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THE BULLETIN

COURAGEOUS ADVOCACY AWARD RENAMED *for* GRIFFIN BELL

Griffin B. Bell

LONGTIME COLLEGE LEADER HAS SINCE DIED

At the Toronto meeting in September, then President-Elect **John J. (Jack) Dalton** announced that the College's Board of Regents had renamed its Courageous Advocacy Award the **Griffin Bell Award for Courageous Advocacy** in honor of College Past President **Griffin B. Bell.** Judge Bell, who later died on January 5, 2009, was unable to attend the presentation.

Con't on page 6

FELLOWS TO THE BENCH

The College is pleased to announce the following new Judicial Fellows:

Marcus Z. Shar, Circuit Court for Baltimore City, Baltimore, Maryland.

Anthony J. Trenga, U.S. District Court,
Eastern District of Virginia, Alexandria, Virginia.

Richard T. Tucker, Associate Justice of Superior Court, Worcester, Massachusetts.

IN THIS ISSUE

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

American College of Trial Lawyers
The Bulletin

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FROM THE EDITORIAL BOARD

As has become our custom, we report in some detail the content of the programs at the 2008 Annual Meeting in Toronto. For those of you who were present, this may serve as a reminder of what you heard. Those of you who could not attend will find the program that you missed rich with wisdom, eloquence and humor.

Though we regard all the presentations we have summarized as worthy of your time, we call especial attention to several of them.

The tongue-in-cheek advice of newly inducted Honorary Fellow Canadian Supreme Court Justice **Marshall F. Rothstein** to appellate advocates is a classic. The inspiring story of Fellow **John McGoldrick**'s segue´ from the corporate world to the crusade to find a vaccine against HIV/AIDS should be an example for all of us. Famed Canadian movie producer **Norman Jewison**'s address on the use of art in the search for truth and justice is one that every lawyer ought to read and ponder.

President **Jack Dalton**'s announcement of the renaming of the College's Courageous Advocacy Award for former Federal Circuit Judge, Attorney General of the United States and College Past President **Griffin B. Bell**, who has since died, marks a landmark in the College's history.

We remind you of our desire to hear from you, whether it be a suggestion of how we can improve this publication or a proposed opinion piece.

CANADIAN FELLOWS PUT THEIR BEST FOOT FORWARD *in* TORONTO

In what was billed as the College's first meeting in Toronto, the Canadian Fellows outdid themselves.

Toronto skyline

From the opening reception at historic Osgoode Hall, through the opening session on Friday at which the colours (note the Canadian spelling!) were trooped in to the accompaniment of bagpipes and the national anthems of the United States and Canada (the latter in two languages) were rendered by **John McDermott,** one of the original Three Tenors, to the final banquet, at which Canadian inductee **James S. Ehmann**, Q.C., Regina, Saskatchewan delivered a tutorial on the rule against perpetuities, the entire meeting was a Canadian *tour de force.*

As a historical note, those of a certain age would have remembered that in 1988 the College held a brief meeting and a banquet as an adjunct of the American Bar Association's annual meeting, but this was indeed the College's first real meeting in Toronto.

At the opening session on Friday, the College was greeted by, in order: **Dalton McGuinty**, the Premier of Ontario; Toronto Mayor **David Miller**; Canadian Bar Association President **Guy Joubert; Warren K. Winkler,** the Chief Justice of Ontario, and **J. J. Michel Robert**, JFACTL Chief Justice of Quebec.

Retired Canadian Supreme Court Justice **Jack Major**, Q.C., S.C.C., FACTL inducted his successor, Justice **Marshall E. Rothstein,** as an Honorary Fellow. Justice Rothstein's tongue-in-cheek address on how to impress a Canadian appellate court had the audience rolling in the aisles.

The best oralists in both the Canadian Moot Court Competition (the Gale Cup) and the Canadian National Trial Competition (the Sopinka Cup) addressed the Fellows and their guests. To end the morning, the Canadians introduced their visitors from the south to the intricacies of the Canadian national sport, hockey.

At the opening session President **John J. (Jack) Dalton** announced the renaming of the College's Courageous Advocacy Award for Past President **Griffin B. Bell**. (A tribute to Judge Bell, who has since died at age 90, can be found in this issue.)

President **Mikel L. Stout** also announced the presentation of the Emil Gumpert Award for excellence in improving the administration of justice to "And Justice for All," a consortium of the three legal services providers in Utah.

On Friday night, the Fellows and their guests were entertained at an evening event billed as "Your Passport to Canada—A Destination for All Seasons."

The Saturday morning program was highlighted by the presentation by Past President **Ralph I. Lancaster** of an Honorary Fellowship to United States Supreme Court Associate Justice **Samuel A. Alito, Jr.** and the presentation of the Samuel E. Gates Litigation Award to Chief Judge **Judith S. Kaye**, JFACTL of the New York Court of Appeals.

Fellow **John L. McGoldrick**, whom many remembered for his eloquent 2002 tribute to his adopted city, New York, in the wake of the 9/11 attack and his address on professional excellence, told the story of his journey from the boardroom of a major national pharmaceutical company to helping to lead the effort to combat the HIV/AIDS epidemic in sub-Saharan Africa.

Iconic Canadian film producer **Norman Jewison** delivered a spellbinding address on "The Artist as an Advocate for Truth and Justice," using clips from several of his revered movies from the civil rights era.

The Saturday morning program ended with a panel presentation of the 21st Century electronic tools available to trial lawyers.

Ninety-nine inductees were introduced to the College at a Saturday morning breakfast, and they and their spouses were feted at a Saturday luncheon.

The meeting ended with the traditional black-tie dinner and induction ceremony.

Excerpts from the addresses of various program participants may be found elsewhere in this issue.

The fifty-year history of the College, *Sages of Their Craft,* describes the creation of the Courageous Advocacy Award. In 1964, Jack Ruby, a Dallas, Texas, nightclub owner, was to be tried for the shooting of Lee Harvey Oswald, the accused killer of President John F. Kennedy, an event that had been witnessed live on national television. A California lawyer, Melvin Belli, had boasted publicly and frequently about his own courage and his sacrifice in defending Ruby against the resulting criminal charges against him.

Troubled by the self-serving comments and conduct of Belli, College president Whitney North Seymour asked past president Leon Jaworski of Houston, Texas, to chair a committee to advise the Board of Regents what might done by the College to focus attention on advocates who unselfishly represent clients in unpopular or difficult cases. The Jaworski committee subsequently recommended that the College create the Courageous Advocacy Award, and the Regents approved the proposal.

Long regarded as the College's highest honor, the award has been given only thirteen times in the ensuing forty-four years, "proportionally equivalent," as president-elect Dalton observed, "to about the frequency with which we elect a president in the United States." As a curious footnote to history, eleven years after the award was created the second recipient was Leon Jaworski, who received the award for his service as Independent Counsel in the investigation of the Watergate scandal.

The award was not named at the time of its creation. In June 2008, the Board of Regents had chosen to name it for Griffin Bell. In making the announcement, Dalton said, "After this meeting, we will deliver to Judge Bell a DVD of this portion of our meeting, and this tribute will also be marked by the preparation by a former past president of the College, **Warren Lightfoot** of Alabama, of a medallion which will have the likeness of Judge Bell on it, to be delivered to future honorees. Judge Bell and Nancy today are in their home in Americus, Georgia. They are positive and of strong mind as he confronts illnesses that prevent him from being with us today."

The resolution renaming the award follows on page seven.

RECIPIENTS *of the* AWARD HAVE BEEN:

George E. Allen, FACTL 1965
Leon Jaworski, FACTL 1975
Barnabas F. Sears, FACTL 1975
Robert W. Meserve, FACTL 1979
William R. Gray, FACTL 1985
Stanton Bloom 1990
Hon. Robert J. Lewis, Jr. 1991
Max D. Stern, FACTL 1992
Julius L. Chambers, FACTL 1994
W. Glen How, Q.C. 1997
Nickolas C. Murnion 2000
Oliver W. Hill, FACTL 2001
Bryan A. Stevenson 2004

American College of Trial Lawyers

RESOLUTION of the BOARD of REGENTS

Whereas GRIFFIN BELL of Atlanta, Georgia, in over fifty-five years of service to the Bar and active trial practice, has developed the highest reputation as an outstanding advocate and counselor; has distinguished himself as chief of staff to the Governor of Georgia, Judge of the United States Court of Appeals for the Fifth Circuit, legal adviser to at least three United States presidents, and as the people's lawyer while Attorney General of the United States; has served as a mentor in the development of trial skills for countless young members of the Bar who have thereby personally benefitted from his example; has served as a model of unwavering commitment to exercising the highest degree of professionalism despite the circumstances; has dedicated himself to the furtherance of the American political process as soldier, jurist, the people's lawyer, and advocate; and has been a genuine friend, true colleague and worthy inspiration to the great trial lawyers of the United States.

