitutionally Congress’ role to act, but you also need to make that determination with the eyes open about how likely Congress is to do a satisfactory job.”

Lusteberg spoke of the “far reaches of the Fourth Amendment jurisprudence” of the “so-called Special Needs Exception to the warrant requirement. That is the territory that we are exploring today. The Special Needs Exception to the warrant requirement exists for circumstances in which the purpose of a search is not law enforcement, it is not the apprehension of criminals, but it is to prevent some other harm, typically, or some other special need.... The thing about the Special Needs Exception though is, again, because it is at the far reaches of what we allow as a society, it is very narrowly circumscribed, and there are particular requirements that have to be reached before you can allow that kind of search based upon something other than an individualized something.” He offered two examples: passing through a metal detector or getting patted down at the airport and road stops for alcohol.

Speaking on the political effects of the public’s awareness to the existence of these programs, Cherlin said, “We have gotten to the point where it is impossible to be a participant in society without using to an extraordinary degree devices and services that put very sensitive data in the hands of third parties. People just don’t

make it their business to know, nor do they really have the power to know, what third parties are going to do with this sort of data. So that creates a sort of familiar Washington problem where people feel suspicious that something very bad is happening.”

QUIPS & QUOTES

The evolution of secret government authority by a group of judges is a bad thing when that authority develops into something that is totally out of step with what most Americans think that authority might be, and I think that’s what we got. I think it is a good thing that we are discussing the authority that the government has exercised over the past eight, ten years.

Ted Schroeder

ENGLISH COURTS, DELAWARE’S STATEHOOD

The final speaker was the Honorable Justice **Randy J. Holland** of the Delaware Supreme Court, who was elected to be an Honorary Master of the Bench by Lincoln’s Inn in London. Elected to a third term in 2011, Holland is the past National President of the American Inns of Court Foundation and co-chairs the National Advisory Committee to the American Judicature Society’s Center for Judicial Ethics.

Holland spoke on his book *Delaware’s Destiny Determined by Lewes*, which looks at the role the Privy Council in London played in resolving a dispute between Quaker William Penn and Lord Baltimore over the land that would become the state of Delaware.

“There have been several cases before the United States Supreme Court, and the most famous one was the 1934 case decided by Justice Benjamin Cardozo involving Delaware and New Jersey. In that 1934 case, what you see is the United States Supreme Court saying the boundaries of Delaware were established in 1685 by the Privy Council. Those were the boundaries on which Delaware became an independent state. They are the boundaries upon which Delaware was admitted to the union, and they are the boundaries to this day. We had another dispute with New Jersey a few years ago. Collins J. Seitz, Jr., represented Delaware in that, and Delaware once again prevailed, and once again these boundaries from 1685 turned out to be relevant.”

The next 3rd Circuit Meeting of the Fellows is scheduled for May 29-31, 2015, in Jersey City, New Jersey. ■

ALABAMA FELLOWS HONOR JERE F. WHITE, JR.

Alabama State Fellows honored the life of **Jere F. White, Jr.** on October 2 and 3, 2014, in Birmingham with a dinner and Continuing Legal Education program. First held in 2012 and appropriately named the Jere F. White, Jr. Trial Institute, the Alabama Fellows have embraced this special project as an opportunity to educate lawyers on the values which White represented. White was a founding partner of Lightfoot, Franklin & White and was inducted into the College in 1998.



Prior to his death on October 3, 2011, White and his wife, Lyda, established the Jere F. White, Jr. Fellows Program at the Cumberland School of Law. The Fellows Program seeks to recruit outstanding students with strong academic credentials and who demonstrate a history of leadership and commitment to service, thereby promoting the development of lawyers who share the ideas that were so important to Jere. The CLE program was intended to raise funds for the Fellows Program which provides a full scholarship. The recipient is chosen by a committee made up of Alabama Fellows.

On the evening of October 2, over one-hundred twenty Fellows and guests joined Lyda, her family and friends to celebrate White's life at a dinner hosted by **Harlan I. Prater, IV** and **Walter W. Bates** at The Country Club of Birmingham. Alabama State Committee Chair **Edward R. Jackson** welcomed the guests, including President **Francis M. Wikstrom**, Past Presidents **Chilton Davis Varner** and her husband, Morgan; **Warren B. Lightfoot** and his wife Robbie; and **John J. (Jack) Dalton**. Secretary **Samuel H. Franklin** and his wife, Betty, Regent **C. Rufus Pennington III**, and Outreach Committee Chair **John Kendal Cook**, were also present. The night was made most memorable by President Wikstrom's warm and gracious remarks about Jere.

The all-day seminar held on October 3 was a success. Over thirty-five different Fellows participated in the planning and presentation of the sold-out program which hosted 362 attendees, including lawyers from Arkansas, Florida and Georgia. With the financial support of the Alabama Fellows, the Fellows were pleased to welcome as their guests thirty law students from the Cumberland School of Law, University of Alabama and Jones School of Law. The students appreciated the opportunity to hear from highly skilled lawyers, and there was a positive response from the local state and federal bench.

The program addressed the primary aspects of a trial, beginning with the voir dire examination through closing arguments. Each component of the trial was divided between two Fellows who gave their perspectives from the plaintiff and defendant sides. There were two one-hour panel presentations. The program was fast-paced, intense and directed to an audience who appreciated the content and speakers.

The morning session ended with a tribute to White by Franklin followed by a video of White addressing associates at his firm and outlining the ten characteristics of a great trial lawyer. The video captured the true essence of White's spirit and was a valuable lesson to all the attendees.

The attendees were honored to have Jay Bilas, an ESPN broadcaster, attorney and best-selling author as the luncheon speaker. Bilas was introduced by Prater, his long-time friend from undergraduate days at Duke University. Bilas graciously donated his time and awed the packed audience with his observations about college sports and the current debate about college athletes being paid. Each attendee received a copy of his book, *Toughness*.

The afternoon session began with a panel presentation named "What Judges Want From Courtroom Lawyers (and Why It Can't Always Be Done)." The all-Fellow panel consisted of the Honorable **Callie V. S. Granade**, district judge for the U.S. District Court for the Southern District of Alabama, the Honorable **Marc T. Treadwell**, district judge of the U.S. District Court for the Middle District of Georgia, the Honorable **Donna S. Pate**, circuit judge of the 23rd Judicial Circuit of Madison County, and former Alabama Supreme Court Justice **R. Bernard Harwood, Jr.** Cross examination and closing arguments marked the end of the day.

While the attendees gave high marks to the program and participants, the close attention given by the audience may in part have been due to drawings held throughout the day for tickets to the Alabama/Auburn football game and SEC Football Championship.

The dinner and seminar were a success, cementing strong bonds of fellowship and bringing back fond memories and stories of Jere. The Alabama Fellows were able to raise \$110,000 for the Fellows Program, and are proud to have helped this worthy cause and to honor White, a great lawyer, Fellow and friend who is dearly missed.

