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THE BULLETIN

Dakota Plains Legal Services Receives First New Gumpert Award

Photo courtesy of Todd County Tribune

Dawn Marshall, Legal Secretary; Lynette Dixon, Administrative Assistant; Denita Marshall, Paralegal; Cheryl Rogers, Director of Administration; Ron Hutchinson, Executive Director

Dakota Plains Legal Services, which serves the legal needs of low-income Native Americans on nine Indian Reservations in the Dakotas, is the first recipient of the newly constituted Emil Gumpert Award. The award recognizes programs, public or private, whose principal purpose is to maintain and improve the administration of justice.

The Board of Regents chose Dakota plains Legal Services from among 46 nominees upon the recommendation of the Emil Gumpert Committee, chaired by Joseph D. Steinfield of Boston. The award will be presented formally at the Annual Meeting in Chicago.

The accompanying $50,000 grant from the College will enable the agency to create a website, on which tribal law, both codes and case decisions, can be made available. These materials are largely unavailable today, even in paper form.

(continued on page 6)

Pro bono effort to represent Guantanamo detainees growing—see page 9

Meetings Scheduled for Chicago and Florida

Mary Robinson, the current United Nations High Commissioner for Human Rights and former President of Ireland, heads a list of distinguished speakers and guests at the Annual Meeting scheduled for Oct. 20-23 at the Marriott Hotel in Chicago.

Others include **Richard Goldstone**, former Justice of the South Africa Constitutional Court and War Crimes Prosecutor in the former Yugoslavia and Rwanda, and Professor **Robert Mnookin** of Harvard Law School, who will discuss his efforts to bring together the disparate Israeli factions to form a common position in negotiations with the Palestinians.

Madame Justice Marie Deschamps of the Supreme Court of Canada will be awarded an Honorary Fellowship.

Fellows are urged to make reservations well in advance for the upcoming national meetings since space is limited.

The Spring 2006 Meeting will take place April 6—9 at the Westin Diplomat Resort and Spa in Hollywood, Florida.

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In This Issue

A current calendar of College events is posted on the College Website at www.actl.com, as are a current compendium of the ongoing projects of the College's National Committees.

FROM THE EDITORIAL BOARD

This issue covers in depth the proceedings at the 2005 Spring Meeting at La Quinta. Although most of the programs at the national meetings consist of oral presentations, some of them are in part visual. We try to extract from the transcript of the programs enough quotations to give you the essence and some of the flavor of each presentation.

We invite your feedback about the way we are covering these meetings. We want neither to shortchange nor to overwhelm you.

Although it is the exception rather than the rule, we occasionally have a presentation we feel ought to be reproduced verbatim. One presentation at La Quinta, that of **KENNETH R. FEINBERG**, the Special Master who singlehandedly administered the September 11 Victims Compensation Fund, was so poignant and so uplifting that we have decided to print it in its entirety. It begins on page 47. We commend it to you. We believe that this is a story with which every lawyer ought to be familiar.

We call to your special attention two articles in this issue that are unrelated to the Spring meeting. One, the cover story, describes the new direction of the Emil Gumpert Award and the first recipient of the new award. The other concerns the exemplary response of Fellows to the need for representation of Guantanamo Bay detainees in their status hearings mandated by the decision of the United States Supreme Court last summer in *Rasul v. Bush*.

Our experiment with printing brief obituaries of at least some Fellows who have died seems to have struck a chord. You will find that feature expanded in this issue. As a matter of course, Fellows should send to the national office a copy of the obituary of every Fellow who dies for preservation in

(Continued on page 4)

From The Editorial Board

(Continued from page 3)

the College archives. We draw on that source for our coverage of deaths, but the obituaries should be sent to Irvine.

We intend to devote a significant portion of the Summer issue to state, province and regional activities of the Fellows and to the activities of the College's national committees. We have saved some news items on those subjects for that issue. We will shortly send out a plea for news from all these constituencies.

On the cover of this issue, you may notice a new iteration of the College seal, which has been modernized and adapted for use on all College publications, stationery and the like.

Finally, peruse the regular features that we have begun to incorporate in the *Bulletin*. Feel free to send us newspaper clippings and press releases about the activities and accomplishments of Fellows in your area, so that we can have an opportunity to exercise our editorial judgment about their newsworthiness for our wider audience.

Errata

1. We revised the masthead in the last issue of the *Bulletin* to reflect the change of officers. In listing **Past President David Scott, Q.C.**, we inadvertently placed Ottawa in Quebec, instead of in Ontario, an error that was brought to our attention by a sharp-eyed Judicial Fellow, a Justice of the Supreme Court of Canada. Our apologies to Past President Scott, the Fellows of Quebec and the Fellows of Ontario.

2. A computer back flip, the scourge of modern layout technology, resulted in the placement in the last issue of the material that should have begun at the top of the left-hand column of page 22 instead at the top of the left-hand column of page 23. The error was called to our attention by a North Carolina Fellow, who told us that he reads the *Bulletin* from cover to cover as soon as it arrives to see what he missed by not attending the last national meeting.

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Letters to the Editorial Board

"The Bulletin always brings me information which interests me very much. Bryan A. Stevenson's receiving the Courageous Advocacy Award impressed me. He is, as the article said, a gifted minority lawyer. …(his) responsive remark shows the mettle of the man. I cannot think of any award from any group that is more meaningful. Our College has grown both in size and prestige since our esteemed chancellor, Emil Gumpert, inducted me in 1958. I am nearly overwhelmed at how far its tentacles have reached into our professional world."

Jack E. Horsley, Mattoon, Illinois

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"I recently had both the privilege and pleasure of judging at the Regionals of the National Trial Competition held in Fayetteville, Arkansas. Not only was the judging itself a great experience, but I got to meet some Arkansas Fellows, an opportunity which I might not have otherwise had. The trial competition is great experience for all involved and the purpose of my letter is to suggest that the College should encourage all Fellows who have the opportunity to participate in the trial

(Continued on page 5)

Letters To Editorial Board

(Continued from page 4)

competition at any level to do so. I have this observation, which I do not mean as a criticism but simply an observation. In order to get enough judges, lawyers were recruited who were not long out of law school and clearly did not have significant trial experience. The students who participate in this competition have obviously worked hard to prepare and they deserve to be judged and critiqued by experienced trial lawyers. Members of the College should be encouraged to participate and help recruit experienced trial lawyers to judge."

Karl Blanchard, Jr., Joplin, Missouri

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(In response to "The Vanishing Trial," Bulletin, Summer 2004)

"I am old enough to recall when there was no discovery, no billable hours, and wrongful death was limited to $15,000. It was not unusual to have a jury trial every few weeks except for the summertime. . . . Today I find myself preparing for trial and going through the usual discovery which frequently results in each lawyer having 500 percent of the information required for trial. Shortly before trial there starts what I refer to as the 'dance of the dying elephants.' The lawyers lumber around in circles mashing grass before finally falling down and settling. . . . Again and again I see plaintiffs' firms (frequently those with the largest advertising budget) who settle by agreement or mediation for what I believe is substantially less money than their case merits or their client deserves. . . .On the other side of the coin, there are the multinational law firms and those who would like to be multinational law firms who supply cases with partners, associates, paralegals, etc. Masses of paper are produced. The clients on both sides of the controversy come to believe that what is happening must end and are persuaded that mediation is best. Assurance of some money without risk is hard to deal with. . . . I do not know that we can resolve the problem, but we can surely improve the situation if we are made to consider it."

Colin J. S. Thomas, Jr., Staunton, Virginia

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Heritage Committee Seeks Information

The Ad Hoc Committee on College Heritage enlisted former Regent **Tony Murray** to conduct an in-depth interview with retired Fellow **Phyllis Cooper** of Los Angeles, the widow of Grant B. Cooper, president of the College in 1962-63.

Both Coopers were involved in the origination of the College in 1950.

Committee Chair **James P. Schaller** of Washington, District of Columbia, plans future sessions with more past presidents or their widows.

The committee is inventorying material at College headquarters and consulting with professional archivists.

Anyone with material that might be relevant should contact Schaller or a member of his committee.

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New Gumpert Award Winner

(Continued from page 1)

Created in 1975, in an era when few law schools taught trial advocacy, the Gumpert Award fostered and encouraged law schools to recognize that trial advocacy should be an important part of legal education. For nearly three decades it had recognized law schools in the United States and Canada for excellence in their trial advocacy teaching programs. Forty-one law schools had been so honored.

The Board concluded that in the intervening years the award's original objective had largely been satisfied. It voted to discontinue the award as it had been given in the past and asked the Gumpert Committee to recommend a new direction that would continue to honor the founder of the College in a meaningful way.

At the Spring 2003 Meeting, the Board approved the new mission for the Gumpert Award.

The Committee was charged with determining whether a nominee serves an important public need, whether it adheres to high ethical principles and whether receipt of the award will be meaningful in of helping it to accomplish its goals. Special consideration is given to startup efforts and to programs engaging in innovative methods of advancing the administration of justice.

Headquartered in Mission, South Dakota, Dakota Plains Legal Services began in 1967, the first such program in South Dakota. It has seven branch offices whose 31 employees serve the legal needs of 55,000 low-income Native Americans. The agency provides development, support and assistance to the Tribal Court systems in its service area, including training Tribal Court staff and lay advocates. It has also assisted in the development of Tribal Court bar associations.

Although tribal law differs from tribe to tribe, the Committee felt that making case decisions and written codes available on the Internet could eventually contribute to the formation of a "common law" for Native Americans.

"This effort will not only help the tens of thousands of people in the immediate geographic area, but has the capacity to reach far beyond," the Committee's report to the Board of Regents said. "Reservations in at least two other states, New Mexico and Wisconsin, are looking to DPLS as the leader in this effort."

Committee member **Murray Abowitz** of Oklahoma City served as chair of the due diligence committee for the DLPS nomination. He was assisted by **Gary Bostwick** of Los Angeles.

The three other finalists nominated for this year's award were the Legal Aid University of Boston, the Western Canada Society to Access Justice of Vancouver, British Columbia and the National Center for State Courts Jury Programs of Williamsburg, Virginia.

Any Fellow may nominate a program for the award and programs may apply directly. Details, including application and nomination forms, can be found in the awards section of the College's website, www.actl.com.

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FELLOWS MEET AT LA QUINTA

The College returned to familiar territory, the La Quinta Resort & Club, nestled among the Santa Rosa Mountains at the south end of the California desert, for its Spring 2005 meeting.

The Flores Ballroom was the scene of the opening reception on Thursday night, March 2. Following recent tradition, the hall was arranged so that Fellows could congregate by region.

President **JAMES W. MORRIS, III** of Richmond, Virginia presided over the morning programs. The Friday program began with an invocation by past Regent **LOUIS W. FRYMAN** of Philadelphia. Canadian Ambassador to the United Nations **ALLAN M. ROCK, Q.C**., of Ottawa, Ontario, a Fellow, spoke on the present dilemma of that organization and of the proposals to reform it.

A twenty-five year practicing lawyer and the Treasurer (President) of the Law Society of Upper Canada, the governing body for some 39,000 Canadian lawyers, before he entered public service as a member of the Canadian Parliament, Rock had served as Minister of Justice, Attorney General, Minister of Health and Minister of Industry before assuming his present post.

Rock's thesis, eloquently delivered, was that, despite its well-publicized shortcomings, on balance, looking at its entire history over the past sixty years, the scales are tipped in favor of the continued commitment of both the United States and Canada to reforming and preserving the UN.

He was followed by Fellow **LINDA A. FAIRSTEIN** of New York, who spoke both of her career as head of the Sex Crimes Prosecution Unit of the Manhattan District Attorney's Office and of her more recent career as a novelist. Many of the Fellows in attendance recalled her 1995 acceptance speech on behalf of the inductees. An acclaimed pioneer in the effective prosecution of crimes against women, Ms. Fairstein, now partly retired after a thirty-year legal career, appears frequently as a commentator on three television networks. She has published seven best-selling novels based on her experiences.

Senior United States Circuit Judge **JAMES C. HILL** of Jacksonville, Florida, a twenty-six year trial lawyer and a Fellow before his 1974 appointment to the bench, spoke eloquently of the importance of lawyers, observing that "there is no higher office in the courtroom than that of the trial lawyer." Decrying the advent of hardball litigation tactics that flout the established rules of procedure and evidence, he pointed out that the exclusive franchise that society has granted lawyers to advise clients on legal matters and to appear in court on behalf of others will survive only so long as it serves the interests of that society.

The Friday morning program concluded with an illuminating and entertaining presentation by UCLA Law School Professor and author **PAUL BERGMAN** of Los Angeles. Using a series of film clips from movies dating from *The Mouthpiece* in the thirties, through *My Cousin Vinnie,* to the recent *Chicago*, and taking his theme from his book, *Reel Justice*, Professor Bergman illustrated the images of lawyers and the courts that have been projected on the silver screen over the years. He pointed out that the depiction of the profession in the movies reflects contemporary attitudes towards lawyers and the law and also helps to shape their public image.

(Continued on page 8)

Fellows Meet at La Quinta

(Continued from page 7)

On Friday evening, the Fellows and their spouses and guests were treated to an abbreviated polo match under the lights at the incredibly beautiful Empire Polo Grounds. The evening began with a brief pre-match introduction to the sport for the uninitiated and ended with a picnic under tents. The performance of the women players, who scored several spectacular goals, put to rest any preconceived notions that polo is a sport for men only.

Saturday began with a breakfast for the inductees, where they were introduced to the workings of the College. This event has become a productive part of the national meetings. It has led to many new Fellows becoming involved in College activities from the beginning of their membership.

The Saturday morning program began with remarks from Wisconsin Chief Justice **Shirley S. Abrahamson**, a former practicing lawyer and a professor, who is the current President of the National Conference of Chief Justices and the Chair of the Board of Directors of the National Center for State Courts. Her opening remark that "judges do more than try cases" was underscored by her informative presentation, outlining the almost universal problems facing the state judiciaries and the efforts of the two groups she leads to address them.

Susan T. McGrath, a sole practitioner from the small far northern town of Iroquois Falls, Ontario and the current President of the Canadian Bar Association, described the changes that are taking place in the process for selection of Justices of the Canadian Supreme Court. The electorate and many in Parliament have demanded more transparency in the selection process. Her unspoken theme was that Canada is in the process of trying to fashion selection procedures that will be more open without impairing the independence of the judiciary or allowing the process to become politicized, as it has in Canada's neighbor to the south.

The aftermath of September 11 and the war on terror that followed it dominated the remainder of the Saturday morning program.

Two-time Pulitzer Prize winner and former *New York Times* reporter and columnist **Anthony Lewis**, a repeat guest of the College, chose as his subject "Terrorism and the Law." He spoke forcefully and in blunt detail, citing incident after incident, of what he sees as a creeping culture of indifference to, or disregard for the law, of putting "necessity" above the rule of law, in the wake of September 11 and the ensuing war on terrorism. His thesis: "If we abandon our commitment to law, we will have given terrorism a great victory."

Lewis sees in the third branch of government, the judiciary, and in the practicing bar the answer to this dilemma. He ended with the observation, "We, and above all you as lawyers, must challenge the notion that it is a weakness to respect the law. To the contrary, the law is our strength and our redeemer."

Kenneth R. Feinberg of Washington, D.C., a renowned mediator and the Special Master appointed by the Attorney General to administer the September 11 Victim Compensation Fund, described in detail his handling of that unique assignment. His past assignments had included acting as Special Settlement Master in the DES cases, the Agent Orange product liability cases and the asbestos litigation in the Eastern and Southern Districts of New York, Trustee of the Dalkon Shield Claimants Trust, an arbitrator of the

(Continued on page 36)

FELLOWS RESPONDING TO NEED FOR COUNSEL IN GUANTANAMO CASES

A growing number of Fellows of the College have volunteered to represent detainees at the United States Naval Base at Guantanamo Bay, Cuba in *habeas corpus* proceedings.

The U.S. Supreme Court's June 28, 2004 ruling in *Rasul v. Bush* had held that the nearly 600 foreign nationals imprisoned in Guantanamo Bay had a right of access to the federal courts by way of *habeas corpus* and otherwise to challenge their detention and the conditions of their confinement.

But the decision meant little for individuals who were foreign citizens unfamiliar with U.S. law who had been held virtually incommunicado for nearly three years without access to lawyers. Immediately after the *Rasul* decision, the Center for Constitutional Rights, a New York-based human rights organization, along with cooperating counsel from the private bar, filed new *habeas* petitions on behalf of more than 70 detainees.

The Access to Justice subcommittee's March report to the Regents stated: "Indeed, the establishment of the rule of law in Guantanamo relies heavily upon the availability of dedicated *pro bono* counsel to facilitate these detainees' access to courts."

The College's Executive Committee endorsed the effort and the participation of the College's Access to Justice Committee on January 20.

As of May 9, fifty United States Fellows and three Canadian Fellows had inquired about assisting in the effort. Over thirty Fellows and their firms were already representing more than 50 detainees. Overall, more than 200 attorneys from the United States and Canada have responded. The response from Fellows has been double that of any other legal organization. As of May 9, however, more than 400 detainees still needed individual representation.