Therefore, on behalf of the Fellows of the American College of Trial Lawyers,

It is hereby resolved that the achievements of Griffin Bell, a graduate of Mercer University Law School, a member of the Bar of the State of Georgia, a consummate trial lawyer, Fellow and former Regent and President of the College, are hereby recognized; it is further resolved that hereafter the Award for Courageous Advocacy of this College shall be given in his honor and extended in his name as the "Griffin Bell Award for Courageous Advocacy"; we thank him for his contributions to society, his commitment to the rule of law; his unswerving belief in equal rights to all citizens, his example, his leadership, and especially his friendship.

Dated this 4th day of June, 2008.

Mikel L. Stout, President
American College of Trial Lawyers

David J. Beck
Paul D. Bekman
J. Donald Cowan, Jr.
John J. (Jack) Dalton
Michel Decary, Q.C.
Francis X. Dee
Bruce W. Felmly

Paul T. Fortino
Phillip R. Garrison
Robert A. Goodin
Christy D. Jones
Gregory P. Joseph
Philip J. Kessler

Joan A. Lukey
Paul S. Meyer
John S. Siffert
Robert W. Tarun
John H. Tucker
Chilton Davis Varner

GRIFFIN BOYETTE BELL

OCTOBER 31, 1918-JANUARY 5, 2009

"CITIZEN SOLDIER, TRIAL LAWYER, FEDERAL APPELLATE JUDGE, ATTORNEY GENERAL *of the* UNITED STATES"

This inscription on the tombstone of College Past President Griffin Bell in the Oak Grove Cemetery in his native Americus, Georgia is all too short a summary of a remarkable life.

Griffin Bell and former President Jimmy Carter. Photography Courtesy of Carter Center

The thirty-fifth president of the American College of Trial Lawyers, Bell died of complications from pancreatic cancer on January 5, 2009 at age 90. Several months earlier, the College had renamed its highest award, the Courageous Advocacy Award, in his honor.

Born October 31, 1918, the third son of a farmer turned storekeeper, he had decided as a child that he wanted to be a lawyer after watching trials in the county courthouse. A graduate of Georgia Southwestern College, he was a Major in the Army Transportation Corps in World War II. After the war he went to

law school at Mercer University on the GI Bill, graduating with honors and passing the bar examination after his second year. Indeed, he served as the uncompensated city attorney for the town of Warner Robins during his third year of law school.

After he had practiced in Savannah and then Rome, Georgia for a total of six and one half years and had acquired a growing reputation, he was invited to join the Atlanta firm King & Spalding. By Bell's own account, "Mr. Spalding recruited me, and I turned him down. He sent a committee at first, but because I wasn't certain what the situation was, I wanted to talk to the head man. So, Mr. Spalding called me personally . . . and asked me why I had turned them down. He felt insulted. I said, 'Well, I don't understand your business plan. I don't see how you make enough money to pay the rent on the space you have, to start out with. And I'd like to see the books.' And he was astounded that this young lawyer wanted to see the books! But he said, 'How many years would you want to see?' I said, 'I'd like to go back to the beginning of the Great Depression — 1929.'"

Obviously Bell was satisfied with what he saw, since he accepted the firm's offer. His mentor at King & Spalding was Robert Troutman, a principal lawyer for the Coca-Cola Company and an early Fellow of the American College of Trial Lawyers. From the beginning, Bell made his mark. As his partner Bob Steed observed, "He was thinking outside the box before there was a box."

In the 1950s as an unpaid volunteer aide to then Governor Ernest Vandiver, he persuaded the governor, who had campaigned against school desegregation, to create a General Assembly Commission on Schools to hold hearings around the state. That commission ultimately recommended that the Georgia public schools be preserved at all costs, rather than being closed in the face of desegregation. Bell is thus widely credited with creating a plan to defuse racial tensions and enable Georgia to desegregate its public schools, rather than closing them.

In 1960 Bell chaired the Georgia presidential campaign of John F. Kennedy, delivering the candidate a larger majority than did his home state. In 1961 President Kennedy appointed him to the United States Court of Appeals for the Fifth Circuit. He served on that court for almost fifteen years during the height of the civil rights era, participating in many of the landmark cases that slowly dismantled segregation and other forms of discrimination in the deep South. He left the court in March 1976 to return to King & Spalding and was inducted into the College in 1977.

That same year fellow Georgian President Jimmy Carter persuaded him to become the 72nd Attorney General of the United States. Taking office in the wake of Watergate, Bell quickly set about rehabilitating the reputation of the Department of Justice. To establish the transparency of the department's leadership, he posted a list of all his outside contacts daily, making them available to the press. In the wake of reports of widespread abuse of wiretaps by the previous administration, he helped to craft FISA, the Foreign Intelligence Surveillance Act, placing control of wiretapping by law enforcement officials under the supervision of the courts. He was instrumental in helping President Carter appoint more women and minorities

as federal prosecutors and judges. On a walk through the woods at Camp David, he persuaded a reluctant Eighth Circuit Judge William Webster to leave the bench to head the beleaguered Central Intelligence Agency.

Leaving the government in 1979, Bell again returned to King & Spalding. He wrote a book about his experience as Attorney General entitled *Taking Care of the Law.* When he left the office of Attorney General, then Chief Justice Warren Burger said: "No finer man has ever occupied the great office of Attorney General of the United States or discharged his duties with greater distinction."

At his death, William D. Underwood, the president of Mercer University, on whose Board of Trustees Bell served six terms, observed, "When two of the most turbulent political storms of the past century swept through America – desegregation in the South, and the Watergate scandal in Washington – we as a people turned to Judge Bell, and there he stood, firm, unscathed, and unbending against the storm, guarding the highest and best principles of American law and our constitutional republic. . . . He viewed the law as a sacred calling – as perhaps the most noble of all professions because of the opportunity and, indeed, obligation lawyers have to serve our system of justice."

Back in private practice, Bell developed a specialty of internal corporate investigations and was a key figure in many high-profile legal engagements. In the words of his long-time partner, Frank Jones, likewise a past president of the College, "Griffin Bell became one of the best known lawyers in the nation, representing a wide diversity of clients in major litigation and business matters. Some would say . . . that he was the most admired lawyer in our country."

Bell served as president of the College in 1985-86. When he became president at the London meeting in 1985, he immediately thrust the College into two new projects. He appointed a task force to look into possible recommendations for tort reform legislation and he ordered a special retreat of the Board of Regents and past presidents to consider changes relating to the growth and development of the College. Past presidents of the College remain ex officio members of the College's Board of Regents, with voice and the right to make and second motions, but with no vote. A constant presence at Regents' meetings, Judge Bell was never reluctant to add his voice, always with humor, to the debate.

For the rest of his life, he was regularly called to public service by both Democratic and Republican administrations. When former Department of Defense General Counsel William J. Haynes III delivered the Lewis Powell Lecture to the Fellows of the College at its Spring 2008 meeting, he began with a tribute to Judge Bell and delivered the thanks of the Secretary of Defense for his service to that department. Few in the audience understood the significance of those remarks. In the wake of 9/11, Haynes had twice called on Griffin Bell for help, first to advise the department in dealing with the discovery that, unknown to his superiors, a member of the department had been systematically mining and storing data on United States citizens and second, to assist in creating a structure for insuring due process in appeals from the controversial military tribunals the Bush administration had established at Guantanamo Bay.

Bell's folksy southern charm and his self-deprecating sense of humor were legendary. His deep Georgia accent was a favorite target of his own humor. He loved to tell the story of an international conference at which he led the United States delegation and made the opening remarks for his delegation. After his remarks, the British delegate sought him out, laughing, and informed him, "Griffin, I could not understand a word you were saying and so I put on my earphones and switched to the French translation."

Once a group of Fellows of the College who were guests at a party at his Sea Island home were admiring a watercolor painting of the White House, a gift from Jimmy Carter, and a framed five dollar bill autographed by George H. W. Bush, the product of a golfing bet. One of the guests remarked, "You worked for President Kennedy and have represented both President Carter and President Bush (in the Iran Contra investigation)?" Bell's instant rejoinder, delivered with his trademark grin: "Fast-growing legal specialty."

