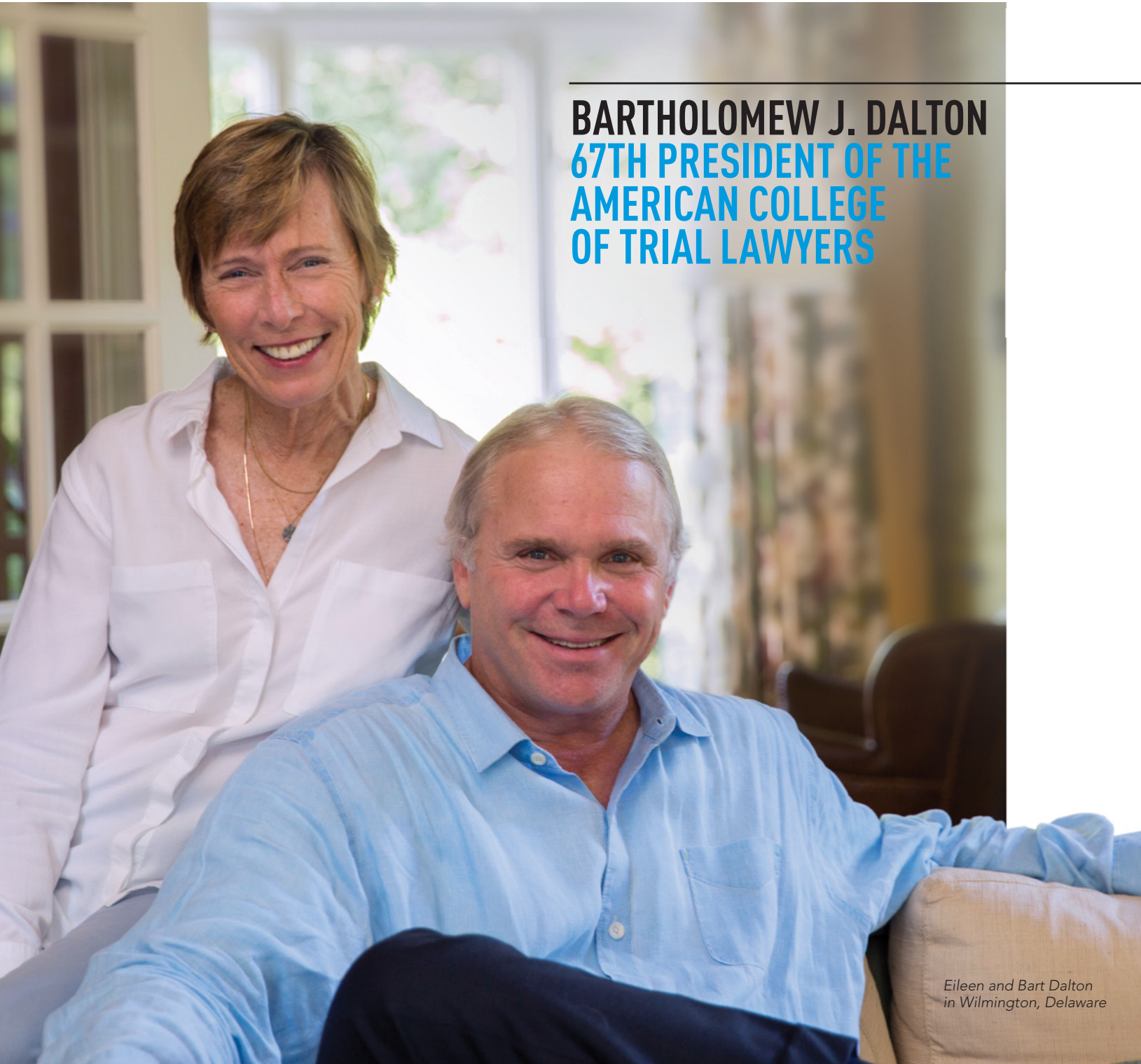




JOURNAL

THE AMERICAN COLLEGE OF TRIAL LAWYERS

BARTHOLOMEW J. DALTON
67TH PRESIDENT OF THE
AMERICAN COLLEGE
OF TRIAL LAWYERS



*Eileen and Bart Dalton
in Wilmington, Delaware*

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FROM THE EDITORS

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Andy Coats and Stephen Grant



In 1811, Joseph de Maistre, a Savoyard philosopher, writer, lawyer and diplomat, wrote, “Every nation gets the government it deserves.” This may have once been true but it’s more likely now that it’s the elite which determine the government we deserve although, as a myth, the former has a nice ironic detachment to it.

Whether true, there are always threats to democracy lurking around the corner. The most obvious and enduring is the attack we see periodically on three of the fundamental pillars on which our democracy rests—the rule of law; an independent judiciary; and free speech.

Nazi Germany couldn’t have been created without the undermining of these abiding principles in several pernicious ways: judges removed from office or co-opted into the Third Reich, free speech and the rule of law suborned to the totalitarian state.

In Turkey recently, after a failed military *coup d’état*, some 750 judges and prosecutors were detained and another 2,700 suspended, roughly one-fifth of Turkey’s justice system. Human rights organizations claim there is no evidence to support the allegations that these judges and prosecutors were aligned with the attempted overthrow.

Troublingly, these actions fundamentally violate any number of international human rights laws including the Office of the United Nations High Commissioner for Human Rights’ (OHCHR) *Basic Principles on the Independence of the Judiciary* and the OHCHR’s *Basic Principles on the Role of Lawyers*. From the first, we find Article 1 which says: “The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.” From the second, we find Article 16 which states: “Governments shall ensure that lawyers are (a) able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference....”

The College has consistently endorsed these principles. In our Recommended Principles Regarding Judicial Selection and Retention (*White Paper on Judicial Elections*), we find this statement: “One of the core values of the College is the improvement of the administration of justice. ... [O]ne of the College’s missions is to support, and seek to preserve and protect, the independence of the judiciary as a third branch of government. While our courts must be accountable, the College believes ... they should be accountable to the Constitution and the rule of law than to politicians and special interest groups.”

Practicing law is a privilege, not a right. With that privilege comes an obligation to guard against incursions, wherever found, into the sanctity of the rule of law and its constituent elements. Especially in this time of rampant self-aggrandizement and self-justifying militarism, it’s too slippery a slope to fail in that endeavor. The stakes are too high, the consequences too enormous.

In this issue, we have diverse articles for your reading pleasure including one by Past President **Robert L. Byman** on litigation funding, perhaps a new trend, at least against the media and, inferentially, free speech. Known as SLAPP (Strategic Lawsuits Against Public Participation), we are starting to see laws designed to protect against systemic attempts to quiet First Amendment rights. Anti-SLAPP protection is now available in California and, in varying degrees in twenty-seven other states. The tension can only become more palpable as states intensify or adopt these measures.

Finally, as we’ve said before, the *Journal* is for all Fellows and we always welcome contributions, be they observations, personal histories or other.

Looking forward to Philadelphia, coincidentally the birthplace of the nation *and* incoming President Dalton.

Andy Coats/Stephen Grant

A PROFILE ON 2016-2017 PRESIDENT BARTHOLOMEW J. DALTON



Bartholomew J. Dalton's road to the presidency was not a direct one; there were many twists and turns along the way.

Dalton never saw himself becoming a lawyer. There were no lawyers in his family, and he did not socialize with lawyers. He grew up in Northeast Philadelphia, became (and remains) a Phillies fan and studied political science for his undergraduate degree at Saint Joseph's University in Philadelphia. Along the way, he became an avid reader, sixty books a year sometimes, his favorite being J.D. Salinger's *Franny and Zooey*, and sometime movie buff, *The Godfather II*, topping the list. (What we all learned from *The Godfather*, of course, was to "keep your friends close, and your enemies closer.")

While fervently maintaining he would not become a lawyer, he nonetheless had to sit in on a criminal trial for one of his courses. After this experience, his future course was sealed: he would become a trial lawyer. After graduating from Saint Joseph's, Dalton found himself at the University of Tulsa College of Law and was called to the bar in 1978.

In 1977 Dalton served as a prosecutor at the District of Delaware Department of Justice while he was completing his six-month residency. In 1983 he became the youngest Chief Deputy Attorney General at the Delaware Department of Justice. He then moved to private practice at Brandt and Dalton, renamed Dalton & Associates in 2000. As his firm evolved, its legal focus has narrowed into complex civil cases in medical malpractice, civil rights and white collar criminal matters. There is plenty more in Dalton's well-rounded career. He is thoroughly engaged in the legal education aspect of practice, having taught at various law schools for about a dozen years only to have to abandon it a few years ago for other endeavors, especially the College. Nevertheless, Dalton remains a frequent guest speaker at various functions, many for physicians, and any number showcasing trial lawyer advocacy. Dalton served as Chair of the Delaware State Committee and Regent for Region 13, which includes Delaware, New Jersey and Pennsylvania, before moving onto the Executive Committee of the College.

Dalton firmly embraces the College's mission, he is committed to the advancement of the justice system

and promoting the best that trial lawyers have to offer the public. He acknowledges the need to preserve the College's direction and vision as set by his predecessors in office. He is fervently committed to the College's work for veterans. He anticipates even greater challenges in defending judicial independence and the unfortunate attempted assaults on that front from various quarters, despite the College's strong position on the issue.

Dalton has three sons who, likely through coincidence although perhaps not, are or will be heading for the same career. His oldest son, Andrew, joined Dalton & Associates three years ago and is involved in handling complex civil cases. His middle son, Michael, graduated magna cum laude, Order of the Coif from Villanova University School of Law, and is about to be called to the bar. His youngest son, Connor, is on his way to Villanova Law. He just couldn't seem to talk them out of this intellectually challenging and professionally fulfilling career despite his best advocacy, but it's something of which he has become immensely proud.



The Dalton men - Connor, Bart, Andrew and Michael

Dalton brings a commitment and passion to the job. This, even with his robust family life, with his effervescent spouse, Eileen, also a lawyer, his sons and his grandchild, let alone his pro bono work. If he has an unlikely moment to spare, he can be found playing with said grandchild or at his Colorado home, where he skis, but more importantly, mountain bikes. A lifelong baseball fan, he can also be found on the occasional afternoon at rest having a sandwich, beer and watching the Phillies suffer through another agonizing season.

The College has (once again) chosen wisely, and we can look forward to a year of battling greater challenges with Dalton on the mound.

Stephen M. Grant, LSM
Toronto, Ontario



SECRETARY JEH JOHNSON: GUARDIAN OF OUR VALUES AND LIBERTIES AS WELL AS OUR PHYSICAL SAFETY

Fellow and Secretary of Homeland Security **Jeh Charles Johnson** sat down with me at his Washington D.C. office in April. Johnson has been a distinguished trial lawyer, and next to his desk he prominently displays the certificate of his induction to the College in 2004, an event he described as “one of my proudest accomplishments.”



He is a congenial man, and, as he was delighted to be described in a recent book, “tall and athletic.” He is a husband and father, and has proud memories of his daughter and son canvassing with him in Des Moines during the first Obama campaign. He keeps nearby in his office six scrapbooks filled with campaign memos, photos and a variety of scraps of paper, cumulative mementos of an impressive succession of public positions: Assistant U. S. Attorney, 1989-1991; Counsel to the Air Force, 1998-2001; Counsel to the Defense Department, 2009-2012; and Secretary of Homeland Security, 2013 to the present.

In the latest chapter of that career, he has a weighty charge. “I am as much the guardian of our values and liberties as I am the guardian of our physical safety,” he said. The contradictions inherent in those dual responsibilities “are why I’m a lot greyer than I was in 2008.”

THE LINES BETWEEN LAWYER AND GOVERNMENT OFFICIAL

The *Journal* wanted to discuss his present role and how he navigated the transition from private practice to public service; how his legal training, including the ethical precepts of the legal profession, inform his decision-making as he performs his present non-lawyer tasks. Does he think or act differently because he is a lawyer?

Johnson himself has spent a lot of time considering the last topic. In a lecture he delivered in 2012 at Yale Law School, he described as ominous a lawyer-turned-government executive weighing in on a policy decision by saying, “I know I’m not supposed to play lawyer, but...”

That comment may have been a bit tongue in cheek. Perhaps in the spirit of *The Federalist Papers*, No. 35, which identified lawyers as a disciplined group whose public service would help ensure a republican form of

government, Johnson said he relies upon “the things I believe as a lawyer, and have learned as a lawyer. When I was hired to represent a client, I’d master the topic, know it as well as the client, and then be able to explain it to someone who doesn’t know it at all.”

His reading at 6:30 every morning is a highly classified daily intelligence report, compiled for him and containing information provided by the nation’s multiple intelligence agencies. This daily intel requires particularly close analysis and understanding. “All the bad stuff that’s happening in the world ... sometimes you have to sort out what’s credible and what’s not; what’s real and what’s not, because if you took literally everything in the book you’d be scared to death. You have to sort out the noise.

“National security and homeland security involve striking a balance between basic physical security and the law, the liberties and the values we cherish as Americans,” he said. It can be a hard thing to navigate but “it doesn’t hurt to be a lawyer. So much of the law reflects our values and who we are as Americans.”

Johnson feels his ethical training as a lawyer has made a major contribution to the performance of his public duties, and calls his service on the ethics committee of the Association of the Bar of the City of New York a formative experience. For any government official, it is critical “to have a certain basic compass and an instinct for right and wrong.” But a lawyer’s training provides something extra. Rules of professional responsibility, honed by years of making difficult choices, do not stop at the entrance to the Department of Homeland Security.

Johnson’s prior assignments as counsel to the Air Force and later Department of Defense were expressly subject to lawyers’ ethical codes and rules. However, discussing those rules raised an interesting question: Model Rule 1.3 continues the age-old admonition that lawyers should represent their clients with zeal, and Johnson agrees that obligation applied to him when he acted as a government lawyer. “There is no addendum for public service lawyers,” he said. Thus, in his prior counsel positions, he zealously represented his client.

New York Times writer Charles Savage and Daniel Klaidman, in his book *Kill or Capture: The War on Terror and the Soul of the Obama Presidency*, published separate accounts of how Johnson, as counsel to the Defense Department, and Harold Koh, former Yale Law School Dean, as Counsel to the State Department,

zealously represented their clients in two separate disputes. They were asked whether the President was required to formally notify Congress that U.S. military participation in the air war in Libya constituted hostilities within the meaning of the War Powers Resolution of 1973. According to Savage, Johnson said he was and Koh said he was not. Another dispute involved Belkacem Bensayah, an Algerian arrested in Bosnia and accused of helping transport new al-Qaeda recruits. The two men were asked whether he could be detained indefinitely under the rules of war.

QUIPS & QUOTES

In many ways their rivalry reflected a healthy government dialectic that led to smarter and better-justified government policies.

A line from *Kill or Capture: The War on Terror and the Soul of the Obama Presidency*, a book written by Daniel Klaidman that compares how Johnson, as counsel to the Defense Department and Harold Koh, Counsel to the State Department, zealously represented their clients

According to Klaidman, Johnson said that Bensayah had substantially supported al-Qaeda and could be detained indefinitely but Koh disagreed.

Although Johnson declined to confirm or deny either the Savage or Klaidman account, it appears that on at least two occasions, two knowledgeable and highly respected lawyers brought their own analytical abilities to the table, zealously pressed their legal positions, and disagreed; but who was the client for whom each man was advocating?

As Johnson saw it, his client was “that man,” pointing to a portrait of Secretary of Defense Robert Gates; Koh’s client was Secretary of State Hillary Clinton. Johnson said that his political loyalty was to the President who appointed him, but his professional responsibility ran to Gates. Each lawyer was professionally responsible to his client, even though the two clients, and their respective counsels, all worked for the same President. But Johnson did suggest a limit to the separate representation concept, “Sometimes it got a little difficult. I have to represent my client’s point of view, but at some point, there is an overriding responsibility to the ‘greater client,’ the people of this country. Sometimes people can disagree, but we’re all doing what’s in the public interest.”



POLICY ADVICE VS. LEGAL ADVICE

He believes public service by lawyers requires making a clear distinction between policy advice and legal advice, which is not always simple. “Immigration law in particular, is so complex that you can’t be a policy advisor without also opining on the law and legal issues.”

At Homeland Security, Johnson receives advice from lawyers who have been employed to serve the Department as lawyers, and also from lawyers who serve as policy advisors. Johnson said it is essential to keep clearly in mind which function a particular advisor is performing. “Sometimes you have to back away and let the lawyers opine on the law, but you have to be careful that when the lawyer is opining, he is giving you legal advice, not policy advice, because when the lawyer says you can’t do something, that’s a red light. You can’t say I disagree, I’m going to do it anyway.”

Johnson, who is perfectly capable of making legal decisions himself, said he must “be in a position to say, ‘I want to hear a formal legal opinion from my lawyers about whether or not we can do something, yes or no.’” But even if the lawyer says it’s ok, it may not be ok with him. “It is not just about legal values, it’s about ethical values.”

Johnson referred to his 2012 Yale speech in which he spoke of the value of lawyers in government, whether giving advice or receiving it:

Perhaps the best part of my job is I work in the national security field with, truly, some of the best and brightest lawyers in the country. Knowing that we must subject our national security legal positions to other very smart lawyers who will scrutinize and challenge them has made us all work a lot harder to develop and refine those positions. On top of that, our clients are sophisticated consumers of legal advice. The President, the Vice President, the National Security Advisor, the Vice President’s National Security Advisor, the Secretary of State, the Secretary of Defense, the Secretary of Homeland Security—are themselves all lawyers.

Johnson picked up the Klaidman book and pointed to the author’s conclusion about the value of competing legal opinions by lawyers serving in the same administration:

[Koh and Johnson] had more in common than perhaps they cared to admit. Still, the bottom line is that they were serious and intelligent men who struggled with excruciatingly difficult questions

of security, morality and law. In many ways their rivalry reflected a healthy government dialectic that led to smarter and better-justified government policies.

“At least the last line is true,” Johnson said, adding, “but it’s painful to admit it.”

Johnson enthusiastically urges young people to consider a career in national security law, to get into JAG, to join a military service. In the military, “it’s not just about legal judgment but values judgment as well; what kind of values do we want to bring to public service?”

He himself was introduced to national security law as Air Force counsel. The decisions got harder when he became counsel to the entire Defense Department in 2009. It was then that he found himself in the position of having to make what he calls “binary, red light, green light” decisions. Once again, he referred me to the Klaidman book, which described the first time that Johnson had to weigh in on a lethal operation. In forty-five minutes, he had to study and give the White House his opinion whether drone strikes against three terrorist suspects were permissible under the rules of war:

Johnson felt like there was a giant spotlight shining down on him. It was moments like these when he wished he could be just a policy advisor who could fudge his answers. Instead, his choice was binary: green light or red light, you take the shot or you can’t. Johnson gave a split verdict: two of the three were targetable.

Johnson watched the aerial imagery on a monitor at the Pentagon.... Digital images of the attacks were being fed back in real time. Later he would confide to others, “If I were Catholic, I’d have to go to confession.”

In his Yale speech, Johnson defended the legality of targeted strikes, pointing out that “in an armed conflict, lethal force against known, individual members of the enemy is a long-standing and legal practice. What is new is that we are able to target military objectives with much more precision, to the point where we can identify, target and strike a single military objective from great distances.” But, he agreed with Harold Koh, where “rules that govern targeting do not turn on the type of weapon system used.” Later, speaking at Fordham Law School, he added an important gloss, pointing out that those rules must be transparent: “the American public is suspicious of executive power shrouded in secrecy.” ▶

He believes that all three branches of government have made the targeting rules clear.