"Since the United States Supreme Court granted *certiorari* in *Rasul*, the pressure of litigation and judicial review has contributed to the repatriation of 172 prisoners to their home countries, where the vast majority now live as free citizens," the subcommittee report went on to state. "The United States has released these prisoners without affording them a hearing in federal court or issuing criminal or military charges against them."

The report continued that attorneys involved in the cases so far "recognize that the challenges to the detentions in Guantanamo raise some of the most significant domestic and international legal issues of our times."

Consistent with the College's established policy, **CHRISTINE A. CARRON** and **WILLIAM B. CROW**, Co-chairs of the Access to Justice Committee, refer interested Fellows who inquire about volunteering to handle these

WILLIAM B. CROW

CHRISTINE A. CARRON

cases to **GITANJALI "GITA" S. GUTIERREZ** of Gibbons, Del Deo, Dolan, Griffinger & Vecchione in Newark, New Jersey. Ms.

(Continued on page 10)

Guantanamo Cases

(Continued from page 9)

Gutierrez, who is coordinating the efforts of all the lawyers who have volunteered, can be reached at 973-596-4493 or ggutierrez@gibbonslaw.com.

The Firms who are representing detainees as of this date and the Fellows involved include:

Bondurant, Mixson & Elmore, LLP (*Emmett Bondurant, FACTL*) (counsel for 1 Moroccan detainee)

Brennan, Trainor, Billman & Bennett, LLP (*Harry J. Trainor, Jr. FACTL and William C. Brennan, Jr., FACTL*) (counsel for 1 Algerian detainee)

Burke, McPheeters, Bordner, & Estes (*Edmund Burke, FACTL*) (counsel for 1 detainee, citizenship unknown)

Crow Dunlevy (*Thomas Brett, FACTL*) (will represent 1 detainee, assignment pending)

Downs Rachlin Martin PLLC (*Robert D. Rachlin, FACTL*) (counsel for 1 Algerian detainee)

Esdaile, Barrett & Esdaile (*Michael E. Mone, FACTL*) (will represent 1 detainee, assignment pending)

Garvey Schubert Barer (*Robert C. Weaver, Jr., FACTL*) (counsel for 1 Syrian detainee)

Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C. (*Michael Griffinger, FACTL*) (counsel for 2 British and 1 Qatari detainees)

Gurewitz and Raben, PLC (*Harold Gurewitz, FACTL*) (will represent 1 detainee, assignment pending)

Lavin, Coleman, O'Neil, Ricci, Finarelli & Gray (*recruited through FACTL*) (counsel for 3 Yemeni detainees)

Holland & Hart LLP (*Scott S. Barker, FACTL and Anne J. Castle, FACTL*) (will represent 6-10 detainees, client assignment pending)

Margol & Pennington, P.A. (*C. Rufus Pennington, III, FACTL*) (counsel for 1 Yemeni detainee)

McDade Fogler LLP (*Murray Fogler, FACTL*) (counsel for 1 detainee, citizenship unknown)

Murphy & Shaffer (*William J. Murphy, FACTL*) (counsel for 1 Yemeni detainee)

O'Donnell Shaeffer Mortimer (*Pierce O'Donnell, FACTL*) (will represent detainee, assignment pending)

Paul, Weiss, Rifkind, Wharton & Garrison LLP (*Jay Greenfield, FACTL*) (counsel for 10 Saudi detainees)

Perkins Coie, LLP (*Paul T. Fortino, FACTL*) (counsel for 1 Saudi and 1 Kazahkstani detainee)

Ruprecht, Hart & Weeks (*Louis A. Ruprecht, FACTL*) (will represent 1 detainee, assignment pending)

Schnader Harrison Segal & Lewis LLP (*Elizabeth K. Ainslie, FACTL*) (counsel for 2 Syrian detainees)

Schwabe, Williamson & Wyatt (*William Crow, FACTL and Jan K. Kitchel, FACTL*) (counsel for 2 Moroccan detainee)

Shook Hardy & Bacon (*Christopher David Brown, FACTL*) (will represent 1 detainee, assignment pending)

Stephen A. Houze, Attorney-at-Law (*Stephen A. Houze, FACTL*) (counsel for 1 Yemeni detainee)

Stradley Ronon Stevens & Young (*Clark Hodgson, FACTL*) (will represent 1 detainee, client assignment pending)

Sutherland Asbill & Brennan LLP (*John Chandler, FACTL*) (counsel for 5 Yemeni detainees)

Judge Charles M. Travis [ret.] (*FACTL*) (will represent 1 detainee, client assignment pending)

Venable LLP (*Carol Elder Bruce, FACTL*) (counsel for 2 Egyptian detainees)

The West Law Firm (*Terry West, FACTL)* (will represent 1 detainee, assignment pending)

Whiteford, Taylor & Preston LLP (*William F. Ryan, Jr., FACTL*) (will represent detainee, assignment pending)

Other Counsel And Firms Who Have Volunteered Include:

Allen & Overy LLP (counsel for 14 Yemeni detainees)

American University School of Law Human Rights Clinic (counsel for 1 Canadian detainee)

Bingham McCutchen LLP (counsel for 2 Chinese detainees)

Blank Rome LLP (counsel for 1 detainee, citizenship unknown)

Lt. Commander Charles Swift (co-counsel for 1 Saudi detainee)

Clifford Chance LLP (counsel for 1 French detainee)

Cohen, Milstein, Hasufeld & Toll PLLC (counsel for 1 Saudi detainee)

Covington & Burling (counsel for 14 Yemeni detainees)

Maj. Dan Mori (co-counsel for 1 Australian detainee)

Dechert LLP (counsel for 14 Afghani detainees)

Denbeaux & Denbeaux (counsel for 2 Tunisian detainees)

Dorsey & Whitney LLP (counsel for 6 Bahraini detainees)

Erwin Chemerinsky (counsel for 1 Libyan detainee)

Foley Hoag LLP (counsel for 1 Sudanese detainee)

Fredrikson & Byron, P.A. (counsel for 1 Algerian Canadian detainee)

Freedman Boyd Daniels Hollander & Goldberg P.A. (counsel for 1 Moroccan detainee)

(Continued on page 30)

Notable Quotes from the Spring Meeting

Invocation

Past Regent Louis W. Fryman, FACTL Philadelphia, PA, delivering the opening invocation

[T]here are times in our lives when our intellect is tested, when our character is challenged, and when our perceptions are put in question. . . . [M]ay we . . . listen and learn . . . and have the ability to respond in responsible and reasonable fashion, as well as the enthusiasm to exchange our ideas with good faith and with good humor. May we have both the strength of our convictions and the good sense to change our concepts. . . May we seek not only the delight of [this] gathering, but the ideas, the concepts, the lessons and the friendships that will enrich our profession and create memories for a lifetime.

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On Reforming and Preserving The United Nations

The Honourable Allan M. Rock, Q.C., FACTL, Ottawa, Canada, Ambassador and Permanent Representative of Canada to the United Nations, urging reformation of that organization

Emerging from a devastating World War, . . . the leaders of another generation imagined a better world and fashioned a tool [the United Nations] with which to build it. They drafted a charter. They designed an institution. And they pledged their fidelity to some simple and timeless ideas: That the world and its nations should work together collectively toward peace; that they should work together to promote human freedom and human progress; and that it was time to forge a new world order based upon international law and respect for human rights.

Allan M. Rock, Q.C.

[W]hat began in such hope and wonder is now mired in doubt and dishonor. To use the language of our profession, the United Nations stands accused, accused of corruption and mismanagement, accused of chronic ineffectiveness, accused of deadlock and irrelevance . . . .

Now, it's important to acknowledge the seriousness of these charges, but it's also important not to rush to judgment, not to seize too quickly upon extreme remedies. And as always, it's important to weigh all the evidence before coming to a conclusion.

I am here this morning to return briefly to my former role as advocate and to make the case that, despite the weaknesses, despite the problems of the U.N., even for a flawed and faulty United Nations, this is not a case for the ultimate penalty, that if the U.N. does not deserve acquittal on all counts, at least it should not be put to death. I will be advocating a remedial disposition. . . .

The Problems

The United Nations, of course, is structurally weak. It's boxed in to a rigid structure that was created in a very different world, and it's simply not equipped to respond to

(Continued on page 12)

Notable Quotes

(Continued from page 11)

the different challenges of the current age. The Security Council is too often locked in stalemate, the General Assembly preoccupied by sterile debate on pointless resolutions, with an agenda that does not reflect the real problems of our times. The Oil For Food Program, with all of its problems and potential corruption, has to be fully investigated. And if anyone is guilty of wrongdoing, they must be prosecuted, and ways must be found to ensure that such a thing never happens again.

There are management issues like the way senior staff is dealt with when they face allegations of misconduct, and, of course, there are also charges of sexual misconduct by some peacekeepers in places like the Democratic Republic of Congo.

But perhaps most importantly, the United Nations has on more than one recent occasion failed humanity by standing by and watching genocide unfold in Rwanda without taking any step to stop it, by its failure to respond, or respond effectively, to needs in Somalia and Kosovo, and today by allowing the continued slaughter of the innocents in Darfur. . . .

The Redeeming Considerations

I base the defense on three submissions: *First*, that that sad record tells only part of the story, and, when viewed against the full background, those faults are seen in a context in which . . . on balance over 60 years, the United Nations has done more good than harm.

Second, that the interests of the member states themselves require that the United Nations continue to exist, albeit in a changed form, because the member states . . . require a multilateral organization of universal membership for their own purposes.

And *third,* despite the acknowledged weaknesses, despite the clear faults, the United Nations is capable of rehabilitation, and a credible plan exists, with the realistic chance of being implemented in the foreseeable future, to change and improve the UN and overcome those very faults, so that weighing the failures of the past against the promise of the future, on balance, the scale should be tipped in favor of continuing our commitment to the United Nations. . . .

The Proposed Solution

We've received two reports — one with recommendations for institutional change, a second dealing with development and progress toward the millennium development goals of addressing poverty and hunger and disease. And between now and September, the nations of the world in New York will be negotiating a document which will be a blueprint for change.

It won't be easy. There's much self-interest that will have to be overcome if we're to reach common ground. But drawing upon four categories of change, I believe it's going to be possible for us to reach a deal.

Those categories are: *institutional changes in the U.N. itself*, making the Security Council more effective and addressing the weaknesses of the General Assembly.

Secondly, *dealing with issues of security*, creating a peace-building commission to monitor fragile and failing states, intervene early to prevent conflict, work with its building capacity to govern in some of these countries.

Third, the issue of *development,* confronting once and for all the gulf between the North and the South, addressing the inequities and the unfairness in the distribution of the world's resources. . . .

(Continued on page 13)

NOTABLE QUOTES

(Continued from page 12)

And the fourth element of course is *trade*. . . . All nations of the world must have access to open markets. And the tradition of subsidies must be diminished and eventually ended.

So . . . I submit that notwithstanding the seriousness of the misfeasance and malfeasance with which its charged, when it's seen against the background of all of the facts, when it's measured against the vital role that it fulfills, and when it's seen especially against the prospects for change and renewal, surely it's time for us to reaffirm our commitment to the ideals articulated in 1945. . . .

[I]t is time for us to . . . take those ideals and give them practical expression, to use institutions to advance our common interests, and to never stop in our efforts to make this a better world.

With that, I rest my case.

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LAWYERS AS NOVELISTS

LINDA A. FAIRSTEIN, FACTL, NEW YORK, NEW YORK, AUTHOR AND FORMER CHIEF OF THE SEX CRIMES PROSECUTION UNIT IN THE MANHATTAN DISTRICT ATTORNEY'S OFFICE, SPEAKING ON "LIFE FROM LAW TO LITERATURE"

Experience as a Prosecutor

Sir Matthew Hale, Lord Chief of the King's Bench, wrote an opinion that was paraphrased in all of our laws in this country regarding sexual assault. And it basically stated . . . that because rape is a charge that is so easy for a woman to make and so hard for a man to defend against, we have to examine it with more caution than any other crime. And that additional caution became the corroboration requirement.

Unfortunately, Sir Matthew Hale wrote that opinion in the year 1671. And it literally took – it was adapted and written into the laws in every state and territory on this side of the ocean – and it took 300 years to get those laws off the books in the 1970s. . . .

It was halfway through my 30 years in the DA's office that I heard for the first time what are now my three favorite letters of the alphabet: DNA. . . . [I]t was another three years before DNA was admitted as a valid technique in any court in the country. . . . [I]t's truly remarkable what science has been able to do, even after the best investigators, the most willing, the most cooperative witnesses are able to, have given their all and still are unable to solve the cases.

I get to do in fiction sometimes what we weren't able to do in real life. I think the single case that haunts me the most, [one] we worked on for almost five years, was a serial rapist on the Upper East Side of Manhattan who . . . still has not been apprehended, who attacked more than 20 women and then just disappeared, just stopped attacking them.

From my experience, most serial rapists don't retire. And he is either in jail somewhere else on some other matter or moved to another location, so we decided to indict his DNA profile to hold the statute of limitations. And we indicted him as "John Doe, whose DNA profile is ___ ." We spelled it out in the indictment, hoping to get that into data banks all over the country and find him somewhere else.

That will happen someday I'm convinced. We're still looking for him.

The Transition to Fiction

But the beauty of fiction is in my latest book, we do a John Doe DNA indictment,

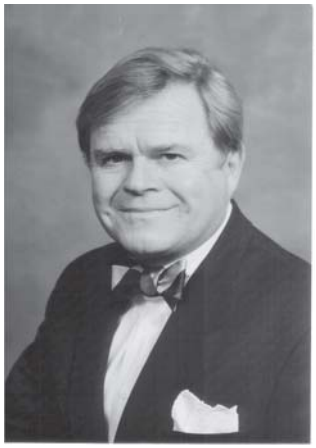
(Continued on page 21)

President's Report: Trial Lawyer—"What's In a Name?"

Have you ever been obliged to explain our College to listeners whose view of "trial lawyers" is low indeed? Did you notice that many thought that "trial lawyer" was the worst epithet they could hurl at a recent candidate for vice president, and a respected Fellow of the College at that? That hurts, no matter which political party you favor. I confess to describing myself on occasion as a "courtroom lawyer," abandoning "trial lawyer" in the manner of the California Trial Lawyers Association, which changed its name to the "Consumer Attorneys of California."

Putting aside for now how the honored appellation "trial lawyer" was dragged so low, and who is to blame, we can agree that there is a problem that the College should address for at least two reasons: (1) "Trial Lawyer" is a part of our name and our identity, and we often are confused or equated with other trial lawyer organizations and individuals; and, (2) whatever the reasons for the besmirched image, much good is done by trial lawyers, especially Fellows of this College, that goes unreported and under appreciated. What we have here, my friends, is an image problem. Dare I say, "public relations"? Let's call it "outreach."

There are other aspects of this problem. There is wide concern among the Fellows, especially younger Fellows, that the College, its standards, purposes and activities are not as well known to lawyers and judges as in the past. Although the image of the College shines in the rarified atmosphere of the United States and Canadian Supreme Courts, among the hierarchy of the legal community of Great Britain and in the Judicial Conferences and the Rules Committees of the United States Federal Courts, we are not as familiar to a surprising number of lawyers and judges outside those lofty environs. We are told that in most states and provinces the honor of induction is under appreciated, even confused with "joining" some other lawyer group; yet, these judges and lawyers "at home" are the public that matters most to the Fellows.



James W. Morris, III

There is more. Central to my "President's Report" in the Winter 2005 *Bulletin* was concern about assaults upon the independence of the judiciary by members of the other two branches of government and by others who would eliminate discretion of judges and dictate the decisions they favor. This is a subject that the Fellows know well and the College has a long established record of thoughtful, nonpartisan comment in support of an independent judiciary.

The tragic case of Mrs. Shiavo recently cast these issues in stark relief. Some Fellows on their own publicly protested the unfair criticism of the judges and the bizarre legislative response to the decision. Others called upon the College as an institution to respond.

The Executive Committee authorized a statement, which was drafted by **Mike Cooper** for the President's signature, but then matters ground almost to a halt. How to get it published? The College as an organization has no established contacts

(Continued on page 15)

PRESIDENT'S REPORT

(Continued from page 14)

with the media, even the ubiquitous lawyer press. We are not known to the relevant editorial boards. More unhappily, even there we are confused with other organizations. In this instance, because of the contacts and persistence of Fellow **MIKE SMITH**, we finally placed our Op-Ed piece (reprinted in this *Bulletin*), in the *Richmond Times Dispatch*. However, last year, our press release regarding our superb paper, "United States Sentencing Guidelines 2004: An Experiment that has Failed" (both available at www.actl.com) was even less successful, ignored by a "Who's Who" of major newspapers, despite the quality of the paper and the timeliness of the topic. The College should not be reduced to shopping door to door, hat in hand, to place a well reasoned comment about the justice system, a subject at the core of our expertise.