Griffin loved to play golf. His partner Frank Jones recalled at his memorial service that on one occasion a few years ago, he shot a 39 on the front side of a very difficult course. The law firm's in-house bulletin featured a picture of him on the cover with the statement that, "He brought the golf course to its knees". Someone asked Judge Bell afterwards what his score was on the back side; he replied, "If I had wanted you to know that, I would have told you."

For his seventy-fifth birthday party, President Carter, who could not be present, had made a videotape of his remarks. His most notable line, delivered dead-pan, but with a twinkle in his eye: "Griffin and I got along fine in Washington once we settled on whether the President or the 'Tuney Gen'l was going to run the cabinet meetings."

At Bell's death, Carter said in a statement released through the Carter Center. "Rosalynn and I are deeply saddened by the loss of our dear friend Griffin Bell, A trusted and enduring public figure, Griffin's integrity, professionalism and charm were greatly valued across party lines and presidential administrations. . . . Griffin made many lasting contributions to his native Georgia and [his] country. . . . "

Judge Bell received and accepted the diagnosis that he had a form of pancreatic cancer, for which he was told there was no cure, with the equanimity that had marked his entire career. At the annual meeting of the Board of Trustees of Mercer University on December 4, 2008, a month before his death, the University unveiled a bust of Bell. In an impromptu response, he delivered his own valedictory:

"I've had a great life — great opportunities to serve. I don't regret anything I've done. I'm well-satisfied that the Lord has given me a square deal. I've lived now to be ninety years old, and I revere all the years I've been associated with Mercer. And also, all the years of public service I've had. And, all the years of law practice that I've had. I don't think there is any greater calling than being a lawyer and being willing to serve. There are lots of lawyers, but we don't have too many who are willing to take these public jobs. I've been able to do both, and for that I am very thankful. I'm thankful for all the friends in this room. I appreciate this honor. I never thought I'd have a bust, but I'm grateful for it. . . . Thank

you very much."

A week later his second book, *Footnote to History: A Primer on the American Political Character,* was released. An article in the Atlanta Business Chronicle, published in advance of its release entitled "Griffin Bell Prepares for His Final Chapter," read in part as follows: "I don't have any complaints," said Bell, who is suffering from untreatable pancreatic cancer and added that he's just waiting around to die. "I'm well-satisfied with my life. I'm perfectly at peace. . . . I wouldn't be disappointed if I died right away, but it's nice to keep on living," Bell said. "I'm thankful for the extra time I'm getting now."

The article ended: "When Bell speaks of this final chapter in his life, he's amazingly open and matter-of-fact, almost as if he's talking about what he had for breakfast. There is no remorse or anxiety, just appreciation for the life he's lived and for every day he still has."

Even at the end of his life, Bell's humor did not desert him. His partner Robert L. Steed relates: "In his last hours, as Judge Bell was lying in the bed in pain, he said, 'I feel like I am dying inch by inch. In heaven, dying must be handled by committee. That is why it is taking so long.'"

In his eulogy at the January 7 memorial service, a day on which flags were ordered lowered to half-staff throughout Georgia, past president Jones enumerated the qualities that set Griffin Bell apart: He was a person of unimpeachable integrity, a role model of integrity, of honesty, of trustworthiness, of uprightness. Bell defined integrity as "doing what's right." He was creative. He was able to sift through a huge mass of complicated facts and lengthy documents and develop a legal position that made good common sense.

He saw lawyers as "problem solvers." He was a zealous advocate for his clients, but at the same time he sought to find a solution to a problem that was practical and would serve the best interests of all concerned. He often viewed himself as being "the lawyer for the situation." He believed strongly that every lawyer has an obligation to serve the public interest.

He was unselfish. A rainmaker to an extraordinary degree – his partner Jones called him a "monsoon-maker"—he was never willing to accept as large a share of the firm's income as his partners felt he was entitled to receive. His position: "There is no room for greed at our firm." And he was eternally grateful, a virtue that stood out in his remarks as he looked back on his life as it neared an end.

Mercer President Underwood summed it up this way: "Judge Bell never forgot where he came from. He never lost his grounding. And he never forgot the people he knew along the way. As far as I could tell, he never seemed to forget anything."

Bell's first wife, Mary Foy Powell, a native of Richmond, Virginia whom he married during World War II, died in 2000. He later married Nancy Duckworth Kinnebrew, the widow of a family friend, who survives him. His survivors also include his son, Griffin, Jr., an Atlanta lawyer, one grandson, also a lawyer, a granddaughter and five great grandchildren.

E. Osborne Ayscue, Jr.

COLLEGE ELECTS NEW OFFICERS

John J. (Jack) Dalton of Atlanta, Georgia was installed as the College's new President, succeeding **Mikel L. Stout** of Wichita, Kansas.

Joan A. Lukey of Boston, Massachusetts is the incoming President-Elect.

Thomas H. Tongue of Portland, Oregon will serve as Secretary.

Gregory P. Joseph of New York, New York will serve as Treasurer.

TWO NEW REGENTS

Robert L. Byman, Regent for District Eight, is a partner in Jenner & Block of Chicago. He was inducted into the College in 1992. Byman is a 1967 graduate of the University of Illinois and received his J.D. in 1970 from the University of Illinois.

Francis M. Wikstrom, Regent for District Four, became a Fellow in 1995. He is a shareholder in Parsons Behle & Latimer of Salt Lake City, Utah. A 1972 graduate of Weber State University, Wikstrom received his J.D. in 1974 from Yale University.

ALITO, INDUCTED AS HONORARY FELLOW, REFLECTS ON JUDGES *in a* DEMOCRATIC SOCIETY

THE BASEBALL ANALOGY

*Associate Justice **Samuel A. Alito, Jr.** was inducted as an Honorary Fellow at the annual meeting in Toronto. Past President **Ralph I. Lancaster** made the presentation, characterizing Alito as "a man who has dedicated his life to public service."*

Samuel A. Alito

Born in 1950 in Trenton, New Jersey, educated at Princeton and Yale Law School, Justice Alito began his career in 1976 as law clerk to Judge Leonard I. Garth of the Third Circuit Court of Appeals. From 1977 to 1981 he was Assistant U.S. Attorney for the District of New Jersey. From 1981 to 1985 he was Assistant to Solicitor General Rex E. Lee. From 1985 to 1987 he was Deputy Assistant Attorney General in the Office of Legal Counsel and from 1987 to 1990 U.S. Attorney for the District of New Jersey.

In 1990 he was appointed Judge of the U.S. Court of Appeals for the First Circuit, where he served for sixteen years. He was appointed and confirmed to the United States Supreme Court in 2006.

Justice Alito's remarks accepting the Honorary Fellowship follow.

JUSTICE ALITO: I am truly honored to receive an Honorary Fellowship in your organization, because I am well aware of the great work that you do. . . . I think that this organization helps to preserve the best traditions of our profession. . . .

INDEPENDENT JUDICIARY

I applaud . . . the report that you issued in 2006 entitled "Judicial Independence: A Cornerstone of Democracy." There has been a lot of talk in recent years, and I think justifiably so, about the importance of an independent judiciary in preserving the rule of law. I thought your report was excellent. It was a great contribution to an important national debate, and I thought that the title of the report got things exactly right: "Judicial Independence: A Cornerstone of Democracy."

Think about the title. It is very important because judicial independence is critical to the kind of democracy that we have in the United States and that those of you who are in Canada have up here, that is, not just a democracy in which the majority rules, but a democracy in which individual rights are respected. There have been many countries that have had wonderful constitutions that profess all of the important rights that we cherish, but we know that those constitutions are nothing but words unless the rights can be enforced. And I don't know of any way in which rights can be enforced against the government and against popular sentiment at times except through the action of a judiciary that is truly independent of the other branches of government and also suitably independent of the currents of popular opinion that may be prevailing at a particular point.

THE ROLE OF CONSTITUTIONAL STRUCTURE

An important aspect of this relationship between an independent judiciary and a democratic form of government is proper respect on the part of the judges who have the honor to serve in that judiciary for the fundamentally democratic character of the government and the society that they are charged with serving. This structure of a truly independent judiciary is, of course, dependent on a sound constitutional structure, a sound legal structure on institutions that are framed, as I think our institutions were, with a realistic appreciation of the way people really behave in political life. Not an idealized and unrealistic conception of political behavior, but a realistic conception of political behavior that was informed, not just by a study of political theory and the history of past democracies, but also by hard experience in the practical world of politics. That constitutional structure is critically important.