Robert P. Mackenzie, III
Birmingham, Alabama



Jay Bilas and Fellow Harlan I. Prater, IV

IN MEMORIAM

The fifty-four Fellows of the American College of Trial Lawyers whose deaths are reported and whose lives are remembered in the pages that follow include a Past President of the College, a former Regent, a number of former State Chairs and many who had served the College in other ways. ♦ At least five had been Presidents of their state Bars and many had led their local Bar organizations. ♦ A number led their law school classes or led their school's law review. ♦ One was a Rhodes Scholar. ♦ Two had been law clerks for Justices of the United States Supreme Court. ♦ Two had gone on to become Federal District Judges and one a state court appellate judge. ♦ One marched in civil rights demonstrations and, wearing his World War II uniform, regularly led the parade at his town's Memorial Day celebration. ♦ Several were published authors, including one whose book led to a C-Span program whose theme was, "Is it time for a new political party?" ♦ One was a two-time All American basketball player, another an All-East football player who snapped the ball to a legendary All-American Heisman Trophy winner. ♦ One was an Eagle Scout. ♦ Forty of the fifty-four are known to have served in the military, twenty-one in World War II, fourteen in the Korean Conflict and another five during the Cold War. ♦ Of those, two served in both World War II and Korea. ♦ But for their military service and the GI Bill that rewarded it, many would have never seen the inside of a college. ♦ They came from different backgrounds; some came from lives of privilege, others did not. ♦ One was the son of the name partner in a national law firm; another was one of fifteen children of the owner of a small grocery store. ♦ One, without dropping out of high school, went to work on the evening shift in a steel mill and continued to work to support himself all the way through law school. ♦ One, whose parents had divorced, while still in high school went to work at night to help support his mother, continuing to do so until he finished law school. ♦ One found a way to explore the world and to pay for his education by working as a kitchen helper on a cruise ship. ♦ They had varying personalities. ♦ Some sang and acted in theater productions. ♦ One was described by a juror as a cross between Jimmy Stewart and Steve Martin. ♦ One, finishing high school at sixteen, had then ventured to hitchhike halfway across the country with some of his friends to attend the 1933 Chicago World's Fair, returning by way of Canada. ♦ One was so likeable that a plaintiff in a national class action, whose attorney was making constant objections during his deposition, turned to his lawyer and said, "Will you be quiet? I am trying to explain this to Grady." ♦ Some were the pillars of their legal and civic communities. ♦ Others had careers marked by names such as Imelda Marcos, the Oklahoma City Bombing, Leona Helmsley, Rev. Sun Myung Moon and his Unification Church and the Gambino family. ♦ Many spent a part of their time passing along the skills and traditions of the

profession to another generation as adjunct professors of law, as writers, as NITA instructors. ♦ One, a professional writer for national publications, went to law school in her late thirties, became a ground-breaking female lawyer, both in public service and as an educator, and capped her career by investigating and critiquing the way in which Independent Counsel had handled the interrogation of Monica Lewinsky in the Whitewater saga. ♦ Many led parallel lives of public service, civic engagement and leadership in their churches and synagogues. ♦ Several played major roles in the growth of their communities. ♦ In retirement, many undertook pro bono representation, acted as mediators and arbitrators. ♦ One, forced to retire because of Parkinson's disease, spent the rest of his life working to build his local Parkinson's support group into the nation's largest. ♦ One spent his retirement giving computer lessons to cruise ship passengers while exploring the world. ♦ One was a philanthropist who donated generously to various causes. ♦ Their diversions were varied. Some were sailors, from those who sailed for relaxation to one who had won major international sailing competitions. ♦ One was a YMCA basketball coach for twenty-five years. ♦ They were the recipients of countless awards and honors, both from the legal community and from the civic, educational and religious organizations they served. ♦ One had a medical office building named for him, another a Bar center conference room, another an aquatic complex where he was once a teenage lifeguard. ♦ One lost a son who was at work in the Twin Towers on 9/11. ♦ The son of a departed Fellow told the story of his father's calm, courageous representation of an accused Soviet spy in the Cold War era, an experience one might find reflected in the son's best-selling novel, *Snow Falling on Cedars*. ♦ The quality of their lives is reflected in their longevity. ♦ Seventeen are known to have been married for over fifty years, ten of those over sixty. ♦ At least nine who were widowers had remarried. ♦ Ten died in their seventies, but eleven lived into their nineties, another thirty-three into their eighties. ♦ Almost half lived to be at least eighty-five. ♦ One, at age eighty, died from a heart attack he suffered while sitting at counsel table in a courtroom.

What we can glean from published obituaries, news articles and research on the internet about the lives of these departed Fellows gives us at least a measure of knowledge about who they were, both as lawyers and as human beings. It is from these sources that we derive the memorials that follow. For others, this kind of information has simply not been preserved, and we are the poorer for that. The College's Heritage Committee has discussed encouraging state and province committees to do what some already do — interview all of their Fellows who approach a certain age so that their stories will be recorded and preserved. Each Fellow is a part of the College's history that deserves to be told.

E. OSBORNE AYSCUE, JR.
EDITOR EMERITUS

THE DATE FOLLOWING THE NAME OF EACH DECESED FELLOW REPRESENTS THE YEAR IN WHICH HE OR SHE WAS INDUCTED AS A FELLOW.

David J. Armstrong, '78, a Fellow Emeritus, retired from Dickie, McCamey & Chilcote, P.C., Pittsburgh, Pennsylvania, died January 5, 2014 at age eighty-two. At an early age, without dropping out of high school, he went to work in the steel mill where his father worked. He earned his undergraduate degree from the University of Pittsburgh in three years and his law degree from Duquesne University, while holding different jobs in the local steel mill and at banks in the area. In the course of his career, he represented PPG Industries in the prolonged asbestos litigation of the 1970s and, leaving his firm for a time, handled antitrust litigation for Westinghouse Electric Company. He served as his firm's president for twenty-five years. His survivors include his wife of sixty-three years, a daughter and a son.

Henry Grady Barnhill, Jr., '77, Womble Carlyle Sandridge & Rice, PLLC, Winston-Salem, North Carolina, died November 9, 2014 of cancer of the liver at age eighty-four. He had begun his undergraduate education at Atlantic Christian College, then completed it at Wake Forest University. After a semester of law school at Wake Forest, he enlisted in the United States Air Force during the Korean Conflict, earning his commission as an officer and serving for three years. He returned to complete law school and graduated *cum laude*, finishing at the head of his class. Nine years into his career, he made his mark in a celebrated case in which a Piedmont Airlines passenger plane and a corporate plane had collided in midair, resulting in eighty-two fatalities. Both planes were insured by the same carrier. To avoid the inherent conflict, the insurer essentially gave Barnhill the sole responsibility for defending the case against the airline to a conclusion, using his own judgment, and he thereafter steered the case to a settlement that the plaintiffs and the court accepted. For many years he chaired the litigation section of the state's largest law firm. He served the College as State Chair, served as President of his local Bar and was a founder of his local Inn of Court and a Life Member of the Wake Forest University Board of Visitors. He was the recipient of the North Carolina Bar

Association Litigation Section's Advocate's Award for Professionalism and the North Carolina State Bar's John B. McMillan Distinguished Service Award. A room in the North Carolina Bar Center is named in his honor. Self-effacing, chewing on an ever-present unlit cigar, with a whimsical smile on his face and a twinkle in his eye, one of his fellow lawyers described him as "a classic example of the smartest guy in the room who was ever humble and professional in his dealings with others." Another, relating his ability to connect with people from all walks of life, told of a case in which Barnhill was taking the deposition of a chicken farmer, a plaintiff in a national class action. Plaintiff's counsel had asserted objections throughout the deposition. Finally, the deponent turned to his lawyer and said, "Will you be quiet? I'm trying to explain this to Grady." His survivors include his wife of sixty-one years, a daughter and three sons.