We can no longer modestly eschew active pursuit of public attention to the value of the trial profession and the distinction of the College. We must act now and act decisively, if the honor of Fellowship is to have meaning outside the College, if our balanced and insightful commentary regarding the justice system is to influence relevant opinion, if we are to raise up the title "trial lawyer" from the muck and mire to which it has been relegated by many observers, and if the American College of Trial Lawyers is to stand apart from other legal groups.

Our awards, our honors and honorees, our competitions, our public service, our consistent contributions to the improvement of the justice system and trial ethics, local and national, are examples of the good that trial lawyers do, but which go virtually unremarked. Public notice of such activities could burnish the image of trial lawyers and present opportunities to explain the College's unique qualities and high purpose, as well as to identify the Fellows involved and to identify *with* them. Notice of College elections, appointments and inductions offer similar opportunities.

While the Outreach Committee under **LIZ MULVEY** of Boston formulates its recommendations, the College currently is encouraging outreach by State/Province Committees, e.g., tombstone announcements honoring inductees, outside attention to their training of public interest lawyers and special awards, and is fostering the efforts of the College office and General Committees to draw more attention to our Trial and Moot Competitions and the Gumpert Award, for example. The Board, the Executive Committee and staff are increasingly alert to outreach opportunities and will be immediately responsive to initiatives suggested by our committees and Fellows. We will be quick to respond to media inquiries in areas consistent with the College's stated purposes. From these efforts we will learn and improve.

THE WOLF AND THE PACK

Rudyard Kipling, in the front piece of *Jungle Book*, famously about a boy raised by wolves, said, "For the strength of the pack is the wolf and the strength of the wolf is the pack." Therein lies a key to our outreach.

The College is zealous in its investigation of the nominees. Only the best are accorded the honor of Fellowship. The very qualities of these lawyers which attracted the College are well known and admired in their respective states and provinces and often beyond.

If we identify the College with our Fellows in a state or province, then by virtue of their formidable reputation the image of the College must be raised in the eyes of those who know them, but do not know the College. Also, because our Fellows are well known, so will be the diversity of their

(Continued on page 28)

First Leon Silverman Award Presented to Judge Leonard B. Sand

(L-R James Morris, Leon Silverman, Leonard Sand, and John S. Siffert)

The Downstate-New York Committee of the College presented the first Leon Silverman Award to Hon. **Leonard B. Sand** on April 13.

Inducted into the College in 1976 as a practicing attorney, Sand is a Senior Judge of the United States District Court for the Southern District of New York. He presided over the Yonkers school desegregation case and the Kenya embassy bombing case. He is the lead author of Sand, *Modern Federal Jury Instructions* and an Adjunct Professor at NYU Law School.

The award was created this year by the Downstate New York Committee with the approval of the College to honor a lawyer or senior judge "who exemplifies the qualities of ethics and professionalism embodied in the College's Codes of Trial and Pretrial Conduct and whose accomplishments manifest a lifetime commitment to advancing the administration of justice."

The award is to be made no more frequently than biennially.

John S. Siffert, chair of the Downstate New York Committee, announced that the award is being named after College Past President **Leon Silverman**, now of counsel to Fried Frank Harris Shriver & Jacobson LLP. Among his long list of public service activities, Silverman is a former U. S. Special Prosecutor, former President of the Legal Aid Society and former Assistant Deputy Attorney General of the United States. He served for many years as President of the U. S. Supreme Court Historical Society and is now its Chairman.

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OPINION: DINOSAURS OR TRIAL LAWYERS?

BY RICK KERGER, FACTL

Every recent study of the subject has concluded that there has been a dramatic drop in the number of trials in the past 20 years, particularly jury trials. Some have expressed surprise and concern.

The concern is understandable, albeit perhaps overstated. But there should be no surprise. The Federal Rules of Civil Procedure were enacted in 1936 and one of the primary purposes of the Rules was to foster resolution of lawsuits without trials. The working premise was that if both sides had experienced counsel and access to the same body of information, those lawyers ought to be able to resolve the disputes short of trial. The surprise is that it has taken 70 years to see the phenomenon have an impact. But it is hardly a surprise.

Then factor in the increased emphasis on alternate dispute resolutions. Within the past 30 years, we have seen the arrival of summary jury trials, mandatory mediation, the increased use of arbitration and even early neutral evaluation. All of these have further increased the likelihood that lawsuits would be settled.

What has been less considered is what the impact of this reduced number of trials will be. An obvious one is that people handling cases will be less skilled than their professional predecessors. You can attend all the NITA programs you wish, but there is nothing that increases advocacy skills like an actual trial. One simply cannot recreate the pressures, and that pressure affects performance.

RICK KERGER, FACTL

This affects lawyers' confidence in their trial work. One can suggest the ability to try a lawsuit is somewhat like the ability to ride a bike, and therefore once the jury selection process begins, the old skills return. But rarely is there someone trying to knock you off your bike! The tension and conflict attendant to trials are a bit more daunting if you try a case every three years as opposed to five trials each year.

A less obvious problem lies in the reduced skill of the trial judges. Studies suggest that in 1962 federal judges tried an average of 39 cases a year whereas today's jurists try an average of 13 within the same period. When I began in this business, I recall Judges wearing robes that appeared almost worn out. They did it proudly, the wear and tear being reflective of the amount of time they spent on the bench, a matter of considerable importance. In the future it may be that judges might not even have to have their robes cleaned, much less frayed, during their careers.

Evidentiary rulings and the assessment of witnesses is easier the more a judge does those tasks. A trial a month is likely

(Continued on page 18)

Dinosaurs or Trial Lawyers?

(Continued from page 17)

adequate to keep them on top of their game. But I am less sure about the result of five or six trials a year, which is certainly the direction we appear to be headed. I am concerned that the product of our trial system will be adversely impacted by a reduction in judicial trial experience.

At the appellate level, great deference is given to decisions by the trial judges. With less skilled trial judges, appellate courts may have to be more willing to review those decisions, heightened scrutiny as it were. The reduced number of trials thus can implicate some of the cornerstones of our legal system.

Still another danger lies in the reduced number of cases being entered in the data banks kept by various verdict reporters, insureds, corporations and law firms. If you have a database with 10,000 recent cases, the number will tend to average out the occasional anomalous verdict. With 750 cases in the data base, as may be the situation in a couple of years, the few unanticipated defense wins or plaintiff's crushing victories may skew the data base.

Worse, I think the change is inexorable. The number of trials will continue to diminish. Delays in resolving civil cases and the costs attendant to them coupled with the increase skills of mediators and judges will assure this continued decline.

But it is hard to imagine that there will not always be a need for trials. Cases like those involving Martha Stewart and Frank Quattrone present close legal and factual issues that inevitably have to be tested in a trial. Plaintiffs with catastrophic injuries will try cases against defendants where liability may seem difficult to establish, leaving the injured plaintiff with little choice, particularly if the company sincerely believes that its product was properly designed.

What I think does need to be is consideration of a couple of points. First, judges should change their view that the occurrence of a trial somehow represents the failure of our legal system. While alternate dispute resolution is important, trials should remain the ultimate mechanism for resolving our disputes. They are what give the public confidence in our legal system. For all the complaining and criticism, the fact is that when an individual is on trial for his life or seeks to recover damages for a serious injury, he wants a jury to hear the case, not a single mind of a trial judge or an arbitrator.

Second we need to change the structure of the bench and bar. Not all judges and lawyers should be allowed in the courtroom. A cadre of judges specializing in pretrial management and dispute resolution could be developed. Another group, however, would be the trial judges. Only they would run the trials.

The same would be true of lawyers. Not all lawyers should be allowed to try cases. Call them barristers or certified trial lawyers, but clients, judges or the public should not be subjected to unskilled advocates.

These two changes would assure that if, as I fear, the number of cases being tried is reduced, the participants in the process nonetheless remain skilled in the art of trial work.

Accept the change, but exercise caution, and work to keep trials as effective methods of resolving disputes.

(Richard M. Kerger, FACTL, is partner Kerger & Associates Toledo, Ohio.)

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OPINION: JUDGES DESERVE RESPECT, NOT RANTINGS

The following editorial, the joint product of the Executive Committee, was published in the Richmond (Virginia) Times Dispatch on May 12, 2005.

Criticism of the judiciary has become more widespread and increasingly strident. Decisions and the judges who render them are denounced as "outrageous," and judges whose decisions meet with congressional disfavor are threatened with impeachment. The federal courts are accused of having "run amok" and having declared a "judicial war on faith." There are calls to alter the jurisdiction of the courts where elected officials don't like the way it is being exercised. These troubling phenomena can be found in the events surrounding the recent tragic passing of Terri Schiavo.

In an area of the law (health care directives) traditionally reserved to the states, a Florida judge, acting under a carefully crafted statute and after an evidentiary hearing, ruled that Terri Schiavo did not wish to be kept on artificial life support indefinitely. The decision was affirmed on appeal. Congress then took the unprecedented step of conferring jurisdiction on the federal court in Tampa to rehear the case and directed the court do so *de novo* "notwithstanding any prior State court determination. . . ." Within a span of eight days, the federal court denied a temporary restraining order twice; its rulings were affirmed by the federal Court of Appeals; that Court twice denied petitions for rehearing; and the Supreme Court twice denied applications to stay enforcement of the judgment.

It is ironic that a Congress that threatens to deprive the federal courts of jurisdiction in school pledge and other cases should hastily enact legislation thrusting upon the federal courts a paradigmatic state law controversy already fully adjudicated by the Florida courts. Indeed, the statute may have been a violation of the separation of powers in our constitutional scheme. But whether or not the statute was unconstitutional, it was surely unwise.

For more than two centuries federal and state judicial systems have coexisted. Each has traditionally deferred to the other when a case has fallen within the other's traditional jurisdictional sphere. Congress should not disturb this delicate balance because of dissatisfaction with a particular decision or line of decisions. Our constitutional structure was built for the ages; it is not like Play-Doh, to be manipulated when it pleases Congress to do so.

Legislative reaction to the decisions in the Schiavo case is notable in a second respect. Courts and judges have been increasingly under personal attack. The House Majority Leader warned that "the time will come" for the judges who ruled against Terri Schiavo's parents "to answer for their behavior." Was he threatening impeachment or some other form of retribution? Or was he simply seeking to intimidate those judges when deciding future cases? What message does this warning convey to the public? It surely is not a call for respect for the rule of law, the authority of the courts and the integrity of judges.

Amid the swirl of controversy that marked the last days of Terry Schiavo and has lingered, we would do well to remind ourselves and each other of some simple truths about our constitutional system and courts.

First, as stated recently by Theodore B. Olsen, the Solicitor General in the President's first administration, our independent judiciary is "the envy of the world." When we read of the

(Continued on page 20)

JUDGES DESERVE RESPECT

(Continued from page 19)

fate that has befallen the wealthiest man in Russia because he openly expressed political views, or the expropriation of lands in Venezuela without compensation, be grateful that our courts would stand firm against similar governmental action.

Second, our judiciary has earned the envy of the world precisely because it is independent. The executive and legislative branches have for the most part respected that independence and the principle of separation of powers that is the jewel of our constitutional system, and not manipulated the judiciary, as Congress did in the Terry Schiavo case.

Third, as Hamilton observed in *The Federalist No. 78*, the judiciary is the weakest of the three branches of government, having neither the power of the purse nor the power of the sword, and it is the most vulnerable to attack. Ad hominem attacks upon judges by government officials subvert public respect for judicial decisions and ultimately for the rule of law.

Finally, judges are dedicated and conscientious public servants. They bear a heavy responsibility in cases where the stakes may be, as they were in Terri Schiavo's case, literally life or death. They are dedicated to their judicial responsibilities and, with exceedingly rare exceptions, are honest and irreproachable. For all the loose talk of impeachment, that ultimate sanction is reserved for serious misconduct, such as bribery and corruption, not for the content of judicial decisions, however erroneous they appear.

The judiciary as an institution and the individual men and women who serve in it earn every day the respect of the other branches of government, of the legal profession and of every citizen of the Nation. Let us give them the respect that is their due.

APRIL 28, 2005
JAMES W. "JIMMY" MORRIS III

PRESIDENT, AMERICAN COLLEGE OF TRIAL LAWYERS

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REGENTS' NOMINATING COMMITTEE APPOINTED

The following have been appointed under Article 5, Section 4 of the College by-laws to the Regents' Nominating Committee: **GREGORY P. JOSEPH**, New York, NY, chair; **RAYMOND L. BROWN**, Pascagoula, MS; **HON. PHILLIP R. GARRISON**, Springfield, MO; **MICHAEL E. MONE**, Boston, MA; **BRIAN O'NEILL**, Minneapolis, MN; **DEBRA E. POLE**, Los Angeles, CA and **EARL J. SILBERT**, Washington, DC.

The committee will nominate Fellows for four-year terms to replace retiring Fellows **EDWARD W. MULLINS, JR.**, Columbia, SC, **DENNIS R. SUPLEE**, Philadelphia, PA, and **SHARON M. WOODS**, Detroit, MI and Regent **JOHN J. DALTON**, Atlanta, GA, who has been nominated to be Secretary of the College.

The committee is in the process of evaluating the suggestions it has received in response to its notice to the Fellows. It will forward its nominations to the President and the Secretary no later than forty-five days before the annual meeting.

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NOTABLE QUOTES

(Continued from page 13)

and we actually solve the case. And the rapist turns out to be somebody I think it was all along. . . .

The transition to writing . . . was something that I had always wanted to do. I first wrote a non-fiction book that was published in 1993 about sexual assault.

I love crime novels. I love procedures in particular where you see the actual work the police and prosecutors do in solving the cases. I had always been told the old axiom, "write what you know," and [I] did find it easier to create this young, thin prosecutor who never gets any older. It's kind of fun.

The *New York Times* best seller list reads like a roster of trial lawyers sometimes. You've got Grisham and Turow, Richard North Patterson, David Modalvi, John Martel, Lisa Scabalini, law professor Steven Carter — many of whom write so they can stop the practice of law. That was never my goal. And that's why I continued to work in the DA's Office until 2002, and why I continue to remain very active now. . . .

It is a wonderful combination of my interests to be able to combine the two passions that I've had, one for the law and one for literature, and put them together in these novels. And I've had great fun doing it. . . .

My goal has been in writing these books to entertain, but also to educate, about an issue that was sort of in the shadows and concealed in darkness for so long and to expose the issues, to talk about them, and to do it in a way that entertains as well as educates.

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PROFESSIONALISM AND FOLLOWING THE RULES

HONORABLE JAMES C. HILL, JFACTL, JACKSONVILLE, FLORIDA, SENIOR CIRCUIT JUDGE, UNITED STATES COURT FOR THE ELEVENTH CIRCUIT

Trial Practice as a High Calling

In my opinion, the practice of law is the highest secular calling in the land. And I say secular because the theologians may be in touch with some things that we're not. And, of course, the practice of medicine is a noble calling. But I believe that a free society of people, even with a somewhat shortened life expectancy, is more to be desired than a population of long-lived individuals under tyranny. And the difference between freedom and tyranny is largely dependent upon the law and the administration of justice. . . .

JAMES C. HILL

John P. "Jack" Gardener . . . was I think the first person appointed to the then new Court of Appeals of South Carolina. . . . [A] reporter came to ask about his appointment. . . . [T]he reporter said, "Jack, I see that you are, you think that the practice of law is important. What do you think lawyers do that is so important?" Jack . . . thought a minute and then blurted out, "I believe the most important thing lawyers do in this country is being willing to get up at 3:00 o'clock in the morning and go down to the police station and look out for the rights of some fellow who has been arrested and taken down there."

The reporter was a little disappointed. He expected something more earth-shaking.

(Continued on page 22)

Notable Quotes

(Continued from page 21)

He said, "Why do you think that's so important?" Jack said, "I don't know that I could ever prove it, I don't think I could, but I believe that if the lawyers in Germany had been more willing to do that in the 1930s, the Holocaust might never have happened."

. . . . I believe that in the administration of justice under law through the jury trial process there's no higher office in the courtroom than that of the trial lawyer. A court, upon which sit fair-minded, hard-working judges, but without any outstanding, earth-shaking scholarship, counseled by a fine professional bar, is more likely to achieve justice under the law than is a court of super-brilliant jurists counseled by an incompetent bar.

Hardball Litigation Tactics Decried

Just over a year ago . . . I came across an issue of *Litigation*, the Journal of the Litigation Section of our American Bar Association. . . . In it was an article entitled "Streetwise Litigation, 'Legitimate' Tactics for Operating Outside the Rules."

. . . . I was amazed by the publication in the *Journal* of an article which recommended that trial lawyers engage in the following: Treat trials as being "more in common with a knife fight" than a legal battle. Engage in "aggressive courtroom tactics outside bland, accepted conduct." Cross the line drawn by the rules, because jurors are impressed by improper acts, no matter what a judge might rule. "Counsel . . . willing to bend the rules and cross the line, is more likely to win." Counsel "operating out of a concern about stepping on the judge's toes, operates at a tactical disadvantage." Trial counsel ought to put the jury first, ahead of the rules of the court. "Many litigators are too hesitant to utilize what we like to call 'guerrilla tactics' from time to time in order to secure a victory."

Apparently assuming that the rules are no longer learned by trial lawyers, they are advised that, "The line can only be found by crossing it." And, "Unless I'm told it's against the rules, it's not against the rules."