THE ROLE OF CIVIC AND LEGAL CULTURE

But something else, I think, is also fundamental and indispensable, . . . a legal culture and a broader civic culture that appreciates the role that a judiciary should play in a democratic society. I think we have had that for most of our history in the United States, and I suspect the same is true up here in Canada, but there were a number of things that happened to me during the past term of the court that made me wary about changes in our legal culture and in our civic culture. I don't want to exaggerate the importance of these, but I think they are worth mentioning.

Let me begin with a public opinion poll that I recently read about. The question that was put to people was phrased, as questions in public opinion polls often are, in a way that was overly simplified. But the question was an important one, and it said: "How do you think judges should behave in interpreting the Constitution? Should they interpret the Constitution as it is written or should they be guided mainly by their own sense of what is just and fair?" Now, those people who are sophisticated about the legal system . . . judges, practitioners like the distinguished practitioners who are here, legal scholars, . . . know that the choice is not exactly that simple, but those are really

the two models that vie often for public acceptance.

THE BASEBALL UMPIRE ANALOGY

A lot of you may remember that during his confirmation hearings, Chief Justice Roberts compared judges to baseball umpires. Now, baseball is a topic that has interested me for a long time. A lot of people thought that the Chief Justice's analogy between judges and umpires was a very apt one, but there were those who immediately attacked it. They charged that what he was advocating was exactly one of the simplistic models that was referenced in the public opinion poll that I mentioned, an entirely mechanical sort of jurisprudence.

A very distinguished advocate before our court, a constitutional scholar, wrote an entry on a blog about this that I saw. Here is an explanation of the point that he made: Let's take a typical baseball play. The batter hits a long fly ball into the outfield stands. Is it a home run or is it a foul ball? Well, it is a very straightforward call. The rules of baseball are very clear. If . . . the ball enters the stands on the fair side of the foul pole or hits the foul pole, it is a fair ball. It is a home run. If it enters the stands on the foul side of the pole, it is a foul ball. It is just a long strike, as the baseball announcers typically say.

The point that this advocate and scholar was making is that these are very clear rules and there is clearly a right answer and a wrong answer. This is very much unlike what judges do in interpreting the Constitution and also in interpreting a lot of important laws. Think of the important phrases of the Constitution that figure most frequently in litigation— things like due process and equal protection, unreasonable searches and seizures, even a concept like freedom of speech or no establishment of religion— not exactly the same sort of cut-and-dried rule as the rule about whether a ball that is hit into the stands in a baseball game is a fair ball or a foul ball.

I am going to come back to umpires. Let me put that aside for now. So that is one model of what judges do. Now, let me mention a couple of things that happened to me this term that highlight the increasing popularity of a very different model of what a good judge is supposed to do.

THE ATTITUDINAL MODEL

Back in February, I judged a moot court at a law school. In connection with that, the other two judges on the panel and I sat in and participated in a class that was being taught at the law school by a friend of mine who is on the faculty and one of my former law clerks. The topic of the course is an interesting one that I think is not covered in very many law school curriculums, . . . the study of judicial decision-making from the political science perspective. This was something that I had been interested in many years earlier, but I had been away from it. I read the articles that were assigned to the students for that class, and I was reminded that, among political scientists, the prominent model that is used to analyze and predict judicial behavior is the so-called attitudinal model. The attitudinal model posits that what judges are doing is to maximize the implementation of their own policy preferences to the greatest degree possible. Very simple.

The article that we read located every justice in the Supreme Court, during an era prior to my service in the Court I was happy to learn, by analyzing what was said about the justice during the justice's confirmation hearings in editorials . . . published in various newspapers and assigning an ideological rank to the justice according to the comments in the newspaper. So, we have the attitudinal model used by political scientists.

WORDS MATTER

A couple of weeks later, I attended a dinner for a class of new judges. The Federal Judicial Center in Washington periodically has orientation sessions for a class of newly appointed federal judges, and at the end of each class there is a dinner at the Supreme Court. At the end of the dinner, several of the judges in the class gave little talks. One of the judges who spoke had been a very distinguished law professor, and she spoke about the things that she had learned during her first few

years on the Court of Appeals. She said, "One of the big things that I learned, or was reminded of, is that, contrary to what a lot of my colleagues in academia thought and still think, words really matter in actual court cases." I thought this was quite astonishing. As a judge, I spend most of my time trying to decipher the meaning of words, the meaning of words in difficult federal statutes and other legal documents, but she was pointing out that from the perspective of a law professor, she had re-learned or learned maybe for the first time that words really matter.

THE POLITICAL COURT THEORY

For my birthday, my daughter gave me a copy of Richard Posner's new book, "How Judges Think," a very interesting book. I don't know whether any of you have read it, but it is, as everything Judge Posner writes, very provocative. When my daughter's roommate saw that she had picked this book as my birthday present, her roommate said, "Why are you giving that book to your father? Doesn't he know already how judges think?"

Actually, it is more complicated than that. There is a chapter in the book that is entitled "The Supreme Court is a Political Court." . . . . Judge Posner argues that because of the nature of the controversies that we are called upon to resolve, it is impossible for us to "behave like other judges."

EDITORIAL COMMENT

A final thing that happened during the term: for some reason at the end of the term I thought it would be interesting to collect all of the editorials that had been written about the work of the Supreme Court during the past term in two of the nation's leading newspapers. So I did have those collected and I read through them and I found, I think not to my surprise, that in one of the two newspapers I could not find a single editorial that said, "We really don't like the results in this case, but we know that that is what the Constitution or the laws require." Every single editorial either praised our work or criticized our work in a way that was absolutely consistent with the clear policy preferences of the editorial writers. In the other newspaper, the record was almost exactly the same.

But there was one exception, and so that editorial is the one that I would select to give an award. I don't know what I would call it, maybe the Rule of Law Award, for the best editorial of the term. And, ironically, it was an editorial that was critical of one of the opinions that I had written. The case in question was a case called *Gomez-Perez*. It involved a woman who worked for the postal service. She claimed that she had been subjected to age discrimination and that after she complained about the alleged discrimination to her superiors, they had retaliated against her. So she sued under the Age Discrimination in Employment Act, asserting that she had been the victim of unlawful retaliation.

I wrote the opinion for the court holding that, contrary to the decision of some of the Courts of Appeals, there is a retaliation claim under the Age Discrimination in Employment Act, and so her retaliation claim could go forward. It wasn't a unanimous opinion. The Chief Justice, Justice Scalia and Justice Thomas, if I remember correctly, voted the other way.

This editorial said, "We like the result in *Gomez-Perez*. We think that there should be a retaliation claim under the ADEA, but we think that Justice Alito's opinion got the law wrong. The law doesn't actually provide that." And it is very important what the editorial said, for us to remember that there is a big difference between what we want the law to mean and what the law actually means, a critical point.

THE COMMON LAW OF UMPIRING

Now I am going to come back to umpires. I talked about just very briefly . . . the Chief Justice's comparison of judges to umpires and the charge that he was advocating a view of judicial decision-making that was simplistic. That would be a correct charge if the rules of baseball actually were the way the people making the charge think they are. But, in fact, they

are not all that way. Some of them are quite different.

And I will give you one example. One of the calls that an umpire has to make during a baseball game is whether the batter has actually swung at the pitch. You know the situation: The pitcher throws the ball, the batter starts to swing but stops before taking a full swing, and either the home plate umpire or the first base umpire will say, "The batter went too far; that is a strike," or, "No, the batter checked his swing in time; it is not a swing." Those of you like me who played Little League baseball or who had children who play Little League baseball probably know various rules relating to this. One is it is a strike if the batter breaks his wrist. . . . Another is that it is a strike if the bat passes over the plate. In fact, neither of those is really the baseball rule. The applicable baseball rule says that it is a strike if the batter has struck at the ball. That is all it says.

And so the . . . applicable baseball rule has delegated to umpires the responsibility for developing, pretty much the way a common law court develops the law, a common law standard on the question of whether the batter has struck at the ball. And I suspect that umpires make that decision based on, what? Based on their observation of the way this has been called traditionally by all the umpires who went before them, the way the call was made by their colleagues, and by their own experiences behind the plate. And so, when the job of the umpire is understood in that way, you can see that it actually is much more like the job that real judges do in deciding legal cases.

GETTING THE LAW RIGHT

Since we are in Canada, and I am talking about sports officials, I am going to end by making a reference to hockey. This . . . comparison that Chief Justice Roberts made between sports officials and judges has really caught on. I had a colleague when I was in New Jersey who was a district court judge by day and an amateur hockey referee by night. . . . Well, he asked me during the term to tape a few words to be broadcast at the beginning of a conference of sports officials, professional and amateur. And I said, "Okay, fine, I would be happy to do that."