CALM, RESPONSIBLE DIALOGUE AND DECISION-MAKING

Johnson is heavily involved in the making and enforcement of immigration policy. He was the architect of President Obama's expanded Deferred Action Programs, intended "to focus our enforcement resources on convicted criminals and threats to public safety," by temporarily postponing deportation of illegal aliens whose children are American citizens or lawful permanent residents, and who pass a security check. In early 2015 a federal district judge in Texas issued a stay preventing the "deferred action" policy from being implemented. However, to the degree possible within the financial and manpower constraints under which his Department operates, Johnson is firm on enforcing existing deportation laws. Last January, he commented, "I know there are many who loudly condemn our enforcement efforts as far too harsh, while there will be others who say these actions do not go far enough. I also recognize the reality of the pain that deportations do in fact cause. But, we must enforce the law consistent with our priorities, American values, and basic principles of decency, fairness and humanity."

At the Pentagon, Johnson and Army General Carter Ham prepared a comprehensive report detailing the legal and practical issues surrounding the proposed repeal of the Don't Ask, Don't Tell (DADT) policy. Both men became "convinced that our military can do this, even during this time of war. We do not underestimate the challenges in implementing a change in the law, but neither should we underestimate the ability of our extraordinarily dedicated service men and women to adapt to such change and continue to provide our nation with the military capability to accomplish any mission." *The Washington Post* praised the report for the thorough and respectful handling of a delicate subject, and DADT was repealed.

Johnson said "people in a free society know you cannot erase all risk," and he believes that public officials "owe the public calm, responsible dialogue and decision-making; not over-heated, over-simplistic rhetoric and proposals of superficial appeal." In a speech at Westminster College, he warned against "the dangers of overreaction in the name of homeland security. Both national security and homeland security involve striking a balance between basic physical security and the law, the liberties and the values we cherish as Americans."

Johnson said it is critical to build bridges to the American Muslim community. "Vilifying" the very groups that "ISIL [Islamic State of Iraq and the Levant] targets for recruitment across this country" is both "un-American" and contrary to our national security interests. He held up an English language printout of DABIQ, a slick and sophisticated magazine that ISIL uses as an online recruitment tool.

When we talked, Johnson was still shaking his head in disbelief that on the same day—immediately after the San Bernardino attacks—that he appeared at a mosque in Virginia to emphasize his bridge-building message, Donald Trump was demanding that U.S. borders be closed to Muslims.

A LINEAGE OF PUBLIC SERVICE

Jeh Charles Johnson's preparation for public service began with his family. He is the grandson of Charles S. Johnson, a prominent sociologist who served as President of Fisk University from 1946 until his death in 1956, who was asked by the government to help redesign the Japanese educational system after the end of World War II. Two of his uncles were Tuskegee Airmen. His father, drafted into the Army, served in the Counterintelligence Corps. Members of his mother's family were employed as postal workers in the District of Columbia, and considered serving the American people a privilege. The family adored FDR and made an annual pilgrimage to Hyde Park. He remembers his Uncle Wilbur insisting that his nephew visit the monuments in D.C. at least once each year. "I have a basic respect for this town; I love this town," Johnson said.

His ambition to serve, to make a difference, and to live up to his full potential, was further inspired upon his arrival at Morehouse College in the fall of 1975. He referred to Dr. Martin Luther King, Jr., a Morehouse graduate, class of 1948; his son, Martin Luther King III, a member of the graduating class of 1979 with Johnson; and Martin Luther King Sr., who began his ministry studies at Morehouse in 1926, "so many motivated black men in one place." At Columbia Law School, he abjured the traditional search for a summer law firm internship to work at the NAACP Legal Defense Fund. The firms he had largely ignored during law school attracted him upon his graduation; at first employed by Sullivan & Cromwell, he soon moved to Paul, Weiss, Rifkind, Wharton & Garrison, whose partners, starting with **Simon Rifkind**, a Past President of the College, he held in awe.

Secretary of Homeland Security and Fellow Jeh Johnson spoke on national security during the 2011 Spring Meeting in San Antonio, Texas.



But federal service, as he put it, was in his blood. Thus, in 1989, he accepted an appointment as Assistant U. S. Attorney in Manhattan, and during the ensuing three years tried twelve criminal cases, overcame his fear of public speaking and surprised himself that he was able to speak effectively to jurors without a text.

Two years after he returned to Paul, Weiss, he became the firm's first black partner. Then came the call from the Clinton White House and the Air Force counsel appointment. His second return to Paul, Weiss was not destined to be permanent, as memorialized by a pink telephone slip, dated November 22, 2006, now residing in one of those six scrapbooks. It reads "B. Obama called;" the call back box was checked. "Something overwhelmingly told me that I was being asked to get in on the ground floor of a truly historical event."

Asked if there would be a seventh scrapbook, he answered: "No."

"Is that a definitive 'no'?"

"Yes."

That answer called to mind a quote from the Brookings Institution that, he said, explains why he was motivated to perform public service. "American government was designed to be led by citizens who would step out of private life for a term of office, then return to their communities enriched by service and ready to recruit the next generation of citizen-servants."

Would Johnson write a memoir for his children and grandchildren? No, because "I don't think it would be

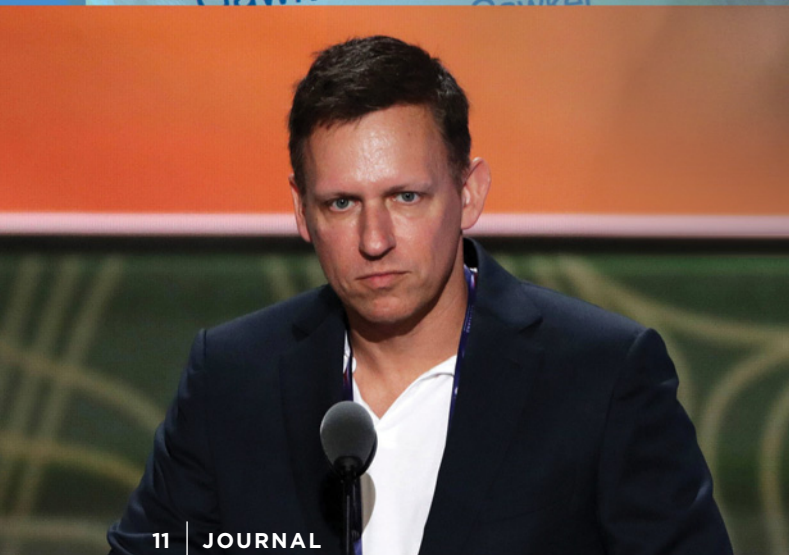
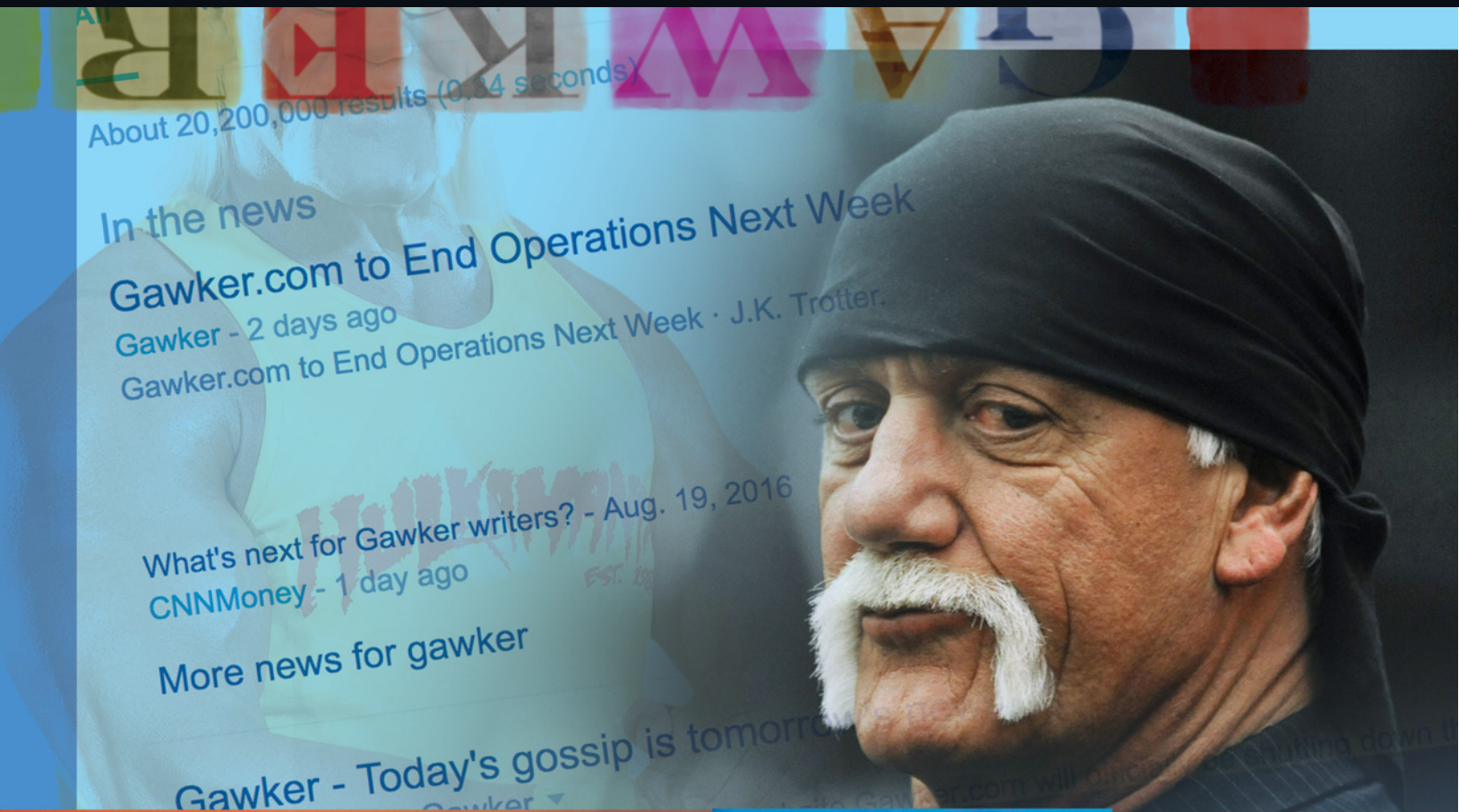
complete or interesting unless I got into things I know I shouldn't talk about ... I'll let others tell the story."

If others do that, they will surely be tempted to make a judgment whether Johnson succeeded in striking the proper balance between protecting security and preserving liberties and the rule of law. He has approved the selective targeting of individual enemy combatants via drone warfare, detention of suspected terrorists captured far from the battlefield and an increased pace of deportations of illegal aliens to the extent resources permit; but has also recognized limitations on the exercise of military power by the President who appointed him; formulated the Deferred Action Programs; played a major role in the repeal of DADT; and continues to place strong emphasis upon building relationships with the Muslim community. He appears determined to use his abilities, as a lawyer and otherwise, to address not only the pre-existing security threats, but also what he calls the "new phase of terror, involving ISIL-inspired attacks rather than ISIL-directed attacks, which are harder to detect because they can strike anytime, anywhere, and require a whole different government response."

In making that judgment, a hypothetical future biographer should consider former Secretary Gates' comments about Johnson, "a straightforward, plain-speaking man of great integrity, with common sense to burn and a good sense of humor," whom he "trusted and respected like no other lawyer I had ever worked with." That would be a good start.

Richard C. Cahn
Huntington, New York

BUBBA THE LOVE SPONGE WIPES OUT GAWKER



You can't make this stuff up, mainly because no one, not even you, has the imagination to come up with the names, much less the scenario. Bubba the Love Sponge directs his occasional swimsuit model wife, Heather (okay, maybe you could have predicted "Heather"), to have sex with his best friend, Terry Bollea, a.k.a. Hulk Hogan, whose obviously self-written website proclaims he is the object of "legendary fan frenzy" and "Hulka-mania." Unbeknownst to Heather or Terry or even the Hulk, the Sponge secretly videotapes the act. The thirty-minute (Thirty minutes? What a Hulk! He never lasted that long in a ring . . .) video somehow ends up being sent anonymously six years later – after all marriages involving Terry, Heather, the Hulk and the Sponge at the time the video was shot have been dissolved – to Gawker, a quasi-news Internet site whose name may be its single most accurate piece of journalism – since "gawk," after all, means "to stare openly and stupidly," and Gawker openly and, as it turns out, stupidly, posts a nine-second excerpt of the video in which the Hulk is depicted, well, hulking. The posting can fairly be described as "stupid" since it leads to a lawsuit by the Hulk against Gawker for invasion of privacy, which leads to a \$140 million jury verdict, which leads to bankruptcy for Gawker. Whew! Got all of that?

But wait, there's more. It turns out that the Sponge was not the only player here with a secret. Unlike other larger-than-life comic figures who boast of funding their own campaigns, the Hulk's was secretly bankrolled by an Internet billionaire, Peter Thiel, the founder of PayPal, who has nursed a simmering grudge against Gawker for years, reputedly because Gawker outed him on his sexual preference. *The New York Times* reports that Mr. Thiel considers his financial backing of cases – yes, multiple cases, to the tune of \$10 million dollars – against Gawker to be "one of my greater philanthropic things that I've done."

To say that this case has generated a fair amount of public interest is an understatement of epic proportion. When was the last (or for that matter, other than this, the first) time you saw a court clerk put a direct link to a single case in a prominent place on his website?

So, well, all of this raises some questions, at least in my mind:

Why would Bubba the Love Sponge ask his wife to sleep with his friend? Why would she say, "Okay, honey?" Why would the Sponge secretly film it? Why . . . wait. Why would we try to make sense of anything done by

someone who is self-named (his momma sure didn't do it) Bubba the Love Sponge? Let's move on to possibly answerable questions.

While the video has long since been pulled and I haven't seen it, and of course I would never (hah!) seek to, the descriptions don't sound as though it was particularly kinky, so what made the release of nine seconds of consensual adult sex worth \$140 million to the supposedly bruised ego of a professional celebrity fake-wrestler who has a penchant for boasting about his sexual conquests?

On what planet is it philanthropic for a billionaire to bankroll private litigation to exact personal revenge against a sort-of news organization? More to the point, whether or not it was charitable, is it legal? And whether or not it's legal, is it good form?

WAS THE THIRD PARTY FUNDING OF THIS LITIGATION PROPER?

Let's start with the battle of the billionaires. Yes, it might surprise you, but not all billionaires, especially billionaires who own media companies, believe it is a good thing for billionaires to attack the media. Jeff Bezos, the founder of Amazon and owner of *The Washington Post*, weighed in after Thiel's involvement was disclosed. The verdict has made for some, if you'll pardon the pun, strange bedfellows. You would hardly think that *The Washington Post* or *The New Yorker* share editorial values with Gawker. But noting the real-world chill that a verdict of this size may have on any media company, those main-stream publications and many others have come to Gawker's defense by lamenting the very idea that a rich guy with a personal vendetta could bring down a media company.

Bezos said it simply: "I don't think a billionaire should be able to fund a lawsuit to kill Gawker."

That's right, Jeff, he shouldn't be able to do it. Champerty! Maintenance! Barratry! Humbugery! Ah, yes, in the good old days, Thiel's financing might have been a tort or even a crime. Off with his head!

Champerty, *Black's Law Dictionary* tells us, is "a bargain made by a stranger with one of the parties to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if he wins the suit, a part of the land or other subject sought to be recovered by the action." Maintenance is similar, except that the stranger has no pecuniary interest in the outcome but "intermeddles officiously." Ah, and ▶

then there is barratry—which *Black’s* informs can mean the practice of exciting groundless judicial proceedings—or in the maritime context, mutiny or other act against the owners of a vessel; or in Scottish law, the taking of a bribe by a judge.

But I digress. Sorry Jeff, but none of these concepts have much relevance in the modern world.

Third party litigation funding is the new black. *Miller UK Ltd. v. Caterpillar, Inc.* (2014) cites extensively to the literature and sums it up:

[T]he costs inherent in major litigation can be crippling, and a plaintiff, lacking the resources to sustain a long fight, may be forced to abandon the case or settle on distinctly disadvantageous terms. Creative businessmen, ever alert to new opportunities for profit, perceived in this economic inequality a chance to make money and devised what has come to be known as third party litigation funding, where money is advanced to a plaintiff, and the funder takes an agreed upon cut of the winnings. If the plaintiff loses the case, the funder may get nothing. Third party litigation funding is a relatively new phenomenon in the United States. The business model has generated a good deal of commentary about and controversy over its intrinsic value to society (or lack thereof depending on one’s perspective).

But the controversy over the value to society of the practice has not led to any real controversy over the legality of the practice. If you have ever sent a dollar to the ACLU or the NRA or the NAACP or the Law Enforcement Legal Defense Fund or any of a zillion others, you have participated in low-tech crowd-funding; and you have probably committed maintenance or barratry – since your financial contribution was likely (or maybe even expressly) used to fund litigation to which you are a stranger and have no pecuniary interest in the outcome. But you have a constitutional right to do it. Half a century ago, in *NAACP v. Button*, (1963), the Supreme Court struck down Virginia’s champerty and maintenance laws as violating the First Amendment, because litigation – and the sponsorship of it – is a vehicle for expressing viewpoints.

In *Miller*, supra at 727, the Court observed that “over the centuries, maintenance and champerty have been narrowed to a filament.” Indeed, the Court cited a case handed down more than 125 years ago, *Dunne v. Herrick*, (1890) for the proposition that champerty and maintenance “have been so pruned away and ex-

ceptions so grafted upon them, that there is nothing of substance left.”

So it isn’t illegal to fund litigation, and if a guy with \$1 to spend has a right to be heard, I can’t think of a legitimate reason to think that a guy with \$10 million to spend does not. So it seems that Thiel has a perfect right to finance litigation against Gawker.

And he has a right, I suppose, to call that philanthropic, just as I have the right to say, “Huh?”

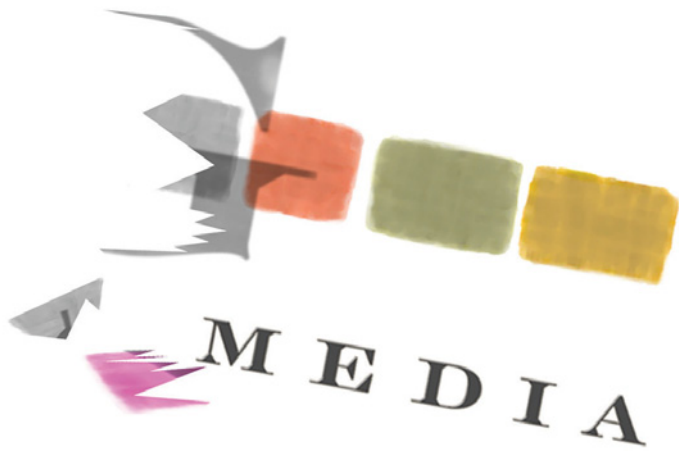
Let’s get out our dictionaries again. Philanthropic means “seeking to promote the welfare of others, especially by donating money to good causes; synonyms include: generous, benevolent, charitable, humanitarian, public-spirited, altruistic, magnanimous, munificent, openhanded, bountiful, liberal, generous to a fault, beneficent, caring, compassionate, unselfish, kind, kind-hearted, big-hearted.”