And it sums up, "It is easy for the trial attorney to become boxed in by the law—to believe that only responses to questions are evidence and that 'evidence' as defined legally is the true basis for the verdict. It is not. The true basis for the verdict is the hearts and minds of the jury. The jury typically looks for answers beyond the evidence, outside the parameters of the law. The trial attorney who meets them there, in that uncharted territory, is the one who will win the case."

And I would add to that, "And is the one who will bring the adversarial system crashing down upon itself."

I referred to that article at that seminar, and I made it clear then as I do now that the official Journal of a Section of our national Bar Association ought not publish an article recommending that trial lawyers conduct themselves in that fashion. At least two other judges I know wrote to the Section with the same [message]. . . .

And then I learned something you probably know: that another Fellow of the College had had the same reaction, and he had, in an opinion piece published in the *Bulletin* [Spring 2004, p. 5], expressed these same feelings, David Allen Kohn of St. Louis, Missouri . . .

We're instinctively offended by this "Streetwise Litigation" article, but it's important to identify just what it is that's wrong with it. After all, it advocates winning trials. And any trial lawyer worth his or her salt wants to win cases. Furthermore, it asserts that the lawyer who is willing to trample on the rules and defy the rulings is likely to win, so that accomplishes what seems to be desirable.

(Continued on page 23)

NOTABLE QUOTES

(Continued from page 22)

Truth as the Object of Trials

But I think maybe we ought to remind ourselves what it is that a jury trial is really supposed to accomplish. . . . Everything done by a lawyer, judge, juror or witness, court reporter or bailiff is done for the single purpose of ascertaining the truth.

The object of a trial is not that the plaintiff shall win. The object is not that the defendant shall win. It is not to confront the claimant with so much expense and delay that he surrenders much of that to which he is entitled. And it is not to burden the defendant with ruinous costs of defense to be avoided only by payment not owed. . . .

What distinguishes the adversarial system with this single purpose from the "Streetwise" contest is the existence of . . . rules. . . . They're adopted to one end, and that is that the proceedings shall be the truth. . . .

Wigmore, in *Wigmore on Evidence* says, "Tens of thousands of trials have forced these elements out in the open where thousands of judges have observed them and their observations have profited by them in thinking out principles and formulating rules. The jury trial system has not been created out of nothing. It rests on a solid basis of experience in human nature at trials."

I went back and reread the article in *Litigation*. The word "truth" is not in it anywhere. . . .

Of course trial lawyers want to win. A trial lawyer who doesn't want to win is of no use to the procedure, because it takes good trial lawyers to be sure that all the corners are swept clean and everything material is brought out.

What is at Stake

Long ago, society conferred on our profession an exclusive franchise. It is our most valuable holding. We alone are authorized to counsel as to the law. Only members of the Bar are allowed to represent clients, appearing in court on their behalf. The judicial system in which we, and we alone, are the officers is designated as the method for resolving disputes. . . .

Now, why did society confer this franchise upon our profession? Simply because society felt that the investigation into and resolution of disputes, great or small, would be accomplished better, more efficiently, and with least waste of time and at least expense, if we handled the procedure.

But mark this well: We have no iron-clad claim to that franchise. Nowhere is it carved in marble. It isn't in the Constitution. When Moses came down from Mount Sinai, nowhere on the tablet did it say, "Thou shalt not resolve legal disputes, save through the services of a licensed lawyer."

When our having that franchise no longer serves the interests of society, society can, and I submit, will cancel it. Should the adversarial system cease to be carefully crafted to produce the truth, it will no longer serve the interests of society. . . .

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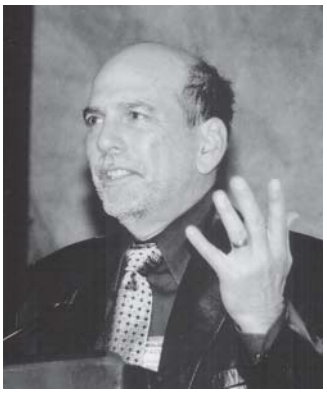
THE LAW AS SEEN IN THE MOVIES

EMERITUS PROFESSOR PAUL BERGMAN, LOS ANGELES, CALIFORNIA, UNIVERSITY OF CALIFORNIA SCHOOL OF LAW AT LOS ANGELES AND AUTHOR, SPEAKING ON "REEL JUSTICE – IMAGES OF LAW, LAWYERS AND JUSTICE IN THE MOVIES"

(Continued on page 24)

Notable Quotes

(Continued from page 23)



Paul Bergman

I do think that there's . . . too much of a gap perhaps between the legal academy, the law schools, and the practicing Bar. . . . [O]ne of the things that writing *Reel Justice* has done is it's gotten me out more than I would have otherwise to be among groups of lawyers and judges. . . . And I always feel inspired . . . to see that there are groups like this, where people take seriously our system of justice and work to improve it and come together to reflect on it. I think . . . an important message that I like to take back to the law students [is] that . . . when they get out of law school, it's not their last time to think seriously about the legal issues that they've been studying. And so — I really mean that. I'm doubly appreciative. . . . I assure you that you have certainly . . . enriched, my thought processes, and I will bring your messages back to the law students. . . .

[T]he disrespect for lawyers in general, but in particularly trial lawyers, is echoed to some extent in movies. . . . [M]y take on this is that for those of us who are lawyers and care about the legal profession, that films and T.V., popular culture, is to us what pottery is to anthropologists. It tells us a lot about the society and what lawyers were viewed as . . . [W]hat did people think of lawyers?

Movies and T.V. are also the greatest teachers of the mass market of what lawyers do. What . . . goes on in courtrooms? What are lawyers like? What is the law? How does it work? Most people don't get their information by attending meetings like this. . . .They get it from watching television or going to the movies.

And so, we can learn by understanding the messages that popular culture gives to people and, in turn, see in those messages a reflection of how we're seen.

[U]p until about 1980 or so, by and large, roughly two-thirds or three-quarters of the lawyer portrayals in films were extremely positive. Since then, since about 1980, about that same number are very negative. So when you talk about . . . how lawyers are perceived, the movies kind of echo that. . . .

[W]e had a movie a few years ago, *The Devil's Advocate,* with Al Pacino, where Al Pacino is the head of a law firm and he's the devil incarnate. He is the devil. How much more negative can you get than that?

A lot of you probably saw *Jurassic Park*, and if you were in the film audience like the one that I was in, you might remember there's a scene where a lawyer goes into an outhouse moments before this dinosaur comes along and squashes it while the lawyer is inside, to the cheers of the audiences. This is like a highlight of the film to have this lawyer squashed by a dinosaur.

So the films kind of echo . . . these popular images, and so we ought to take them seriously.

Issues Affecting State Courts

Wisconsin Chief Justice Shirley S. Abrahamson, Madison, Wisconsin, speaking about the agenda of the Conference of Chief Justices and the National Center for State Courts

State courts handle . . . anywhere from 95 to 98 percent of the judicial business in this country. . . . [T]he quality of life in your state depends on how your state courts are operating. We deal with your traffic tickets. We deal with your misdemeanors. We deal with your family law

(Continued on page 25)

NOTABLE QUOTES

(Continued from page 24)

problems. We deal with your children's problems. And we deal with your commercial law problems. So they are important to all of you.

Issues Facing State Courts

SHIRLEY S. ABRAHAMSON

And a key factor in state courts these days is access to justice. . . . It's better to fight in court than to fight on the streets. And so we have to provide courts for people. . . .

I wanted to tell you some of the key administrative access to justice issues that we are dealing with . . . .One, a lot of people are representing themselves these days. In family courts across the country, probably 60 to 80 percent of the family law cases, one or both parties do not have lawyers. . . .

The courts are not set up for *self-representation*. Courts are set up for lawyers, and so, we are revamping to help people represent themselves. We have also found that once people understand how to hire a lawyer and what's involved in self-representation, the first thing they do is go hire a lawyer. But if they don't want to, we have to be prepared to give them forms and then help them through it. And when I say "we", I mean the system, because the judge has to be neutral and independent.

Another aspect of access to justice is *interpreters*. . . . We have a huge influx of people from all over the world . . . . [W]hat kind of justice do you get if you don't understand the language?

We have very significant *outreach* programs at the state court level and at the national level . . . . People have to understand what lawyers do and what courts do and that we resolve disputes, not make them, and that we are important in society.

We are working on *pro bono*; I'm delighted to hear about your program. . . .

Another area that we're working in is . . . *unauthorized practice* of law. And there's great concern that we have a lot of people who are doing things that in years past only lawyers did . . . . All of these talk about the laws, give advice about the laws, and they don't want to be viewed as practicing law illegally. So we, the states, are having a hard time separating the authorized practice of law and the unauthorized practice of law.

With that comes the concept of licensing people from other states to come into your state and licensing lawyers from abroad. . . . [T]he federal government seems to think it might be able to negotiate for all 50 states about licensing foreign lawyers in our states. Well, the Chief Justices have some concerns about that, and so these treaties [such as NAFTA] and these documents are, now our foreign colleagues are all involved in federalism. And they can't quite understand why the U.S. federal government can't get a grip on 50 state court systems. And so, we're deep into negotiation on that. . . . [T]hat affects all of you, because to the extent that our fellow lawyers abroad can't come in here, they're not going to let you go there.

Support for the Judiciary

Now, I would like to end on two notes. One is you should be very concerned about *selection of judges* in your local states. . . .

[I]t is to your interest to get a judge that favors you. I recognize that. The problem is you can't be sure. So, from your perspec-

(Continued on page 26)

Notable Quotes

(Continued from page 25)

tive, the second best thing is to get a neutral, independent, fair and impartial judge. Then you stand an even shot. . . . So that's what I think you all ought to go out and be sure is happening in your state, and you ought to be fighting on that. And you ought to get your clients to agree to that, because what's happening across this country is various interest groups — some you like, some you won't — but various interest groups are attempting to put large sums of money into the selection process, no matter what it is, and influence the elections or selection if it's done by the political branches. And that is extraordinarily dangerous, extraordinarily dangerous, regardless of which, or what, interest groups are involved. . . .

And the second thing that I'm here to remind you about is . . . many of the states are in *fiscal crisis*. . . . [T]he judiciary's budget is a small percent of any state budget, but we can't starve the judicial system. . . . [I]t's very important that you communicate with the administrations of your court systems. Find out what's happening with the budget, what's happening with judicial compensation, and be supportive of the system in its fight through the legislature for compensation. . . .

[T]hese are access to justice issues that we are concerned with every day that are the umbrella over each case that we decide.

Supreme Court Appointments in Canada

Susan T. McGrath, Iroquois Falls, Ontario, President of the Canadian Bar Association, speaking on "On the Threshold of Change: Scrutinizing Supreme Court Appointments in Canada."

The Similarities of our Two Systems

[W]e in the United States and Canada share a common land mass, highly integrated economies, a deep and abiding friendship, and a fervent belief in the democratic tradition. . . . Our democracy is built on three separate and independent pillars, the legislative, the executive, and the judicial. . . . It is a system based on checks and balances. We know that a weakening of any one of those pillars jeopardizes government and threatens democracy itself. . . .

Susan T. McGrath

Our legal systems, based on common law roots, have served both American and Canadian societies well. Although the legislative branch is a prime source of laws and law reform, the judiciary plays an essential role in interpreting the Constitution, particularly in matters of individual rights. The judiciary protects the integrity of the system. That's why the caliber of judges on the bench is such a critical issue. Almost 30 years ago, *New York Times* journalist and my fellow speaker, Tony Lewis, . . .concluded that the character of any country's judges is one test of its civilization. . . .

Judicial Selection in Canada

Most judicial appointments in Canada are notionally made by the Governor General, in council on the advice of Cabinet. In practice, the Justice Minister submits to cabinet the names of persons to fill judicial vacancies. The Minister's selections are . . . based not only on consultation with senior judges and lawyers, but with representatives of the governing bodies of the profession and our Association. . . .

(Continued on page 27)

NOTABLE QUOTES

(Continued from page 26)

For most Canadians, the appointment process is a mystery. As our Supreme Court judges are not elected, candidates will not necessarily have a public profile. There are no public confirmation hearings. This very discrete process has led to the belief that political considerations are paramount in the appointment process. The merit basis for such decisions has become lost to a sophisticated public who demand transparency and public accountability for government action.

Calls for Reform

Last Spring, when two Supreme Court Justices announced they were about to retire, the appointment process rapidly became headline news. Sensing the public mood for a more open process, Prime Minister Paul Martin called for a new screening process. His preference was parliamentary review, or what some feared was the introduction of public confirmation hearings. . . . to counterbalance the power that resides with the executive. . . .

The key question: Would this approach blur the lines between the legislative and judicial branches to the extent that it would undermine the justice system, and ultimately Canadian democracy?

The Canadian Bar's Role

My predecessor . . . immediately wrote to the Prime Minister with a compromise proposal. Acknowledging the need to enhance the transparency of the process, he opposed public confirmation hearings involving the judicial candidates themselves. . . .

We take a principled approach to our position. *First*, we are unwilling to support a confirmation process that inevitably becomes mired in partisan politics. *Second*, our Supreme Court faces a heavy workload, and we recommend that the process adopted avoid what we call delays of opportunity. *Third*, we believe the process chosen must be designed to enhance respect for our courts and the rule of law. Anything less will not serve justice well. *Finally*, we want to continue to attract the best candidates to our Supreme Court. The system must not . . . discourage experienced lawyers from accepting judicial nomination. . . .

[W]e called for a modified advisory committee approach, which would include Parliamentarians among the experts consulted in the process. After considering differing proposals, the Parliamentary Committee . . . steered clear of allowing politicians to scrutinize the nominees in public session. The Committee recommended an advisory committee that would prepare a short list of candidates for the Justice Minister, who would make one or more recommendations to the Prime Minister. Adopting the approach of the Canadian Bar Association's submission, the advisory committee would include representatives from Parliament, judges, lawyers, lay persons, and provincial representatives. . . .

For the two vacancies at hand, the Prime Minister accepted the majority position that the Justice Minister should appear before the committee to explain the appointments after the fact, rather than subject the candidates to direct questioning. The result was a televised public hearing between the committee and the Justice Minister. . . .

[T]he question focused virtually exclusively on the process rather than on the candidates. . . .The two nominees were appointed within days and are now serving as Justices of our Supreme Court.

[T]he controversy didn't die there. For many, the approach did not provide sufficient transparency. Given the divergent views, the matter is not closed. . . . We

(Continued on page 40)

President's Report

(Continued from page 15)

practices, which should diminish confusion at least with the special interest trial lawyer groups. We should not hide our light—nor these our brightest lights—under a bushel.

Three initiatives designed to capitalize on the Fellows as our core strength are underway right now: (1) as mentioned, placing tombstone announcements in the lawyer press to congratulate new inductees, containing a brief description of our standards and ideals and listing the State/Province Committee; (2) the web site is being revised to allow public access to the names, firms and locales of all our outstanding Fellows (without street address, telephone numbers, etc., at least without specific request); and, (3) our justly praised Codes of Pretrial and Trial Conduct are being distributed to almost every judge in the United States and Canada, accompanied by a list of all the Fellows and the State/Province Committee of each judge's state or province.

These efforts will describe who we are and what we stand for, exemplify the quality of our contribution to the improvement of trial practice and ethics in the case of the Codes, and, not incidentally, will identify the College with our Fellows in the minds of those who know and admire them. The wolves strengthen the pack.

We must improve how we present ourselves to the public and learn to better identify the constituents of our public and how to reach them. As we expand our outreach, we should not forget that the Fellows are the most important element of the College's public, and we must relate and communicate more effectively with them.

We must educate editorial boards, key reporters and legal writers, about the standards, purposes and activities of the College and our bipartisan nature, so as to assure more knowledgeable attention when we speak and to give added meaning to our pronouncements. We must make ourselves better known to the state/province judiciary, their associations, conferences and leadership, and to trial lawyers and to lawyers in general, as well as their bar associations and specialty groups. We must take our message to law schools, students and faculty, capitalizing upon the thousands of otherwise "billable hours" our Fellows contribute to the four trial and two appellate competitions we sponsor every year, for example. Although we do not lobby, it may be of value to educate legislatures and government officials about our bipartisan approach and lofty purposes, as well as the quality of our Fellows.

The College welcomes your suggestions and participation in the effort to reclaim our identity and restore the honorable meaning of "trial lawyer." It won't be easy, but it is not too late.

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Fellows to the Bench

The College is pleased to announce the following judicial appointments of Fellows:

Jack Zouhary, Lucas County Common Pleas Court, Toledo, Ohio

Sophie Bourque, Superior Court of Quebec, district of Montreal

Nancy J. Spies, Superior Court of Justice, Toronto, Ontario

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AWARDS, HONORS AND ELECTIONS

Former U. S. Senator and 2004 Democratic Vice Presidential Candidate **JOHN EDWARDS** has been named to lead a newly created Center on Poverty, Work and Opportunity at the University of North Carolina School of Law in Chapel Hill. Edwards holds a two-year, part time fixed-term faculty position. He is designated a University Professor and holds an Alumni Distinguished Professorship, a chair funded by private gifts to the University. His appointment took effect Feb. 14.