It was towards the end of the term, so I was quite harried when I did it. But a short time before the crew arrived to tape these remarks, someone from the organization arrived and gave me talking points about what they wanted me to say on this tape, so I thought this was very helpful; it made my job a little easier. Fortunately, I looked over the talking points before I actually went out to make the remarks, and I saw that point number one was, "Sports officials are just like judges." They are picking up on Chief Justice Roberts' point. I said, "All right, I can go along with that."

Point number two, however, was, "What are we trying to do? It is not about getting it right. It is about professionalism." Now, I was startled by this and I thought probably it would not be a good idea if I made a tape that might well end up on YouTube in which I said, "Sports officials are just like judges, and for both of us it is really not about getting it right." So I didn't. I modified my remarks.

But, actually, if you think about it, there is a sense in which the talking point is correct, because for judges at least . . . it is not about getting it right in the sense of getting the right result, getting the result that our society would like to have at that particular time in that particular case under those particular circumstances. It is about deciding the case in accordance with the law and the proper judicial role, which is really something at times quite different. And it is exactly at those times that the rule of law is most important.

So, I give you this challenge . . . as you read our opinions for the upcoming term. If you like every one of our decisions, if you like the result in every one of our decisions, then maybe we are not doing things right. If, however, there are cases where you say, "I really don't like this result, but I can see that it may be the correct interpretation of the law," then we are doing exactly what we are supposed to be doing.

Thank you very much.

bon mot

I will never forget my first conference on the Court. Now, I am the junior justice on the Court. . . . As you may know, the junior Justice on the U.S. Supreme Court has certain special duties, and they occur at the conference. . . . The most important of my duties as the junior guy is to keep the official votes on whether we vote to grant cert in a case or to deny cert. No staff members are present when we meet in our conference, so it is my job to keep the votes. That is the most important part of my responsibilities.

My other responsibility is to answer the door, if anybody knocks on the door during our conference. Our table is arranged so that my seat is the one that is closest to the door, and periodically while we are meeting there will be a knock on the door, and it is my responsibility to get up and open the door and say, "Who is it? What do you want?" "Justice so-and-so has forgotten his or her glasses," or, "Here is a cup of tea," or a note from chambers or something like that. Not, when you think about it, a very difficult responsibility, but I was pretty nervous at the first conference that I attended. I knew that I had this duty, but, as I said, I was incredibly impressed by the surroundings, so when there was a knock on the door, it took me a little bit of time to process what was going on.

Before I joined the Court, the Court had not changed at all in personnel for eleven years. So, Stephen Breyer had been the junior Justice for eleven years. And he was used to the responsibilities of the office. When there was the knock on the door, he was like the proverbial fire-horse who heard the bell. So, before I could even process this information, he was up and headed for the door. And the Chief Justice had to say, "Steve, sit down. That is not your job anymore." So now I am faster on the draw.

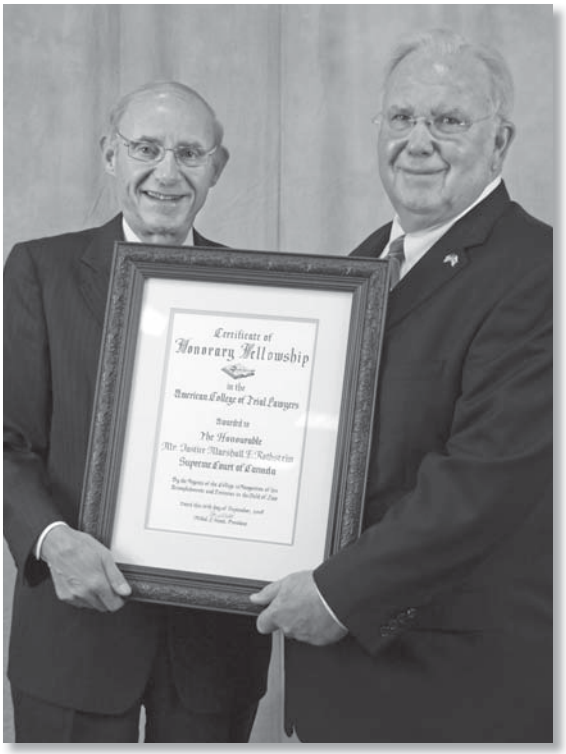
I also received some really excellent advice when I started. One of my colleagues said, "I am going to give you some advice that was given to me years ago when I started." And so I was listening eagerly for the advice. He said, "You know, don't feel bad. You are going to spend your first five years here on the Court wondering how in the world you ever got here, and you are going to spend all of the rest of your time here in the Court wondering how in the world your colleagues ever got here."

Associate Justice Samuel A. Alito, Jr.

bon mot

CANADIAN JUSTICE ROTHSTEIN *made* HONORARY FELLOW

*Canadian Supreme Court Justice **Marshall E. Rothstein** was inducted as an Honorary Fellow at the annual meeting in Toronto. The presentation was made by his predecessor, retired Justice **Jack Major**, Q.C., S.C.C., FACTL.*



Marshall E. Rothstein and President Mikel Stout

ACCEPTANCE REMARKS LACED WITH HUMOR AND WISDOM

A native of Winnepeg, Manitoba, the son of immigrants from Eastern Europe, he was educated at the University of Manitoba. Called to the Bar in 1966, he became a Queen's Counsel thirteen years later. He is married to Dr. Sheila Dorfman, a physician.

After practicing law for twenty-six years with the Winnipeg firm Aikins, MacAulay & Thorvaldson, he was appointed in 1992 to the Federal Court of Canada, Trial Division, ex officio as a member of Appeal Division and to the Court Martial Appeal Court. In 1999 he was appointed a Judge of the Federal Court of Appeal, and in 2006 he became the first appointee to the Supreme Court of Canada whose appointment was presented to a parliamentary committee under a controversial new procedure.

The edited text of Justice Rothstein's acceptance remarks follows.

JUSTICE ROTHSTEIN: Being introduced by Jack [Major] is a great honor; it is no exaggeration to say that he is an icon of the Canadian legal community and of this College.

His . . . introduction brings to mind the story of the Pope. He had an engagement, he came down to the car that was waiting for him, and he decided that he wanted to drive, so he told the chauffeur to get in the back, and he started driving. Unfortunately, he was going too fast and he was stopped. The officer came to the car window. When he saw the Pope, he decided he had better call headquarters.

He . . . said, "We have an incident here." The desk sergeant said, "What is the problem?" The officer said, "Well, I have stopped someone really important for speeding." Desk sergeant said, "Who is he?" Officer replied. "I am not sure, but the Pope is his chauffeur." Today, I feel like the guy sitting in the back seat, with the Pope as my chauffeur.

As Jack told you, I never made it as a real member of the College, but I am happy to get in any way I can. Consider me a late bloomer.

ADVICE CONCERNING CANADIAN APPELLATE PRACTICE

I want to talk, just for a moment, and say to you that lawyers are very mobile these days. I know that Canadian lawyers have appeared in U.S. courts, and American lawyers may soon appear in Canadian courts. Canadian lawyers will be familiar with what I propose to say, but the College I know is concerned about continuing legal education, so I thought it would be instructive for me to help our American visitors with the practice and procedure they will encounter if they come to the Canadian Supreme Court. I am going to cover ten points.

One, getting leave to appeal: Generally, advocacy before our Supreme Court starts with the application for leave to appeal. Some lawyers complain that it is hard to get leave in our court, but there is no secret to getting leave. Our Charter of Rights came into force in 1982. We like to write judgments about the Charter. It doesn't matter whether the case is about the Charter or not. You just have to sprinkle the Charter through the application at least half a dozen times. If it is bolded and put in large font, we won't miss the point. Color is good. If we see the Charter enough times, and it is highlighted, we will grant leave.

Two, the brief: We call the brief a factum. In our court, you don't have to worry about the factum. You can patch up any errors or omissions in oral argument. If you don't put an argument in the factum, and you argue it orally, you will gain the advantage of surprise. Don't worry about the page limit in the rules for the factum. Those limits are not meant to be taken seriously. Factums should be as long as possible. It gives weight to the argument. If the other side has raised a good argument, don't get sucked into providing a response. Focus only on your winnable arguments, and if necessary, go off on tangents. That way, you will divert the judges from the difficult and contentious point.

Judges get bored with reading dry legal writing, so you should make the factum as rhetorical as possible. References to Greek mythology, Shakespeare or John Grisham are a welcome change.