Charles Howard (Chuck) Brock, '79, a Fellow Emeritus, retired from Hoge, Fenton, Jones & Appel, Inc., San Jose, California, died October 12, 2013 at age 83. A graduate of the University of Washington, after two years' service in the United States Army during the Korean Conflict, he earned his law degree from the University of California, Hastings College of the Law. He was a member of the Order of the Coif and graduated at the head of his class. A Past President of his local Inn of Court, he served on a number of local civic boards. Among his interests were singing and acting, and he participated in numerous local plays. His survivors include his wife of sixty-one years, two daughters and two sons.

Ray Richards Christensen, '68, a founder of Christensen & Jensen, PC, Salt Lake City, Utah, died October 24, 2014 at age ninety-two. A graduate of the University of Utah and of its S.J. Quinney College of Law, he served in the United States Army in France and Germany in World War II. After briefly serving as an Enforcement Attorney in the Office of Price Administration, he was a law clerk for a

Justice of the Utah Supreme Court. In a long career, he was President of the Utah State Bar Commission and the Western States Bar Association and was the Utah State Delegate to the American Bar Association House of Delegates. The Utah State Bar awarded him both its Lawyer of the Year Award and its Lifetime Service Award. The American Board of Trial Advocates had chosen him the Utah Trial Lawyer of the Year and the Federal Bar Association honored him with its Distinguished Service Award. He served the College as Utah State Chair. A widower who remarried, his survivors include his wife, two daughters, two sons, two stepdaughters and two stepsons.

Alvin Richard Christovich, Jr., '64, Christovich & Kearney, PPL, New Orleans, Louisiana, died August 12, 2014 at age ninety-three. A graduate of Tulane University and of Tulane University Law School, between undergraduate and law school he served in the 100th Bomb Group of the 8th Air Force, flying thirty-five missions over Europe in a B-17 Flying Fortress and earning a Distinguished Flying Cross and an Air Medal. A widower, his survivors include two sons.

Donald Joseph Cohn, '75, a Fellow Emeritus, retired from Webster, Sheffield, Fleischman, Hitchcock & Carlyle New York, New York, died August 13, 2013 at age eighty-three. He earned his undergraduate degree from the Woodrow Wilson School of Public and International Affairs at Princeton University, where he was a founder of the Hillel Society and, centering the football to All-American and Heisman Trophy winner Dick Kazmaier, was an All-East lineman. His legal education at Yale Law School, where he served as an editor of *The Yale Law Journal*, was interrupted by two years of service in the United States Coast Guard in the Korean Conflict. He once took a three-year leave of absence from Webster & Sheffield to serve as Administrative Assistant to the United States Attorney's Office for the Southern District of New York. After his return, he rose to become head of the litigation department of his firm.

In retirement he served a number of civic and charitable organizations, including a nature preservancy, volunteering as a pro bono attorney for the Children's Aid Society and the Natural Resources Defense Council. His survivors include his wife, a daughter and three sons.

William Francis Costigan, '70, a Fellow Emeritus, retired from Costigan & Wollrab, P.C., Bloomington, Illinois, died November 14, 2014 at age eighty-eight. He served in the United States Navy in the South Philippines in World War II before earning his undergraduate and law degrees from the University of Illinois. A past president of his local Bar, he chaired several divisions of the Illinois State Bar Association Attorney Registration and Disciplinary Commission. He also served as Assistant Attorney General of Illinois, was a Laureate of the Illinois State Bar Association and received an award of excellence from his county Bar. He also served as a leader in several local civic and charitable organizations, as a Trustee of his Catholic Church and as Grand Knight of his Knights of Columbus Council. He served the College as Illinois State Chair. A widower who remarried, his survivors include his wife, five daughters, a son, two stepdaughters and a stepson.

Louis D'Amada, '87, a Fellow Emeritus, retired from Chamberlain, D'Amada, Oppenheimer & Greenfield, Rochester, New York, died January 21, 2014 of Alzheimer's disease at age eighty-four. He earned his undergraduate degree from Wesleyan University and attended Harvard Business School before serving in the United States Army. After his military service, he earned his law degree from the Cornell Law School. An outdoorsman, he was active in nature conservancy and, an avid foxhunter, he was awarded the United States Equestrian Association's Vintage Cup. His survivors include his wife of almost sixty years, a daughter and three sons.

Harry Junior Daniel, Q.C., '70, a Fellow Emeritus, retired from Daniel & Partners LLP, St. Catharines, Ontario, Canada, died December

24, 2013 at age eighty-one. He was a graduate of the University of Western Ontario and of the Osgoode Hall Law School and was a member of both the Ontario and New York Bars. He served as Chair of the Board of Ridley College, served on the Niagara Parks Commission and was a Past President of the Golf Association of Ontario. A widower, his survivors include a daughter and three sons.

Warren Lee De Vries, '81, a Fellow Emeritus, retired from De Vries, Price & Wilson, Mason City, Iowa, and living in Tucson, Arizona, died November 16, 2013 at age eighty-eight. He had attended Northwestern Junior College, the University of Dubuque and Northwestern University, served as an officer in the United States Navy in World War II and then graduated from Drake University Law School. A widower who remarried, his survivors include his wife and two sons.

Gerald Alan Feffer, '94, a Fellow Emeritus, retired from Williams & Connolly LLP, Washington, District of Columbia, died February 13, 2013 of Parkinson's disease at age seventy. At age fourteen, he moved to Europe where his father, a diplomat, was stationed. After attending school in Switzerland and in Rome, he returned to the United States to earn his undergraduate degree at Lehigh University and his law degree at the University of Virginia. After four years of practice with a New York law firm, he served as an Assistant United States Attorney and later as Assistant Chief of the Criminal Division in the Southern District of New York. After another three years in private practice in New York, he was appointed by President Jimmy Carter as the Assistant Attorney General of the Tax Division of the Department of Justice, in charge of criminal tax investigations. He remained in Washington for the rest of his career as a white-collar criminal defense lawyer. One of his more celebrated cases was his defense of Leona Helmsley against charges of federal income tax evasion and extortion. Fellow lawyers described him as uniformly nice and a kind

person, gentle, and with an ever-present smile, who could be a zealous advocate, yet remain a gentleman who could preserve his friendship with opposing counsel. The foreman of the Helmsley jury later described him as "a cross between Jimmy Stewart and Steve Martin." His years of community service principally involved education, including participation in a local high school mentoring program and service as chair of the board of one local private school and vice-chair of another. When the onset of Parkinson's disease forced his retirement, he volunteered to serve on the Board of the Parkinson's Foundation of the National Capital Area and was given credit for helping it to become the largest Parkinson's chapter in the nation. His survivors include his wife and three sons.