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J. WALTER SINCLAIR of Boise, Idaho has received the Denis Day O'Donnell Pro Bono Award from the Idaho State Bar for his firm's work on the *Balla* case in Idaho, a case for which he volunteered through the College's Access to Justice Committee.

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WILLIAM W. SCHWARZER, senior U.S. district judge for the Northern District of California, has been selected to receive the 2004 Edward J. Devitt Distinguished Service to Justice Award named for the late Chief Judge of the District of Minnesota.

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JOSE C. FELICIANO of Cleveland has been honored with the Spirit of Excellence Award by the American Bar Association's Commission on Racial and Ethnic Diversity in the Profession.

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L. RICH HUMPERYS of Salt Lake City has received the Pursuit of Justice Award from the American Bar Association Tort Trial and Insurance Practice Section.

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DENNIS SHACKLEFORD of Shackleford, Phillips, Wineland & Ratcliff in El Dorado, Arkansas, a former Regent of the College, has received the James H. McKenzie Professionalism Award from the Arkansas Bar Association. McKenzie was also a Fellow of the College.

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ROBERT C. COMPTON of Compton, Prewett, Thomas and Hickey in El Dorado, Arkansas has received the C. E. Ransick Award of Excellence from the Arkansas Bar Association.

◆ ◆ ◆

JAMES N. PENROD of San Francisco has received a California Litigation Lawyer of the Year Award for 2004.

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REGENT CHARLES A. "CHUCK" DICK, JR. of San Diego was the subject of a feature story in the *San Diego Union Tribune* entitled, "A standout litigator."

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REGENT DAVID J. BECK of Houston, Texas has received the 2005 Karen H. Susman Jurisprudence Award from the Anti-Defamation League, Southwest Region. The award goes to "legal professionals who demonstrate a devotion to the principles enshrined in the U.S. Constitution, commitment to democratic values and dedication to fair and equal justice for all."

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(Continued on page 30)

Awards, Honors, and Elections

(Continued from page 29)

Phillip A. Wittman of New Orleans and **John T. Marshall** of Atlanta have received the 2005 American Inns of Court Professionalism Award, Wittman for the Fifth Circuit and Marshall for the Eleventh Circuit. The award is given to a lawyer "whose life and practice display sterling character and unquestioned integrity, coupled with ongoing dedication to the highest standards of the legal profession and the rule of law."

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Jack H. Olender of Washington, D.C. has received the Charles Hamilton Houston Medallion of Merit from the Washington Bar Association.

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James B. Wham of Centralia, Illinois delivered his 9th annual Memorial Day Service Address to the VFW Post 9770 in Brownstone, Illinois. His address was submitted to the U.S. House of Representatives by Judge John Shimkus.

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David J. Noonan of San Diego, California has been selected to receive his local bar's Daniel T. Broderick III Award, given annual by the San Diego trial lawyer organization to the practitioner who best exemplifies civility, integrity and professionalism.

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Guantanamo Cases

(Continued from page 10)

Georgetown University Law Center (co-counsel for 1 Saudi detainee)

Law Offices of John Holland (counsel for 1 Saudi detainee)

Jenner & Block LLP (co-counsel for 1 Australian detainee)

Joshua Dratel (co-counsel for 1 Australian detainee)

Justice in Exile (counsel for 25 detainees of various nationalities)

Keller & Heckman LLP (counsel for 3 British detainees)

Kessler, Mullkoff and Hooberman (counsel for 1 Saudi detainee)

Lesser, Newman, Souweine & Nasser (counsel for 1 Saudi detainee)

MacArthur Justice Center, University of Chicago School of Law (counsel for 1 Australian detainee)

Marjorie M. Smith, Esq. (counsel for 1 French detainee)

Manchel, Wiggins, Kaye (counsel for 1 Saudi detainee)

Mayer, Brown, Rowe & Maw LLP (counsel for John Does 1-570)

Michigan Clinical Law Program (counsel for 1 Tajikistani detainee)

Nixon Peabody LLP (counsel for 1 detainee, citizenship unknown)

Pepper Hamilton LLP (counsel for 2 Yemeni detainees)

Seton Hall Law School Center for Social Justice (counsel for 1 Turkish-German detainee)

Edward M. Shaw (counsel for 1 Libyan detainee)

Shearman & Sterling LLP (counsel for 12 Kuwaiti detainees)

Weil, Gotshal & Manges LLP (counsel for 5 Saudi detainees)

Weinberg & Garber, PC (counsel for 1 Saudi detainee)

Whiteford, Taylor & Preston L.L.P. (counsel for 1 detainee, citizenship unknown)

Wilmer Cutler Pickering Hale and Dorr LLP (counsel for 6 Bosnian Algerian detainees)

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BON MOTS FROM THE SPRING MEETING

HONORABLE ALLAN M. ROCK, FACTL, CANADIAN AMBASSADOR TO THE UNITED NATIONS, WHO, AS PRESIDENT OF THE STUDENTS' COUNCIL AT THE UNIVERSITY OF OTTAWA, ARRANGED A MEETING BETWEEN JOHN AND YOKO LENNON AND THE LATE PRIME MINISTER OF CANADA, PIERRE TRUDEAU

One of the untold stories of my delightful day with John and Yoko is that John was so taken with me, perhaps it was the mellifluous tenor of my voice, he wanted to make me the 5th Beatle.

And I said, "No." I said, "John, what I really want to do in life is grow up and become a Fellow of the American College of Trial Lawyers."

And I, of course, never looked back.

◆

You know, it's said that diplomats are people who spend their time trying to solve problems that wouldn't exist if it wasn't for diplomats.

That's my job.

◆ ◆ ◆

REGENT GREGORY P. JOSEPH, FACTL, NEW YORK, NEW YORK, INTRODUCING NOVELIST AND FORMER CHIEF OF THE SEX CRIMES PROSECUTION UNIT OF THE MANHATTAN DISTRICT ATTORNEY'S OFFICE, LINDA A. FAIRSTEIN, FACTL

Since 1996, nine years ago, Linda has published seven novels and had seven best sellers. Her heroine, Alexandra Cooper, is by coincidence the head of the New York County District Attorney's Sex Crimes Unit. She is blonde. She is elegantly turned out. And in the past nine years, she's aged about a year and a half.

GREGORY P. JOSEPH

One of the privileges of fiction is self-improvement, Linda describes her heroine as, "A younger, thinner and blonder version " of herself. On the Today Show in January of this year, when her current novel came out, Katie Couric said to her about this, "I don't know how she can be blonder at this point."

◆

Not everyone is a perceptive observer. One day when Yogi Berra was playing for the Yankees, a number of naked people ran across the infield. After the game, a reporter asked Yogi, "Were they men or women?" And Yogi said, "I don't know. They had bags over their heads."

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She's still in New York part of the time. It's very difficult to get New York out of the system of a New Yorker. There's a saying in New York , "If you leave New York, you're not going anywhere."

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LINDA A. FAIRSTEIN, FACTL, NEW YORK, NEW YORK, DISCUSSING HER NOVELS

The hardest way, truly the highest price that anyone has paid to be a character in

(Continued on page 32)

Bon Mots

(Continued from page 31)

books, is my husband marrying me, which is a path nobody else would want to take. But he does appear as the most prominent litigator in New York, the most distinguished lawyer in New York. He's seven for seven, and so I hope he thinks it's worthwhile.

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Regent John J. "Jack" Dalton, FACTL, Atlanta, Georgia, introducing the Honorable James C. Hill, JFACTL, Senior Circuit Judge of the Eleventh Circuit Court of Appeals

Well, if you ask his colleagues, Senior Judge Paul Roney would tell you that the 11th Circuit is known as a hot court, that is, one where lots of questions from the bench. . . . . And in a particular argument, Judge Hill had been relentless in his questioning of the advocate in front of him with hypothetical after hypothetical after hypothetical. And the poor advocate had used up all of his time in dealing with Judge Hill and his questions.

Judge Roney, a senior panel member, when the red light went off in front of the advocate, signaling that his time was up, graciously allowed to the candidate that the court would extend his time by five minutes so that he could finish his argument. And perhaps in a muted voice, but enough so that others might hear, he leaned over to Judge Hill and said, "Jim, do you think you can finish your argument in five minutes?"

To which Judge Hill quickly responded, "I could if these lawyers would stop interrupting me."

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Senior Eleventh Circuit Judge James C. Hill, JFACTL, Jacksonville, Florida

I think you ought to know it's an invasion of privacy to ask Paul Roney, because he's liable to tell the truth. . . .

I'm a little bit like the late great Chief Judge John R. Brown of the old 5th Circuit. Once he was asked to speak and the caller said, "We understand, Judge, that you have one hundred speeches already prepared." John said, "No, I have one speech and one hundred titles." And the caller said, "Well, that's very fine because you're going to fit right in with the theme of our meeting." John said, "What is that?" He said, "We haven't decided."

◆

My credentials to criticize may not be perfect. You folks probably remember the old story: In South Georgia on a hunting preserve, there was the finest bird dog in the state, probably in the South. Oddly, his name was "Lawyer." All the hunters wanted the services of Lawyer. So at the beginning of the season, some people asked for him. And the head man of the hunt says, "No, you don't want that dog. He's no damn good." He said, "What do you mean, no good? He's the greatest hunting dog in these parts." He said, "Well, that's just what brought on the trouble. Some of us were sitting around at the end of the season, and we decided we would give him what we contended was a promotion and started calling him 'Judge.'" He said, "You know, that dog took to that name Judge quite well. But ever since then all he has done was sit around on his hind end and bark at the other dogs."

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(Continued on page 33)

BON MOTS

(Continued from page 32)

THOMAS E. HOLLIDAY, FACTL, LOS ANGELES, CALIFORNIA, INTRODUCING PROFESSOR PAUL BERGMAN

THOMAS E. HOLLIDAY

Were it not for trial lawyers, Los Angeles would not be the movie capital of the world. In the late 1800s, L.A. was a sleepy little village of about 10,000 people. It was very quiet, very peaceful. The Treaty of Guadalupe Hidalgo had resolved the land grants with the Spanish, and things were really nice with the orange groves. Shortly after that, however, a problem developed on the East Coast. Trial lawyers, at the request of Eastman Kodak, either wickedly or vigilantly, were enforcing the patent and licensing rights for cameras and for film. And movie producers moved to little Los Angeles under the guise of saying they were going to film movies in Mexico outside the enforcement powers of the trial bar. Obviously they didn't do that. They just went over the hill to the San Fernando Valley and made all their movies. But as a result of that, the movie industry was born in Los Angeles.

And were it not for the trial bar out of the East Coast, we would still be that sleepy little village with orange groves. So we owe it all to the trial lawyers for what they did.

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UCLA LAW PROFESSOR AND AUTHOR PAUL BERGMAN, LOS ANGELES, CALIFORNIA, SPEAKING ON IMAGES OF LAW, LAWYERS AND JUSTICE IN THE MOVIES

I was glad to hear your remarks, Tom. Apparently now, the trial lawyers are also to blame for the huge traffic jams we have in L.A. If not for trial lawyers, L.A. would still be this little idyllic backwater.

◆

Most states have judicial committees of one sort or another to investigate problems of judges. Well, in a lot of states, the judge that gets the most complaints is Judge Judy. You know, people see her on television, think this is a real judge. And so they say, "She can't do that," and they fire off a letter to the judicial commission.

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PRESIDENT JAMES W. MORRIS, III, FACTL, RICHMOND, VIRGINIA

They should have made a movie of a famous courtroom trick they talk about in Richmond, Virginia. There was a murder trial in which the victim's body, or the alleged victim, had never been found. And if you've ever heard a criminal defense lawyer argue reasonable doubt, they can turn it into the most insurmountable burden that the prosecution has. In this case, at the end of the trial, they had enough circumstantial evidence for it to go to the jury, but they never had a body.

In the closing argument, the lawyer turned and said, "Indeed, we don't even know if the victim was killed. I'm going to show you right now. He's going to

(Continued on page 34)

Bon Mots

(Continued from page 33)

walk through that door. Now." And every person on the jury turned and looked at the door. And they looked and they looked and the door never opened.

And he said, "You see, you thought he really might come through that door. And that is a reasonable doubt."

Story is not over. Jury went out and ten minutes later came back with a guilty verdict. And the lawyer, of course, was puzzled. He said, "I don't understand." He talked to one of the jurors. " I don't understand. All of you turned and looked to that door. You must have had a doubt."

He said, "Well, one of them didn't. He looked at your client, and he didn't bother to turn around."

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Jack Giles, Q.C., FACTL, Vancouver, British Columbia, introducing Canadian Bar Association President Susan T. McGrath

I want to assure you all that my laryngitis, contrary to the assertions of Canadian wit, is not a psychosomatic reaction to the prospect of speaking in public without a fee.

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I have had myself the misfortune of once being introduced in this way; it went like this: "Some of you have heard Jack Giles speak before. The rest of you will be looking forward to hearing him speak."

Jack Giles

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Canadian Bar Association President Susan T. McGrath, Iroquois Falls, Ontario

I couldn't help but think of the candid remark by the former Governor of New York, Mario Cuomo, himself a trial lawyer. His wife complained that even on a good day he sounded like an affidavit.

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Past President Michael E. Mone, FACTL, Boston, Massachusetts, introducing Pulitzer Prize Winner, Author and Former New York Times Columnist Anthony Lewis, Cambridge, Massachusetts

Tony Lewis is so well-known to most of you that I could simply introduce him as Anthony Lewis. But in keeping with the tradition of a Past President, I will go on at some length.

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PAST PRESIDENTS NOMINATE BECK AS PRESIDENT-ELECT

The Past Presidents of the College, sitting as the officers' nominating committee, have nominated the following slate of candidates for 2005-2006:

President: MICHAEL A. COOPER, New York, New York

President-Elect: DAVID A. BECK, Houston, Texas

Treasurer: MIKEL L. STOUT, Wichita, Kansas

Secretary: JOHN J. "JACK" DALTON, Atlanta, Georgia

Cooper, a partner in Sullivan & Cromwell LLP, has served as a Regent, and as both Secretary and Treasurer of the College. Beck, a partner in Beck, Redden & Secrest, L.L.P., has likewise served in all three positions. Stout, a partner in Foulston Siefkin LLP, is currently Secretary of the College. Dalton has served four years as Regent.

DAVID A. BECK

Under the bylaws, the officers for the coming year will be elected by the Board of Regents at its reorganization meeting following the adjournment of the Annual Meeting of the Fellows.

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STOUT IS COLLEGE SECRETARY

Mikel L. Stout of Wichita, Kansas, is currently secretary of the College. Stout has been recommended to take over as treasurer at the Annual Meeting in Chicago.

A partner in Foulston & Siefkin in Wichita, Stout was inducted into the College in 1984 and served on the Kansas State Committee from 1989-1993, again from 1997-1999 and as committee chair in 1995-96.

He currently serves on the College's Finance and Compensation Committee.

Stout is former chairman and current member of the Kansas Commission on Judicial Qualifications and has served as president of the Kansas Association of Defense Counsel and the Wichita Bar Association.

MIKEL L. STOUT

A graduate of Kansas State University in 1958, he received his J.D. with distinction in 1961 from the University of Kansas law school where he was a member of the Order of the Coif and editor of the Kansas Law Review.

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Fellows Meet at La Quinta

(Continued from page 8)

value of the original Zapruder film of the Kennedy assassination and an arbitrator to determine the allocation of legal fees in the Holocaust slave labor litigation.

(Feinberg's moving account of his dealings with the victims of September 11 and their survivors may be found beginning at page 47.)

The final speaker was **David Z. Nevin**, FACTL, of Boise, Idaho, defense counsel in the terrorist trial, *United States v. Sami Omar Al-Hussayen*, in which his client was acquitted by an Idaho jury after being held for five hundred eleven days in solitary confinement. A 1999 inductee, perhaps Nevin's most noted previous engagement had been his successful defense of Ken Harris in the prosecution arising from the shootout at Ruby Ridge.

Nevin gave a gripping account, laced with his unique brand of ironic humor, of the prosecution of Al-Hussayen, a Saudi graduate student caught in the aftermath of the furor that followed September 11 and of the First Amendment issues raised by his prosecution.

Following the Saturday program the inductees and their spouses and guests were the honorees at a luncheon at which Past President **Earl Silbert** continued their introduction to the College.

Ninety-two inductees became Fellows at a black-tie dinner on Saturday evening. Assembled on stage and faced by several Past Presidents, they received the induction charge. Massachusetts State Chair **Elizabeth N. Mulvey** of Boston gave the invocation, and **Morgan Chu** of Los Angeles responded on behalf of the inductees.