“Good causes?” Take this simple test: which is a good cause, cancer research or Hulk Hogan’s bruised psyche? “Openhanded?” As a rule, Thiel is open about his philanthropy. See, for example, <http://www.insidephilanthropy.com/guide-to-individual-donors/peter-thiel.html>, which describes his good works in support of science and technology, freedom and humanitarian efforts, and LGBT rights – but is silent on ridding the world of Gawker. There was nothing philanthropic about a secret campaign to destroy an entity, even a possibly unlikeable entity like Gawker.

And here’s the real problem with Thiel’s support. When ten million people each donate a dollar to the cause they believe in, the cause can use that money to support the cause, but none of the contributors has the ability to control the details of the litigation. But when there is only one contributor, he is likely to have a voice – a voice that might even drown out the real cause.

The Hulk’s goal was to recover damages, right? Thiel’s goal was different. Thiel’s agenda was to destroy Gawker.





It was widely reported that the Hulk's lawsuit could have included claims that would have triggered Gawker's substantial insurance coverage – but those claims were expressly not made. A plaintiff who wants to recover wants the insurance to be there so he can collect his judgment; but a silent backer who wants to destroy the defendant wants the defendant to be uninsured and naked. So who made that call?

So is Thiel's involvement troubling? You bet. Is it illegal? Not in the slightest. Is it distasteful? Well, that's a matter of taste, and your palate may be stronger than mine.

SO HOW DID THIS VERDICT HAPPEN?

\$140 million.

Let's start with the fact that there were no sympathetic figures in that courtroom. Scott Adams, the creator of the comic strip *Dilbert*, describes Gawker this way: "How awful is Gawker? Imagine if revenge porn and cancer decided to get married and have an ugly baby with fangs. That would be Gawker. Pure evil." When it learned of Adam's comment, Gawker fired back that Adams is "a run-of-the-mill white nerd racist misogynist. He called us 'pure evil' and 'completely lazy.' Hey—we are only partly evil. But you are completely loathsome. Dork." If that doesn't display journalistic maturity, what does? Adams writes a cartoon, while Gawker wants to be regarded as a news organization, but gleefully admits that it is at least partly evil. I'm guessing that the jury saw evil.

And it couldn't have helped that Gawker's witnesses shot themselves in the head, not the foot, but the head.

Gawker editor A.J. Daulerio testified that "the Internet has made it easier for all of us to be shameless voyeurs and deviants, we love to watch famous people have sex." And then he was asked if there was any celebrity sex tape he would not publish. He responded that he would not publish, perhaps, if the celebrity were a child. "How

old?" a child, he was asked. "Four." Really? Gawker would without hesitation publish a sex tape involving a five-year-old child? It was reported that the jury gasped. Of course they did.

HOW COULD YOU NOT HATE GAWKER?

But then, how could you love the Hulk? When rumors of his sex tape surfaced, Hogan was quoted as saying that he had no idea who his sex partner on the tape might be because he had "banged so many chicks" during a four-month alcohol-fueled screwing bender between the time when he left his ex-wife and met his current wife that the woman could be one of many possible conquests. He went on the Howard Stern Show and other media to cluck about his sexual prowess.

I'm just guessing, but I'm betting that the jury wasn't all that fond of either side. But just like this year's presidential election, the fact that you may not be excited about the choices doesn't necessarily mean you won't vote.

As is now known the jury voted that the Hulk receive \$140 million. Wow. Thompson Reuters' Jury Verdict Research analyzed seven years of wrongful death verdicts from 2006-2012 and found the average award was about \$1.1 million. Sure, that makes sense. The pain of having nine seconds of consensual adult adultery made public is worth 140 lives.

The term runaway verdict comes to mind. But Florida, where the Hulk had his day, and boy, did he ever have his day, doesn't think that caps on noneconomic damage awards, at least in the medical malpractice arena, are constitutional, see *McCall v. United States*, (2014), so it is not clear that the courts will find the jury ran excessively. Gawker's motion for new trial or remittitur has been made and denied. Gawker has appealed, but faced with the reported \$50 million cost of an appeal bond, it has also filed for bankruptcy protection.

Florida Appellate Courts review a trial court's order denying a motion for remittitur for abuse of discretion, *City of Hollywood v. Hogan* (2008). And Florida law requires that "awards of damages be subject to close scrutiny by the courts and that all such awards be adequate and not excessive" (2010).

So stay tuned. That's all Bobba The Amorous Moistette has for now . . .

Robert L. Byman
Chicago, Illinois



A VOIR DIRE FIT FOR THE FRAMERS: DESCRIBING INDIVIDUAL VOIR DIRE FROM THE FEDERAL CRIMINAL TRIAL CONCERNING THE BP DEEPWATER HORIZON OIL SPILL

The right to trial by jury has been a centerpiece of American government since before the founding. In fact, the Framers thought the right so vital that King George III “depriving us in many cases, of the benefits of Trial by Jury” was one of the grievances important enough to be enumerated in the Declaration of Independence. Extolled by Alexander Hamilton in *Federalist No. 83* as “the very palladium of free government,” the right to trial by an impartial jury was accordingly enshrined in the Sixth Amendment (along with the jury rights guaranteed by Article III and the Fifth and Seventh Amendments). As Chief Justice John Marshall opined when sitting as the trial judge for Aaron Burr’s 1807 treason trial:

The great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of the mind. I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it. This is not to be expected, certainly the law does not expect it, where the jurors, before they hear the testimony, have deliberately formed and delivered an opinion that the person whom they are to try is guilty or innocent of the charge alleged against him. The jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those preconceived opinions which will resist those impressions. All the provisions of the law are calculated to obtain this end.

The peremptory challenge both enables—and is enabled by—vigorous and probing voir dire. Blackstone chronicled the peremptory challenge’s roots in the common law. And the Supreme Court has repeatedly held



“the very availability of peremptory challenges allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror’s hostility through examination and challenge for cause.” Yet voir dire in federal criminal cases is becoming a lost practice. Many judges do not allow the attorneys to ask questions, even though the attorneys know the case better than the court. And the judge-led examination sometimes discourages honest answers: “Can everyone follow my instructions?” is akin to asking “Raise your hand and be embarrassed if you will not follow the law.” Yet we know that all jurors (like all people) bring express and implied biases that make them “better” jurors for some cases than others. If jury service is important to the parties and the justice system and to the jurors themselves, then a more productive voir dire only makes sense—a voir dire like the one recently conducted in the federal criminal trial of *United States v. Kaluza* in New Orleans.

UNITED STATES V. KALUZA: BACKGROUND

Kaluza was the last criminal trial arising out of the 2010 “BP” oil spill forty-eight miles off the Louisiana coast. The explosion in April of that year caused eleven deaths and the largest oil spill in U.S. history. The President and Attorney General announced a “task force” to identify and punish the perpetrators. In 2012, a grand jury in New Orleans charged two supervisors on the rig with eleven counts of “seaman’s [negligent] manslaughter,” eleven counts of “reckless manslaughter,” and one count of negligent water pollution. The defendant, Robert Kaluza, found the courage to defend himself all the way through trial, eventually defeating all twenty-three counts.

First, the District Court dismissed the “seaman’s manslaughter” counts, because that 1852 law applied only to the “marine” crew of a vessel, such as the captain or pilot or engineer, and not to employees engaged in special, non-marine work such as drilling. The government appealed, and the Fifth Circuit affirmed that dismissal. Second, the defense raised factual and legal challenges to the “reckless manslaughter” counts, and new management at the DOJ reconsidered and voluntarily dismissed those counts. See Defendants’ Joint Motion to Dismiss, *United States v. Kaluza*, Case No. 2:12-cr-00265-SRD-MBN (E.D. La. Aug. 13,

2015), (No. 191); United States’ Motion to Dismiss (Dec. 2, 2015), (No. 246); Order Granting Dismissal (Dec. 2, 2015), (No. 250).

The remaining pollution count proceeded to jury trial on February 16, 2016.

TAKING TIME TO BE FAIR: THREE STEPS TO A FAIR JURY

The trial was assigned to the Honorable Stanwood Duval. A 1966 graduate of the LSU School of Law, Judge Duval spent twenty-five years as a practicing attorney (both in private practice and government service) before his appointment to the U.S. District Court for the Eastern District of Louisiana in 1994. He had many notable cases, including much of the litigation arising from Hurricane Katrina. Set to retire this year, *Kaluza* would be among the last trials of his career.

Judge Duval devised a three-step plan to pick a fair jury in the case:

First, about six weeks before trial he sent a questionnaire to all potential jurors. The form was created after he invited the parties to submit “agreed” questions plus any other questions either side wanted that were not agreed. Judge Duval had the final say in crafting the questionnaire. In the end, he submitted forty-eight questions to the jurors, including ones such as:

- Rank from 1 to 10 how you feel about topics such as oil companies, BP, offshore drilling, prosecutors, and defense lawyers ... and explain why for each.
- Have you, any family members or close friends ever had a particularly good or bad experience with any local state or federal agency, including any law enforcement or environmental agency? If yes, please explain:
- Some of the witnesses in this case will be federal agents or other law enforcement officials. Would you be inclined to believe their testimony: More than; The same or; Less than the testimony of an ordinary citizen? Why?
- Do you have an opinion about the government’s use of cooperating witnesses or about people who have entered into plea agreements that

would make it difficult for you to sit as a fair and impartial juror in this case?

- What are your feelings or opinions about drilling for oil in the Gulf of Mexico?
- Under the United States Constitution, a person accused of a crime does not have to testify in his defense or present any witnesses, and his silence may not be used against him. Would you have any difficulty following the Court's instructions on this point?
- How strongly do you agree with the following statement: BP did the best they could to contain the Deepwater Horizon oil spill. (0 = strongly disagree, 10 = strongly agree). Why do you feel this way?
- Do you or have you participated in any chat rooms or comment forums, or do you ever blog? Explain.

The completed questionnaires were returned and shared with the parties one month before trial—with an order that neither party was to do any Internet research or other investigation into the jurors other than review the questionnaires.

Second, one week after sharing the questionnaires, Judge Duval asked each side to suggest jurors who should be struck for cause based solely on their written answers, and he met the lawyers to see if any could be struck by agreement. This meeting was surprisingly successful, as the parties agreed to strike thirteen jurors. Reasons for strikes ran the gamut from extreme personal hardships, to special knowledge of the subject matter of the case, to extreme views—pro or con—of law enforcement or environmental issues.

Third, and critically, came the voir dire itself. Judge Duval installed a conference table at the front of the courtroom, where he and the lawyers and court reporter

sat out-of-hearing from the rest of the court. (Classical music fills his courtroom during sidebars.) The judge called jurors up one by one for questioning. He expressed interest in each juror - where they lived and worked and what service would mean to them—and made them feel as comfortable as possible. He asked each juror what he or she had heard or read in the media about the case, but he then let each side ask questions on any topic reasonably related to their service. It only took ten minutes per juror, but in that “private” setting, jurors were open and talkative—even emotional—about the issues. The interviews revealed only two or three more jurors who were struck for cause—showing the wisdom of the “second” step above, which saved time during voir dire. After four or five hours, there was a sufficient pool from which to exercise peremptory strikes, and the remaining jurors were dismissed.

WAS IT WORTH IT?

The *Kaluza* case was highly publicized, but Judge Duval's voir dire is equally valuable in any kind of case. Juries make decisions that change lives. Judge Duval's method made them feel more invested in the process. The jurors felt they were “selected” based on full information. They were remarkably attentive during the trial. This is as important in a “felon in possession” case as in one as complex as *Kaluza*, as important in a civil case as a criminal one. And the jury selection was finished within one day. Judge Duval indicated afterward that these few extra hours contributed to the fairness of the trial.

After twenty-one years on the bench, Judge Duval is retiring this year. He had a long and distinguished career, and his method of voir dire was the fairest to be found. Perhaps his example will inspire others to try it.

David Gerger

Houston, Texas

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

AWARDS & HONORS

MICHAEL P. BRADLEY of San Francisco, California was voted Trial Lawyer of the Year for 2016 by the American Board of Trial Advocates for California (CAL-ABOTA). Bradley is also serving as President of CAL-ABOTA for 2016. He has served on the Attorney-Client Relationships Committee and has been a Fellow since 2006.



THOMAS G. FRITZ of Rapid City, South Dakota was recognized with the McKusick Award by the South Dakota Student Bar Association (SBA). The SBA selects the recipient based on their contributions to the legal profession. It is named after Marshall M. McKusick who became a law professor at the University of South Dakota School of Law in 1902 and dean in 1911. He served in this capacity for nearly five decades. Fritz is South Dakota State Committee Chair and has served on the following committees: Access to Justice and Legal Services; Emil Gumpert Award; Heritage; and Sandra Day O'Connor Jurist Award. He has been a Fellow since 1998.



ANTHONY R. "TONY" GALLAGHER of Great Falls, Montana received the 2016 Ninth Circuit John Frank Award during the opening session of the 2016 Ninth Circuit Judicial Conference. The John Frank Award recognizes a lawyer who has "demonstrated outstanding character



and integrity; dedication to the rule of law; proficiency as a trial and appellate lawyer; success in promoting collegiality among members of the bench and bar; and a lifetime of service to the federal courts of the Ninth Circuit." The late Mr. Frank was a renowned attorney in Phoenix who, over the course of a 62-year career, argued more than 500 appeals before the Arizona Court of Appeals, the Arizona Supreme Court, the Ninth Circuit Court of Appeals, other federal circuit courts and the U.S. Supreme Court. Gallagher has been a member of the Federal Criminal Procedure Committee and has been a Fellow since 2013.

ALAN G. GREER of Coral Gables, Florida was the recipient of the David W. Dyer Professionalism Award from the Dade County Bar Association at its 100th Anniversary Gala in June. The award was established in 1997 to honor the memory of Judge David W. Dwyer, one of Florida's most respected jurists, and is conferred annually to lawyers or judges who exemplify Judge Dyer's conduct and character. Greer was selected for his role in reflecting Judge Dyer's integrity, humility, compassion, and professionalism. A former Trustee of the U.S. Foundation of the College, he has served as chair of the following committees: Florida State Committee; Professionalism; and Task Force on Lawyer Advertising and Related Issues. He has been a member of these committees: Complex Litigation; Federal Rules of Evidence; Florida State; Legal Ethics and Professionalism; and Professionalism. He has been a Fellow since 1992.



WILLIAM C. HUBBARD of Columbia, South Carolina received the prestigious 2016 Burton Award for Leadership. The Burton Awards, which recognize major achievements in the law, recognized Hubbard for his leadership to the legal profession and for advancing the rule of law during his service as president of the American Bar Association. He has been a Fellow since 2002.



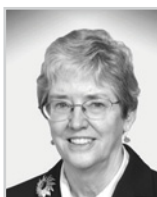
PATRICK T. O'CONNOR of Savannah, Georgia was installed as president of the State Bar of Georgia during the organization's annual meeting. He is Georgia State Committee Chair and has served on the National Moot Court Competition Committee and Technology Committee. He has been a Fellow since 2007.



HERSCHEL E. RICHARD of Shreveport, Louisiana was selected by the Louisiana Bar Foundation as recipient of the 2015 Distinguished Attorney Award. This recognition is given to individuals who have distinguished themselves in their legal career and have brought credit and honor to the legal profession. He served as Louisiana State Committee Chair. He has also been a member on the following committees: Access to Justice and Legal Services; Adjunct State; and Louisiana State. He has been a Fellow since 1988.



SYLVIA H. WALBOLT of Tampa, Florida received the 2016 John Paul Stevens Guiding Hand of Counsel Award from the American Bar Association's Death Penalty Representation Project. Walbolt was unanimously chosen by the ABA Death Penalty Representation Awards Committee, which received a record number of nominations this year. First presented to U.S. Supreme



Court Justice John Paul Stevens in 2011, the Guiding Hand of Counsel Award is given annually to a lawyer who demonstrates exceptional commitment to providing pro bono counsel for individuals facing death sentences. She has served on the following committees: Chair, Access to Justice and Legal Services; Chair, Florida State; Chair, Griffin Bell Award for Courageous Advocacy; Chair, Samuel E. Gates Litigation Award; Chair, Teaching of Trial and Appellate Advocacy; Admission to Fellowship; Long Range Planning; and Regents Nominating. She has been a Fellow since 1981. She was the second woman named a Fellow of the College.

W. SCOTT WELCH III of Jackson, Mississippi was presented with the Capital Area Bar Association's 2016 Professionalism Award. The award recognizes the exemplary professional careers of lawyers in the Capital area who have demonstrated consistent adherence to professional standards of practice, ethics, integrity, civility and courtesy; encouraged respect for, and avoided abuse of, the law and its procedures, participants and processes; and who have shown commitment to the practice as a learned profession, to the vigorous representation of clients and to the attainment of the highest levels of knowledge and skill in the law and contributed significant time and resources to public service. He has been a Fellow since 1994.



J. MICHAEL WESTON of Cedar Rapids, Iowa was elected President of the National Foundation For Judicial Excellence at its 2016 Annual Symposium in Chicago on July 15, 2016. Founded in 2004, the mission of the National Foundation for Judicial Excellence is to support a strong, independent, responsive judiciary by providing officers of the courts with educational programs and other tools that enable them to perform at their highest level. Weston has been a Fellow since 2015.





PRESIDENT'S PERSPECTIVE

COLLEGE PRESIDENT MICHAEL W. SMITH

Mike Smith's tenure as the 66th President of the College continued a long-standing history of exceptional leadership. His stewardship of the College standards, traditions and values will help ensure its continued status as the premier trial lawyer organization in North America. Initiatives started during his term will help propel the College to new heights in a fast-changing world. Mike reflects on the state of the College and reports that the organization is in excellent shape with his friend President Bart Dalton about to take the helm.

Q: What is your “elevator speech” regarding the state of the College?

I'm delighted to report that the state of the College is as strong as ever. Our membership totals around 5,900 Fellows. Our Fellows are exceptional lawyers, with many and varied interests, and some of the most collegial and fun people I've ever known. They are committed to the standards and ideals of the College, which support and advance the very foundation of our legal system for the betterment of attorneys, the judiciary and law students. Our Fellows give countless hours of service to the College through the work of our Board of Regents, the 33 General

Committees and 61 State and Province Committees in the United States and Canada. I thank everyone for their service and contributions, and I encourage all Fellows to find a way to engage in our work. I promise you'll be glad you did.

Q: When you began your term, you outlined many areas of priority for the 2015-16 year. Let's start with the first one, “Preserving the independence of the judiciary.” What are some of the major accomplishments under this banner?

The “independence of the judiciary” is a priority and remains one for the College. That the College remains vigilant is exemplified by three situations occurring this year: in Kansas, Fellows successfully challenged special legislation aimed at limiting the role of the court which was ultimately declared unconstitutional. The genesis of the legislation was a governor bent on payback for a decision with which he disagreed. A unanimous Kansas Fellowship backed the Court's position. Secondly, when a political candidate went after a sitting trial judge and his rulings in a case involving the political candidate, the College immediately responded with a press release reaffirming its position against unwarranted attacks against the judiciary. In Virginia, the governor used intemperate remarks in assessing why a majority of the Virginia Supreme Court reversed a program instituted by him, including a lack of integrity. The College responded quickly with an op-ed article objecting to the governor's comments and supporting the independence of the Court's decision-making process.