Charles Osborne Fisher, '69, Westminster, Maryland, died June 22, 2012, seven days after his ninety-fifth birthday. As a boy, he worked in his father's automobile dealership, helping to push Model T Fords from the railroad station to the showroom and assemble them for sale. Living across the street from the local courthouse, he made friends with the lawyers and judges and helped to maintain the lawyers' tennis court next to his home. At age sixteen, after graduating from high school a year early, he and three friends, all Boy Scouts, traveled to the Chicago World's Fair of 1933, camping along the way and returning by way of Canada after a month-long journey. During his years as an undergraduate at Loyola University Maryland in the depths of the Great Depression, he worked in the summers as a kitchen helper on cruise ships in order to see Europe. He then began to attend law school at the University of Maryland at night while employed as a social worker. Enlisting in the United States Army Signal Corps in 1941, at the end of World War II he was discharged as a Captain, completed his legal education at the University of Maryland and formed a law firm, Walsh and Fisher, with which he practiced until early in the year of his death. He was a Past President of the Maryland State Bar Association, of the Maryland Institute for Continuing Education

of Lawyers and of the University of Maryland School of Law Alumni Association, Chair of the Commission to Study the Judiciary of Maryland (known as “the Fisher Commission”) and a charter member of both the Maryland Bar’s Commission on Judicial Disabilities and its Client Security Trust Fund. He was the last surviving member of a group of local leaders who founded Carroll Hospital Center, whose board he chaired. The medical office building on the campus of that institution is named for him. For eleven years he chaired the Maryland Health Services Cost Review Commission, which sets rates for hospitals, and he chaired the Governor’s Salary Commission, which sets the governor’s compensation. He was active in the civil rights movement and attended the 1968 Democratic National Convention. As long as he was able, he marched at the head of the local Memorial Day Parade. Holding season tickets for the Baltimore Orioles for fifty-five years, he attended the season’s opening day the year he died. He was honored by the Knights of Columbus of his local Catholic Church for over sixty years of service. His wife of sixty-nine years, whom he married on a weekend pass while in military service, preceded him in death by six months. His survivors include three daughters and four sons.

Lawrence Joseph Franck, ’76, a Fellow Emeritus, retired from Butler, Snow, O’Mara, Stevens & Cannada, PLLC, Ridgeland, Mississippi, died August 4, 2013 at age eighty-three. After completing his undergraduate education at the University of Mississippi, where he was Editor of the student newspaper, commander of the Army ROTC Unit and a member of Omicron Delta Kappa, he served as an officer in the 11th Airborne Division during the Korean Conflict. Returning to Ole Miss to law school, he was a member of the law journal and graduated with distinction, first in his class. After practicing for a few years in Vicksburg, Mississippi, he joined Butler, Snow, where he practiced until his retirement. The author of numerous scholarly articles, he also served as an adjunct law professor. One of his articles formed the basis for the most sweeping procedural

reforms in the Mississippi judicial system in a century and led to his sixteen-year service, seven as Chair, of the Mississippi Supreme Court Advisory Committee on Rules. He was a Past President of the Mississippi Defense Lawyers Association and of the Bar Association of the Fifth Federal Circuit. He was honored with the American Inns of Court Professionalism Award, the Mississippi Bar Foundation Professionalism Award, the Mississippi Bar Award of Merit and its Lifetime Achievement Award, and he was inducted into the Mississippi School of Law Alumni Hall of Fame. Deeply involved in church activities, he became a lay expert on the documents of the Second Vatican Council and served as Vice-President of the National Council of Catholic Laity. Later becoming a communicant of the local Episcopal cathedral, he and his wife served as Lay Eucharistic Visitors and he served as a lector and convener of his church’s Liturgy Commission. He served the College as Mississippi State Chair. His survivors include his wife of fifty-six years, two daughters and a son.

Robin Roderick Freeman, ’75, a Fellow Emeritus, retired from Wildman Schooley LLC, London, Ohio, and living in Columbus, Ohio, died September 23, 2014 of congestive heart failure at age eighty. A legendary high school and college basketball player, while at Ohio State University, where he earned his undergraduate degree, he was a two-time All American and the second highest scorer in the nation in his senior year, averaging 32.9 points per game. Drafted by the St. Louis Hawks, an accident while chopping wood that severed the tips of two fingers helped him to decide instead on law school, and he returned to Ohio State University Michael E. Moritz College of Law to earn his law degree. He practiced as a plaintiff’s personal injury lawyer until his health forced his retirement. His survivors include his wife.

William Lee Garrett, ’77, a Fellow Emeritus, retired from Landram, Silveira, Garrett & Goul, Merced, California and living in Pacific Grove, California, died May 1, 2012 at age ninety. After beginning his undergraduate education at Fresno

State University, he enlisted in the United States Army Air Corps, where he piloted a B-24 Liberator bomber in the European Theater in World War II, earning an Army Commendation Medal and an Air Medal with six oak leaf clusters. After the war, he earned his undergraduate degree at the University of California at Berkeley and his law degree at the Hastings College of the Law. He remained in the Air Force Reserves and was recalled to active duty as a JAG officer during the Korean Conflict. During the course of most of his career, he served as a United States Commissioner, an office which was later transformed into a Magistrate Judge, both part-time commitments. After his retirement, he was recalled to that position, where he remained until he reached age eighty. His survivors include his wife, two daughters and two stepsons.

Daniel Gilligan Grove, '97, Jackson Kelly PLLC, Lexington, Kentucky, died July 15, 2014 of complications from diabetes at age seventy-four. A graduate of Villanova University, where he was Editor-in-Chief of the university newspaper, and of the University of Virginia School of Law, he served as a law clerk to a judge on the Fourth Circuit Court of Appeals. He also earned a Master's degree in criminal law at Georgetown University Law Center, attending on an E. Barrett Prettyman Fellowship. He began his practice as a Senior Defender Fellow with the National Legal Aid & Defender Association. He was a co-founder and for twenty-five years a team leader of the Georgetown/NITA Trial Advocacy Skills Program and an adjunct professor of criminal trial practice at that law school. He practiced for most of his career in Washington, D.C., being principally known for his domestic relations practice. In his later career he returned to his native Kentucky to practice. His survivors include his wife, a daughter, two stepdaughters and a stepson.

Murray Bernard Guterson, '75, a Fellow Emeritus, retired from McNaul Ebel Nawrot & Helgren, PLLC, Seattle, Washington, died October 4, 2013 of Alzheimer's disease at age

eighty-three. A graduate of the University of Washington and of its School of Law, he spent his first five years of practice in public service, first as a Deputy Prosecuting Attorney and then as an Assistant United States Attorney. Two years into private practice, he made headlines in a case in which, representing an indigent defendant charged with robbery and murder, he offered no evidence for the defense and procured an acquittal solely by attacking the testimony of the State's witnesses. The presiding judge told the defendant, "If you had a million dollars, you could not have bought the defense you got in this case for free." The *Seattle Times* headline read, "Attorney Hugged by Defendant." Guterson's son, David, author of the acclaimed novel *Snow Falling on Cedars*, recalled an incident during the Cold War, when his father was defending a client accused of spying for the Soviet Union. A policeman came to their house with a metal detector in response to a bomb threat, a neighbor suggested that they move out of the neighborhood and their telephone rang regularly with callers who wanted his father's head. Through it all, his son recalled, his father went back to reading his newspaper. Murray Guterson, who liked to act, once played the role of the defense attorney in a local theater production of *The Caine Mutiny*. Well-known as an old-school lawyer who kept his notes on yellow pads and 3-by-5 cards, the closest he came to modern technology was learning to use a Dictaphone. Seven years before his death, he was interviewed by the local newspaper in an article about aging lawyers in which he was quoted about the need to recognize one's own declining faculties and to know that it was time to retire. By the time of his death, his own memory had long begun to fade and he had retired. One of his early law partners related how on his last visit, Guterson was holding a 3-by-5 card, on which his wife had written the names of those who were coming to visit him. His survivors include his wife of sixty-two years, two daughters and three sons.