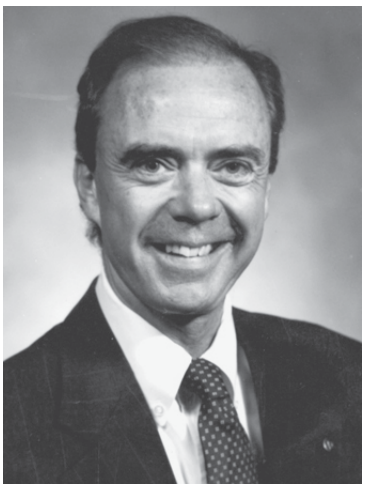
Excerpts from the substantive remarks of the various speakers may be found elsewhere in this issue under the title "Notable Quotes," and some of the humor that traditionally graces the collegial exchanges at College meetings may be found in "Bon Mots."

Tucker Named Regent

John H. Tucker of Tulsa, Oklahoma, has been named Regent for the region of Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming.

A Fellow since 1990, Tucker served on the Oklahoma State Committee in 1994, 1996 and 1997 and was state chair in 1997 and 1998. He also served as a member of the Samuel E. Gates Litigation Award Committee from 1999-01 and chaired that committee in 2002-2004.

A graduate of the University of Oklahoma in 1963 and its law school in 1966, Tucker was admitted to the bar in 1966. He is a member of several bar associations and he has held a number of professional and honorary posts, including regional chairmanship of the U.S. Supreme Court Historical Society.



John H. Tucker

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IN MEMORIAM

FRANK. H. ALLEN, JR., Albuquerque, New Mexico, a Fellow since 1986, died on June 22, 2000. Retired District Judge of the 2nd Judicial District, Bernalillo County, he received his J. D. at the University of Illinois and practiced in New Mexico.

WILLIAM O. BARNES, JR., Sarasota, Florida, a Fellow since 1969, died on April 18, 2005. A former New Jersey State Assemblyman, he was president of the Rutgers Law School Alumni Association and a trustee of Rutgers University. He also wrote and directed more than 30 original musical comedies for various community groups.

H. REGINALD BELDEN, JR., Greensburg, Pennsylvania, a Fellow since 1994, died on January 21, 2005. Past president of the Pennsylvania Bar Association, he received the Pennsylvania Bar Medal for outstanding service. It is the highest honor given by the organization, with only eight recipients in 110 years. He also was a Life Fellow of the American Bar Foundation.

JOHNNIE L. COCHRAN, JR., Los Angeles, California, a Fellow since 1993, died of a brain tumor on March 29, 2005. The great-grandson of slaves, grandson of a sharecropper, he gained early fame as an advocate for victims of police abuse. He was best known for representing celebrities in trouble. His most visible case was the 1995 defense of retired professional football player O.J. Simpson in his murder trial.

PHILIP E. DIXON of Little Rock, Arkansas, a Fellow since 1982, died February 25, 2005. At the time of his induction he defended most of the personal injury cases filed against Arkansas Power & Light Company. He was a retired commander in the U.S. Naval Reserve.

KENWYN M. DOUGHERTY, Philadelphia, Pennsylvania, a Fellow since 2001, died February 28, 2005 after a seven-year battle with metastatic melanoma. A medical malpractice defense lawyer, she was one of the first women to lead a major Philadelphia law firm.

LEWIS L. FENTON, San Jose, California, a Fellow since 1968, died on February 15, 2005. A co-founder of San Jose's largest law firm, he was a jazz buff and an amateur violinist.

JIM F. GASSAWAY, Tulsa, Oklahoma, a Fellow since 1982, died on May 4, 2005. A former president of the Oklahoma Bar Association, he served for 18 years as that organization's sole representative on the Trial Division of the Court on the Judiciary.

SENATOR HOWELL THOMAS HEFLIN, Tuscumbia, Alabama, a Fellow of the College since 1967, a decorated (Silver Star) Marine, a twice wounded combat veteran of World War II and one of two Fellows to serve in the United States Senate, died of a heart attack March 29, 2005. Elected Chief Justice of Alabama in 1970, he is remembered as the father of court reform in that state. A conservative who supported civil rights legislation and a Senate committee member during several high-profile hearings, he was sometimes described as the conscience of the Senate.

F. RUSSELL KENDALL, Houston, Texas, a Fellow since 1979, died on January 2, 2005. A great-grandson of General Sidney Sherman, a cavalry leader in the Battle of San Jacinto, he received the Brotherhood Award, along with George H. W. Bush, then a congressman from Texas, from the National Conference of Christians and Jews.

IVIN E. KERR, Marine City, Michigan, a Fellow since 1981, died January 26, 2005. He practiced for 41 years at the firm of Vandeveer Garzia in Detroit after receiving his J.D. in 1949 from the University of Detroit.

(Continued on page 38)

In Memoriam

(Continued from page 37)

Retired United States District Judge Whitman Knapp, a Fellow since 1955, died June 14, 2004. He had led the 1970 Knapp Commission, which uncovered a pattern of corruption in the NYPD. The movie "Serpico" was based on that investigation. He also made his mark as a jurist by refusing to hear drug cases in protest of what he called "failed drug policies" that emphasized prosecution and inflexible sentences over prevention and drug treatment.

Henry "Lat" Latimer, Fort Lauderdale, Florida, a Fellow since 1995, died in a single-car accident on January 24, 2005. Growing up in public housing in Jacksonville—his father had died before he was born—Latimer had joined the Marine Corps and worked as a teacher and federal employee to save enough money to go to college and law school. A tireless worker for pro bono causes and a mentor of young lawyers, he had served as a trustee of the University of Miami Law school. He was widely expected to become the first African-American president of The Florida Bar two years hence. In his memory, the Florida Bar has renamed its professionalism center the Henry Latimer Center for Professionalism.

William P. "Pete" Mitchell, Tupelo, Mississippi, a Fellow since 1976, died May 5, 2005. A highly decorated officer in the 30th Infantry Division in World War II, his awards included the Silver Star, Bronze Star and Purple Heart, as well as medals from both the Belgian and French governments. He had practiced in Tupelo since 1937.

George J. "Duke" Murtaugh, Jr., Chicago, Illinois, a Fellow since 1986, died of a series of malignant brain tumors on April 14, 2005. A long-time criminal defense lawyer, he was co-prosecutor in the 1966 trial of Richard Speck for the slaying of eight student nurses.

Earl Langdon Neal, Chicago, Illinois, a Fellow since 1977, died of cancer February 13, 2005. The first African-American President of the Board of Trustees of the University of Illinois, he had occupied a long line of local governmental appointments. At his death, Chicago Mayor Richard M. Daley described him as "a giant of the legal profession, an outstanding educational and civic leader and a friend and counselor to every Chicago mayor of the last fifty years."

John L. Oliver, Jr., Cape Girardeau, Missouri, a Fellow since 1990, died May 12, 2005 of a heart attack. A fourth generation lawyer who began his practice with his father, grandfather and a great uncle in a firm founded by his great-grandfather in 1894, he was appointed U.S. Magistrate for the Southeastern District of Missouri in 1976, and held that position until 1990. A graduate of Yale University and the University of Missouri Law School where he was editor-in-chief of the law review, he was a leader in several bar organizations, including being president of the Cape Girardeau County Bar Association, the Missouri Organization of Defense Lawyers and the Missouri Bar Foundation.

Charles E. Pierson, Akron, Ohio, a Fellow since 1982, died November 18, 2003. President of the Akron Bar Association in 1973-74, he earned his J.D. in 1949 from Harvard Law School. He was given a posthumous Lifetime Achievement Award from the Akron Progress Through Preservation.

Superior Court Judge Philip D. Sharp, San Diego, California, a Fellow since 1988, died of prostate cancer in February 2005. A Vietnam veteran, he had been on the state trial bench since 1989.

J. Roy Thompson, Washington, D.C., a Fellow since 1966, died March 9, 2005. For 30 years he represented the Kiowa, Comanche and Apache Indian tribes. In 1974, he obtained the largest settlement issued by the U. S. Indian

(Continued on page 39)

IN MEMORIAM

(Continued from page 38)

Claims Commission and received a $3.5 million legal fee. Later he established scholarships in his name for native Americans at the University of Oklahoma and Oklahoma State University. Contributions may be sent to the J. Roy Thompson Scholarship at the OU School of Law.

LAWRENCE H. WAGNER, Buffalo, New York, a Fellow since 1974, died January 30, 2005. A former member of the College's Upstate New York Committee from 1987-1991, he had served as assistant attorney general of the State of New York from 1951-59 after receiving his law degree from the University of Buffalo School of Law in 1949.

BURTON K. WINES, San Jose, California, a Fellow since 1976, died December 23, 2004. He received his law degree in 1949 from the University of San Francisco and had served in Naval intelligence.

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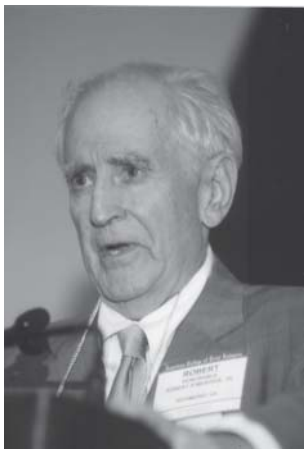
GATES LITIGATION AWARD WINNER RETIRED UNITED STATES JUDGE ROBERT R. MERHIGE, JR. DEAD AT 86

Retired United States District Judge Robert R. Merhige, Jr., a legendary trial judge, who became the nineteenth winner of the Samuel E. Gates Litigation Award at the 2004 Annual Meeting of the College in St. Louis, died February 18 in Richmond. He was 86. Created in 1980, the award honors a lawyer or judge who has made a significant contribution to the improvement of the litigation process.

Judge Merhige's career spanned six decades, first as a trial and appellate lawyer for twenty-two years, then as a Federal District judge for thirty-years and finally as of counsel to Hunton & Williams in its Richmond office.

Over his career on the bench, by his own count, Judge Merhige presided over court in more that one hundred different courthouses throughout the federal system. Employing the procedures of the legendary "rocket docket" of the Eastern District of Virginia, he regularly made himself available as a roving judge to address crowded dockets in districts other than his own. He presided over litigation arising out of the Kepone pollution of the James River, the Westinghouse Uranium case and the A.H. Robins Dalkon Shield class action.



ROBERT R. MERHIGE, JR.

One of the judicial heroes of the civil rights era, he also presided over more that forty school desegregation cases. He was reversed only once, that ultimately by a four-four decision in the United States Supreme Court. During those years, he was subjected to vicious threats. The local press called for his impeachment. His home was picketed, his dog was shot and his guest house was burned. For years, he and his family lived with round-the-clock protection from United States Marshalls. At one point, the problem became so severe that he had to send his family away for their own protection.

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Notable Quotes

(Continued from page 27)

have reinforced our message: "Beware of compromising the independence of the judiciary.". . .

We are up against: elected legislators who would subject judges' decision to review to ensure uniform sentencing; qualified experienced practitioners who are declining offers of appointment due to inadequate judicial compensation; upset litigants who find civil procedures are expensive, user-hostile, slow, and cumbersome; and qualified nominees eligible for judicial appointment who are unwilling to face the rancor and public spotlight of a public hearing. . . .

The public expects a change and our politicians will accept nothing less. But the wrong choice could result in precipitous political decisions that could well threaten the balance among the three branches of government. . . . It falls to the legal profession to craft a workable solution. . . .

We must create the best appointment process to ensure that the best qualified individuals are willing to accept appointment. In doing so, we will strengthen respect for the rule of law and for the democratic traditions on which our nations are built.

The Law in a Post-9/11 World

Pulitzer Prize winner, Author and Former New York Times Columnist Anthony Lewis**, Cambridge, Massachusetts, speaking on "Terrorism and the Law"**

Law as the Nation's Defining Element

I have profound respect for the profession and in particular for this College. That respect is more than personal. It is based on my belief that this country, more than any other, depends on law. From the beginning, law has defined the American political structure. Without the intricate balance of state and federal power created by the framers of the Constitution in 1787 and the separation of the federal government into three branches, the United States would not have come into existence.

Anthony Lewis

And without enforcement of the Constitution as law by the courts, I doubt that this sprawling, unruly, fractious country would have held together as, with one terrible exception, it has.

Think about the Supreme Court's decision in 2000 in *Bush v. Gore*. Many Americans thought that decision was unprincipled. Yet it was quietly accepted. And George W. Bush entered the White House. Such is the hold of law and the courts on the American mind.

We do not have ethnic solidarity in this country to hold us together — thank goodness. We do not have the romance of kings and queens. We have the law.

Or do we still?

Emerging Culture of Low Regard for Law

That troubling question has to be asked after the revolting photographs of the way some Iraqi prisoners were treated at Abu Ghraib, after disclosures about the tormenting ways interrogations have been conducted at the prison in Guantanamo Bay in Cuba, after the compelling recent report by Jane Mayer in *The New Yorker* about the practice of what is called "extraordinary rendition," which means our sending prisoners to countries . . . which routinely practice torture, and worst of all

(Continued on page 41)

NOTABLE QUOTES

(Continued from page 40)

in my judgment . . . after the publication of memoranda by high-ranking lawyers of the United States Government arguing that only physical torment approaching death counts as torture, and arguing that neither a treaty nor a congressional statute forbidding torture can prevent the President from ordering its use.

Administration officials told us that the depravity at Abu Ghraib was the work of a few rotten apples in the military barrel. I think it reflected something much more profound: a culture of low regard for the law, a view of law as a mere instrument of those who hold power to be manipulated as needed to the ends they desire.

That culture of contempt for the law has grown since September 11, 2001. . . . I don't mean that America has become a totalitarian society. Most of us go on about our lives as before. Those who have paid the price of this new view, new to America, of law as a mere instrument of power, have mostly, though not entirely, been immigrants and foreigners, people without political influence. Thousands of them have been the victims of harsh, punitive action.

But insistently, relentlessly, government officials have been laying down principles that can be used against anyone. In a dozen ways, they have argued that there are no limits on what a President can do in the name of national security. The king can do no wrong.

Geneva Conventions Ignored

. . . . The Third Geneva Convention, signed and ratified by the United States, provides a system for deciding the status of those seized in a conflict. Is a captive a prisoner of war, someone taken by mistake when he was innocently near a battlefield, a spy or terrorist rather than a legitimate soldier? The Convention requires that such issues be decided by a competent tribunal. In the Persian Gulf War in 1991, American forces set up tribunals of our own officers, who held hundreds of such Geneva Convention hearings. In most of them, the tribunal decided that the prisoner was wrongly held and should be released.

In [this] administration . . . Justice Department lawyers wrote memoranda concluding that prisoners taken in the Afghanistan War, or indeed some captured in other countries far away, were not covered by the Geneva Convention. Taliban soldiers, for example, they said, were outside the protection of the rules because Afghanistan under the Taliban was a "failed state," though, in fact, it ruled almost all the country. The memoranda said everyone captured should be denied the protection of the Convention without any individual hearings. . . .

The Geneva Conventions also require the humane treatment of prisoners, barring torture. The International Convention Against Torture is to the same effect, And its bar was written into domestic United States law by a statute called the War Crimes Act.

But the . . . administration lawyers explained all that away too. They gave an extraordinarily narrow definition to the word "torture," saying that it was not something that inflicted fleeting pain, it must be "equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function, or even death." . . .

There were warnings from inside the Administration that refusal to comply with the Conventions was unwise. Secretary of State Powell, for one, wrote the President warning that to violate the Conventions would reverse over a century of U.S. policy and practice and undermine the protections of the laws of war for our troops. The

(Continued on page 42)

Notable Quotes

(Continued from page 41)

State Department's Legal Advisor William H. Taft, IV said that compliance with the Conventions would show that the United States bases its conduct not just on its policy preferences, but on its international obligations. . . .

Status of Detainees

There can no longer be any doubt that torture was used as a method of interrogation. . . . The Administration took the position that the prisoners there could not challenge their indefinite detention by bringing *habeas corpus* actions in American federal courts. The issue went to the Supreme Court last year. There, the Justice Department took an absolute position: On this issue, it argued what the President says is the law. "The President in his capacity as commander-in-chief has conclusively determined that the Guantanamo detainees are not entitled to prisoner of war status under the Geneva Convention." In other words, "Justices, keep your hands off."

But the Justices did not agree. Last June, they decided that the Guantanamo prisoners could bring *habeas* actions. They could, in other words, ask that the government produce evidence before a court to justify a prisoner's detention. . . .

I heard last night what I think is wonderful, that 33 members of this College are now representing Guantanamo detainees.

I don't think it's necessary to dwell on what has gone on in Iraq, in Abu Ghraib and other prisons but we should remember that most of the Iraqi prisoners were not enemy soldiers or insurgents or terrorists. The International Committee of the Red Cross estimated that 80 to 90 percent of them were civilians swept off the streets or taken from their homes with no evidence of wrongdoing. It should also be noted that, although we do apply the Geneva Conventions in Iraq, names of a certain number of prisoners have never been given to the Red Cross, in violation of the Conventions. They are believed to be undergoing interrogations at secret locations, some in Iraq and some in unknown places around the world.

Domestic Abuses

It's not only prisoners abroad who have felt the effects of this post-9/11 indifference to the rule of law.

Thousands of aliens inside this country were rounded up in the weeks after the terrorist attacks of 9/11. . . . The theory was that they might have a connection to terrorism, a theory without any individual grounds for suspicion. They were held for weeks and months, often under appalling conditions, and without their families being told where they were. . . and in the end, most deported for violations of immigration law. None were convicted of terrorism.