The College will continue to monitor situations of interference and speak when appropriate to do so under the College standards.

Q: An important new initiative this year was the creation of a formalized diversity initiative. Can you please summarize its status?

For at least as long as I have been involved, the College has been proactive in its approach, trying to identify for consideration every exceptional trial lawyer from whatever walk of life. While the College has increased the number of qualified female and minority Fellows, we can do better. The current initiative commenced with the Board's adopting and publicizing a Diversity Statement, which is now carried prominently in our Roster. To make sure that the Diversity Statement had teeth, the Diversity Subcommittee, a part of the Admission to Fellowship Committee, was appointed with the charge of maximizing our efforts through recommendations while maintaining explicitly our standards for Fellowship. The Subcommittee suggested to the Executive Committee guidelines to assist State and Province Committees in focusing on all appropriate practice areas and organizations. Additionally, it suggested potential contacts best suited to identifying diverse, qualified candidates. Along with the creation of locally tailored plans aimed at helping to enhance the diversity, an appropriate level of accountability is built into the process. The Executive Committee recommended to the Board a plan of implementation based on the Diversity Subcommittee's recommendations. The Board has approved the implementation plan and it will be implemented now.


Q: The College is very committed to "assisting our veterans in navigating the process of appealing denials of benefits before the Board of Veterans Appeals." Can you update us on these efforts?

We launched this initiative a few years ago. It takes, on average, four years for an appeal to make its way through the process. Meanwhile, some veterans die before their appeals are heard, much less decided. The political branches of government have been

unable, for whatever reason, to adequately address the problem, and the College's offers to assist the bureaucracy have fallen on deaf ears or were disregarded. The problem continues unabated. **John Chandler**, of King & Spalding as chair of our Special Problems in the Administration of Justice (U.S.) Committee, has been deeply involved with others working for the past few years to resolve the problem amicably. Faced with no other alternative, John and two other Fellows, **Beth Tanis** of King & Spalding and **Steve Raber** of Williams & Connolly, were the lead attorneys in filing a Petition for Writ of Mandamus and Other Relief with the United States Court of Appeals for Veterans' Claims on July 21, 2016. The suit was filed on behalf of 17 veteran plaintiffs or their survivors, asserting that the long delays are violative of plaintiffs' due process rights and, hence, unconstitutional. The suit seeks an order requiring the VA to eliminate the delays in the appeals system. We are all grateful to the Fellows who have undertaken this effort on a pro bono basis.

Q: An important organizational service to the Fellows is, "presenting each year two national programs of the highest quality." What can you tell us about the success of the Spring Meeting in Maui?

The Spring and Annual Meetings, as we know them today, are hallmarks of the College. They really got their start through the work of a Retreat Committee in Williamsburg, Virginia in 1986. **Griffin Bell** was the President and **Harvey Chappell** was President-Elect, and together they led the retreat. The subject involved the College's "going it alone", a daunting thought with no guarantee of success. Prior to that time, the College held a dinner in conjunction with ABA meetings.

The meetings have grown over the years to include not only a social gathering, but Committee meetings, sometimes CLE, and always Friday and Saturday morning sessions with between six and eight speakers on varied and interesting topics. The quality of these two meetings, and their venues, are second to none and remind us why our founders insisted on a collegial enterprise as a standard for College events. 



Q: So much of the work of the College is accomplished in Regional, State and Province meetings. What can you share about the important work being undertaken by Fellows across the organization?

In many respects, the College is a “bottom up” organization relying on its State and Province Committees and their meetings to serve several purposes. In addition to carrying out the core function of identifying worthy candidates for Fellowship, the State and Province meetings have become adjunct participants with the standing committees and ad hoc committees, both in providing social time together and in carrying out the Missions of the College through the institution of wide-ranging programs. The Regional meetings, while generally of more recent vintage, serve many of the same purposes. Notably, all of these meetings provide another avenue for our Fellows to participate in the College when, for whatever reason, they are unable to attend the Annual or Spring Meetings. These meetings are instrumental as well in identifying for consideration concepts and programs which are relevant to and form the basis of College programs, including programs at the National level.

President Mike Smith, Regent Bob Warford; and Alejandro Barajas, Loyola Immigrant Justice Clinic Staff Attorney during the 2nd Annual Immigrant Justice Clinic Reception where Smith presented the Clinic with the Emil Gumpert Award check for \$100,000.

Q: The College sponsors two Foundations, one in the United States and one in Canada. They provide significant grants to organizations that are dedicated to the improvement in the quality of trial and appellate advocacy, the ethics of the profession and the administration of justice. How would you describe the impact of these grants?

My answer to this question will hopefully lead to stepped up participation by our Fellows in our contributions. After all, the College is much more than just a group of collegial, elite lawyers who appreciate each other’s company and good times. The Foundations serve the public and professional interests and they put our money where our mouths are. How, you might ask? Here are but a few of the many examples:

- By providing a \$100,000 grant through the Emil Gumpert Award to the Loyola Immigrant Justice Clinic which has become an outstanding enterprise of young, bright law students helping an underserved segment of our population in California navigate the legal world;

- By providing a \$50,000 grant to Emory University School of Law Volunteer Clinic for Veterans;
- By funding grants available to our public interest lawyers to help defray their expenses when attending State, Province and Regional Meetings of the College

The list goes on and on. Please support the Foundations and help with their efforts to keep the right public face on the College.

Q: What other thoughts do you have as you reflect over your term?

There are too many to list, much less discuss in any detail. A couple of matters, however, are never too far from my thoughts – one personal and the other College business related.

One is a need to thank everyone who helped make this year possible for Ellen Bain and me. Traveling the United States and Canada, seeing old friends and making new ones, seeing North America and experiencing the sights and sounds were made possible only by being lucky enough to be appointed to the office. It has been a wonderful gift indeed. Every trip serves to remind one of just how unique our institution is—inspired by the quality, excellence and downright genuine friendliness of the Fellows and the spouses, significant others and friends. Our geographical reach requires a President to give of his or her time in large quantities, but the payback far exceeds the race.

As to the business of the College, it became clear that we had let slip communicating internally with our Fellows about all the good things happening with the College. We have this year attempted to turn that situation around, increasing communications across the board in the hopes that all Fellows will be inspired to take advantage of what the College has to offer



President Smith during the 2015 Annual Meeting in Chicago when he was installed as President.

and become as involved as their busy schedules will allow. Our meetings aside, there are three basic ways for the College to communicate with our Fellows. Our *Journal* is an award-winning publication, but it is published only three times a year. So, with the permission of the Board, and the hard work of a specially appointed Committee comprised of Fellows, members of our staff and être Communications, the new eBulletin has come to life. As presently constituted, the aim is an every-other-month publication, brisk and to the point, identifying a smorgasbord of events and activities going on in and around the College. It will certainly augment the *Journal* but will use a different format and distribute information in a different way. Lastly, our technology system consisting of a database and website, will be further enhanced in the fall of 2016, making the staff's job more efficient, and our Fellows' relationship with the College more connected. ■

PERSONAL HISTORY — VOLUNTEER LEGAL WORK IN FOREIGN COUNTRIES

I have practiced law for fifty-six years, including ten years as a federal prosecutor and then as a criminal defense lawyer in Portland, Oregon where I have specialized in defending those accused of fraud and white collar crime. I have also defended high-ranking Serbian army officers in war crimes cases before the International Criminal Tribunal for the Former Yugoslavia located in The Hague, Holland. But perhaps my most satisfying period in the practice of law has been my work as a volunteer lawyer helping governments overseas.

My volunteer work started in 1998 when I was 65-years-old. By that time, I felt that I was becoming too comfortable in my role as a criminal defense lawyer. While the facts of each case were usually interesting and varied, the process was pretty much the same—investigate the case, attempt to persuade the government not to prosecute, enter into plea negotiations or go to trial. In short, I wanted to shake my life up a bit. It was while in this mood that I saw a blurb in the Sunday *New York Times* announcing that the American Bar Association was looking for volunteer lawyers to assist countries in Eastern Europe and central Asia to help establish the rule of law following the break-up of the Soviet Union in the early 1990s.

I traveled back to Washington, D.C. to interview for the position of criminal law liaison with the ABA's Central European and Eurasian Law Initiative (CEELI). A few weeks later, I received a call from a CEELI representative who asked me if I would like to be a volunteer lawyer for six months in the country of Moldova. I said, "Great, where is it?" Moldova sounded to me like a *Mission Impossible* country, but I was assured that it really did exist. It's a small country located between the Ukraine in the east and Romania in the west with its southern border very close to the Black Sea. Moldova is about the size of Maryland with close to 4.5 million people, ethnically diverse, mostly people of Romanian descent, but with a substantial number of its citizens being of Ukrainian and Russian heritage. Both Romanian and Russian are spoken throughout the country. I worked primarily in the capital city of Chisinau, a city of some 750,000 people. I lived in a funky, but comfortable rented apartment whose only shortcoming was no hot water in the kitchen. My living expenses were paid by CEELI.

The Moldovan government had requested an ABA representative to generally assist Moldova in reforming its criminal laws and procedures. I was the first CEELI criminal law liaison in Moldova. My job was to help the country modernize and reform its criminal justice system. To do the job, I had to find out quickly as much as I could about Moldova's criminal justice system. The first difficulty was that, amazingly enough, there was no manual in Moldova which explained the country's criminal justice system. Indeed, no manual existed in either language, Romanian and Russian, let alone in English.

Therefore, the only way really to learn the practices of the Moldovan system was to visit and interview the best people in the legal community. So, during my



first several weeks in Moldova, I did just that, along with my full-time interpreter. It is always useful to know the language of the country, but foreign language skills are usually not necessary on these types of projects since the country involved will make available the services of an interpreter.

Incidentally, many of these interviews were accompanied by large amounts of cognac, wine and vodka. The Moldovans love to eat and drink, especially drink, and Moldovan-made wines and cognacs are wonderful and consumed in large amounts. You could get a good bottle of wine for about a dollar. After several of these eating and drinking fests, it occurred to me that, contrary to my original hope when I embarked for Moldova, I was not going to realize my lifelong dream of becoming lean and fit!

THE NEEDS OF A HOST COUNTRY COME FIRST

One thing I quickly decided: I would make no effort to suggest wholesale revisions of the Moldovan criminal justice system based on the American system. One of the key principles of the CEELI organization is that projects are designed to be responsive to the needs and priorities of the host countries and not to those of the United States' participants or sponsors. We have a very complex criminal justice system in this country, particularly our federal system. We have intricate laws on bank reporting, money laundering, large-scale drug dealing, economic crimes and the like. While I made the Moldovans generally familiar with these laws and created a basis perhaps for future enactment, it was clear to me that the one part of the Moldovan criminal justice system most in need of reform was the lack of a guilty plea procedure.

Fellow Norman Sepenuk, center, led a training seminar in 1999 for judges, prosecutors and defense lawyers in Chisinau, Moldova.

After a few days in Moldova, it struck me that every criminal case in that country went to trial. This seemed to me to be a vast waste of legal and judicial resources in an already very poor country. There was no guilty plea procedure, primarily because the Moldovans, who had lived for decades under the yoke of Soviet communism, associated guilty pleas with the old Soviet policy of beating confessions out of suspects and otherwise applying coercive measures to force admissions of guilt.

The dissolution of the Soviet Union had occurred in the early 1990s, but when I arrived in 1999 the Moldovans in the legal community still had bad feelings and memories of what had occurred all too often under the Soviet system. Accordingly, when I first made my proposal to at least discuss the possibility of guilty plea legislation, I was met with generally polite but very firm opposition by most of the more influential members of the legal community. The Moldovans were also concerned that plea-bargaining between the prosecutor and the defense lawyer could usurp the sentencing power of the judge. To alleviate these concerns, I had numerous discussions with prosecutors, defense lawyers, judges, law professors and members of parliament.

As the opposition of these groups to guilty plea legislation gradually became somewhat less vehement, I was able to conduct a number of plea-bargaining scenarios in various cities in Moldova (most of them being in Chisinau, the capital city) consisting of a prosecutor, defense lawyer and judge. These plea bargaining scenarios were staged by me and several of my American CEELI counterparts, working in countries in Central and Eastern Europe, who traveled to Moldova for these



conferences. These training sessions showed that the American system worked, that a guilty plea was only accepted by the judge after a most careful inquiry into its voluntariness and the nature of the crime and the evidence surrounding its commission. It became clear that the decision whether to accept the plea, the ultimate sentence, is solely in the discretion of the judge after close questioning of the prosecutor, the defense lawyer and the defendant.

After leaving Moldova, I was gratified to learn from my colleagues there that the Moldovan legislature did indeed enact guilty plea legislation based on our efforts. I should add that, as a criminal defense lawyer, a not guilty verdict or persuading the government not to prosecute your client is most gratifying. But what was equally, if not more, satisfying to me after my six-month stay was to help enact this guilty plea legislation that was for the benefit of the entire country and not just one person.



FROM UZBEKISTAN TO BOSNIA TO CAMBODIA

As another example of my volunteer service, in the year 2000, I lived for one month in Tashkent, Uzbekistan, working at the request of ABA-CEELI. My work there generally involved training sessions I conducted for prosecutors, defense lawyers and judges on various aspects of the American criminal justice system with a view to assisting

Uzbekistan to develop similar procedures in their own country (such as bail reform and money laundering legislation) that would be beneficial.

In 2001, again as an ABA-CEELI volunteer, I lived in Brcko, Bosnia (Brcko was a small but strategically important town during the Balkan War), for one month following the enactment in Bosnia of a new Code of Criminal Procedure based largely on the American model. I conducted a number of training sessions on these new procedures for the benefit of defense lawyers, prosecutors and judges.

My most recent volunteer service was for a five-week period in 2010. I responded to a request from the International Senior Lawyers Project, an organization based in New York City, which invites senior lawyers to volunteer their time on a wide variety of projects in developing countries around the world. ISLP connected me to a group called International Bridges to Justice, based in Geneva, Switzerland, which sponsored criminal law reform projects. My mission was to conduct training sessions in Cambodia on advocacy and trial tactics for criminal defense lawyers. I lived in Phnom Penh during this period.

I should mention that Cambodia, a country of over 14 million people, had only about 750 lawyers at that time. This was due to the legacy of the large-scale killings of the intelligentsia perpetrated by the Khmer Rouge some decades before and its continued deleterious impact.

While in Cambodia, aside from these training sessions, I wrote a manual for criminal defense lawyers setting forth what I believed to be the most persuasive and effective manner of presenting the defense case, from opening statement to closing argument. This manual took into account that there were no jury trials in Cambodia, and that its criminal code and procedure are largely based on the continental-civil law system of their former colonial occupier, France.

While working on this manual, I was not exactly thrilled with the ridiculously hot, humid weather and the perils of the rainy season where knee-deep water in the streets was a common occurrence. But it was all worth it when I submitted a draft of the manual to the smiles and appreciation of my Cambodian colleagues and friends.

My volunteer service has been fittingly limited to working on criminal law reform since that is my area of expertise. However, help is needed from experts in many areas of the law. For example, the International Senior Lawyers Project is currently seeking “highly experienced lawyers to provide pro bono legal services to non-governmental organizations, developing country governments and other institutions in an effort to promote human rights, the rule of law and equitable economic development throughout the world... Experience in legal areas such as criminal law, litigation, human rights law, commercial law, natural resources law, environmental law, media law and many others are especially welcomed in the work we do with our global partners.”

OVERSEAS WORK IS TRIAL WORK IN DISGUISE

The former ABA CEELI program has expanded to become the ABA Rule of Law Initiative (ROLI). ROLI implements legal reform programs in fifty countries in Africa, Asia, Europe and Eurasia, Latin America and the Caribbean, the Middle East and North Africa. The ROLI program requests volunteer assistance from lawyers and judges in a variety of areas, including access to justice and human rights, anti-corruption and public integrity, criminal law reform and anti-human trafficking, judicial reform, legal education reform and civic education, legal profession reform and women’s rights.

Other volunteer opportunities abound, as an Internet search makes readily apparent.

I have previously mentioned my own reasons for embarking on volunteer work overseas. This may strike a chord with other Fellows but of course there are infinite reasons that motivate us either to accept our life as it is or to strike out in new directions. I found these volunteer projects to be most rewarding in terms of the work itself, the professional satisfaction it provided, and the overseas friends that I made and still have.

Indeed, the comments of one of our Fellows, U.S. Magistrate Judge **Carolyn Ostby**, are most apt here. Judge Ostby recently returned from doing volunteer work for the State Department in Egypt, Jordan and Mexico. Here is what she said about this work:



Judge Victor Pușkaș, President of the Supreme Court of Moldova, left, with Fellow Norman Sepenuk, right. Judge Pușkaș was also head of the Moldovan Procedural Reform Committee.

“Because each trip is different, it is hard to give members of the College an idea of what they would be getting into if they sign up, other than to say that they certainly have the skills to respond and contribute if they are interested. Like trial work, it requires lots of preparation in advance of the trip (sometimes on short notice), being comfortable with uncertainty in programming, and the ability to react on the fly—all things that College members are familiar with! It is fascinating, rewarding, and sometimes frustrating work. I encourage members to volunteer. I hope they will come away, as I have, very impressed with and grateful for those fellow citizens who make this their life’s work.”

By the end of my six-month stay in Moldova, I think it’s fair to say that I became a bit grandiose about my country, Moldova. American volunteers become quite proprietorial about their countries. There was a farewell party for me with the usual staggering amounts of alcohol and outlandishly overstated speeches of thanks by Moldovan judges and lawyers and indeed by yours truly. In this euphoric state, I ended my toast to the group with the words I end with here: “Today Moldova, tomorrow the world!” ’Nuff said.

Norman Sepenuk
Portland, Oregon



NEW MEXICO FELLOW, VETERAN RECEIVES LONG OVERDUE DIPLOMA

He grew up in a small mountain village in northern New Mexico and was on track to graduate from the local high school when he was drafted into the military at the end of his junior year.

He served as a military police officer in Germany where his exceptional intelligence and knack for languages caught the attention of his superiors. He was assigned to military intelligence and trained to speak fluent Russian and German. While in the service he earned his GED certificate, but of course did not have the opportunity to participate in a graduation ceremony. After he completed his service, he returned home and went on to earn degrees from New Mexico Highlands University and Georgetown University.

On May 27, 2016, seventy years after being drafted, he returned to his hometown, put on a cap and gown, and marched with thirty seniors who were graduating from his old high school. He was the last in line of the graduates. The high school was in Mora, New Mexico, population of 5,000. This esteemed graduate and Fellow of the College since 1977 was **Matias A. Zamora**.

The idea to present Zamora with his diploma came from the youngest of his five children, Santa Fe Public Schools general counsel and former city attorney Geno Zamora. The elder Zamora was escorted during the graduation procession by his daughter Monica, a judge on the New Mexico Court of Appeals.

Zamora grew up on a small family farm along with five other siblings. He was 18 in 1945 when he was drafted. He was first bused to Fort Hood, Texas. Zamora has said that he was very surprised, after having been raised bilingual in a community where Spanish ancestry was highly valued, to find signs in business windows around the town announcing “No dogs or Mexicans.” It was, he said, “a very different time” and “eye-opening.” He nevertheless dedicated himself 100% to be becoming the best soldier possible. He was trained to be a paratrooper to be used in an invasion of Japan but when Japan surrendered, the paratrooper program was canceled and he was sent instead to Germany.