Henry Hervey Hancock, '90, a Fellow Emeritus, retired from Farris Matthews

Brannan Bobanago & Hellen, PLLC, Memphis, Tennessee, died May 14, 2014 at age eighty-five. After earning his undergraduate degree from the University of Tennessee, he served in the United States Army during the Korean Conflict, first in an entertainment unit that played at the Ernie Pyle Theater in post-war Japan and later as an information officer. He earned his law degree from the University of Michigan and along the way had worked as an electrical engineer for General Electric. He was instrumental in securing Memphis' cable franchise and served as counsel for the Memphis Port Authority. He served as Vice-Chair of the Board of Professional Responsibility of the Supreme Court of Tennessee and spent eighteen years as an adjunct professor of trial procedure at the Memphis State University Law School. His survivors include his wife of fifty-six years, a daughter and two sons.

John Alton Hansen, '83, a Fellow Emeritus, retired from Stafford, Rosenbaum, Rieser & Hansen, Fitchburg, Wisconsin, died August 15, 2014 at age eighty-one. He first attended Virginia Military Institute, then transferred to Marquette University, from which he earned both his undergraduate and law degrees. After graduating from law school, he served as an officer in the United States Navy during the Cold War years. A widower who remarried, his survivors include his wife, two daughters and two sons.

John J. Hanson, '77, a Fellow Emeritus, retired from Gibson, Dunn & Crutcher LLP, Los Angeles, California, died November 12, 2013 at age eighty-one. He was a graduate of the University of Denver and of Harvard Law School. His survivors include his wife.

Jo Ann Harris, '93, a Fellow Emeritus from New York, New York, died October 30, 2014 at age eighty-one of lung cancer. After earning a degree in journalism from the University of Iowa, she worked as a writer for *Time* and other publications before entering law school at New

York University at age thirty-eight. She served as law clerk to a federal district judge in the Southern District of New York, then joined the Office of the United States Attorney for the Southern District, advancing from Assistant United States Attorney to Deputy Chief of its Criminal Division. She helped to prosecute a number of high-profile cases, including that of Rev. Sun Myung Moon, leader of the Unification Church for tax evasion and Imelda Marcos, widow of the President of the Philippines, on corruption charges. In 1979, she was appointed Chief of the Fraud Section of the United States Department of Justice, the first woman to head a major prosecutorial section in the Department. After two years, she returned to New York, where she became Senior Litigation Counsel and then Executive Assistant to the US Attorney for the Southern District. Over the ensuing years, she was in private practice, as well as serving on the staffs of three Independent Counsels. In 1995, she returned to government service under Attorney General Janet Reno as the first woman to head the Department of Justice Criminal Division. She was involved in the early stages of the investigation of the Oklahoma City bombing. Along with her government service and her private practice, she was a Visiting Professor at Emory University School of Law and also taught at Fordham University Law School, Harvard Law School, Hofstra University School of Law and New York Law School before joining the faculty of Pace University School of Law. She was nationally known as a team leader for the National Institute of Trial Advocacy (NITA), of which she was also a trustee. She was honored with NITA's Faculty Award for her years of service. She helped to establish a tribal advocacy program for Native American tribal courts and helped to organize an early mediation program when that form of dispute resolution began to appear. In 2000, she and a colleague were appointed by the successor to Kenneth Starr to prepare a special report on the Independent Counsel Office's dealing with twenty-two year old White House intern Monica Lewinsky in the course of its

investigating what had begun as the investigation of a land transaction in Arkansas. Her report was presumed to have been preserved under seal until *The Washington Post* recently retrieved it. In an article published six days before Ms. Harris' death, the *Post* reported that she found that Ms. Lewinski had been interrogated for hours in a hotel room by members of the Independent Counsel's staff and the FBI. Ignoring her repeated requests that she be allowed to talk with her lawyer, they reportedly threatened her with prosecution for perjury and a twenty-seven year prison term if she did not agree to testify against the President until she finally gave in. Ms. Harris' conclusion: "I would not have touched that with a ten-foot pole." A widow, she is survived by a stepdaughter and a stepson.

Milton King Hill, Jr., '73, a Fellow Emeritus, retired from Smith Somerville & Case LLC, Baltimore, Maryland and living in Parkville, Maryland, died October 5, 2014 of chronic obstructive pulmonary disease at age eighty-seven. Near the end of World War II he had enlisted in the United States Army Air Corps, where he was waist gunner on a B-29 bomber and then participated in the occupation of Germany. A graduate of the University of Maryland and of its School of Law, from which he graduated with first honors, he had retired in the 1990s. He was regarded as an especially devoted mentor to the younger lawyers in his firm and, a sailing enthusiast, he frequently challenged them to races. A widower whose wife of fifty-eight years predeceased him, his survivors include a daughter and two sons.

James Hill (Blackie) Holmes, III, '83, Burford & Ryburn, LLP, Dallas, Texas, died October 8, 2014 at age seventy-nine following recent heart surgery. After earning his undergraduate and law degrees from Southern Methodist University, he served as a JAG Officer in the United States Air Force. After serving on various local governmental committees in the Dallas suburb of Highland Park, he served four terms on the Highland Park City Council, followed by six

years' service as its Mayor. Co-author of *The Texas Lawyer's Creed*, he was Past President of the Texas Association of Defense Counsel. Named the ABOTA Trial Lawyer of the Year and a Texas Legal Legend by the Dallas Bar, he was also honored with the Lola Wright Foundation Award for Outstanding Public Service. The swim complex where he was a lifeguard in his teenage years is now named the Holmes Aquatic Center. He received Distinguished Alumni Awards from Southern Methodist and from the Highland Park Educational Foundation. His survivors include his wife and three sons.

D. Michael Huckabay, Sr., '97, Huckabay Law Firm, Little Rock, Arkansas, died October 1, 2014 of cancer at age seventy-four. A graduate of Ouachita Baptist University and the Vanderbilt University Law School, he was also a Fellow of the American College of Legal Medicine. At the time of his death, he was practicing in a firm that he and his son had established. His survivors include his wife, a daughter, a son, a stepdaughter and three step sons.

James Leonard Hunt, '93, Bingham McCutchen LLP, San Francisco, California, died in August 2014 at age seventy-two. His family has requested that there be no published obituary.

Robert Jett Ingram, '82, Gilmer, Sadler, Ingram, Sutherland & Hutton, L.L.P., Pulaski, Virginia, died September 29, 2014 at age eighty-four. After earning his undergraduate and law degrees at Washington & Lee University, he attended JAG School at the University of Virginia and served for four years in the Korean Conflict as a JAG officer in the United States Army. He had served as President of his county Bar and as a member of the Executive Committee of the Virginia State Bar Council. Active in civic and educational affairs in his small community, he had been Chair of the Board of Trustees of New River Community College and President of the local Chamber of Commerce. Named Business Executive of the Year, he was also honored by Rotary International as a Paul Harris Fellow,

and he served on the Board of his Methodist church. A widower who remarried, his survivors include his wife, a daughter and a son.

Henry Eric Kastner, '77, a Fellow Emeritus, retired from Rosling, Williams, Lanza & Castner, Seattle, Washington, died June 22, 2010 at age ninety-two. A graduate of the University of Washington and of its School of Law, he was a member of the Law Review Board and President of the student body. He thereafter served in the United States Army Quartermaster Corps in World War II. In retirement, he served on the Board of Trustees of three condominium complexes on Maui, serving as Chair of two of them. His survivors include his wife, a daughter and two sons.