Nor has the abuse of law been confined to aliens. You're probably familiar with the case of Brandon Mayfield, a 37-year-old lawyer, in Aloha, Oregon, who was arrested last May for unstated reasons. He was held in total secrecy for two weeks. The Justice Department said only that he was being detained as a material witness. . . . Arrested and held in secret, with no chance to know what the reason was or dispute it. Could that happen in America? It did.

The Mayfield case shows how the usual protections of American criminal law, the right to a hearing in public, for one, have been drained of their meaning in what is called the "war on terrorism." From the top of the government to federal prison guards in Brooklyn and federal prosecutors in Oregon, there is a culture, I think, of indifference to law.

For me, the most dangerous example of bending law and the Constitution to the

(Continued on page 43)

NOTABLE QUOTES

(Continued from page 42)

supposed needs of the War on Terrorism is the claim by [the] President . . . that he can arrest any American citizen suspected of a connection to terrorism and imprison him or her indefinitely without a trial and without access to counsel. That claim has been pressed by the government in the cases of two Americans, Yassir Hamdi and Jose Padilla. . . . Last June, the Supreme Court decided that under the Constitution, Hamdi had the right to know the government's evidence against him and to challenge it in a proper hearing with a lawyer.

The . . . administration's response to that hearing seems to me to have been extraordinarily revealing. Rather than give Hamdi his day in court, they decided to let him go home to Saudi Arabia, where he had lived, if he would agree to give up his American citizenship. He agreed. So this man, who the Administration said was so dangerous that for years he could not even speak to a lawyer, was now free. . . .

Terrorism as a Threat to the Supremacy of Law

[T]terrorism is a serious challenge. I don't mean to minimize it. But it is a threat among other things to the supremacy of law. . . . If we abandon our commitment to law, we will have given terrorism a great victory.

Now you know that this is not the first time that fear of terrorism has tested our commitment to our constitutional foundation. . . .

But there is a worrying difference between those past episodes and the excesses of today. Soon after those earlier events, our government regretted its abuses. President Jefferson pardoned editors punished under the Sedition Act. We apologized to the Japanese Americans for their mistreatment and paid the survivors modest compensation. But this time it is hard to imagine an end to the war on terrorism. . . . So if we allow the government to put what it calls "necessity" above the rule of law, there will be no end to repression.

Until the middle of the 20th Century, the United States stood alone in having a written Constitution whose rules were enforced by judges. Other democratic societies relied on the good faith of officials and on public opinion to prevent abuse of power. . . . Countries around the world have copied the American model. . . . It would be a great irony, and a bitter one, if we now abandon the constitutional faith that has inspired so many others.

Moreover, it was Americans who in large part created the concept of international human rights. We measured other political systems by their respect for basic standards of humanity. American constitutional rights, the right to counsel, guarantees of due process, free speech, became international ideals. That enlightened leadership seems now to belong to another age. . . .

Challenge to the Separation of Powers

Our government argues that our system of carefully divided powers really vests unchallengeable power in the executive. That point brings me, as I approach my end, back to the legal memoranda by administration lawyers that laid the groundwork for the torture of prisoners. The lawyers argued that Congress could not forbid the President to order the use of torture. He could do so, they said, despite treaties and the federal statute prohibiting torture. . . .

One of the fundamental checks on the abuse of power, maybe the fundamental check in their view, the Framers' view, was the separation of powers into the three branches of the federal government. If one of those branches overreached, another,

(Continued on page 44)

NOTABLE QUOTES

(Continued from page 43)

they thought, would curb its abuse. Congress, as an institution, has hardly exercised its checking powers since 9/11. That leaves the third branch, the courts.

And lately there have been some instances where judges are unwilling to be cowed by the claims of unreviewable presidential power. There were the Supreme Court decisions in the Hamdi and Guantanamo case. And this week there was a decision by the Federal District Judge in South Carolina, Henry Floyd. Judge Floyd . . . ordered Padilla released.

"The Court finds," he said, "that the President has no power, neither express nor implied, neither constitutional nor statutory, to hold Petitioner as an enemy combatant." "To allow that," Judge Floyd said, "would not only offend the rule of law and violate this country's tradition, but it would also be a betrayal of this nation's commitment to the separation of powers that safeguards our democratic values and individual liberties."

It was only a trial judge's decision, and the government is appealing it. But it seemed to me a signal. It meant something that a trial judge reached those conclusions and had the courage to express them.

We need courage. What we and above all you as lawyers, must challenge is the notion that it is weakness to respect the law. To the contrary, law is our strength and our redeemer.

COMPENSATION FOR THE VICTIMS OF 9/11

KENNETH R. FEINBERG, WASHINGTON, D.C., SPECIAL MASTER, SEPTEMBER 11 VICTIMS COMPENSATION FUND, SPEAKING ON "SEPTEMBER 11 VICTIM COMPENSATION FUND: LESSONS LEARNED."

Trial Bar Thanked for its Role

I'm here to thank you, to thank you for making sure . . . . that the 9/11 Fund would be a success. It would never have been a success without the cooperation of the trial bar. The trial bar represented some 2000 people in grief, *pro bono*. Another 800 families were represented by some people in this room at vastly reduced fees. The American bar is the unsung hero of the 9/11 Fund, and I am troubled by the fact that more people don't know of the role that you played in making it such a success. . . .

You know, our profession gets maligned and criticized, sometimes with justification, like any profession, not perfect. But if you ever want an example of what this profession can do in the public interest, take a look at the 9/11 Fund. There are lawyers in this room . . . who represented scores of people in the Fund, worked with the Fund, helped us make rulings not only to benefit his clients, but to benefit everybody as a precedent, because if we did it for one, we did it for all.

And if you want a perfect example of what the profession can do for America, then take a look at all of the thousands of people represented without compensation by the lawyers of America throughout the nation. I just hope that when there's a debate about the profession or when people throw a lawyer joke at you, you remind people about the nobility of the profession and what we mean to deliver in the public interest. . . . I came here because, although I'm often, these days at least, getting praise, as opposed to the invective I received for a few years, it sort of balances out in the end. The real praise doesn't go to me. It goes to you as surrogates for the thousands of lawyers in this country who made the program a success. For that, I thank you.

(The complete text of Mr. Feinberg's remarks begins at page 47.)

(Continued on page 45)

Notable Quotes

(Continued from page 44)

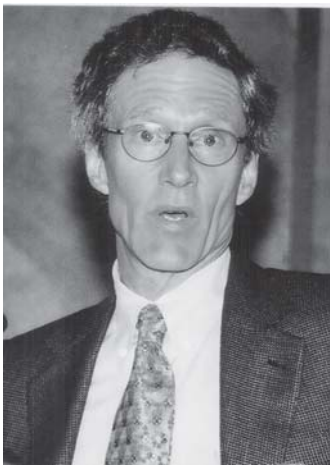
Defending an Accused Terrorist

David Z. Nevin, FACTL, Boise, Idaho. speaking on "The Rule of Law in a Time of Terror: Reflections on the Defense of Sami Omar Al-Hussayen."

The First Amendment Issue

[T]he real question in the case [was], . . ." What can you say in the U.S.? What can you say in this country? What can you stand up in public and say in this country?"

And I've raised this question: Suppose that I go down to the public square in Boise, Idaho, and I think I'm maybe at Speakers Corner in Hyde Park and I get up a stepladder, and I say, "You know, I think that the Israelis have it wrong. I think the Palestinians have it right. They don't have guns or money. And I don't think they have any other choice except to go blow themselves up and terrorist operations. And I think they should do it."



David Z. Nevin

Well, I would not be expressing my view if I said that. And I expect many of you would if you were there say, "Hey, David, you're talking about terrorism. That's wrong." And you might shout me down or insist on the opportunity to make a counter statement. But I don't think any of you would suppose that I could be arrested for saying that.

ABC runs an interview with Osama Bin Laden in which he exhorts people to join him killing Americans wherever he can find them. Can they do that? *Time* does the same thing. And here's CNN. And the thing I like about CNN is there's a button there you can push and you watch a Bin Laden recruiting video if you want to. You can push this button and have Bin Laden try to recruit you to join Al Qaeda. Can CNN publish that?

How about Ann Coulter: "Invade their countries, kill their leaders, convert them to Christianity." Can she say that? That's murder. It violates the Neutrality Act and probably twenty-five other things.

Here's a guy in Tucson, I think, who writes, and he says this, "We can stop the murders of American soldiers in Iraq by those who seek revenge, et cetera. Whenever there's an assassination or another atrocity, we should proceed to the closest mosque and execute five of the first Muslims we encounter." Can he say that?

And the answer is contained in *Brandenberg v. Ohio* in 1969 which says that you can advocate for illegal action, "except when such advocacy is directed to inciting or producing imminent lawless action and is likely to do so." . . . [Y]ou probably thought it rather anomalous or quaint to think of me standing up in the public square haranguing people. We don't really do that anymore. That's not how free speech works anymore. I'll tell you how free speech works. It works on the Internet. That's where the rubber meets the road these days for the First Amendment really. I mean ten million people, according to a witness from Yahoo who testified at our trial, are members of these Yahoo e-mail groups – ten million people. And there are a million of these groups discussing every, I mean there are forty of them discussing Chechnya. There are

(Continued on page 46)

Notable Quotes

(Continued from page 45)

thousands of them discussing everything under the sun. . . . And I listen to the public prosecutor cross-examine one of his expert witnesses on the proposition that that news that my client had published and posted to that website was not 'good' news. It wasn't 'real' news. It wasn't news like you see on, you know, Channel 6 in the evening. "This was propaganda." I'm quoting. . . .

The Greater Significance of the Case

[Y]ou have to ask what his case stands for, because he's known all over the world now for better or for worse. And I got interviewed by the Middle Eastern media a lot. And I always said, "The government wanted this guy. He wasn't really guilty. They threw huge resources at him. And they did it in the most conservative state in the nation, the most law-and-order state in the nation. And a jury in little old Boise, Idaho said, 'No, you can't have it.' " And it just doesn't really get any better than that in terms of the way the justice system works.

The other side of this story is that Sami spent five hundred eleven days in solitary confinement. I went to see him almost every day because I didn't want him to go crazy — people go crazy in this environment — for something that he didn't do, for something that if he had done would not have been a crime in my view.

You can make your own decision about what the dominant theme of the thing is. But these are the future leaders of Saudi Arabia, people like Sami. This is how we co-opt the world, really. And I submit that we didn't get it quite done right in this case and that may be something that people get to talk about for quite some time.

Closing Prayer

Elizabeth N. Mulvey, FACTL, Boston, Massachusetts, delivering the invocation at the Spring banquet

. . . . As we prepare to return to our busy lives, make us ever mindful that our talents and skills are not simply an end, but a means to an end, namely that we must use these skills and talents for the benefit of those less fortunate than we. Help us to trust our instincts and to follow them, to have self confidence without conceit, decidedness without arrogance and passion without pretension. Help us to make the necessary sacrifices in our lives without bitterness or resentment, to share our wisdom without being condescending.

Help us to respect the rule of law while remembering our common sense, and help us never to lose sight of the principles on which our great countries are founded. And finally, let us always remember, and especially on this induction night, that none of us stands alone. Let us appreciate the family, friends and colleagues whose love, loyalty, support and guidance have brought us here tonight. And let us, ever looking with hope toward the future always honor the memory of those who have gone before us to lead the way.

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THE SEPTEMBER 11 VICTIM COMPENSATION FUND, LESSONS LEARNED

The following remarks were delivered to the Spring Meeting of the American College of Trial Lawyers by Kenneth R. Feinberg, Washington, D.C., who was appointed by the Attorney General of the United States as the Special Master to administer the Federal September 11 Victim Compensation Fund. The editors have chosen to print almost in its entirety his compelling story of this unique chapter in our recent history.

. . . . I'm here to thank you, to thank you for making sure that the 9/11 Fund would be a success. It would never have been a success without the cooperation of the trial bar. The trial bar represented some 2000 people in grief, *pro bono*. Thanks to ATLA, thanks to this College, thanks to the Bar Associations of the City of New York and Philadelphia and Boston, two thousand families were represented *pro bono*. Another 800 families were represented by some people in this room at vastly reduced fees.

The American bar is the unsung hero of the 9/11 Fund, and I am troubled by the fact that more people don't know of the role that you played in making it such a success.

Now, the statistics are clear. The program is over. And most of you know the statistics. Congress passed this law within days after 9/11, giving every family that lost a loved one on 9/11 or those physically injured an option: Come into this program, funded by the American taxpayer, tax free awards, or, if you want, opt to litigate against the airlines, the World Trade Center, the Port Authority, MassPort, the security guards, Boeing, and any other number of would-be defendants.

Ninety-seven percent of eligible families entered the Fund. Today, as we speak, there are only about eighty people who decided to litigate in the Southern District of New York. That's their right under the law. I wish them well. I told each of them they were making a mistake to litigate, but that is their prerogative. I'm not troubled by that.

I am troubled today by the nine families that did nothing. They didn't enter the Fund. They didn't litigate. I've learned a lot in the last few years about what clinical depression can do to people. I would go and see some of these families: "Mrs. Jones, you've only got a few more weeks to file. Don't pass up the opportunity to

THE AMERICAN BAR IS THE UNSUNG HERO OF THE 9/11 FUND, AND I AM TROUBLED BY THE FACT THAT MORE PEOPLE DON'T KNOW OF THE ROLE THAT YOU PLAYED IN MAKING IT SUCH A SUCCESS.

get money from the federal government, from your fellow citizens. It could be as much as two million dollars or more."

"Mr. Feinberg, leave the application on the table. I lost my son at the World Trade Center. I can't sign the application."

"I'll help you fill out the forms, Mrs. Jones, sign it, set up a foundation in your son's name."

"Go away. I can't do it."

(Continued on page 48)

Lessons Learned

(Continued from page 47)

That's my biggest disappointment: that nine families ended up losing the right under the statute to file a claim with the Fund.

Now, how did the Fund work? We paid out seven billion dollars to 5,300 families or physically injured victims. We learned a lot about the physical injury victims. There weren't that many seriously physically injured in 9/11. You either got out of those planes and buildings or you didn't. The number of really seriously injured victims who survived with burns, mostly burns, you can put at two dozen. Two dozen. The rest of the injuries were the respiratory claims, modest injuries arising out of breathing the gunk down at the World Trade Center after 9/11. Everybody else came into the program. We paid about 5,300 people, seven billion dollars tax free.

The death awards ranged from $500,000 to $7.2 million, a thirty-three year-old stockbroker who died in the World Trade Center and left a wife and three small children that was earning about two or three million dollars a year. The average death award was just over two million dollars, tax free.

Physical injury awards averaged about $400,000, ranging from a low of $500 for a broken finger at the World Trade Center to a high of 8.6 million dollars to a surviving burn victim with eighty-five percent third-degree burns all over his body who came to see me.

Kenneth R. Feinberg

Congress, in enacting the law, did not appropriate any money for this program. It simply delegated to me spend wisely out of petty cash from the U.S. Treasury. Seven billion dollars was the result.

Now, you might think there would be a ground swell of opposition to such a generous program unprecedented in American history. You are wrong. You are wrong. I rarely in three years received any criticism from the American people about the generosity of this program, in which a very select few people received the largess of the American community. Instead, almost invariably, the letters were letters of support: "Keep up the good work, get the money out as fast as possible, help these people," I think demonstrating a very, very important part of the American character in supporting the program.

Now, I'm asked all the time what were the biggest problems you confronted in administering the program, and I want to explain in a few minutes just some of the problems and the difficulty we had in convincing people that there was no hidden agenda here, no secret plan, how we were able to ultimately achieve success.

First, the program required that one person, me, calculate future economic loss of those dead and injured on 9/11. I was

The average death award was just over two million dollars, tax free.

(Continued on page 49)

LESSONS LEARNED

(Continued from page 48)

the jury and judge who had the responsibility of distinguishing between fact and speculation in deciding what the victim would have earned over a lifetime had she or he survived. Now, I can tell you juries do this every day, but they do it collectively. They do it quietly out of the public eye. They do it based on local community mores and values. Asking one person to do this was guaranteed to be a problem and to fuel divisiveness among the very people we were trying to help.

I'll give you one example: Lady comes to see me. "Mr. Feinberg, my daughter died. She was a first-year law associate at a law firm in the World Trade Center. But listen to me carefully: when you calculate the award, make sure you treat her not as a first year associate. I know my daughter. She was not only going to become a partner in seven years in this firm, they were going to change the letterhead of the firm to add her as a named partner."

"Well, Mrs. Jones, I mean, you know, most of these law associates leave after a year or two. They go on to . . . ."

"Not my daughter. Not my daughter. They were going to change the name and add her. So it's not $105,000 dollars a year that you'll calculate, but $800,000 a year, because she would have been a partner."

Well, I explained about speculation, and Mrs. Jones didn't want to hear about it.

I could give everybody in this distinguished crowd a fact pattern and ask you to calculate future economic loss. And I guarantee you we would get hundreds of different calculations. That was the first problem: a very murky crystal ball that I am looking into to try and figure out what a life lost would have earned.