Three, approach to the oral hearing: As a senior, well-known lawyer, certainly someone who is a member of the College, you can usually rely on your reputation. The judges will hang on your every word. The judges will be so star-struck by your mere presence before them that they will be won over even before you stand up. Whatever you say, you will have them eating out of the palm of your hand.

But if, in the remote case things go badly, becoming meek and timid will turn the tide. After all, we are the Supreme Court of Canada. Make sure you keep saying, "It is respectfully submitted," and calling the judges "Your Lordship" or "Your Ladyship." "Your Holiness" only works with some judges. If you really want to make points, you should call the Chief Justice "Your Majesty".

Four, time: Your time for oral submissions is limited: for a party, one hour, for an intervenor, only 15 minutes. So, how do you cover everything you have to say in the limited time you have? The answer is, talk fast. The judges are always impressed by someone who can talk fast, even if they can't understand the argument.

Five, presenting the arguments: If you have a weak case, in our court, you should do four things. One, argue the facts in excruciating detail, especially when they are agreed, and your opponent won't contradict them. Two, read from the record. Make sure you do so in a monotone voice. Three, indicate a real sense of grievance and frustration with the Court of Appeal. It will show victimhood. That is always useful. Four, show a genuine desire to get even with your opponent. The judges will identify with your desire for vengeance. In describing your opponent's argument, use terms like "absurd" and "preposterous."

Six, dealing with the material: Some counsel prepare a condensed book for the day of the hearing that they will refer to in oral argument. You shouldn't bother with this, especially if you are going to be referring to several different volumes of the record during argument. Judges are always impressed by counsel's ability to flip from book to book, and all the commotion helps to keep them awake. They even keep a tally of which counsel referred to the most books. It helps to decide the case. When you refer to the record or to books of authorities, don't waste time taking the judges to the material you are referring to. Just paraphrase. Your paraphrases will be better than the excerpt from the record of the case itself.

Some lawyers spend a good portion of their time dictating the tab and page numbers from the record to the judges. That is good. The judges like to write down lists of numbers. If they do follow up on the references, they will enjoy seeing if they can link the tab and pages you dictated with the material in the record, and then figure out why you wanted them to look at it in the first place.

Seven, dealing with an authority that is against you: There are two ways to deal with a previous Supreme Court of Canada decision that is adverse to your position. One, tell the Court they got it wrong, and that they should overrule the prior decision. Two, better still, tell the judges what they really meant in their prior decision. That will be especially effective if the judge who wrote the decision is still on the bench.

Eight, dealing with questions: My pesky colleagues have a tendency to use up the time allotted to counsel with their pointless questions. I also ask questions, but they are always good. Some useful answers in our court, if a question happens to strike a weak spot in your case are: One, "I wasn't counsel at the trial or at the Court of Appeal"; two, "Another lawyer prepared the factum, and she isn't here"; three, "I will get to it later"; four, "My colleague will address the point"; five, "You are missing the point"; six, "The question is irrelevant"; seven, "You are trying to trap me, and I won't answer."

Nine, dealing with theoretical questions: Sometimes a judge will ask a hypothetical question about the application of the principles of law that go beyond the facts of the case. You shouldn't answer. It is a trap. You are there to win the case for your client. You should just tell the judges there are no broad implications, and that they will only confuse themselves if they think there are.

And ten, persistence: As you argue, you must be persistent. You can't give in. If the court says it disagrees with your point, just carry on. If the court says it isn't interested in your point, don't be discouraged. Just make it again. Judges will eventually get it. And never sit down. When you are finished, if your time hasn't run out, just start all over again. Don't worry about the red light. Continue until the Chief Justice pleads for mercy, and begs you to sit down.

Well, if you believe any of what I have said, you really do need continuing legal education. But let me assure you, we have seen it all, or at least almost all.

INDEPENDENCE OF BENCH AND BAR

Seriously, I want to say what a truly great honor it is for me to be inducted as an honorary member of the College. We often talk about the independence of the judiciary, and about the independence of the Bar. In North America, we take these things for granted. We shouldn't. When we look around the world, we see many examples where the Bar and the Bench are not independent. Independence is a fragile thing. As lawyers, you have to be free to take on all kinds of cases, to engage in courageous advocacy . . . .

Even for the most unpopular clients and causes, in litigation lawyers are often acting against the government in one form or another, or for the government, or for large and powerful clients, where there can sometimes be pressure to break the rules or to act in ways that are not consistent with professional standards. In that context, nothing is more important than the integrity and independence of counsel.

The College, with its objective of elevating the standards of trial practice, the administration of justice, and the ethics of the profession, is a key participant in contributing to an independent Bar and Bench. As judges, we are reliant on the integrity and independence of counsel, and in turn, on the important work and influence of the College, and I will be proud to be an honorary member.

Now, I was appointed, as Jack told you, in 2006, and as he said, to get my job I had to appear before that parliamentary committee to answer Members of Parliament. And it was the first time, and as he told you, it was fairly benign. It is nowhere near as rigorous an exercise as the process before the [United States] Senate confirmation committee. The difference in Canada is that the parliamentary committee can advise, but it does not have the power of consent. Under our Constitution, the Prime Minister has the authority to appoint a judge to the Supreme Court with or without the approval of the parliamentary committee.

But whether the new process is good or bad is, as Jack indicated, controversial. Judges and lawyers generally don't like it because, as he said, they are concerned that it is going to degenerate into nasty, intrusive questioning of a nominee and overly politicize the appointment process. But the press and the public like it. They want to see the individual who will fill the position.

JUDGES AS ORDINARY PEOPLE

What they see is that ultimately, we are ordinary people, at least most of us. I am sure I am. Last week, I opened a can of tuna fish, and threw the empty can in the garbage. Next morning, my wife sent me an e-mail in the office: "Rules: One, wrap all fish products before putting in garbage; Two, close blinds in living room. Sun bleaches couches; Three, put toilet seat DOWN." We are ordinary people.

One thing that comes from that parliamentary hearing process is that it creates a lot of publicity for the nominee. A couple of months after I was appointed, I called Air Canada to order a ticket on a personal matter. After the agent completed the process, she said, "Rothstein. So you are the guy they appointed to the Supreme Court?" I said, "Yes". She said, "I have a problem. I have to come to work very early, and I leave my house at 5 a.m. when it is dark. And some mornings on my way to the bus, I run into a raccoon. I don't like that raccoon; it scares me." And she said, "Can I kill the raccoon?"

I paused for a moment, thinking there were probably laws against killing wild animals in the city, and then wondering about self-defense and whether that would be an exception, and I end up saying, "Well, I don't know". She said, "You don't know? You are a judge of the Supreme Court! Can I or can't I?" Well, I retreated to the judge's safe harbor, and explained to her that as a judge I couldn't give legal advice. My answer did nothing to enhance her confidence in the administration of justice.

I thank you for the honor that has been bestowed upon me today . . . and for your attention. Thank you very much.

NEW YORK CHIEF JUDGE *receives* GATES AWARD

New York Court of Appeal Chief Judge Judith Smith Kaye, a Fellow of the College since 1986, became the twentieth winner of the Samuel E. Gates Litigation Award at the annual meeting of the American College of Trial Lawyers in Toronto.

Michael Cooper, Judith Smith Kaye and Mikel L. Stout

Created by his law firm in 1980 in memory of a president-elect of the College who died shortly before he was to become president, the award honors a lawyer or judge who has made a significant contribution to the improvement of the litigation process.

In presenting the award, Past President **Michael A. Cooper** paid the following tribute to Judge Kaye:

"In New York, the Chief Judge of the Court of Appeals, our highest court, is also the Chief Judge of the state, responsible for a court system with 3,500 full- and part-time judges, at an annual budget of more than two billion dollars. Those twin positions have been held for the past

fifteen years by Judith S. Kaye, who has served longer than any of her twenty-one predecessors.

"Her contributions to the jurisprudence of New York while serving on the Court of Appeals for a quarter century have illumined and improved the law in a multitude of areas, including the death penalty, the right of the public and press to attend judicial proceedings, the right of children to a meaningful high school education, the attorney-client privilege and many, many more. For this body of decisional law alone, Chief Judge Kaye has earned a seat in the pantheon of the truly great judges of New York, alongside Benjamin Nathan Cardozo and Chancellor James Kent.

"But Chief Judge Kaye has done so much more than decide cases and write opinions. She has literally transformed the administration of justice during her tenure. Example: Automatic exemptions from jury service were available to every occupation with influence in the legislature. They have all been eliminated. The jury pool has been expanded. There is an automated call-in system. Jury rooms are well lit and comfortable. And automatic sequestration . . . in all criminal cases, has been eliminated.