He remained in the Army until he was twenty-three, at which time he became one of the more than a half-million American veterans to attend college on the G.I. Bill. After earning an undergraduate degree in political science, he earned a law degree from Georgetown University in 1954. He and his young family then returned to New Mexico where he began a long and successful career as an attorney both in private practice and in public service. In 1965, he was appointed a district court judge in the area that included his hometown of Mora. He was the first person from Mora to hold this office.

The New Mexico Fellows congratulate Zamora on all of his many contributions to the legal profession but especially for the wonderful (and long overdue) recognition he recently received at his old high school.

W. Mark Mowery
Santa Fe, New Mexico

NATIONAL OFFICE UPDATES

Journal Receives National Recognition



Issue 79 of the *Journal* was recognized with a 2016 Apex Award for Publication Excellence in the category of Magazine, Journal & Tabloids – Print + 32 pages. The awards are based on excellence in graphic design, editorial content and the ability to achieve overall communications excellence. APEX Grand Awards honor the outstanding works in each main category, while APEX Awards of Excellence recognize exceptional entries in each of the individual categories. There were over 1,600 entries and 86 Grand Awards were presented to honor outstanding work in 11 major categories. There were 632 Awards of Excellence recognizing exceptional entries in 100 subcategories.

Remember to Update Your Contact Information

All updates made online before September 30, 2016 will appear in the 2017 Roster. Follow these three easy steps below to update your information online:



STEP 1

Log onto www.actl.com

Have you forgotten your login credentials? Just click the “Forgot Password” link on www.actl.com and they will be emailed to you.

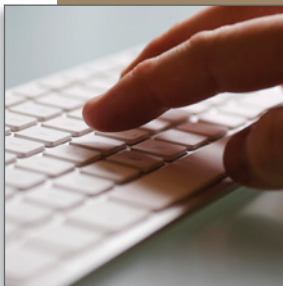
STEP 2

Once logged in, hover on “My Account” in upper right corner then click on “Fellow Profile.”

STEP 3

You’re in! On this screen you can review the information the College has in your record. If you need to change any details, click the edit button located to the upper right of the section name. There are four sections, so please be sure to review all sections. Any edits you make will be recorded exactly as typed. We request using upper- and lowercase letters, as appropriate. Make sure to save any changes by clicking the “Save” button at the bottom of each edited section.

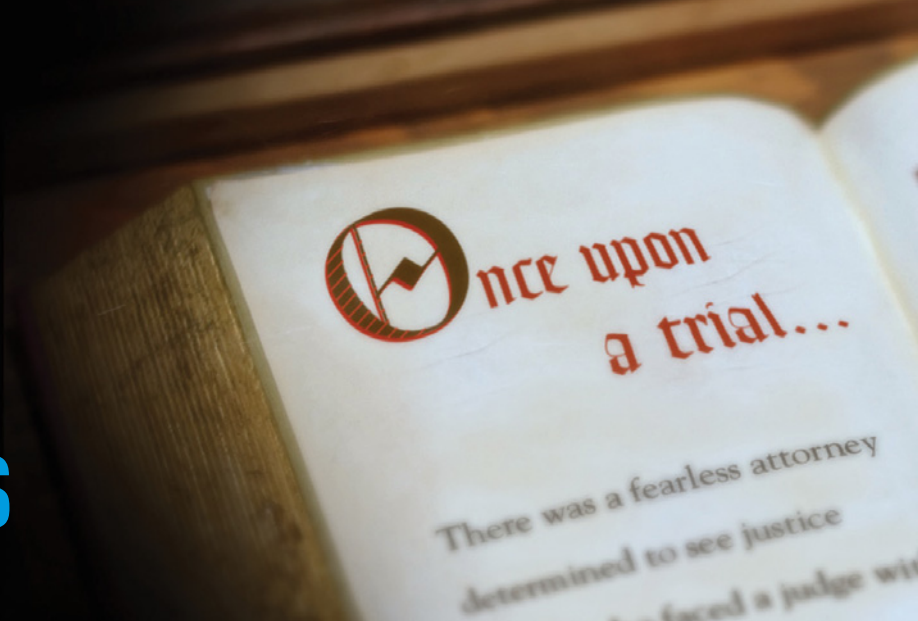
College Switches to Constant Contact for Sending Messages to All Fellows



The College will be sending out future *eBulletin* issues as well as other important news through Constant Contact. Please adjust your email settings and ensure Constant Contact is added to your firm’s whitelist so mail originating from Constant Contact’s email addresses, domains and IP address will always be allowed.

Contact the National Office for more details.

WAR STORIES FROM FELLOWS



Below is a continuing series in the *Journal* featuring war stories from our very own Fellows. Ranging from entertaining to instructive, these stories will feature something a Fellow did or something that happened to a Fellow or another Fellow during a trial.

Please send stories for consideration to editor@actl.com

TAKE YOUR BEST SHOT, AND THEN HUSH

I spent my first thirty years in Chattanooga, Tennessee, in a storytelling family, society and, eventually, profession. Many older people passed on knowledge by telling stories, although usually you were left to figure out what that knowledge was. Storytelling by older attorneys over an evening's soda or beer was a daily standard.

Later, I joined a major San Francisco firm. I had none of the qualifications expected of an attorney there: no big name school, no clerkship, no step-by-step training. However, I had certain advantages. I had quite a bit of "first chair" experience. More important, even if I had not seen or done something, I probably had heard a story about a similar situation. Through stories, I had hundreds of experiences woven into my very foundation.

Here's a war story about a trial tactic I devised because of a story I heard.

1985

It was three or four days before one of the main defense witnesses was to be cross-examined. Lawyers for another claimant had planned to do the job, but suddenly asked me to take him. No small task. I had not even attended his deposition, and certainly had not familiarized myself with the intricacies of his testimony. And, it was intricate. This expert, call him Dr. Seale, was a national authority on economics. He specialized in calculating what market value a raw material should have. He would work back from the sale prices of products created from that raw material, deducting costs until he got to a residual value.

We were claiming a high value for a particular raw material. However, Dr. Seale's many pages of calculations showed that our claimed value was nearly the total of the sale prices for all of the products made from it. That would leave almost nothing to pay manufacturing costs, much less the cost of investment and profit. If Dr. Seale was right, our claim was ridiculous.

Dr. Seale had taken real data from real companies to construct a hypothetical company to process the raw material we were dealing with and then sell the end products. Many of the data were our own. Such calculations are susceptible to the argument that any error in the process pushes through to the result, which then is suspect. And to the argument that the assumptions or initial data are erroneous: "Garbage in, garbage out." But that is a cumulative type of cross-examination. "So, this is wrong, and that is wrong, and these are errors, and this is a mistake," and so forth. I did not think I could do that. At a minimum, I lacked the time to understand the calculations and prepare an extended cross. Worse, I did not have proof of other numbers.

A Story From The 1930s

The Tennessee Valley Authority (TVA) had condemned many acres of farmland as it created the TVA system with its huge dams and lakes. It was the Depression. Many farmers were relieved to see their land condemned, but some contested just how much the “guvmint” owed them.

Nathaniel Johnson was an experienced Chattanooga trial attorney. He was a man of the people, who could strike resonant cords with the plain men who made up the juries in East Tennessee, and he was using those skills for one of those complaining farmers. The rising water was going to cover about seventeen acres of farmer Smith’s land, leaving him another forty untouched acres. He claimed that the water would eventually undercut the steep hillside that held the forty acres and that this prospect rendered the remainder worthless. In effect, he claimed that the TVA had taken the whole farm.

Mr. Johnson had already presented witnesses (neighbors, friendly to the farmer) who had testified to the high value of the farmland and their expectations that the remainder would slip into the lake because of the unique character of the local lands.

TVA’s only witness was an expert on landslides, a U.S. Army Corps of Engineers Colonel from Washington, D.C. In uniform, he strode into the courtroom as he had entered classrooms at advanced engineering schools, the forums of Congress, the war rooms of World War I. He brought maps and charts and graphs and more stuff than Mr. Johnson had ever seen. The Colonel was an authority, and for two days he made clear that the remaining farmland would not, no, never fall into the water.

This was before what is now called discovery. Mr. Johnson had not seen the Colonel before, and he certainly did not know of any errors in all those charts and numbers. Mr. Johnson did not seem to have any weapons as he rose for cross-examination of testimony he had barely understood. However, he did have one fact. Maybe it wasn’t an important fact, but it was all he had. The Colonel could never have seen the farm. Mr. Johnson knew no stranger had been near the place.

“How’d ya get he-ar?”

“What?”

“Sorry, I mean, ya came from Washin’ton up there, didn’t ya?”

“Yes.” (Irritated.)

“Well, how’d ya get he-ar? It’s a long drive.”

“I came in a plane. Last night.”

“Last night. In an ar-plane? They brought ya down he-ar in an ar-plane!”

“Yes, last night. In an airplane!”

“Are ya a real colonel? Ah mean, do ya carry a gun?”

“Of course not. I am a colonel in the Army Corps of Engineers. We don’t carry guns; we build massive earthworks all over the country.” (Importantly.)

“Oh. So this he-ar farm is a lot smaller than what ya usually deal with?”

“That’s right, but of course I gave it just the same expert attention that I give to all projects for which I am responsible.”

“Really? How long does it usually take one of them projects to get done?”

“Oh, years, years. We often live at the site. But the issue with this farm was much more simple; it only took a short while to develop this presentation.”

“Presentation? Is that what it was? Fer two days? And did ya tell us all ya knew about Mr. Smith’s farm?”

“Yes.”

“But, y’ain’t never seen it, have ya?”

“What?”

“Y’ain’t never seen the farm, have ya?”

“No, but I don’t...”

“Ya mean they brought ya down he-ar from Washin’ton in an ar-plane to talk to us for two days about a place y’ain’t never seen.... That’s all. No further questions.”

Of course, TVA’s attorneys had the Colonel testify that, scientifically, he didn’t need to see the property to come to the opinions that he had. Mr. Johnson just sat there gazing at the ceiling, shaking his head a little. He asked no more questions. He did not have any.



My client's experts and those of the co-claimant gathered in an office and tried to educate me about Dr. Seale's analysis. The numbers involved in the analysis were large, and varied. As Dr. Seale had created his hypothetical plant, he had assumed labor costs that were in the millions, electricity costs that were in the hundreds of thousands of dollars, and so forth. Page after page of numbers. How, in a couple of days, could I be ready to cross-examine all this?

On Spreadsheet 6, there was one small number, \$12.13, stuck at the bottom of a column in the middle of the page without explanation. "What's that," I asked.

Dr. Seale had used average numbers from several sources to construct his hypothetical case. When average or rounded numbers are used, all of the columns often don't come out exactly even. To keep the calculation going, accountants put in entries to increase or decrease a result so that it matches its opposite number. It's sometimes called a "balancing entry," or, in more casual terms, "a plug." Somebody had stuck a plug into this mass of calculations to make them come out "right."

Now, one can argue that a \$12.13 balancing entry has no significance in such a massive analysis, but at least I could understand what had happened, and I didn't like it. I didn't think other people would either, especially if Dr. Seale acted the right way on the stand. Based upon his deposition, there was a good chance he would.

At trial, Dr. Seale spent more than a day qualifying himself and his analysis. Opposing counsel hardly had to ask questions. According to Dr. Seale, who was pontificating just as I had hoped, no one could pay the price we said we were entitled to for the raw material and do more than go bankrupt in a matter of days. My turn came.

One of the worst types of cross-examination is to ask questions that allow a witness, especially an expert, to repeat his prior testimony. However, I began to ask Dr. Seale questions about how he had done his study. "Does this column contain cost numbers?" "What do you subtract this from?" He loved this and condescended to demonstrate, again and again, how intricately woven and precise his analysis was. (The judge and the jury, who were used to my normally short and focused cross, were leaning forward.)

I appeared to finish, maybe thirty minutes. Then, almost as an afterthought, I asked him if he knew what a plug was.

"Yes. It is a number some people stick in when they can't get things right, to make things add up. It's a crutch." (It was clear that someone else must have done the final edition of what he had presented, or that he had forgotten what he himself had done.)

"Doctor, take a look at Spreadsheet 6, middle of the page."

"Yessss."

"What's that \$12.13?"

"Oh, my God, it's a plug!"

"No further questions."

Of course, opposing counsel got up and had Dr. Seale explain what a "balancing entry" was and why it was needed and why it made no difference and all that. I asked no further questions, but throughout the rest of the case managed to work references to a "plug" into exchanges with opposing counsel or friendly experts. Dr. Seale's testimony had no effect on the final decision.

I do not mean to imply that Dr. Seale's calculations were correct, and that I somehow deflected the truth. I also acknowledge that my tactic was horribly risky. However, faced with a broadside of data, I had to come up with a simple way to show that this "presentation" could be a fantasy and that the hard evidence we had presented was more believable. That 1930s jury back in Tennessee would have known that smart Colonels from "Washin'ton" could easily sing a pretty song, not based upon reality. Mr. Johnson had to raise that possibility in a way the jury could understand, and he only had one fact. That story had taught me to take my best shot, and then hush.

Alson R. Kemp, Jr.

Santa Rosa, California

* * * * *

A LESSON LEARNED FROM ROY COHN

With recent front-page articles in *The Washington Post* (June 17, 2016) and *The New York Times* (June 20, 2016) about his role as an alleged mentor of Donald Trump, Roy Cohn is back in the news. By reason of a near-miss experience with Cohn years ago, I learned a valuable lesson.

Roy Cohn

Cohn graduated from Columbia Law School at age twenty. In 1950, at age twenty-three, he became involved

in the prosecution of the so-called Atomic Spy Case, in which Julius and Ethel Rosenberg were convicted of transmitting U.S. atomic secrets to the Soviets. By one account, Cohn had an ex parte conversation in which he convinced the trial judge to impose the death penalty not only upon Julius, but upon Ethel as well.

In 1953, Cohn served as chief counsel to a Senate Special Committee, headed by Senator Joseph McCarthy, which was then holding hearings on McCarthy's charge that hundreds of Communists had infiltrated the U.S. State Department. The ultimate upshot of those hearings was that McCarthy's charges were discredited and he was personally disgraced. Somehow Cohn skated free.

Cohn then went into private practice in New York City where, as *The Post* put it, he established a reputation as "a fixer" and "a legal knife fighter" who "us[ed] his connections in the courts and City Hall to reward friends and punish those who crossed him." In the 1960s and 1970s, Cohn fought—and won—four federal or state indictments against him personally for extortion, bribery, conspiracy, perjury and banking violations. Meanwhile, as *The Times* put it, he became "one of the most famous and feared lawyers in America."

Cohn lived and worked in a townhouse on the Upper East Side, which he kept in his law firm's name for tax reasons. Guests at parties there, some of whom became clients, included Norman Mailer, Bianca Jagger, Barbara Walters, William F. Buckley, Jr., George Steinbrenner, Andy Warhol, Estee Lauder and former New York mayor Abraham Beame, among many others.

The Lawsuit

In 1975 Cohn filed an antitrust suit in the Southern District of New York on behalf of thirty-five trucking companies from the New York garment district against a major national trucking company (called the XYZ Company here), which my firm represented. At least a few of the plaintiffs had alleged mob connections, which gave the case a certain pizzazz. Early on, my partner **Larry Hoyle** argued a couple of motions against Cohn, and reported back that (a) Cohn had little regard for the truth, and (b) the federal judge assigned to the case appeared to have little regard for Cohn.

As the case proceeded, it became clear that, regardless of his fearsome reputation, Cohn and his colleagues were not doing the gritty legal work necessary to put together and try that kind of case on the plaintiffs' side. Cohn

took very little discovery until we had finished with the depositions of plaintiffs. Only then did he notice the depositions of a number of XYZ executives. He scheduled each deposition to start at 2 o'clock in his townhouse but, on the first five depositions, which were covered by one of my partners, Cohn did not actually start the deposition until about 4:30, and then finished at about 6:30. With each delayed deposition, XYZ's in-house counsel became more annoyed and asked if we could not "do something." We explained that, as annoying as it was to XYZ's executives and to us, if Cohn started at 2, he'd probably still run till 6:30, so by starting late he was cheating himself out of two-plus hours of questioning time, which was to our advantage. So, it was best to do nothing. Although not happy with that advice, the client accepted it.

But then, when Cohn did the same thing yet again (noticed the deposition for 2 but did not start it until 4:30), we made a mistake. Rather than sticking with our first best judgment, we let our exasperation get the best of us and decided that there was, after all, a way to "do something" so that future depositions would proceed in a more orderly way and the client's executives would be treated more courteously. I was to cover the next deposition of an XYZ employee (let's call him Ed Jackson). As with the others, the deposition was scheduled to start at 2. We agreed with the client that if Cohn did not start the deposition by 2:45, Jackson and I would walk out.

When Jackson and I got to Cohn's townhouse, we were sent to the waiting area on the second floor. Already there were the three members of plaintiffs' executive committee, including Tommy Gambino, the son of Carlo Gambino (reputedly capo di tutti capi, the boss of bosses of the New York mob). Their presence was no surprise since they had attended previous depositions of XYZ witnesses. Jackson and I chitchatted with Gambino and his colleagues while we waited for Cohn. At about 2:40, I heard Cohn arrive on the first floor, speak with the receptionist and pick up his mail. Cohn then took an elevator that went by our floor to the upper reaches. When we got to 2:45, I asked Gambino what time he had. He replied, "2:45." To which I said, "So do I. Let's go, Ed." With that, Jackson and I walked down the steps and out the door. We could hear an associate running after us shouting, "The deposition is going to start now. It's going to start right now."

Jackson and I got into a cab and headed for Penn Station.

Everybody at XYZ was very pleased that we had finally "done something." 

The euphoria did not last long. Within a month, Cohn was out of the case and the Alioto firm, a very fine antitrust trial firm from San Francisco, was in. So the net result of “doing something” was that we now faced a much tougher opponent, who had much better standing before the trial judge. Though I don’t know for sure, I’m virtually certain that Gambino, whom I got to know by deposing him for several days, was stunned that we had shown so little respect for Cohn, and that led plaintiffs to retain a new lawyer who would command respect.

We tried the case against Joseph M. Alioto, a very effective jury trial lawyer (and the son of Joseph L. Alioto, the former Mayor of San Francisco), in June/July 1980. After a hard-fought six-week trial, followed by eight days of deliberations, the jury came back with a verdict in favor of XYZ.

The Lesson

No matter how difficult, rude and obnoxious opposing counsel may be, no matter how tempting it may be to

take advantage of an opportunity to embarrass him in front of his client, or to move to disqualify her for some reason, keep in mind the ancient adage: “Better the devil you know than the devil you don’t.”

Postscripts

On June 23, 1986, Cohn was disbarred. Five weeks later, on August 2, 1986, he died. He was 59. In 1993, Tommy Gambino was convicted of racketeering and racketeering conspiracy. The Second Circuit affirmed.

I have sometimes wondered how things would have played out if Cohn had started the deposition before 2:45. It would be fun now to say that I had jousting with one of the legendary rascals (to put it charitably) of that era. I wonder what lessons I would have learned if that had happened.