Second, non-economic loss, a tort concept that you're all familiar with, the pain and suffering of the victim, the emotional distress visited on the survivors. Again, I made it very clear to these families very early on, "I'm not Solomon. I'm not making such distinctions."

THAT WAS THE FIRST PROBLEM: A VERY MURKY CRYSTAL BALL THAT I AM LOOKING INTO TO TRY AND FIGURE OUT WHAT A LIFE LOST WOULD HAVE EARNED.

One lady says to me, "Mr. Feinberg, I was married to my husband who died. I was married for thirty-six years to him. You give me more emotional distress than the widow who was only married six months."

Then the widow married six months jumps up. "How dare you. I loved my husband every bit as much as you loved your husband. How dare you ask for more money than me. That's a outrage."

I decided early in the program: Everybody who's eligible gets the same non-economic loss. I am not going to make distinctions. $250,000 for the death of the victim. $100,000 for each surviving spouse and dependent. And that's what I did. It had the benefit of bringing all of the families together and en mass they criticized me for being cheap. It worked. I brought them together as they trained their sights on me: "How dare you give such a meaningless amount for non-economic loss." That was a problem, and that's how we addressed it.

Third, when you examine this statute that Congress deliberated – you know, Congress spent a great deal of time thinking about this – twenty-four hours. This law was passed in twenty-four hours. I was

(Continued on page 50)

Lessons Learned

(Continued from page 49)

telling Tony Lewis [Anthony Lewis, also on the program] earlier, "I think that if Congress had waited four or five more weeks, they wouldn't have enacted it at all." But they did. And nowhere in the statute, nowhere, is there one word about who gets the money or how to allocate the award.

Now, this raises all sorts of dilemmas for me: "Mr. Feinberg, I'm the sister of my brother, the victim. He hated our brother. Make sure my brother doesn't get a nickel."

Then the brother comes in, "Is my sister badmouthing me again? Let me tell you something: my dead brother hated her. Keep the money away from her, you see."

"Mr. Feinberg, I was the fiancee of the victim. We were going to be married on October 11th. You should treat me as a spouse."

"Biological parents, what do you think of that?"

"That marriage was never going to take place. My son called me on September 10th and said he was going to call it off."

"Spouse, fiancee, what do you say to that?"

"Is that what they said? Let me tell you something. Here, here's the invitation that went out. Here's the reservation. We were already in the church. We already had the church reserved. They say it was going to be called off? Let me tell you something, Mr. Feinberg, on September 10th, the biological parents, I spoke to them, and they said we're not losing a son, we're gaining a daughter. And on September 12th when I called hysterical, they hung up the phone. They wouldn't even speak to me."

"Mr. Feinberg, I was the same-sex partner of the victim. We lived together for eleven years. I should be treated as a spouse."

"Biological parents, what do you say to that?"

"I spoke to my daughter. They were splitting up. They were splitting up. So she's not entitled to a nickel."

"Same sex partner, what do you say to that?"

"Is that what they said? Do you know that when I moved in with their daughter eleven years ago, they haven't spoken to her since. They disowned her. The idea that the biological parents should get one nickel of your money is an outrage."

Now, nowhere in the statute was there one word about this, so we had to come up with regulations. Basically we said, "If there's a will, we'll follow the will." These masters of the universe, there was no will. This program, talk about the value of having a will. Lawyers in this audience who do trust and estate work, I'm in your debt. I mean everybody should have a will. Twenty percent had wills. So what do we do with the other eighty percent? Well, we followed the intestacy laws of the state of the victim's domicile. If somebody gets killed in an auto accident, there's a law that governs. There's wrongful death statutes that govern. We followed those statutes. What else? I couldn't solve these dilemmas in the family. How do I know who is right on this? I'm not a family counselor.

Now, what we did do, since following state law would eliminate any money for fiancees or same sex partners in almost every state, we mediated. We resolved disputes. I would ask the family to come in, or the fiancee, and we managed to work it out in almost all cases. Today I think there are about two dozen families litigating in various surrogate courts, probate courts. Everywhere else I added a little money, I sat with the parents, I worked it out.

(Continued on page 51)

LESSONS LEARNED

(Continued from page 50)

Now, understand none of this involved greed. It really didn't. This wasn't about greed. This was about the wrenching emptiness of a lost loved one, a life that would never be, a marriage that would never take place, grandchildren that would never exist, placing a value on what might have been. It was emotional. It wasn't financial. But that was a serious problem.

The next problem we had under this statute, under the generosity of Congress, foreign claimants were eligible. Eleven undocumented worker families who lost a loved one working in the World Trade Center, they were eligible. Reaching these people, making sure they take advantage of the program was very, very difficult. Foreign claimants – I went to London, and I met with forty-five families of foreign claimants in London to explain the program. I explained it. "You're going to get about two million dollars on average tax free."

"Mr. Feinberg, do we have to give up our citizenship?"

"No."

"Do we have to surrender our passport?"

"No."

"Do we have to come to the United States to get the money."

"No."

"Do we have to, do we get the money in pounds or dollars?"

"Dollars."

"We'll get back to you. We're going to think about it."

Suspicion: What's the agenda here? This must be a trick. There was no trick. There was no agenda. And eventually all of the foreign families came in. Undocumented worker families – we had applications in Spanish, Korean, Portuguese, French. I went into the Bronx and met with families. "Now, look, your husband died in the World Trade Center, and he was an illegal worker but you're eligible for the money. Take it."

"Will you deport us?"

"No. I have an order here from the Immigration and Naturalization Service and a letter here from the Attorney General in eight different languages: There will be no deportation."

"Will we go to jail?"

"No. You won't go to jail. There will be no sanctions."

"Will we be fined?"

"No. There will be no civil fines at all, no fines whatsoever."

"Will we be unable to work?"

"No. As a matter of fact, you're going to get a automatic green card with the check. You get that too."

"You're going to put us in prison?"

You know, I felt – you try and be a professional about this – but a couple of times I felt like saying "You're going to be deported to the Dominican Republic, so you'll be the richest person in the Dominican Republic." You can't say that, but you get, I would get so frustrated.

Eventually everybody came in. All those families came in. How did we finally convince them? Simple, the minute a couple of the families took the money, they went back into their local community, and with a credibility that I never had, they convinced their neighbors to take advantage of the money. And so that worked.

But, without a doubt, the single biggest problem I had – what was the single

(Continued on page 52)

Lessons Learned

(Continued from page 51)

biggest obstacle to success? I agreed as part of this program to meet with any individual family that wanted to meet with me to talk about their compensation. And I must tell you no matter how professional you think we are, it gets to you. And it got to me.

I conducted personally nine hundred sixteen individual hearings with families. And the stories I heard chilled me and would chill you to the bone. People just didn't come in here with their tax returns to see me. People came to see me to vent. They would bring to these hearings videotape of their wedding, of the bar mitzvah, video of their son as a child running around the house, medals, certificates, everything imaginable, photograph albums.

"Mr. Feinberg, help, we want to show you what our son meant to us. Look, here he is when he's 12. Here he is, oh, this is when we went on vacation and here now, turn the page."

That's what went on. A couple of people came and demanded to play the tape on the voicemail of their loved one screaming, calling from the World Trade Center to say, "Good-bye." "Mr. Feinberg, we want you to listen to the tape of my husband calling me from 103rd Floor of the World Trade Center trapped."

People just didn't come in here with their tax returns to see me. People came to see me to vent.

"No, no, Mrs. Jones, you don't really have to."

"We want you to hear it."

"Okay. Go ahead. Play it."

Then they would play the tape of a dying man saying "good-bye" to his wife, his kids, telling them where the safety deposit box key is, saying that they're not going to get out alive. Horrible. But we had to do this. We had to listen to each family come in and explain their situation.

And it wasn't just tragedy that confronted me in these applications. It wasn't just tragedy. One lady came in to see me, tears streaming down her face. "Mr. Feinberg, I lost my husband. He was a fireman. He got out of the World Trade Center and rescued 30 people and brought them to safety to Lower Broadway. And then the Battalion Chief said to him, 'Stay here, too dangerous, don't go back.' 'I'm sorry, Chief, I've got to go back. There's ten people trapped right over there on the mezzanine.' Running back across the World Trade Center Plaza, the fireman was killed by somebody who jumped and hit him. One step either way , but like a coordinated missile, they both died."

Tears streaming down her face, "Where is the justice, Mr. Feinberg? You tell me. Where is there justice, my husband killed that way. There is no God."

Another lady came to see me with a story that you have to have Solomonic wisdom I think. She comes to see me sobbing, "Mr. Feinberg, I'm 25 years old and I lost my husband, a fireman, at the World Trade Center. He was 'Mr. Mom.' He was either at that firehouse or home teaching my six year-old how to play baseball, the four year-old how to read, the two year-old a bedtime story at night. What a cook. What a cook. He cooked the meals. He vacuumed the house. Mr. Mom. Mr. Feinberg, I need more money. I can't continue without him in my life."

(Continued on page 53)

LESSONS LEARNED

(Continued from page 52)

She leaves. The next day I get a call from a lawyer in Queens:

"Mr. Feinberg."

"Yeah."

"Did you meet Mrs. Jones yesterday?"

"Yeah."

"Mr. Mom, the one with the three kids, 6, 4, 2?"

"Yeah."

"Now look, I am not calling you to cause trouble here, but I want you to know something: Mr. Mom also has two kids by his girlfriend in Queens, five and three, that she knows nothing about. And I'm telling you this, because when you cut your check, it's not three biological children, it's five biological children. And I don't know how you're going to do this, but I wanted you to know that, with paternity, we can show all of that."

We thought long and hard about this, long and hard, and decided not to tell her. And we cut two checks, one for the widow and the three children and one for the two children in care of the guardian Jane Doe. I think some day she'll probably find out and won't be happy that we didn't tell her, but what would be the point? She had this view: What would be the point of explaining to her about the two other children? So we didn't do it.

Those were the problems we confronted in administering the program but in the end, it worked.

And that brings me to the last point I want to make: You know, our profession gets maligned and criticized, sometimes with justification, like any profession, not perfect. But if you ever want an example of what this profession can do in the public interest, take a look at the 9/11 Fund. There are lawyers in this room I've already seen here last night and today . . . who represented scores of people in the Fund, worked with the Fund, helped us make rulings not only to benefit his clients, but to benefit everybody as a precedent, because if we did it for one, we did it for all.

And if you want a perfect example of what the profession can do for America, then take a look at all of the thousands of people represented without compensation by the lawyers of America throughout the nation. I just hope that when there's a debate about the profession or when people throw a lawyer joke at you, you remind people about the nobility of the profession and what we mean to deliver in the public interest.

Congress will never do this program again, I'm convinced. It was a one-off program. It was a unique response to a very unique event. Congress stepped up and did it. But they did it, I think now, knowing it was an appropriate response, but it shouldn't be repeated as a matter of course.

I also think that if there's another terrorist attack – I hope to God there won't be, but we're told there will be – that Congress, if it does anything, will simply give a flat amount to everybody, the same amount, and not try and make distinctions among claimants, and leave the tort system alone. That would be okay.

This is the reason I came here. I came here because, although I'm often these days at least getting praise, as opposed to the invective I received for a few years, it sort of balances out in the end. The real praise doesn't go to me. It goes to you as surrogates for the thousands of lawyers in this country who made the program a success.

For that, I thank you.

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Ninety-Two Fellows Inducted at La Quinta

Alaska: Howard A. Lazar and Matthew K. Peterson, both of Anchorage Arizona: William G. Fairbourn, Phoenix Arkansas: Mark A. Moll, Fort Smith, John E. Moore, Little Rock Northern California: Martin L. Blake and Martha A. Boersch, both of San Francisco, Eugene Brown, Jr., Oakland, Nanci L. Clarence, San Francisco, Jonathan B. Conklin, Fresno, John McDougall Kern, San Francisco, Michael G. Marderosian, Fresno, Michael J. Ney, Walnut Creek, Thomas J. Orloff, Oakland, Charles F. Preuss and Gregory C. Read, both of San Francisco Southern California: Michael J. Bidart, Claremont, Morgan Chu, Los Angeles, Anthony M. Glassman, Beverly Hills Colorado: Bruce F. Black, Gordon W. Netzorg, and Donald E. Scott, all of Denver Delaware: Thomas J. Allingham II, Richard G. Andrews and Collins J. Seitz, Jr., all of Wilmington District of Columbia: Paula M. Junghans and Roger C. Spaeder, both of Washington Florida: David T. Knight and Alan F. Wagner, both of Tampa Georgia: Jonathan C. Peters, Atlanta, Claudia S. Saari, Decatur Idaho: Thomas E. Moss, Boise Illinois: Bruce S. Sperling, Chicago Indiana: Robert B. Clemens and Douglas B. King, both of Indianapolis Maryland: James K. Archibald, Baltimore, Mary Alane Downs, Hunt Valley, M. Natalie McSherry, Towson Montana: John P. Connor, Jr., Helena, Tom L. Lewis, Great Falls Nebraska: Thomas A. Grennan, Omaha, Alan E. Peterson, Lincoln New Hampshire: Michael P. Lehman, Concord, Peter W. Mosseau, Manchester New Jersey: James D. Martin, North Brunswick Downstate New York: Desmond T. Barry, Jr., Thomas W. Hyland and Marc S. Moller, all of New York Upstate New York: John L. Murad, Jr., Syracuse Pennsylvania: William J. Conroy, Philadelphia, Thomas W. King, III, Butler, Julie Elise (Lisa) Struk Tourek, Pittsburgh Puerto Rico: Charles A. Cuprill-Hernandez, San Juan Tennessee: Leslie I. Ballin, Memphis, Robert L. Trentham, Nashville Texas: Daniel W. Bishop, II, Austin, J. A. (Tony) Canales, Corpus Christi, Jerry K. Clements, Dallas, Marvin (Marty) W. Jones, Amarillo, William E. Junell, Jr., Houston, Sydney Bosworth McDole, Dallas, John (Mike) J. McKetta, III, Austin, Lewis R. Sifford, Dallas, John E. Simpson, III, William J. Wade, and James (Larry) L. Wharton, all of Lubbock, William O. Whitehurst, Austin, Jeffrey S. Wolff, Houston Utah: George M. Haley and Paul M. Warner, both of Salt Lake City Virginia: Grayson P. Hanes, Falls Church Washington: Daniel L. Hannula, Tacoma, Daniel E. Huntington, Spokane, Michael F. Madden, Seattle, Carl J. Oreskovich, Spokane, Ben Shafton, Vancouver West Virginia: Robert V. Berthold, Jr., Charleston, James A. Varner, Sr., Clarksburg Wisconsin: Lester A. Pines, Madison Wyoming: Michael K. Davis, Sheridan, Robert M. Shively, Casper British Columbia: S. David Frankel, Q.C., Vancouver, Paul J. Pearlman, Q.C., Victoria Manitoba/Saskatchewan: Douglas G. Ward, Q.C., Winnipeg Ontario: Ian J. Roland, Mark J. Sandler, and Lorne Allan Waldman, all of Toronto, John C. Walker, Q.C., Sault Ste. Marie Quebec: Pierre Bienvenu, Suzanne Cote, Roy Lacaud Heenan, Q.C., and Michel Yergeau, all of Montreal.

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INDUCTEE RESPONSE

MORGAN CHU, FACTL, LOS ANGELES, CALIFORNIA, RESPONDING ON BEHALF OF THE INDUCTEES

. . . . We come from different states, different provinces, different types of practices, different life experiences. But there is a common thread that binds us all, and that is the craft we have chosen as our life's work. We are trial lawyers and proud of it.

What's a trial? It's hard work, it's long hours, it's sometimes being away from home for weeks or perhaps months. It's pleading our cases to juries who are skeptical of our positions. It's having our life and appointments controlled by a judge. And of course, there's always someone else in the courtroom who's twice as smart as we are and willing to work three times as hard, and that person unfortunately always sits at the table for opposing counsel. . . .

I think . . . what's so special for all of us who are new inductees today . . . we look around this room and we see giants of the trial courtroom, and each of us, as new inductees, feel that there is a pat on the back. And my wife and I have learned over the last several days there's this warmth and comradery and friendship that I think will carry us through for a lifetime.

But there's something more. Those who are really giants, as is true here for those that have been a member of this fellowship for some time, are gentle giants, because in a way you lift us onto your shoulders to help us see farther and do more, so that each time we stand in the courtroom we not only represent individuals or companies or the people of the United States or Canada or the State of Illinois, we surely represent those people for that particular case, but we do more each time we stand. We represent our court system. We represent a justice system. We are a part of a system that this College has known for so long that is so important, not only to those of us who participate in its affairs everyday, but to all people of our country.

And it is with that in mind, with great respect, humility, that I stand . . . on behalf of all of the inductees to say, "Thank you, but we know that we carry a responsibility, and it is for that reason each of us are proud to be new Fellows of the American College of Trial Lawyers."

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The Bulletin

of the

American College of Trial Lawyers

19900 MacArthur Boulevard, Suite 610
Irvine, California 92612

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.

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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, ACTL