"To address public dissatisfaction with the legal profession, Chief Judge Kaye led the movement to institute mandatory continuing legal education, to strengthen sanctions for frivolous litigation conduct and to adopt standards of civility for lawyers, a subject, as we all know, of paramount concern to the College.

"Perhaps her most notable achievement has been the creation of integrated problem-solving courts, overcoming the maze of jurisdictional barriers and boundaries that have long impeded, rather than furthering, the administration of justice. You will hear more about problem-solving courts from Chief Judge Kaye and her vision for them.

"When Judith Smith, as she then was, finished law school in 1962, law firms were not exactly enthusiastic about hiring women graduates. One firm [Sullivan & Cromwell] saw her potential. . . . Judith left the firm a few years later to marry and have three children, but she returned to practice, inevitably made her mark as a lawyer, and was appointed by a newly elected governor, Mario Cuomo, as the first woman on the Court of Appeals.

"A recitation of Judith Kaye's accomplishments cannot convey to you her dedication, her enthusiasm, her warmth as a person or the warmth of the respect and affection that lawyers and judges in New York have for her. When she asks your help in addressing one of the myriad problems facing the courts, it is simply impossible to say 'no' to her because her tireless commitment demands so much more of her than she is asking of you."

The list of those honored with the Gates Award in the past includes former Harvard Law School Dean Erwin Griswold and Associate Justice William J. Brennan.

Judge Kaye's remarks are separately reported in this issue of the *Bulletin.*

It is unusual that you get the opportunity of introducing your successor. I have that privilege. You have heard earlier that there is a mandatory retirement age on our courts of 75, and I was approaching that rather rapidly in the fall of 2005. I was scheduled to retire in the normal course of things, on February the 20th of 2006, and felt I would give the nation a gift, so to speak. So I left on Christmas Day. My official retirement date is December the 25th.

Now, taken by itself, that is not a bad story. The problem is, it isn't true. What really happened was that I was rather complacently letting the time drift away to February the 20th, 2006, when the Registrar told me in a casual conversation that she thought your provincial income tax was payable in your place of residence on December the 31st.

I have to say that when I heard that I could become a resident, and pay Alberta tax if I got there before December the 31st, I was dramatically inspired to get a driver's license, I think, faster than almost anybody in Alberta's history, so that by December the 31st, I was a resident of Alberta, no longer a member of the Supreme Court. And I hate to say, but the truth is, I was $12,000 richer, because that was the difference between Ontario and Alberta tax, the difference, you might say, between the free enterprise of the West and the rather subdued approach of the East.

My concern after taking care of my own monetary problems was wondering how the Court could possibly cope with my absence. The answer was quick in coming by the appointment of Justice Rothstein.

Retired Canadian Supreme Court Justice Jack Major, Q.C., S.C.C., FACTL, Introducing Justice Rothstein

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I did have a unique experience yesterday attending the Hockey Hall of Fame and having my photograph taken alongside the Stanley Cup. When you live in New York City, you never do get to stand alongside the Stanley Cup. . . .

I remember the first advice I received 25 years ago when I became a judge of the Court of Appeals. Regrettably, I did not take the advice, but a good friend said, "Get your portrait painted right away."

I am going to steal one of his [Canadian Chief Justice Brian Dickson's] stories . . . . about an oral argument concerning statutory interpretation. About half way through the tedious recitation, the lawyer looked up from his notes and he asked, "Does Your Honor follow me?" "Yes, I follow you", the judge replied, "but if I knew the way back, I would not proceed another step."

Chief Judge Judith Smith Kaye

bon mots

CHIEF JUDGE KAYE *accepts* GATES AWARD

There follow excerpts from the remarks of New York Court of Appeals Chief Judge ***Judith Smith Kaye*** *in accepting the College's Samuel E. Gates Litigation Award.*

Judith Smith Kaye

Thank you to the College for these extraordinary days that I have been with all of you, beginning new friendships, renewing old friendships. . . . Thank you too for this just utterly amazing and wonderful award . . . .

LAWYERS AS CREATIVE THINKERS, STRATEGISTS, PROBLEM-SOLVERS

When I think of . . . all of you who make up this great organization, I think not e-discovery or hearsay exceptions, endlessly fascinating as those subjects are. I think more of our professional skills . . . as creative thinkers and strategists and problem-solvers, dedicated to the advancement of justice throughout society.

In a sense, the luxury of having your attention this morning gives me the opportunity to focus on that essential aspect of our craft as well as to give just a brief personal accounting of the decades since I left the world of private commercial litigation practice . . . for the New York State High Court, the past fifteen of those years in the additional chief executive officer role as Chief Judge of the State of New York, truly, truly the role of a lifetime.

Remarkably, the other day in my chambers I ran across the 1986 autumn Bulletin of the College, carrying on its cover page the remarks of Canada's then chief justice, the Right Honorable Chief Justice **R.G. Brian Dickson**, on the occasion of his own induc-

tion as an Honorary Fellow. That was the occasion of my own induction into the College as well. He spoke of the close relationship between Canadian lawyers and judges and their American counterparts, as well as the importance of judicial independence, two enduring truths. . . . [In] his closing words, he said: "Membership in the American College of Trial Lawyers is something that I will cherish all my life." Well, I feel just as he did. . . .

I am going to get right to the heart of my message, and that is to give you, in a sense, an accounting of my Chief Judge life, centered on the problem-solving initiatives dedicated to the advancement of justice in today's world.

Unquestionably, I am vastly changed from the person admitted into your ranks back in 1986, and, I think, pity anyone among us who is not vastly changed from 1986. Our beloved profession most surely has also changed dramatically to meet the demands of a vastly changed society. . . . [H]ow could that not be so, given the scientific and technological and cultural advances of our shrinking and warming and flattening world.

Yet in our most fundamental core values, we are unchanged: Zealous representation of the client within the bounds of the law, dedication to the protection and the preservation of our nation's fundamental ideals, commitment to *pro bono publico*, the public good, public service in the interest of equal opportunity and equal justice under law.

For the past quarter century in my adjudicative capacity, I have been privileged to serve as a member of a great common law court, fitting those values to breathtaking new patterns. But whether the subject is the venerable rule against perpetuities or today's brand new foreclosure laws, as judges, we apply familiar tools of construction and interpretation, trusting that the efforts of outstanding counsel who come before the court, combined with our own diligence and our own good sense, will yield a result that works well for the stare decisis future.

CHALLENGES OF COURT ADMINISTRATION

Many, many times the choices have been truly anguishing. . . . But anguishing as my judicial dilemmas often are, it is the demands of that second box of stationary, the chief executive officer role, Chief Judge of the State of New York, that are consistently the most bedeviling.

It is not just the through-the-roof size of the dockets that our state courts nationwide confront today . . . . It is also the thousands upon thousands of repeat, low-level offenders in our courts, most often drug addicted, corroding their own lives and the vitality of our neighborhoods. And it is the thousands upon thousands of domestic violence cases, too often beginning with an assault and a court-ordered issue of protection and ending with a murder-suicide. And it is the thousands upon thousands of child neglect and abuse cases, foster care cases, juvenile delinquents with children of their own, generation upon generation of poverty, homelessness, mental illness, unemployment and crime, graduating from our family court to our criminal court. What a waste of lives. What a waste of resources. Could our court intervention perhaps help to stop the downward spiral of those lives? So, yes, bedeviling for the Chief Judge and for all of us, bedeviling, but also challenging, energizing, and when the mountain moves even a millimeter, satisfying beyond all description. . . .

COMMUNITY COURTS

Today in New York State we have eight community courts, each necessarily its own local product, but with the same core elements, beginning with a dedicated judge in the leadership role of judicial decision-maker and convener of all collaborators necessary to assure maximum information and the best opportunity for a truly meaningful resolution. Second, offenders after pleading guilty typically receive sentences of community service designed to help restore the neighborhood that has been harmed by the offence . . . . Those sentences are closely monitored, and they are fully served.

Third is a recognition that these offenders most often are in need of additional help, which is actually made available through the court, including mental health referrals, even job interview training and employment services. . . . [T]here are many things in addition to the statistics that tell us that they are, in fact, making a difference. It is the neighborhood associations who express their satisfaction, even their praise, for the visible impact of the courts on their community. It is the graduates, many who speak with great emotion about the fact that as a result of the court's interven-

tion, for the first time in their lives they have obtained jobs. They have credit cards. They have their own apartments. . . .