Dennis R. Suplee

Philadelphia, Pennsylvania



CORRESPONDENCE TO THE EDITORS

In issue 81 of the *Journal*, the In Memoriam section lists 51 recently deceased members. I did a little math (not my strong suit) and determined that the average age of each decedent was 85.8 years and that 20 (39%) were 90 years or older at the time of their death. As an octogenarian myself I see a message here: by keeping active in one’s profession in some capacity it indeed leads to a more productive, fulfilling and obviously longer life. It is working for me. Our Fellows epitomize the dedicated members of our profession and their reward is a longer and healthier existence. Woody Allen once said that he wanted to be remembered for his immortality; of course, that is wishful thinking. Personally, I am looking forward to becoming one of the 39%. Share this with our members if you would like (but first check my math).

Robert N. Stone

Torrance, California



VIRGINIA FELLOWS RECOGNIZE TWO OUTSTANDING YOUNG LAWYERS

The Virginia State Committee awarded the Chappell-Morris Young Trial Lawyers' Award to two deserving lawyers at the June meeting of the Virginia Bar Association.

Virginia State Committee Chair **Donald R. Morin** of Charlottesville, Virginia presented the award to Kelli H. Burnett and Justin Michael Lugar. Burnett is a Senior Assistant Commonwealth's Attorney for the City of Richmond and Lugar practices with the law firm of Gentry Locke of Roanoke, Virginia.

The presentation was made in front of an audience that included lawyers, spouses, family, friends and a number of judges from the various courts.

The award recognizes a young trial lawyer in Virginia who has demonstrated professionalism, high ethical and moral standards, excellent character and outstanding trial skills to this point in his or her career. The first award was made in 2013 to four young lawyers: Robyn P. Ayres, Zachary T. Lee, Jon Allon Nichols, Jr. and Robert E. Travers, IV.

The award is named in honor of **R. Harvey Chappell, Jr.** and **James W. Morris, III**, both of whom served as President of the College and both of whom have been outstanding trial lawyers in Virginia for more than 50 years. Chappell was President of the Bar Association for the City of Richmond, President of the Virginia State Bar and Rector of the College of William & Mary. Chappell died December 1, 2012. Morris has been the President of the Bar Association for the City of Richmond and President of the Defense Research Institute.

FELLOWS TO THE BENCH

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

Gary Pohlson

Newport Beach, California

Effective July 2016

Judge

Orange County Superior Court

Harold L. Stewart, II

Presque Isle, Maine

Effective April 15, 2016

Superior Court Justice

Superior Court for the State of Maine

Robert F. Rossiter, Jr.

Omaha, Nebraska

Effective June 27, 2016

U.S. District Judge

U.S. District Court for the District of Nebraska

Jon Mark Weathers

Hattiesburg, Mississippi

Effective January 2016

Judge

Twelfth Circuit Court District –
State of Mississippi

The College extends congratulations to these Judicial Fellows.

Delaware, New Jersey, Pennsylvania

June 10-11, 2016

Princeton, New Jersey

REGION 13: THIRD CIRCUIT REGIONAL MEETING



On June 10-11, over fifty Fellows and guests gathered at the historic Nassau Inn in Princeton, New Jersey, for the Third Circuit Regional Meeting. The meeting is held every year with each state rotating as host. The Nassau Inn is located in the heart of downtown Princeton, directly on Palmer Square and just across the street from Princeton University. A cocktail reception in the hotel on Friday night kicked off the weekend's events.

Playing off of the rich history of Princeton, the Saturday morning presentations did not disappoint. The first speaker was New Jersey Superior Court Judge Nelson C. Johnson, who in his spare time as an amateur historian and author, wrote the acclaimed best-selling book, *Boardwalk Empire*, which was the basis for the HBO hit series of the same name. “No one had ever written a complete history of Atlantic City. The histories prior to *Boardwalk Empire* were like wedges in pie with histories of the boardwalk. Histories of hotels, histories of fire companies, histories of *Miss America*, histories of Atlantic City as a vaudeville location, air shows, convention hall, dog races, wrestling matches,” Johnson said. Judge Johnson spoke on the topic of *Battleground New Jersey: Vanderbilt, Hague, and Their Fight For Justice*, his latest book about the history of New Jersey politics and the development of the modern New Jersey judiciary. The book describes the development through the stories of Arthur T. Vanderbilt, the first chief justice of the state’s modern era Supreme Court, and Frank Hague, mayor of Jersey City. Vanderbilt and Hague “were more alike than either one cared to admit. In fact, I say in the book if the two of them knew they were being discussed in this book side by side, they would be angry about it because they really disliked each other.” However, a legal system that was described as a “hydra-headed monster got turned into ...unification, flexibility and concentration of judicial power and responsibility with the overarching goal being greater accountability.”



The second presentation featured an all-star lineup of panelists to address the fairness of the Charles A. Lindbergh, Jr. kidnapping trial, one of New Jersey's most famous criminal cases. Charles Augustus Lindbergh Jr. was the eldest son of famed aviator Charles Lindbergh and author Anne Morrow Lindbergh, who was abducted from their family home on the evening of March 1, 1932. Over two months later, on May 12, 1932, the body of the 20-month-old toddler was discovered in Hopewell Township, a short distance from the Lindberghs' hometown of Highfields, in East Amwell, New Jersey. A medical examination determined that the cause of death was a massive skull fracture. Richard Hauptmann was arrested and charged with the crime after an investigation that lasted for more than two years. The trial, held from January 2 to February 13, 1935, found Hauptmann guilty of murder in the first degree and he was sentenced to death. He was executed by electric chair at the New Jersey State Prison on April 3, 1936. Hauptmann maintained his innocence to the end.

The panel included noted historian, best-selling author and professor at Rutgers University, **Lloyd Gardner** (author of *Lindbergh: The Case That Never Dies*), as well as retired New Jersey Supreme Court Justice **Virginia A. Long**, in addition to New Jersey Fellows **Henry E. Klingeman**, **Brian J. Molloy** and **William J. O'Shaughnessy**, acting as moderator. The panel was balanced to provide a variety of perspectives on the trial from a noted historian, a retired Supreme Court Justice, a leading criminal defense lawyer and a former prosecutor. Molloy provided his view of the approach taken by David Wilentz, lead prosecutor in the trial, while Klingeman provided his view of the approach

taken by Edward "Death House" O'Reilly, Hauptmann's lead defense attorney.

QUIPS & QUOTES

So what was the defense? The spaghetti defense. Throw a bowl of spaghetti against the wall and see what sticks. You can call it a kitchen sink defense. Call it the 'I'm making it up as I go along' defense. Call it the 'I've only met with my client for 45 minutes before the trial starts' defense. Call it what you want. Because one of the difficulties a trial lawyer has in any case is figuring what to say and more importantly what not to say. Mr. Reilly did not establish the kind of theme that we all learn in our trial advocacy classes and that we all learned when we sit and listen to lectures by able trial lawyers. He did not establish a theme that he asserted in his opening statement, that he maintained through the cross-examination of the various state witnesses that he introduced through the defense case, that he returned to in his summations to say to the jury 'I told you in opening what I was going to do in this case. I've done it through every witness. Now that I've done it, you have no choice but to acquit the defendant' and then sit down. He didn't do any of those things.

Henry Klingeman

The weekend was capped off with a cocktail party and dinner in the garden of the Nassau Inn. "We were honored to have College President **Mike Smith** as well as President-Elect **Bart Dalton** in attendance," said New Jersey State Committee Chair David S. Osterman. "A great time was had by all."

David S. Osterman

Princeton, New Jersey

Arizona, California-Northern, California-Southern, Hawaii, Nevada

July 15-17, 2016

Dana Point, California

REGION 1 AND 2: SOUTHWEST REGIONAL MEETING



The California – Southern State Committee sponsored the Southwest Regional Meeting at The Ritz–Carlton, Laguna Niguel over the weekend of July 15 - 17, 2016. A group of Fellows arrived early on Thursday, July 14, to take in the one-of-a-kind Pageant of the Masters in Laguna Beach. The event, which started in 1932, is known for its tableaux vivants or “living pictures,” where classical and contemporary works of art are recreated by real people who are made to look nearly identical to the originals through costumes, makeup, headdresses, lighting, props and backdrops.

On Friday night, there was a welcome cocktail party on a patio overlooking the Pacific Ocean, which ended as the sun dipped below the horizon. Attendees included Fellows from Northern California and Arizona, as well as a number from Southern California. College President **Michael W. Smith** and Ellen Bain Smith also joined the meeting.

On Saturday morning, the Fellows, their spouses and guests were treated to two lively and entertaining CLE programs. **Thomas R. Malcolm**, California-Southern State Committee Chair, introduced the speakers. The first involved “Point and Counterpoint” – a debate between **Erwin Chemerinsky**, founding Dean of the School of Law at University of California, Irvine and nationally known constitutional scholar, and **Miguel A. Estrada**, a former Assistant Solicitor General under the George W. Bush Administration and currently a Washington, D.C. based partner at Gibson, Dunn & Cutcher. The discussion started with the passing of U.S. Supreme Court Justice Antonin Scalia, his impact on the court and the legal community and how his passing could influence future cases.

The discussion and debate then covered recent U.S. Supreme Court decisions involving searches and seizures and the Fourth Amendment (*Birchfield v. North Dakota*); the exclusionary rule (*Utah v. Strieff*); due process rights (*Williams v. Pennsylvania*); whether it is



necessary for there to be quid pro quo for bribery (*McDonnell v. United States*); jury selection (*Foster v. Chatman*); reproductive health (*Whole Woman's Health v. Hellerstedt*); apportionment and one person, one vote (*Evenwel v. Abbott*); and affirmative action (*Fisher v. University of Texas at Austin*). Chemerinsky and Estrada then took questions from the audience.

Later in the morning, attendees were presented with a CLE program by **Michael Doyen**, a partner of Munger, Tolles & Olson in Los Angeles. Doyen has studied the strategies of war and trials for over twenty years, and has been working on a book on the subject. His presentation, "From Gettysburg to Brown v. Board of Education," started with a discussion of military tactics and flanking maneuvers, describing with historical maps how those tactics were

applied at the Battle of Gettysburg. He described how similar tactics apply to cross-examination of witnesses, including the famous cross-examinations in *People v. Gambino* from the motion picture *My Cousin Vinny*. Doyen concluded by describing how the NAACP used such tactics in its litigation strategy leading up to the Supreme Court's decision in *Brown v. Board of Education*.

On Saturday night, attendees were treated to a dinner followed by closing remarks from Regent **Robert K. Warford** and President Smith about current work of the College. It was an educational, thought-provoking and extremely collegial weekend.

Kevin H. Brogan

Los Angeles, California





DOWNSTATE-NEW YORK FELLOWS HOLD SUCCESSFUL TRAINING FOR LEGAL SERVICE LAWYERS

On June 23, 2016, Downstate-New York Fellows sponsored a trial training program for Legal Services NYC, an umbrella organization of legal services lawyers throughout New York City. The program focused on direct and cross-examination, and was attended by thirty participating lawyers. Ten Fellows volunteered as trainers, and actors were hired to play the role of witnesses. It was an all-day program with six hours of mock exercises, critiqued by the trainers. The program also used College videos, created by the Teaching of Trial and Appellate Advocacy Committee, which demonstrated the techniques of direct and cross-examination. The following Fellows participated as trainers: **Stanley S. Arkin**; Regent **Ritchie Berger**; **Thomas Fitzpatrick**; **George R. Goltzer**; **Shawn P. Kelly**; Downstate-New York Committee Chair **Larry Krantz**; **Avraham Moskowitz**; **James W. Quinn**; **Maurice Henri Sercarz**; and **Robert F. Wise, Jr.** The program was enthusiastically received.

NEW EDITION OF *ANATOMY OF A PATENT CASE* REFLECTS CHANGES

The Complex Litigation Committee has written and published *Anatomy of a Patent Case: Third Edition*. The book will be available in fall 2016. "Numerous changes in the patent law that have occurred since the second edition was published make the new edition particularly timely," said **Harry J. Roper**, Chair of the Complex Litigation Committee.

WORKING SMARTER BUT NOT HARDER IN CANADA

Working Smarter But Not Harder In Canada: The Development of A Unified Approach to Case Management in Civil Litigation is available. Following up on the success of *Working Smarter, Not Harder: How Excellent Judges Manage Cases*, a joint publication of the College and the Institute for the Advancement of the American Legal System (IAALS), the Judiciary Committee undertook an effort to write a complementary Canadian version of this useful tool for judges. The Canadian publication's proposal to adopt the One Judge Model, the use of a single judge to case manage civil proceedings prior to trial and then preside over those proceedings at trial is "one change that will have a dramatic and positive impact in Canada," said **Kent E. Thomson**, Ex-Officio Chair of the Judiciary Committee, who led the project.



TEACHING OF TRIAL AND APPELLATE ADVOCACY COMMITTEE OFFERS TRIAL TRAINING IN MEMPHIS

The Teaching of Trial and Appellate Advocacy Committee held a Litigation Institute for Trial Training (LITT) on May 19, 2016 at the University of Memphis School of Law. Around 140 attended the training. The daylong boot camp trial training was open to law students and young lawyer. The case of the day was the trial of Nicola Sacco and Bartolomeo Vanzetti, Italian-born American anarchists who were convicted of murdering a guard and a paymaster during the armed robbery of the Slater and Morrill Shoe Company on April 15, 1920, in South Braintree, Massachusetts. The pair were executed by the electric chair seven years later at Charlestown State Prison. The training covered topics including case analysis, theory of the case, civility, opening statements, direct examination, cross-examination and closing arguments. A highlight of the program was the luncheon panel discussion, “What Judges Want from Trial Lawyers.”

“We use a historic case for each program,” said Teaching of Trial and Appellate Advocacy Committee Chair **Paul Mark Sandler**. “The curriculum involves teaching the rudiments of trial with lectures about how to present each phase of the trial, followed by a demonstration, and then a panel discussion reviewing the demonstration.”

Most of the twenty-one faculty were Fellows from Tennessee, including: **Leslie I. Ballin**; **Leo Bearman, Jr.**; **Harriett Miller Halman**; **William H. Haltom Jr.**; **Albert C. Harvey**; **Lawrence J. Laurenzi**; **Marty Roy Phillips**; **Glen Reid, Jr.**; Teaching of Trial and Appellate Advocacy Committee Chair **Paul Mark Sandler**; and **David Wade**.

The next LITT program is in the works and will likely take place in San Francisco. If the committee does develop the program, the case for the day will be a hypothetical trial of Al Capone for the St. Valentine’s Day Massacre. ■



BOCA RATON

AMERICAN COLLEGE OF TRIAL LAWYERS **SPRING MEETING**
MARCH 2-5, 2017, BOCA RATON RESORT & CLUB, FLORIDA

~ SAVE THE DATE ~



DELAWARE FELLOWS COLLABORATE ON REPORT PROVIDING RECOMMENDATIONS TO JUDICIARY

Delaware Fellows partnered with the Delaware State Bar Association (DSBA) to release a report that surveyed members of the Delaware Bar on the operations of the courts. Conducted throughout the past year, the report solicited suggestions on ways which to improve the courts.

The survey originated at the request of Chief Justice of the Delaware Supreme Court Leo E. Strine, Jr. in 2015, who in consultation with judges, attorneys and other system partners, set a goal of involving the Bar and others in setting and implementing the Courts' agenda.

"There is a long tradition on the part of the Delaware Judiciary of caring deeply about the views of lawyers, litigants and the public generally about how we can serve them better. We sought out this unvarnished input in that tradition, with the goal of making a strong judicial system even stronger. In the coming months, the Judiciary will work closely with the Bar Association, the College and other key constituencies to examine the report's recommendations and to come up with a concrete action plan to address it," said Chief Justice Strine.

Then President-Elect **Bartholomew J. Dalton** and Fellow **Thomas J. Allingham II** co-chaired the study. "The goals of the College involve the protection of the rule of law and the fair administration of justice. The Delaware Courts — through the Chief Justice and the full cooperation of all the Courts — have again showed why the Delaware Judiciary is the best in the country by allowing a full examination of how they operate. The results show that a very good court system can always be made better," said Dalton and Allingham in a statement.

Members of the College and DSBA interviewed more than 100 members of the Bar, including judges, in face-to-face conversations and reviewed more than 1,300 responses from Delaware attorneys and others to an online survey. The results were then analyzed and reports were created for each of the Courts and for Administrative Law.

The reports, available online on the Delaware State Bar Association website at www.dsba.org, summarize the responses from both the interviews and surveys and offer recommendations for each of the Courts and Administrative Law based on that feedback. The DSBA and the College then submitted the reports to the Delaware Judiciary.

Early feedback from the study's initial interviews — which were presented at last year's Delaware Bench and Bar conference — resulted in:

- Amendment of the Supreme Court rules governing interlocutory appeals to make them clearer and easier for practitioners to employ;
- Amendment of the Supreme Court's internal procedures to enable the Justices to confer in advance of an oral argument when they believe that would be useful;
- Focus by the Court's Criminal Justice Council of the Judiciary in its review of the problem-solving courts on making sure those courts were working in a cooperative, integrated way that maximizes their effectiveness and makes their schedules more convenient to lawyers, litigants and key agency service providers;
- Creation of a working group to review the Administrative Procedures Act and the handling of appeals from regulatory agencies;
- Discussion with criminal justice system partners on ways the Courts could work more effectively efficiently with our partner agencies.

The study has also helped refine the judiciary's work on creating an integrated case management system for criminal justice agencies along with a statewide and branch-wide electronic filing system for criminal cases. ■

IN MEMORIAM

The lives of the thirty-five departed Fellows whose deaths are reported in this issue continue to paint a remarkable picture of the American College of Trial Lawyers. Their careers ranged from those whose practices were centered on their own localities to those whose names were widely known.



Their origins were as varied as their careers. One was the son of a thirty-five-year state court judge. One was the son of two college professors. One was a farm boy who had gone away for a brief vocational education, earning certificates of proficiency in gasoline and diesel engines, and returned to the farm. His path to the law began when he volunteered to serve in World War II.



One became a newsboy at age eight, worked through high school and drove delivery trucks to pay his way through law school. Several found their way to higher education on athletic scholarships. One passed his state bar exam without a law degree. More than a few would never have seen the inside of a college without the GI Bill and its Canadian counterpart that rewarded their World War II military service.



The arc of each of their careers was unique. One, who entered the University of Alabama as a freshman the year when Governor George Wallace tried unsuccessfully to stand in the doorway to prevent its racial integration, went on to become President of the student body, helping to lead the struggle to keep his university free of politics, and spent his life as a civil rights lawyer. One served as General Counsel to the Governor of his state and then as President of both his state Bar and the American Bar Association, was counsel to the panel that investigated the 1968 massacre at the Vietnamese hamlet of My Lai and authored a well-known critique of the American legal education system that bears his name. One was reputed to have tried more patent cases than any other lawyer in the United States. Three became state court judges. One became his state's Chief Justice. Two became General Counsel to major national corporations.



Several were involved in the product liability class actions of the 1970s and 1980s, cases that bring back the recollection of PCBs, breast implants, toxic emissions and cigarettes. One, appointed a local prosecutor at age thirty, had as one of his early assignments, the successful prosecution of his immediate predecessor. He went on to help create a law firm whose alumni include a half dozen judges, two of whom rose to their state's Supreme Court.