Harold Wallace Kay, '79, retired from Kay & Kay Law Firm, North Platte, Nebraska and living in Lincoln, Nebraska, died September 23, 2014 at age eighty-seven. He served in the United States Navy in World War II, then earned his undergraduate and law degrees from the University of Nebraska. An Eagle Scout, he served as President of his local Bar, of the Defense Counsel of Nebraska and of the Nebraska State Bar Foundation. He had also been President of the local Chamber of Commerce and of the local Board of Education and Senior Warden of his Episcopal Church. A widower, his survivors include two daughters and a son.

John Franklin Kay, Jr., '75, a Fellow Emeritus, retired from Mays Valentine (now Troutman Sanders LLP), Richmond, Virginia, died August 13, 2014 at age eighty-four. He earned his undergraduate degree at Washington & Lee University, where he was a member of Phi Beta Kappa and Omicron Delta Kappa, and was part way through its law school when he entered the United States Marine Corps, serving as an officer in Korea. Returning to Washington & Lee, he was Editor of his law review and a member of the Order of the Coif. After practicing for two years in Waynesboro, Virginia, he joined the Richmond firm where he spent the remainder

of his career. He was a Past President of the Virginia Bar Association, the Virginia Board of Bar Examiners and the Washington & Lee Law School Association. His survivors include his wife of fifty-nine years, two daughters and a son.

Paul DeWitt Kelly, Jr., '79, a Fellow Emeritus, retired from Kelly & Kelly, P.C., Jasper, Tennessee, died November 16, 2013 at age ninety-six. A descendant of Alexander Kelly, one of the founders of the State of Tennessee, he was a graduate of Vanderbilt University and of its law school. He served in the United States Army in Italy in World War II. A former President of his local Bar, he served on the Board of Governors of the Tennessee Bar, as a Director of two banks and as Senior Warden of one Episcopal Church and later Chancellor of another. His survivors include his wife, two daughters and two sons.

James Walter Kenney, '81, a Fellow Emeritus, retired from Geraghty, O'Loughlin & Kenney, PA, St. Paul, Minnesota, died in late October 2014 of Alzheimer's disease at age eighty-one. A graduate of the University of St. Thomas, St. Paul, Minnesota, and the William Mitchell College of Law, his undergraduate education had been interrupted by service in the United States Army during the Korean Conflict. After several years in private practice, he had been Chief Prosecutor for the City of St. Paul before returning to private practice. In retirement, he taught computer classes on Crystal Cruise ships while sailing around the world with his wife. A widower whose wife of fifty-one years predeceased him, his survivors include two daughters.

John Farrell Kimberling, '74, a Fellow Emeritus, retired and living in Palm Springs, California, died January 27, 2014 of cancer at age eighty-six. His undergraduate education at the University of Indiana interrupted by World War II, he earned a Bachelor of Naval Science degree from Purdue University in the United States V-12 Navy program before returning to Indiana to finish his undergraduate degree and his law degree there. He was later recalled to active duty during the

Korean Conflict. He took early retirement from his first law firm and was then recruited to join the Los Angeles office of Dewey Ballantine LLP as head of its litigation department. He again retired in 1990. He served as President of the Los Angeles Junior Chamber of Commerce and was a charter member of the ABA Litigation Section. His book entitled *How to Try a Jury Case* was published by NITA. He served on the boards of various arts and human relations organizations in Los Angeles and later in Palm Springs, sat on the boards of directors of two banks and was active in politics, first in the Republican Party and later in the Democratic Party. His book *What This Country Needs: A New Political Party*, a study in voter alienation, led to his moderating a discussion on a C-Span program entitled "Is it time for a new political party?" He taught for a number of years at the Indiana University Maurer School of Law and led a highly successful endowment campaign at Indiana University. His law school's planned giving society is named the Kimberling Society. He established the John F. Kimberling Foundation, a private foundation that over the years gave millions of dollars for college scholarships, medical research, social programs and other charitable purposes. He endowed the John F. Kimberling Chair in Law at his alma mater. His survivors are a sister and nieces and nephews.

William Fisher Koegel, '78, a Fellow Emeritus, retired from Rogers & Wells, New York, New York, died February 3, 2014 at age ninety. His undergraduate education at Williams College was interrupted by service in the United States First Army in Europe in World War II. After graduating from law school at the University of Virginia, he joined Dwight, Royall, Harris Koegel & Caskey, which ultimately became Rogers & Wells. At the time of his retirement in 1989 he was chairman of its litigation department. Twice a widower, he is survived by his third wife, two sons, three stepdaughters and three stepsons.

William A. Kyler, '83, Kyler, Pringle, Lundholm & Dormann, New Philadelphia, Ohio, died

August 27, 2014 of lung cancer at age seventy-one. A graduate of Ohio Wesleyan University and of Duke University School of Law, while at Duke he was an associate editor of *Current Thoughts on Peace and War* and a research assistant for the World Rule of Law Center. A recipient of an Africa/Asia Public Service Fellowship, he became a District Officer in the British Colonial Service in the Fiji Islands, where he met his wife. After a year in Cleveland, Ohio, he moved to New Philadelphia, where he practiced for the rest of his career. Past President of his local Bar, he chaired the boards of numerous civic, educational and public service organizations. His survivors include his wife of fifty-one years, two daughters and four sons.

John Robert Lacy, '07, Goodsill Anderson Quinn & Stifel, Honolulu, Hawaii, died September 22, 2014 at age seventy-one. A graduate of San Diego State University, he served as an aircraft maintenance officer in the United States Air Force, earning a Master's degree from the University of Southern California while on active duty. He earned his law degree from the University of California-Hastings College of the Law, and practiced in Honolulu for forty years. His principal field of practice was admiralty law. He served the College as Chair of the Hawaii State Committee. His survivors include his wife.

Raynold Leopold Langlois, QC, CIRC, '92, founding partner of Langlois Kronström Desjardins, Montreal, Quebec, Canada, died October 29, 2014 at age seventy-three. He received his undergraduate education from Bourget College and St. Lawrence College and his law degree from Laval University Law School. He was a recipient of the Lexpert Zenith Award for his professional leadership and the Prix Justicia from Laval University and had been named an Avocat Émérite (Emeritus Lawyer) by the Quebec Bar. His survivors include his wife and five children.

Hon. Peter Keeton Leisure, '76, a Judicial Fellow from New York, New York, died September 17,

2014 of complications from pneumonia at age eighty-seven. A graduate of Choate Rosemary Hall and Yale University, he was the son of George S. Leisure, a founder of the now defunct New York firm Donovan, Leisure, Newton & Irvine. After a year at the Columbia University School of Law, he entered the United States Army as an artillery officer during the Korean Conflict. He then earned his law degree from the University of Virginia Law School. After three years in private practice, he became Assistant United States Attorney for the Southern District of New York under Robert M. Morgenthau. Four years later, he joined Curtis, Mallet-Prevost, Colt & Mosle LLP, where he chaired its litigation department. Nominated to the United States District Court of the Southern District of New York, by President Ronald Reagan, he assumed senior status in 1997 and retired in 2010. He presided over the antitrust litigation between the National Football League and the newly organized United States Football League and a racketeering trial that led to the conviction of three members of the Gambino crime family. He also ordered the release of secret grand jury testimony taken in the investigation of Alger Hiss, accused of being a Soviet spy and convicted of lying to a Congressional committee during the McCarthy era. His survivors include his wife of fifty-three years and two daughters.