Five were college football players; one of them, a year after returning from World War II, was the co-captain of his university's Sugar Bowl team. Another had given up his senior year in order to enter law school, thereafter justifying his decision by finishing second in his law class. One was an All-American lacrosse player; another played college basketball.



Their lives extended beyond the courtroom. The names of organizations devoted to civil rights, human rights and other aspects of a civil society—names such as Vista Volunteers, the Selma Interreligious Project, the National Prison Project and Silent Partners—crop up frequently in the tributes offered at their deaths. Many were pillars of their churches and temples and of their communities. One helped to organize and deliver humorous lectures to teenagers about drinking, driving and not wearing seatbelts. At least four were presidents of their state Bar organizations. One was managing editor of a family-owned newspaper. One barely escaped a bullet during a civil rights march and entered as an unarmed mediator into the midst of a prison riot. One, motivated by his own long journey from a farm to the courtroom, sponsored five foster children and made provisions for their support after his death.



In their later years, they remained active and engaged. One was heavily involved in the Grand Teton Music Festival and the National Museum of Wildlife Art. One learned to ski at age fifty-six. One, a member of his state's bicycle association, died of a heart attack on his bicycle at age sixty-eight. One flew his own plane; another flew as co-pilot in his wife's plane. Another stood near the top of the heap in his region's United States

Tennis Association eighty-and-over rankings and won several Long Island sailing races. One devoted his retirement to writing the history of his six-year pursuit of justice for three young men sentenced to life in prison on perjured police testimony.



Almost incredibly, after over seventy years, one era in the last century continues to play a major role in the picture we see. Of the thirteen departed Fellows who had reached age ninety, all but one had served in World War II. One came home with a Combat Infantryman Badge, battle stars from four different countries in Europe, three Bronze Stars awarded for bravery and additional decorations from both Holland and France. One, injured when he parachuted from his crashing plane forty feet above ground, insisted on returning to combat after a year's recovery. One began his combat career at Omaha Beach. One turned nineteen in a foxhole and, captured in the Battle of the Bulge, spent the last few months of the war in a German concentration camp. At the end of the war, several served in the occupation of Japan. One represented several defendants in Japanese war crimes trials. One was managing editor of the *Pacific Stars and Stripes*. One was an officer in the provisional Japanese government. Another was selected for a combat group to protect General Douglas MacArthur after the Japanese surrender. Seventy years after the end of the war, one was a proud passenger in an honor flight from his state to visit Arlington National Cemetery, where many of his World War II comrades are buried.



The engaged lives we describe continue to tell a story. Of the thirty-five Fellows memorialized in this issue of the *Journal*, those who had reached age ninety exactly equaled the total of those who died in their fifties, sixties and seventies and exceeded by almost one half those who died in their eighties! One died nine months short of 100.



Over the years, perhaps in recognition that the surest path to success in life is to out-marry oneself and to share the life that results, the College meetings have long been a gathering place for both Fellows and their spouses. The broad subjects of the meeting programs are in great part designed to be informative to every participant and to allow them to carry back home presentations worthy of further thought. It is therefore no surprise that seventeen of the Fellows whose deaths are reported in this issue had, before either they or their spouse died, been married for over fifty years. Eight of those were married for over sixty years; one had been married for seventy-three. Another was twice a widower whose two marriages totaled sixty-six years. In keeping with that thought, you will find at the end of the memorials to the thirty-five departed Fellows we honor in this issue, a brief tribute to Joan Midkiff Farley Chappell, the widow of R. Harvey Chappell, Jr., the College's thirty-seventh President, who died recently.



You will note that four of the Fellows whose passing is reported died three years ago and that several memorials are foreshortened by the lack of a published obituary or other information available online. Our ability to do justice in our memorials to the lives of departed Fellows is frequently dependent on what we can learn directly from those who knew them. In some places, upon the death of a Fellow, including those retired from somewhere else, the State or Province Chair immediately uses the College email list to notify all of their Fellows. These often result in the online exchange of tributes to, and colorful stories about, the departed Fellow. These are then shared with us. We would hope that in this Internet age this might become a standard practice among all of us to help ensure that we can do justice to the lives of all of our departed Fellows.

E. OSBORNE AYSCUE, JR.
EDITOR EMERITUS

THE DATE FOLLOWING THE NAME OF EACH DECEASED FELLOW REPRESENTS THE YEAR IN WHICH HE OR SHE WAS INDUCTED INTO THE COLLEGE.



Charles C. Baker, '79, a Fellow Emeritus, retired from GableGotwals, Tulsa, Oklahoma and living in Amarillo, Texas, died May 22, 2016 at age eighty-three. Born in Wyoming, an all-state athlete, he was recruited to play football for the University of Oklahoma. In his senior year, he gave up football for early admission to the University of Oklahoma College of Law, from which he graduated second in his class, a member of the Order of the Coif. Then, for thirty-one years he practiced with GableGotwals, where he became head of its Litigation department, specializing in complex commercial litigation. In 1988, he retired to Wilson, Wyoming, where he lived until 2012, then moving to Texas to be closer to his children as his health declined. In Wyoming he became heavily involved in the Grand Teton Music Festival, serving both as a member of its Board and as its President. During his tenure he helped to establish the Jackson Hole Wine Auction. He was also actively involved in the National Museum of Wildlife Art, on whose Board he also served. His survivors include his wife of sixty years, a daughter and a son.

James C. Bass, '83, a Fellow Emeritus from El Reno, Oklahoma, died September 26, 2015 at age seventy-seven. After graduating from the University of Oklahoma, he served for two years as an officer in the United States Army before earning his law degree at the Oklahoma City University School of Law. He began his practice with his father-in-law and practiced in El Reno for his entire career. Serving the Oklahoma Bar Association on two separate occasions, first as a member of its Board of Governors, and then as a Vice-President, he was also a Trustee of the Oklahoma Bar Foundation. A generalist, he also served as the State Chair of the American College of Trusts and Estates Counsel. In the civic arena, he

twice served as a member of the El Reno City Council, as a longtime Trustee of Park View Hospital Authority, as a Director and Chair of the Executive Committee of Oklahoma Medical Research Foundation and as a Trustee of Oklahoma City University. His survivors include his wife of fifty-five years, a daughter and a son.

William R. Blood, '77, a Fellow Emeritus, living in Olean, New York, died February 23, 2016 from natural causes at age ninety-one. A decorated combat veteran of World War II, he was a machine-gunner in the 104th Infantry Division, earning battle stars for combat in France, Belgium, Holland and Germany and the Combat Infantryman's Badge. Awarded three Bronze Stars for acts of courage under fire, he also received the Dutch Resistance Medal and the French War Veteran's Medal. After the war, he earned his undergraduate degree at St. Bonaventure University and his law degree from Georgetown University. He practiced for his entire career, either in a small firm or as a solo practitioner, in Jamestown, New York. In his early days, he was an instructor in business law at a local community college. A lifetime communicant in his local Catholic Church, he served as a Eucharistic minister. A widower, his survivors include three daughters and three sons.

Francis Carroll (Tyke) Bryan, '76, a Fellow Emeritus from Mt. Sterling, Kentucky, died April 16, 2016 at age ninety-six. He earned his undergraduate degree from Washington & Lee University, where he played football and basketball and was two years in to his legal studies at the Washington & Lee Law School when it was closed in 1942 during World War II. After then attending one term at Harvard Business School, he took and passed the Kentucky bar examination without a law degree and began practice in February 1943

in Mount Sterling. He practiced there for sixty-five years. A lawyer of the old school and a consummate storyteller, he was a mentor to generations of lawyers in his community. He served as City Attorney and as a member of the House of Delegates of the Kentucky Bar Association. He served the College as Kentucky State Committee Chair. An avid pilot who flew his own plane, he was widely credited with having been instrumental in the creation of the local airport, on the board of which he served for more than thirty years, for most of them as its Chairman. He served a term as President of the Kentucky School Boards Association, served on the board of a local bank for more than fifty years and was named by his local Chamber of Commerce to its Hall of Fame. He was a deacon and elder in his Christian church. An adventurer, he had traveled the world with his wife and friends, loved deep sea fishing, scuba diving, hunting and golf. He even learned to ski at age fifty-six. His survivors include his wife of forty years, four daughters and two stepdaughters.

Thomas F. Burke, Jr., '84, Burke & Smith, PC, Dartmouth, Massachusetts, died July 1, 2016, a day short of his eighty-second birthday after a brief illness. After earning his undergraduate degree from Boston College, he served for two years as an officer in the United States Army Guided Missile School. He then earned his law degree from Boston College Law School. He served on the Boards of both the Massachusetts Academy of Trial Lawyers and the Massachusetts Defense Attorneys Association. An avid supporter of public education, he had been a member of the Dartmouth School Committee, into whose Hall of Fame he had been inducted, and he served as trial counsel for another school system. His survivors include his wife, two daughters and four sons.

John Michael Calimafde, '01, a Fellow Emeritus, Old Greenwich, Connecticut, died August 5, 2015 at age ninety. Raised in Brooklyn, he was an outstanding athlete, once invited to try out for the Brooklyn Dodgers. He received a college scholarship to play ice hockey. In World War II, he served with the ski troops in the 10th Mountain Division of the United States Army and after the war, served a tour of duty as an officer in the post-war provisional Japanese government. After finishing his undergraduate degree in electrical engineering from the University of Michigan, he earned his law degree from Fordham University. A co-founder of the New York City patent firm, Hopgood, Calimafde, Judlowe & Modolino, he was credited with having tried more patent cases than any other attorney in the United States. In later life, he was ranked at the top of the Eastern Section of the United States Tennis Association in the eighty-and-over category. He had also won the Long Island Sound Sailing Championship several times. His survivors include his wife of seventy years and two daughters.

Hon. Harold G. Clarke, '77, a Fellow Emeritus from Forsyth, Georgia, the former Chief Justice of the Georgia Supreme Court, died February 26, 2013 at age eighty-five. The son of a Presbyterian minister, he served in the United States Army in World War II and, at the end of the war, was assigned in Japan to be the managing editor of the military news publication, *Pacific Stars and Stripes*. He earned an Army Commendation Ribbon and a Far East Command Certificate of Merit. A graduate of the University of Georgia and of its law school, he founded the Forsythe law firm, Clarke, Haygood and Lynch. In addition, he managed the local newspaper, formerly owned by his father. He served in the Georgia House of Representatives for a decade and was President of the State Bar of Georgia. In 1979 he was appointed Chief Justice of Georgia. ▶

When one of the members of the Court became terminally ill, he stepped aside for a few months so that his fellow justice could serve as Chief Justice, returning after his colleague died. As Chief Justice, he was instrumental in creating the Chief Justice's Commission on Professionalism, the first of its kind in the nation, the Georgia Office of Dispute Resolution and the Equality Commission. He also chaired the Institute of Continuing Judicial Education and served on the Board of Directors of the American Judicature Society and the Board of Visitors of the University of Georgia. An elder in his Presbyterian church, he was a Commissioner from the Atlanta Presbytery to the General Assembly of the Presbyterian Church in the United States. He was honored with the American Inns of Court's Lewis F. Powell Award for Professionalism and Ethics. After his retirement from the Supreme Court, he became Of Counsel to the Atlanta firm Troutman Sanders, chairing its Alternative Dispute Resolution group. Shortly before his death, he was honored by the Southern Center for Human Rights with its Lifetime Achievement Award. His survivors include his wife, three daughters and a son.

Milton Carey Colia, '07, El Paso, Texas, died December 1, 2015 at age sixty-one. A graduate of Texas Christian University and of the Texas Tech University School of Law, he served for four years as an officer in the Judge Advocate General Corps before entering private practice in San Antonio. After practicing there for thirteen years, he moved to El Paso, ultimately joining the firm of Kemp Smith LLP. At the time of his death he was serving as President of the Texas Association of Defense Counsel. He had received the William Duncan-George McAlmon Civility Award from the American Board of Trial Advocates. His survivors include his wife of forty years, and two sons.

Hon. William J. Cook, '88, a Judicial Fellow from Haddonfield, New Jersey, died April 21, 2016 at age seventy-six, of heart failure. A paperboy at age eight, he worked while in high school and drove a delivery truck in the summer while in law school. After earning his undergraduate degree from St. Joseph's University and his law degree from Rutgers Law School, he served as an officer in the United States Marine Corps Judge Advocate General Corps, first as Chief Defense Counsel at Camp Lejeune, where he also undertook infantry training. He then served as a prosecutor with the First Marine Air Wing, stationed in Da Nang, Vietnam, where he tried cases throughout the combat zone, sometimes in courts held in bunkers. Returning from military service, he joined the firm of Brown & Connery in Camden, New Jersey, where he practiced for twenty-eight years. He then served as a Superior Court Judge, retiring in 2010 after thirteen years on the bench. His survivors include his wife, a daughter and a son.

John Joseph Corrigan, '73, a Fellow Emeritus from Los Altos, California, died October 8, 2015 at age eighty-five. After earning his undergraduate and law degrees at the University of California at Los Angeles, he served for two years in the United States Army and then was in private practice for two years. Joining the legal department of the Southern Pacific Railroad, where he practiced for thirty-five years, he then spent two years as Of Counsel to Brobeck, Phleger and Harrison in San Francisco. A widower whose wife of fifty years predeceased him, his survivors include two daughters and a son.

Peter J. DeTroy, III, '90, Norman, Hanson & DeTroy, LLC, Portland, Maine, died May 28, 2016 at age sixty-eight. A graduate of Bowdoin College and the University of Maine School of Law, his practice ranged from representing

the State of Maine in a precedent-setting lawsuit against tobacco companies and the plaintiff in what he termed a “cyber bullying” case to defending high-profile white-collar criminal cases and representing a prisoner who was asserting his right to publish under a pseudonym while incarcerated. He served on the Boards of the Maine School of Law Foundation, the Maine Law Alumni Association, the Maine Assistance Program, the State Employees Appeal Board, the Maine State Ballet, a local school board and the Center for the Prevention of Hate Violence. He chaired the Maine State Bar’s Silent Partners Program and was co-chair of the Commission on Gender, Justice and the Courts. The Maine Law School Alumni Association awarded him its Distinguished Service Award. He served the College as the Maine State Committee Chair. A member of the Board of Directors of the Bicycle Coalition of Maine, he died of a heart attack while riding his bicycle. His death was noted by public tributes from both the Chief Justice of Maine and the Chief Judge of the Maine Federal District Court, and his funeral, held in a local auditorium, drew 1,500 people who came to pay him tribute. His survivors include his wife, a daughter, two stepdaughters, two sons and a stepson.

Edward R. Durree, ’93, Kingery Durree Wakeman & O’Donnell, Assoc., Peoria, Illinois, died January 27, 2016 at age sixty-six, of cancer. A graduate with honors from both the University of Illinois and Drake University Law School, he was a member of the *Drake Law Review*. He served as President of his local Bar. A global traveler, in the late stages of his illness, he traveled with his daughter to spend the Christmas holidays in Sydney, Australia. Divorced, his survivors include a daughter and a son.

Donald Vernon Ferrell, ’94, Jeliffe, Herrell, Doerge & Phelps, Harrisburg, Illinois, died April

27, 2016 at age seventy-one. He was a graduate of the University of Illinois and of the University of Alabama School of Law. His survivors include his wife and three stepsons.

John Martin Freyer, ’81, a Fellow Emeritus, retired to Lady Lake, Florida from the Albany, New York firm Bond, Schoeneck & King, died February 5, 2016 at age seventy-nine. A graduate of Hamilton College and Harvard Law School, he served as his firm’s managing partner. His survivors include his wife of thirty-one years, three daughters and four sons.

David Eldon Gauley, Q.C., ’82, Gauley & Co., Saskatoon, Saskatchewan, Canada, where he practiced for almost seventy years, died May 4, 2016 at age ninety-three. He earned his law degree at the University of Saskatchewan and later served as Chair of its Board of Governors. He was one of the incorporators and a Director of the Estey Centre for Law and Economics in International Trade. In 2003, he was invested as a Member of the Order of Canada. He served the College as Manitoba/Saskatchewan Province Committee Chair. His survivors include three daughters.

John Hopkins Hall, ’70, a Fellow Emeritus, retired from Strasburger & Price, Dallas, Texas, died February 2, 2016 at age ninety. He attended undergraduate school at the University of Texas and the University of the South before entering the United States Army in World War II. Attached to the 112th Cavalry Regimental Combat Team in the Asian Pacific Theater, after the Japanese surrender, he was one of a combat group selected to guard General Douglas MacArthur. He then both completed his undergraduate studies and earned his law degree at Southern Methodist University. He was a Master of the Bench in his Inn of Court and a Research Fellow in the Southwestern Legal Foundation. His survivors include his wife of fifty-eight years, a daughter and a son.

Frank L. Heard, Jr., '76, a Fellow Emeritus, retired from Vinson & Elkins, Houston, Texas, died March 7, 2016 at age ninety-nine. He was a graduate of the University of Texas and of its School of Law, where he was Editor of the law review and a member of the Order of the Coif. He joined the United States Army in 1941 before the attack on Pearl Harbor and served in the Counterintelligence Corps during the war. At the war's end, as an officer in the Judge Advocate General Corps, he represented several defendants in Japanese war crimes trials. After first returning to private practice, he then joined the law department of Exxon (then Humble Oil and Refining Company) and for the next decade tried cases across the state, including the infamous "slant hole" cases. He then became General Counsel of Exxon Pipeline, leading the legal effort in the 1960s to secure approval of the Alaska Pipeline. Retiring from Exxon at age sixty-five, he was Of Counsel to Vinson & Elkins for another sixteen years before retiring for the second time at age eighty-one. He taught a Bible class at his Baptist church for sixty-four years and was a Master of the Diaconate. A self-described amateur carpenter, painter, electrician, plumber and yard man, he enjoyed manual labor as much as he did courtroom advocacy. His survivors include his wife of seventy-three years, a daughter and a son.

Harold F. Jackson, Q.C., '79, a Fellow Emeritus, retired to Dartmouth, Nova Scotia from McInnes Cooper & Robertson, Halifax, Nova Scotia, died November 6, 2015 at age ninety-six. He was born and grew up on a farm in Nebraska and attended the Chicago Vocational Training School, graduating with a certificate of proficiency in gasoline and diesel engines. Returning to his father's farm, he worked there and in the lumber woods until he

joined the Royal Canadian Air Force in 1940. Beginning with the 119th Bomber Squadron, stationed in Nova Scotia, the next year he was posted to the 408th Bomber Squadron in Yorkshire, England. When his plane was shot down, he survived by parachuting when it was only forty feet above ground. Badly injured, he was hospitalized for a year before returning to duty when his squadron was assigned to submarine patrol. He was offered the opportunity to repatriate to Canada because of his injuries, but he instead chose to return to a ground crew, and was assigned as a Flight Sergeant to a large maintenance hangar for the remainder of the war. He was awarded the Atlantic Star for his military service. He then earned his undergraduate arts degree from the University of New Brunswick and his bachelor's and master's degrees in law from Dalhousie University. He practiced his entire career with McInnes Cooper & Robertson. Upon his retirement, he was appointed by the Canadian Bar as an Honorary Fellow of the Law for the Future Fund in recognition of his contribution to the legal profession and the advancement of law. An advocate of free university education, he, his wife and their four sons collectively earned sixteen university degrees. A scoutmaster, at the time of his death, he was sponsoring five foster children and had made provision for their continued support after his death. His survivors include his wife of fifty-seven years and the four sons.