Gael Mahony, '68, Boston, Massachusetts, the thirty-third President of the American College of Trial Lawyers, died November 4, 2014 at age eighty-eight after a period of declining health. A memorial service honoring his life was held January 5, 2015, after the press deadline for this issue of the *Journal*. He will be the subject of a separate article in the next issue.

Eugene J. Majeski, '68, a founder of Ropers, Majeski, Kohn Bentley, PC, Redwood City, California, died July 4, 2014 at age ninety-seven. A native of Chicago, Illinois, he earned both his undergraduate and law degrees from DePaul University. After six years' practice in Chicago, he moved to California and established the firm

from which he never officially retired. President of his local bar and of the California Association of Defense Attorneys, he was named Trial Lawyer of the Year by the American Board of Trial Advocates and elected to the Trial Lawyer Hall of Fame by the Litigation Section of the State Bar of California. His survivors include his wife, a daughter, a son and two stepdaughters.

Hon. William Anderson Masterson, '74, a Judicial Fellow from Mendocino, California, died March 11, 2014 at age eighty-two. He told his own story in a recorded interview for the California Appellate Court Legacy Project. Born to first-generation Irish immigrants, he spent his first twelve years in what he described as an Irish Catholic ghetto on Long Island before his family moved to California. When he was fifteen, his parents divorced and his father disappeared from their lives. At age seventeen, still in high school, he began work as a truck loader for a restaurant chain, hitchhiking from school after his classes were over and working until ten or eleven o'clock each night. Entering the University of California, Los Angeles, he worked his way through college as a truck driver, supporting his mother and earning a Rhodes Scholarship nomination. Drafted during the Korean Conflict, he served in the United States Army as an infantry drill instructor. Returning to UCLA to enter law school on the GI Bill, he worked as a parking lot attendant, a private detective and a staff administrative assistant to a dean, while earning a spot on the editorial board of his law review and induction into the Order of the Coif. He practiced for twenty years with Sheppard Mullin Richter & Hampton, LLP, spending two of those years on leave to Litton Industries, then founded the Los Angeles office of Rogers & Wells, where he remained for four years before spending his last five years in private practice with Skadden, Arps, Slate, Meagher & Flom, LLP. Appointed to the California Superior Court bench in 1988, he served at the trial level for five years before becoming an Associate Justice on the California Court

of Appeal, retiring in 2000. Thereafter he served in retirement as an arbitrator. His survivors include his wife, two daughters and two sons.

Addison Lane McGovern, '78, a Fellow Emeritus, retired from Ropes & Gray LLP, Boston, Massachusetts, and living in Winchester, Massachusetts, died July 31, 2014 of Alzheimer's disease at age eighty-nine. A graduate of Phillips Academy Andover, where he was a classmate of George H. W. Bush, his undergraduate education at Harvard College was interrupted by World War II, in which he served in the United States Army's 742nd Amphibian Tank Battalion. Returning to Harvard, he graduated *magna cum laude* and was inducted into Phi Beta Kappa, then earned his law degree *cum laude* from Harvard Law School. Known as a teacher, he was a mentor to many young lawyers in his firm and to his family. Throughout his career he served his community in numerous leadership roles and in retirement took on various pro bono projects. His survivors include his wife and four daughters.

Wade Harold Mitchell, '82, a Fellow Emeritus, retired from Mitchell, Blackwell & Mitchell, PA, Valdese, North Carolina, died October 1, 2014 at age eighty-eight. A tail gunner on a B-17 Flying Fortress in the European Theater in World War II, after the war he earned his undergraduate and law degrees from Wake Forest University. He served on the Boards of Trustees of Wake Forest University, Bowman Gray School of Medicine, Western Carolina University, and Valdese General Hospital and as an elder in his Presbyterian Church. A widower, his survivors include a daughter and two sons.

Donald Thomas Morrison, '77, a Fellow Emeritus retired from Morrison & Morrison PC, Waukegan, Illinois, died May 20, 2013 at age eighty-four. A graduate of Northwestern University and of its School of Law, his law school education had been interrupted by service during the Korean Conflict in the United States Navy on the attack transport *USS Algol*, AKA-54. He had served as a Special Assistant Attorney General of Illinois and as President of his county Bar and Grand Knight of the Deerfield Knights of Columbus. A widower

who remarried, his survivors include his wife, six daughters and four sons. Among these ten offspring and their spouses, the names of two, presumptively judges, are followed by "Hon." and six other names are followed by "JD."

Edward Linscott Oast, Jr., '86, a Fellow Emeritus from Portsmouth, Virginia, retired from the Norfolk firm Williams Kelly & Greer, died June 13, 2014 at age eighty-five. He was a graduate of Virginia Military Institute and earned his law degree from Washington and Lee University Law School, where he was Editor of his law review. He served as an officer in the United States Air Force Judge Advocate General Corps during the Korean Conflict before entering private practice. A Past President of his local Bar, he served as a deacon and trustee of his Baptist Church and served two terms on the Portsmouth City Council. His survivors include his wife of sixty years, two daughters and a son.

James Emery Price, Jr. '80, Price & Krohn LLP, Corinth, Mississippi, died February 1, 2014 at age eighty-seven. His education was interrupted by service in the United States Army in World War II. He managed to wrap around his time in service undergraduate study at Tulane University, North Carolina State University and the University of Mississippi. After the war he first attended law school at Tulane and then the University of Mississippi, from which he earned his law degree. He attended St. John's College, Oxford, as a Rhodes Scholar. Over his lifetime, he served as Chairman of the Board of Deacons of his Baptist Church, of his local United Way and of the local school board, and as a member of the State Board of Education. He was a YMCA baseball coach for twenty-one years. He was counsel to his county, its electric power association and its board of supervisors and to three different local school districts. Named his city's outstanding citizen, he was also honored with the Mississippi Bar's Lawyer Citizenship Award. His survivors include his wife, three daughters and a son.

Hon. Stanley Julian Roszkowski, '75, a Fellow Emeritus from Rockford, Illinois, died July 7, 2014 at age ninety-one. One of fifteen children whose father operated a small grocery store, in

World War II, he flew thirty-four combat missions in the European Theater as the nose gunner on a B-24 Liberator bomber in World War II. After the war, he earned his undergraduate and law degrees from the University of Illinois in Urbana-Champaign. During his years in private practice he was the founder and chairman of a local bank. After twenty-two years in practice in Rockford, he was nominated to the United States Court for the Northern District of Illinois by President Jimmy Carter, initially holding court in Chicago. Lobbying over the years for the creation of a Western Division of the Court, the courthouse in Rockford that resulted bears his name. Among his more notable cases were the People Who Care suit, challenging segregated schools in the Rockford School District, an antitrust case against the Chicago Bulls and the criminal trial of a high-profile Chicago mobster. After his retirement from the bench in 1998, he acted as a mediator for many years. A widower whose wife of sixty-one years preceded him in death, his survivors include four sons.

Herbert Frederick Schwartz, '96, a Fellow Emeritus, retired from Ropes & Gray LLP, New York, New York, died July 15, 2014 of bladder cancer at age seventy-eight. He earned his undergraduate degree from the Massachusetts Institute of Technology, his MBA from the Wharton School at the University of Pennsylvania and his law degree *cum laude* from the University of Pennsylvania Law School, where he was Editor of the law review. He practiced intellectual property law with Fish & Neave (which in 2005 became Ropes & Gray), where he was for a number of years the managing partner. He was counsel in numerous landmark intellectual property disputes, the primary author of *Patent Law and Practice* and a co-author of *Principles of Patent Law*. He taught as an adjunct professor at the University of Pennsylvania and New York University Law Schools and served as a special master and mediator in numerous intellectual property cases. An accomplished sailor, he won many major regattas, including winning his class in the 2005 Newport to Bermuda race. He was a Trustee of the Woods Hole Oceanographic Institute. His survivors include his second wife, two daughters, a son and three stepdaughters.

Marvin S. Schwartz, '69, Sullivan & Cromwell LLP, New York, New York, a former member of the College's Board of Regents, died February 19, 2014 at age ninety-one. His undergraduate education at the University of Pennsylvania was interrupted by World War II, in which he served in the United States Army Signal Corps. He then both completed his undergraduate degree and earned his law degree from the University of Pennsylvania. He served as a law clerk for both Judge Herbert F. Goodrich of the United States Court of Appeals for the Third Circuit and United States Supreme Court Associate Justice Harold H. Burton. A specialist in securities law, he had appeared in many high profile cases in that field. He was a member of the Board of Overseers of the University of Pennsylvania Law School and served on eleven different American College committees, including chairing the College's Downstate New York Committee. His survivors include his wife of sixty-six years, a daughter and a son. His oldest son, John B. Schwartz, perished in the September 11, 2001 terrorist attack on the World Trade Center.

Richard A. Segal, '79, a member of Gust Rosenfeld, P.L.C., Phoenix, Arizona, died suddenly on April 18, 2014. Born in 1933, his last conscious moment was spent at counsel table in a local court when, waiting for the judge's arrival, he suffered a heart attack that took his life two days later. A state champion high school debate champion, he began his undergraduate education at Phoenix College, then went on to earn his undergraduate and law degrees from the University of Arizona. After a three-year tour of duty as an officer in the United States Army Judge Advocate General Corps, serving in Berlin, he joined the firm with which he practiced for fifty-five years. His modest explanation of his successful career was, "I showed up and they just kept paying me." In his own words, one built a law practice by "doing the work on time at a fair price, and winning more than your share (of cases)." He served as a judge *pro tem* and was a Past President of his county Bar and of the State Bar of Arizona. He was heavily involved in the renaissance of downtown Phoenix. His survivors include his wife of thirty-five years, two daughters and a son.

Alex Fishburn Smith, Jr., '82, a Fellow Emeritus, retired from Mayer, Smith & Roberts, L.L.P., Shreveport, Louisiana, of which he was a founding member, died March 12, 2014 at age eighty-nine. After graduating from Kemper Military School in 1943, he served in the United States Navy in World War II, then earned his undergraduate and law degrees from Louisiana State University. His survivors include his wife of sixty years, a daughter and two sons.

George Hutchings Spencer, '72, a Fellow Emeritus, retired from Clemens & Spencer, San Antonio, Texas, died June 29, 2013 at age eighty-nine. His college education at Texas A&M College was interrupted by World War II, in which he served as an officer in the 101st Airborne Division. After then graduating from the University of Texas School of Law, he practiced in San Antonio until his retirement in 1998. He was honored with the Texas Center Professionalism Award, the San Antonio Bar Association's Joe Frazier Brown, Sr. Award of Excellence and the South Texas Corporate Counsel Association's Ethical Life Award. In 2012 he was recognized as the Outstanding 50-Year Lawyer by the Texas Bar Foundation. A widower, his survivors include three sons, one of whom, a Fellow of the College, now leads his father's old firm.

David Everett Wagoner, '77, a Fellow Emeritus, retired from Perkins Coie, Seattle, Washington, died July 5, 2014 in Palm Desert, California at age eighty-six. A graduate of the Lawrenceville School and of Yale University, he earned his law degree from the University of Pennsylvania School of Law. He served as an officer in the United States Army and as a law clerk for both Judge Herbert F. Goodrich on the United States Court of Appeals for the Third Circuit and United States Supreme Court Associate Justice Harold H. Burton. Long active in public education, he served as President of the Board of Directors of the Seattle Public Schools, as Chair of the Council of Big City Boards of the National School Boards

Association and as Chair of the Evergreen State College Foundation. After retiring from his firm, he served as an international arbitrator and mediator, taught courses in that field at American University and coached University of Washington Law School students in international dispute resolution competitions. His survivors include his wife of twenty-five years, three sons and four step-daughters.

James Conner Whelchel, '94, a Fellow Emeritus, retired from Whelchel & Carlton, LLP, Moultrie, Georgia, died January 4, 2014 at age seventy-nine. After attending Mercer University for one year, he completed his undergraduate education at Emory University, earning membership in Phi Beta Kappa. He then served for three years of Cold War duty as a fighter pilot in the United States Air Force, flying F-86D fighters based in Okinawa before entering the University of Georgia School of Law, from which he graduated first in his class. His wife had predeceased him.

Philip J. Willson, '69, a founding partner of Willson & Pechacek, P.L.C., Council Bluffs, Iowa, died May 8, 2014 at age ninety. A graduate of Parsons College in his hometown, Fairfield, Iowa, he had also attended the University of Wisconsin. After serving in the United States Army in World War II, he earned his law degree from Yale Law School. After law school, he served for a year as Assistant City Attorney in Council Bluffs before joining a law firm. A Past President of his county Bar, of the Iowa Defense Counsel Association and of the Iowa State Bar Association, he was the co-author of a 1975 book, *Iowa Practice*. He was honored in 2000 with both the Iowa State Bar Association's President's Award and its Community Service Award. Licensed to practice in both Iowa and Nebraska, he was a Past President of the Council Bluffs Library Board, Chamber of Commerce and YMCA Board and had been a member of the Opera Omaha Foundation. Twice a widower, his survivors include a stepdaughter and a stepson.



UPCOMING EVENTS

Mark your calendar now to attend one of the College's upcoming gatherings. More events can be viewed on the College website, www.actl.com.

NATIONAL MEETINGS

2015 Spring Meeting

The Ritz-Carlton Key Biscayne, Miami
Key Biscayne, Florida
February 26 – March 1, 2015

2015 Annual Meeting

Fairmont Chicago Millennium Park
Chicago, Illinois
October 1 – 4, 2015

REGIONAL MEETINGS

Region 12

First Circuit Regional Meeting

Atlantic Provinces, Maine,
Massachusetts, New Hampshire,
Puerto Rico, Rhode Is Island

Ocean Edge Resort
and Golf Club
Brewster, Massachusetts

May 15, 2015

Region 13

Third Circuit Regional Meeting

Delaware, New Jersey,
Pennsylvania

Location TBA
Jersey City, New Jersey

May 29-31, 2015

Region 3

Northwest Regional Meeting

Alaska, Alberta,
British Columbia, Idaho,
Montana, Oregon, Washington

The Fairmont Jasper Park Lodge
Resort
Jasper, Alberta

August 6-9, 2015

Region 9

Sixth Circuit

Kentucky, Michigan, Ohio, Tennessee

The Homestead Resort
Glen Arbor, Michigan

August 13-16, 2015

Region 4

Tenth Circuit

Colorado, Kansas, New Mexico,
Oklahoma, Utah, Wyoming

The St. Regis Deer Valley
Park City, Utah

August 20-23, 2015

JOURNAL

American College of Trial Lawyers

19900 MacArthur Boulevard, Suite 530

Irvine, California 92612

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“In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships.”

*Hon. Emil Gumpert
Chancellor-Founder
American College of Trial Lawyers*

Statement of Purpose

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.