Harry Joseph Jennings, '81, a Fellow Emeritus, retired to Valparaiso, Indiana from Spangler, Jennings & Dougherty, Merrillville, Indiana, died May 20, 2016 at age ninety-three. Beginning his education at the University of Iowa, where he was a member of the football team, he entered the United States Army in World War II, serving as a Sergeant in

the 163rd Infantry. His combat service began at Omaha Beach. After the war, he earned his law degree from Chicago-Kent College of Law and was a founder of the firm with which he practiced for his entire career. He was an Elder Emeritus of his Presbyterian church and served as a Trustee of Covenant College. He and his wife met during World War II at Le Havre, France, where she was serving in the American Red Cross. He often flew as her co-pilot in her Cessna 182. Seventy years after the war, he was privileged to be on Indy Honor Flight Fourteen, on which 180 Indiana veterans went to Washington, D.C. to visit Arlington National Cemetery. A widower, whose wife of sixty-one years had predeceased him, his survivors include two daughters and a son.

Ralph Irving Knowles, Jr., '03, Doffermyre, Shields, Canfield & Knowles, Atlanta, Georgia, died May 17, 2016 at age seventy-one of complications from brain cancer. Entering undergraduate school at the University of Alabama in the year that segregationist Governor George Wallace made his infamous stand at the schoolhouse door, Knowles thereafter became President of the student body, leading the campus fight to prevent Wallace from taking control of the university. Upon graduation from the University of Alabama Law School, he went to work as a staff attorney for the Selma Interreligious Project, opposing segregationist practices in the Alabama Black Belt, at one time representing over 700 African-American students who had been suspended from school for demanding equal treatment. In one demonstration, he barely missed being killed by an assassin's bullet. He and a former classmate formed a Tuscaloosa law firm, bringing a series of landmark cases that reformed the state's mental health system, declared the state's prison system unconstitutional for violations of human

rights, barred public schools from excluding students too poor to pay school fees and shut down the state's "peace bond" statute that had been used to jail those considered troublemakers. When his wife, an Alabama Law School professor, was appointed as the first Inspector General in the United States Department of Labor by President Jimmy Carter, he followed her to Washington, serving as Associate Director of the National Prison Project, litigating landmark cases. In one instance, he entered a New Mexico prison as an unarmed negotiator to end a deadly disturbance in which the prison inmates had taken control of the facility. When his wife returned to her Alabama teaching post, he returned to Tuscaloosa, rejoining his old firm, representing clients ranging from death row inmates to tort plaintiffs. When his wife became Dean of the Georgia State University School of Law, he joined the Atlanta law firm where he practiced for the rest of his life. There, he represented plaintiffs in class actions, including major involvement in the \$6 billion settlement of the breast implant cases and a class action involving damages from PCB (polychlorinated biphenyls) chemicals in an Alabama community. His survivor includes his wife of forty-four years.

Alan Edward Kraus, '00, Latham & Watkins, Newark, New Jersey, died April 2, 2016 at age sixty-two. He was a graduate of Wesleyan University and the University of North Carolina Law School. As a partner in a Morristown, New Jersey firm he defended major product liability cases, including the tobacco class actions of the late 1990s. He joined Latham in 2001, chairing its Litigation department for six years. In the absence of a published obituary, no further information is available.

Robert MacCrate, '75, a Fellow Emeritus, retired from Sullivan & Cromwell LLP, New

York, New York, died April 6, 2016 at age ninety-four. The son of a thirty-five year New York State jurist, after graduating from Haverford College, he served in the United States Navy aboard the *USS Pennsylvania (BB-38)* in World War II. After earning his law degree from Harvard Law School, he joined Sullivan & Cromwell. In his early years he took a year off to serve as legal secretary to a state appellate justice and later served for three years as General Counsel to New York Governor Nelson A. Rockefeller. In 1969, the Secretary of the Army appointed him to a panel created to investigate the 1968 massacre by American troops of civilians in the hamlet of My Lai in the Vietnam War. The panel's 260-page report led to major changes in military regulations. MacCrate became President of the New York State Bar in the early 1970s and of the American Bar Association in 1987. He created the ABA Commission on the Status of Women in the Profession, appointing an Arkansas trial lawyer named Hillary Clinton to lead that group, a role she relinquished in 1992 to assist in her husband's presidential campaign. After his presidency, he led the landmark ABA Task Force on Law Schools and the Profession. Its 1992 report, *Narrowing the Gap*, widely known as "The MacCrate Report," strongly suggested that the traditional academic legal education was not adequately preparing law students for practice and called for an overhaul of legal education. Although the report led to the adoption by the ABA of revised standards for approval of law schools, resistance in legal academia to practice-oriented education continues to be an issue. Among his many honors were the Gold Medals of the New York State Bar and of the American Bar Association, the highest award of both, and seven honorary doctorates. A widower whose wife of almost seventy years died shortly before him, his survivors include a daughter and two sons.

James J. Marcellino, '07, a Fellow Emeritus, retired from Murphy & King, Boston, Massachusetts, died June 30, 2016 at age seventy-three after a long illness. A graduate of the College of the Holy Cross, where he played on the varsity football team, he had earned his law degree at Boston College Law School and later earned a Masters of Business Administration at Boston University. He began his legal career as a Vista Volunteer Community Legal Counsel in Detroit, Michigan, moving from there to serve as a Deputy and then as Assistant Attorney General of Massachusetts. He then served as Project Director and Attorney for the Downtown Waterfront Development Project of the Boston Redevelopment Authority before entering private practice. He served as President of the Boston Bar Association and as Chair of the Policy Advisory Board of the City of Boston Department of Health and Hospitals. He also served as President of the Boston College Law School Alumni Association and had been an adjunct professor at its law school. His survivors include his wife, a daughter and a son.

Irving Nathaniel Morris, '81, a Fellow Emeritus, retired from Morris & Morris, Wilmington, Delaware to Palm Beach, Florida, died June 28, 2016 at age ninety. His undergraduate studies at the University of Delaware were interrupted by World War II, in which he served in the United States Army. He turned nineteen in a foxhole, was captured in the Battle of the Bulge and spent six weeks as a prisoner of war before being liberated in 1945. Completing his undergraduate education at Delaware, he earned his law degree at Yale Law School and served as law clerk for the Chief Judge of the Federal District of Delaware. Early in his career, he undertook the representation of three young men sentenced to prison for life four years earlier.

Over the next six years, he pursued their case all the way to the United States Supreme Court, establishing that police testimony against them had been perjured and ultimately persuading the courts that perjury by a police officer is state action within the meaning of the Fourteenth Amendment. In retirement, he wrote a first-person account of this saga, entitled *The Rape Case*. He was also involved in litigation brought to force the desegregation of the Delaware public schools. Over time, his practice changed to representation of plaintiffs in national corporate securities litigation. He served as President of the Delaware Bar Association, which honored him with its First State Distinguished Service Award. He also served as President of his temple. A widower whose wife of fifty-eight years predeceased him, his survivors include two daughters and a son.

Charles Arthur Nugent, Jr., '83, a Fellow Emeritus, retired from the West Palm Beach firm. Cone, Wagner, Nugent, Johnson, Roth & Romano, PA, which he helped to found, and living in Lake Worth, Florida, died April 2, 2015 at age eighty-nine. A graduate of Palm Beach Junior College and the University of Miami, he earned his law degree at the University of Miami. Three years out of law school, at age thirty he was appointed Palm Beach County Solicitor. One of his first cases involved the successful prosecution of his predecessor in that office. Over the years after he entered private practice, his career evolved from criminal defense to civil litigation. His firm produced more than a half dozen judges, including two Justices of the Florida Supreme Court. A widower whose wife of fifty-eight years had predeceased him, his survivors include four daughters and three sons.

David Arthur Oliver, Jr., '89, Of Counsel to Oliver Walker Wilson, LLC, Columbia, Missouri,

died October 20, 2013 at age eighty-four. After attending Westminster College and earning his undergraduate degree at the University of Missouri, he served in the United States Army Counterintelligence Corps during the Korean Conflict before returning to the University of Missouri-Columbia Law School. After serving as Probate Judge for his county, he became Director of Legal Education for the Missouri Bar Association. Returning to private practice, he practiced for forty-six years before retiring in 2011. He served in numerous civic and health-related organizations. His survivors include his wife of fifty-six years, a daughter and a son.

James Daniel Peacock, '81, a Fellow Emeritus, retired from Semmes, Bowen & Semmes, Towson Maryland and living in Topsham, Maine, died April 2, 2016 at age eighty-five of multiple organ failure. An All-American lacrosse player at Duke University, where he earned his undergraduate degree, he was drafted into the United States Army and, although he was eligible for deferment as a Quaker and a conscientious objector, he nevertheless chose to serve as a physical training instructor. He thereafter earned his law degree from the University of Maryland, where he was a member of the Order of the Coif. He also served in various capacities in the Sheppard Pratt Health System, including chairing its Board. He served the College as its Maine State Committee Chair and as Chair of the Adjunct State Committee. His survivors include his wife of sixty-two years and four daughters.

Hon. Robert Francis Pffner, '63, a Judicial Fellow from Chippewa Falls, Wisconsin, died March 30, 2016 at age ninety-eight. Beginning his college education at Central State Teachers College (now UW-Stevens Point), he graduated from the University of Wisconsin at Madison and received his law degree from its School of Law. After practicing for a short time,

he was called into service in World War II. Beginning boat training in the United States Navy, he entered officer training school, was commissioned an officer and assigned to a motor torpedo squadron as the Executive Officer of PT 526. His squadron escorted cargo ships down the Atlantic Coast through the Panama Canal and across the Pacific to New Guinea. From there, he went to Leyte Gulf, participated in the Battle of Surigao Straits, where the Japanese navy was soundly beaten, participated in the landing on Luzon and ended up patrolling the seas around Borneo until the nuclear bombing of Japan ended the war. He practiced law in Chippewa Falls for twenty-one years before being appointed to the Wisconsin Circuit Court, where he served for sixteen years. He continued as a Reserve Circuit Judge for another twenty-one years, finally retiring in 2004 at age at age eighty-six. His first wife of thirty-nine years and his second of twenty-seven both predeceased him. His survivors include two sons.

Michael Henry Runyan, '03, a Fellow Emeritus, retired from Lane Powell, PC, Seattle, Washington, died December 19, 2015 at age sixty-eight after a five-year illness. His education interrupted by two years' service in the Vietnam War era, he earned his undergraduate degree from the University of Michigan and, after a year at Wayne State Law School, returned to the University of Michigan, graduating cum laude from its School of Law. After a clerkship with a United States District Judge, he joined the firm with which he spent his entire career. He served on the Board of Directors of the Defense Research Institute and as President of the Washington Defense Trial Lawyers, which honored him with its Jack R. Scholfield Outstanding Achievement Award. A prolific writer and speaker on legal subjects, he was a co-founder of the Foundation for

Washington State Courts, coached children's soccer teams and organized a program in which he spoke at high schools on the subject of drinking, driving and not wearing seatbelts. He was also a Judge pro tem of his county court and an arbitrator and mediator. His survivors include his wife of forty-two years, a daughter and a son.

Wofford Hampton Stidham, '82, a Fellow Emeritus, retired from Stidham & Stidham, Bartow, Florida, died August 30, 2013 at age eighty-three. Between undergraduate and law school at the University of Florida, he had served for two years as an officer in the United States Army, stationed in Japan during the Korean Conflict and earning his paratrooper wings. After thirty years with Holland & Knight, he opened his own law firm, which eventually had as members both a son and a grandson. In retirement, he authored three books, one about the Georgia homestead where his mother had grown up and about her family, one about his own family and one an account of a lawsuit. His survivors include his wife of fifty-eight years and two sons.

Ralph Nichols Strayhorn, Jr., '72, a Fellow Emeritus from Winston-Salem, North Carolina, died June 4, 2016 at age ninety-three. His education at the University of North Carolina at Chapel Hill was interrupted by World War II. Enlisting in the United States Navy ROTC program, he served for three years in the Pacific Theater as the commanding officer of a sub-chaser. Returning after the war, he was co-captain of the 1946 Tar Heel Sugar Bowl team. He was inducted into his university's highest honorary society, the Order of the Golden Fleece. After earning his law degree from the UNC Law School he practiced in Durham, North Carolina for twenty-eight years. He then assumed the position of General

Counsel of the Wachovia Corporation and Wachovia Bank & Trust Company, at the time already the largest bank in the Southeast. After retiring from that position, he was Of Counsel for several years to Winston-Salem's Petree Stockton & Robinson before retiring completely. Remaining in the Naval Reserve for twenty years, he retired as a Lieutenant Commander. He served his alma mater as Chair of its Board of Trustees, as President of its General Alumni Association and as President and General Counsel of its Educational Foundation. He was honored with the University's William Richardson Davie Award, its highest honor. His public service included a term in the North Carolina General Assembly, chairmanship of the North Carolina Penal Study Committee and the presidency of the North Carolina Bar Association. He also served on the Legal Advisory Committee of the New York Stock Exchange and the Board of Visitors of Wake Forest Law School. While in Durham, he served as Senior Warden of his Episcopal church. He served the College as its North Carolina State Committee Chair. His survivors include his wife of sixty-seven years, a daughter and a son.

Landman (Landy) Teller, Jr., '87, Teller, Hassell & Hopson, LLP, Vicksburg, Mississippi, died April 15, 2016 at age seventy-four. After earning his undergraduate and law degrees at the University of Mississippi, he served for three years as an officer in the United States Army Judge Advocate General Corps. In addition to many leadership roles in his community, he served as President of his local Bar, of the Mississippi Bar Foundation and of the University of Mississippi Law Alumni Association. He chaired the Lamar Order of the University of Mississippi Law School. He served the College both as Mississippi State Committee Chair and as Liaison to the Emil Gumpert Award Committee. His survivors include his wife of fifty-three years, a daughter and two sons.

Leslie Richard Weatherhead, '03, Lee & Hayes, Spokane, Washington, died May 9, 2016 at age fifty-nine, of cancer. The son of college professors, he was a graduate of the University of Oregon Honors College and of the University of Washington School of Law. Upon graduation, he served for three years as a criminal prosecutor for the Territory of Guam before entering private practice in Spokane. An adjunct professor of trial advocacy at Gonzaga University School of Law, he served the College both as Washington State Committee Chair and as Liaison to its Teaching of Trial and Appellate Advocacy Committee. Declaring himself to be among the top 1% of the happiest human beings in the history of mankind, he often told his children that, because of his deep passion for his profession, he "never worked a day in his life." An avid reader, he was known for his willingness to speak out on issues he considered important. His survivors include his wife, whom he had met and married on Guam, two daughters and a son. Those who attended his funeral were instructed to wear bow ties in his honor and to be prepared to sing the University of Oregon fight song.

Joe C. Willcox, '75, a Fellow Emeritus, retired from Dell Graham, PA, Gainesville, Florida, died December 23, 2013 at age ninety-three. After attending Middle Georgia College for two years, he entered the United States Army Air Corps in World War II. Married at New York City's Little Church Around the Corner to a girl he had met on a blind date, after the war, he returned to the University of Florida to earn his undergraduate and law degrees. A member of his Methodist church, among his many roles was singing for about fifty years in its Chancel Choir. A widower whose wife of sixty-five years had predeceased him, his survivors include two daughters.

William Harrison Flick Wiltshire, '84, Pensacola, Florida, a solo practitioner at the time of his death, died March 7, 2015 at age eighty-four. After graduating from Shepherd College, he had served during the Korean Conflict as an aviator in the United States Navy, first on the *USS Ticonderoga (CV-14)*, and then as a flight instructor. He returned to earn his law degree from the University of Florida School of Law. He continued his service in the Naval Air Reserves, retiring

as a Commander and served as General Counsel for the National Aviation Museum Foundation, which honored him with its Lifetime Service Award in 1998. He also served as President of the Fiesta of Five Flags and on several civic boards and was widely known as an avid outdoorsman. He was laid to rest at Barrancas National Cemetery at the Pensacola Naval Air Station. His survivors include his wife of sixty years, two daughters and two sons.

An Additional Loss to the College Family

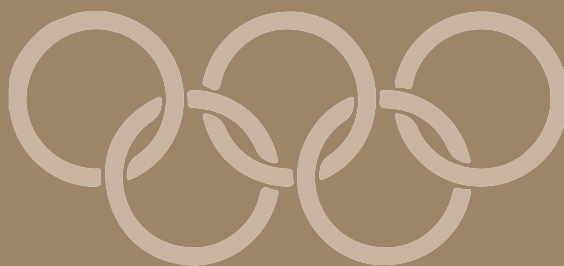
Joan Midkiff Farley Chappell, Richmond, Virginia, the widow of Past President Robert Harvey Chappell, Jr., widely known for her warmth, openness and good humor, died July 21, 2016 after a long illness. A graduate of St. Mary's College, Notre Dame, she earned her master's degree in urban planning from Virginia Commonwealth University. She served for many years as a Commissioner of the Richmond Redevelopment and Housing Authority, as well as in numerous other civic and charitable endeavors. Twice a widow, her first husband, Edward Milton Farley III, was also a Fellow of the College. Her survivors include two daughters, three sons and a stepson.



CALL FOR STORIES

In honor of the 2016 Olympic Games in Rio de Janeiro, the *Journal* is seeking personal stories from Fellows who are former Olympic athletes.

If you would like to share your story, contact editor@actl.com.



UPCOMING EVENTS

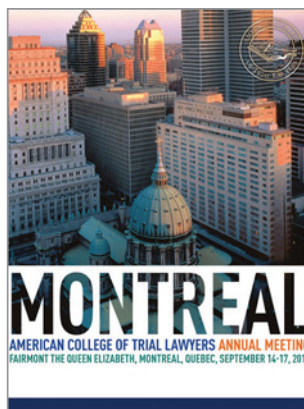
Mark your calendar now to attend one of the College's upcoming gatherings. More events can be viewed on the College website, www.actl.com, under Future Annual and Spring Meeting Dates and under the Events tab.

NATIONAL MEETINGS



2017 Spring Meeting

Boca Raton
Resort & Club
Boca Raton, Florida
March 2-5, 2017



2017 Annual Meeting

Fairmont The Queen
Elizabeth
Montreal, Quebec
September 14-17, 2017

STATE / PROVINCE MEETINGS

Sept. 30, 2016 **Nebraska Fellows Dinner**

Sept. 30, 2016 **New Mexico Fellows Meeting**

Oct. 1, 2016 **Ohio Fellows Dinner**

Oct. 5, 2016 **British Columbia Fellows Dinner**

Oct. 5, 2016 **Vermont Fellows Dinner**

Oct. 10, 2016 **Delaware Fellows Dinner**

Oct. 21, 2016 **Indiana Fellows Dinner**

Dec. 1, 2016 **Arkansas Fellows Dinner**

Dec. 2, 2016 **Mississippi Fellows Dinner**

Dec. 3, 2016 **Louisiana Fellows Dinner**

Dec. 7, 2016 **Oregon Fellows Holiday Dinner**

Dec. 8, 2016 **Washington Fellows Holiday Dinner**

Jan. 27, 2017 **Northern California Fellows Dinner**

Jan. 27, 2017 **Northeast Fellows Black Tie Dinner**

JOURNAL

American College of Trial Lawyers

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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.