For the Chief Judge, the very best assurance that these courts are indeed working are the words of the wonderful judges who for the past fifteen years have presided over them and see the difference they can actually make in a person's life. When they tell me, "This is what I became a judge to do," then my spirits really soar.

DRUG COURTS

And that brings me to my second problem-solving example, drug courts, basically offering drug treatment as an alternative to incarceration. . . .

Ideas, old or new, just have to be right for their time and for their place, and this one surely was, our dockets overflowing with cases involving lifetime drug addicts going nowhere good, ready to acknowledge that as human beings they have touched rock bottom, ready to take the hand offered to them to climb out of their deadly downward spiral.

Just weeks ago in an insurance case being argued in our court, counsel answered a question with an insight that struck me as particularly apt. "In a Plan A world," he said, "the insured would of course have given timely notice of the occurrence to the insurer. But we don't live in a Plan A world. We live in a Plan B world." I must say, lately I have been thinking we actually live in a Plan C world.

KIDS IN COURT

The Plan B world really does challenge every fiber of our being, every skill, every ounce of ingenuity, whether the subject before the courts is insurance, or drug addicted offenders, or people in need of mental health services, or domestic violence victims, or my next and final example of things that keep the Chief Judge of the State of New York up at night, and that is kids: kids in court, kids in the justice system, thousands of cases involving abuse and neglect and juvenile delinquency. . . . And here I think the issue is especially relevant for all of us. Collaboration is essential to every problem-solving initiative, collaboration among the justice system leaders, among the lawyers, the social service providers, the community groups.

Indeed, the insight that drives all of the problem-solving courts is that, while there are legal issues to be sure that we must decide, these cases repeatedly coming back into the courts present frustrating social problems that can be more effectively, more constructively, more definitively resolved when we work on them together. . . . In a Plan B world, plainly this requires the problem-solving skills, the creativity, the ingenuity that mark and distinguish us in our professional lives as counselors and in our personal lives as well.

This is the challenge that I leave with all of you. . . . When it comes to interventions for children in the courts, there is hardly a bad idea. . . . And maybe, maybe what is most critical to the success of every one of these efforts is that they provide an opportunity for single-minded focus, not just on the law issue, but on the human being, on the individual in limbo, an opportunity to make a genuine connection with someone who is concerned about them. It can be a lawyer, it can be a judge, it can be a family member, it can be a teacher, it can be a case worker, it can be a mentor. That is the message I hear when I visit community courts or attend drug treatment court graduation: "Somebody reached out. Somebody showed an interest. Somebody believed in me when I had stopped believing in myself."

MAKING A DIFFERENCE

And that is where each and every one of us truly can make a difference: We can be that person, we can be that connection. We can be a resource for the courts. We can promote civic education in the schools. We can inspire youth courts. We can find ways to keep deserving kids in school instead of keeping them in jail. We can contribute ideas. We can contribute time. We can contribute services. Each one of us can help make that critical difference.

And that, in a nutshell, has been a large part of my life, a large focus of my attention these past decades, since my life so happily came together with the American College of Trial Lawyers. I treasure and I thank you for our many, many past associations. I thank you for this truly wonderful award, and for an exciting future confronting, along with you, the challenges of this great Plan B world of ours.

Thank you.

UNIQUE UTAH ORGANIZATION *wins* GUMPERT AWARD

"And Justice For All," a unique collaboration of Utah's three primary providers of legal aid, was the winner of the 2008 Emil Gumpert Award presented at Annual Meeting in Toronto.

Stewart Ralphs and President Mikel L. Stout

Based in Salt Lake City, the goal of 'And Justice for All' is to develop a web-based, legal aid clinic program. Accepting the $50,000 grant from the College was **Stewart Ralphs**, executive director of the Legal Aid Society of Salt Lake.

"The very name of our organization, 'And Justice For All,' which is lifted from the final phrase of the American Pledge of Allegiance, embodies the mission of the Emil Gumpert Award, and guides our activities on a daily basis," Ralphs said. "I wish to express our deepest gratitude to the Emil Gumpert Award Committee, and the American College of Trial Lawyers for this very wonderful and prestigious honor. Thank you."

Ralphs explained that the collaboration consisted of his organization, the Disability Law Center and Utah Legal Services. Legal Aid Society of Salt Lake represents victims of domestic violence and family law matters in Salt Lake

County with half the state's population. The Disability Law Center provides advocacy and protection for the disabled statewide.

Utah Legal Services provides family law assistance outside of Salt Lake County, and assistance with housing, government benefits, senior issues and migrant farm workers statewide.

Ralphs said the three organizations will use the funds from the Gumpert Award to implement web-based clinics in eight rural areas of the state.

"Currently, attorneys in our agencies have to travel up to five hours one way to meet with clients in some of the remote areas of our state," Ralphs said.

"Of particular concern to me are the victims of domestic violence, who don't have the benefit of counsel when they need it most, when they start an action to get a protective order. Too often, they don't include the relevant information that is necessary to prevail in the request to get a protective order, and sometimes, they even get frustrated and abandon their case, and go back to living with their abuser. That is not anybody's ideal of equal justice."

He said the web-based clinics will enable clients to meet with an attorney face-to-face via an internet connection located at terminals in community action programs or co-locations. These are areas already familiar to low income clients. Much more than a telephone conversation, contact via the web-based clinics will enable the advocate and client to interact verbally and visually.

Ralphs credited **Alan Sullivan**, a Utah Fellow, with being the key person behind the success of the formation of the three-pronged organization in the late 1990s when the three organizations decided to join forces for fund-raising reasons.

"Alan has become the godfather of 'And Justice For All,' and served as the chair of our fundraising campaign for the first three years," Ralphs said. Also he said that more than 25 percent of the College Fellows in Utah have served in leadership positions, either in "And Justice For All" or one of the partner agencies.

"In our first ten years of operation, we have increased financial support from the legal community from less than $75,000 in 1998 to over $500,000 annually," Ralphs said. "We set aside 10 percent of the campaign funds to grant awards to smaller organizations that provide civil legal services. We are also thrilled and proud to say that over 30 percent of our Bar donate to 'And Justice For All.' It is one of the highest percentages of giving in the United States."

"And Justice For All" funds have enabled the organization to more than double the number of people served from just over 16,000 in 1998 to over 34,000 clients last year.

"Finally, we hope that the success of our web-based clinics will be replicated by other legal service providers that have similar challenges of access to rural areas in both the United States and Canada," Ralphs said.

(The Emil Gumpert Award Committee seeks applications for the award on a continuing basis. It looks to Fellows of the College to suggest to it or to nominate organizations that advance the administration of justice.)

TORONTO MAYOR *welcomes* FELLOWS

***David Miller**, lawyer and two-term Mayor, welcomed the College in Toronto. We found his inspiring description of how his city, to which many Fellows had no prior exposure, has created itself into one of the great cities of the Western Hemisphere to be well worth repeating as a case study, particularly for the benefit of those Fellows who could not attend.*

David Miller

"I would, " Miller began, " . . . like to . . . tell you a little bit about why we are so proud of our city, and what we are trying to do . . . to ensure the future success of Toronto. . . .

"[A]s you probably know . . . Toronto is Canada's business capital. Five of our six major banks are located in Toronto. Most of our major law firms have their head offices here, our accounting firms. We are a city that is also marked by an extraordinary sense of social justice, I think, because of our diversity. More than half of the people who live in Toronto . . . were not born in Canada, and it is the only city in the world that I know of in which more than half of the residents are first-generation immigrants. Literally on the streets of Toronto, you will find people speaking every major language in the world.

"As a result of that, it has become an extraordinary city of diverse neighborhoods, interesting places to work, to walk, and to visit. We are also a city that values our green spaces and our environment. . . . We are a city . . . that is very proud of its contribution to arts and culture. We are a major filmmaking center in the world, and we have wonderful new arts facilities

like the new Four Seasons Centre for the Performing Arts . . . an opera house that has the best sound of any opera house in the world. It is an extraordinary place, and if you have an opportunity to see a performance there, you will never forget it.

AGENDA FOR PROSPERITY

"Our goal at the City of Toronto is to build on those tremendous strengths, to ensure that the City of Toronto takes its rightful place in the world. We have a strategy to do that. It is called the 'Agenda for Prosperity.' I want to speak very briefly about that, because I think it will tell you a little bit more about Toronto in a different way.

"In partnership with business, with labor, and with academic institutions, we wrote this Agenda for Prosperity. It is really an economic development plan. In fact, the business and labor community wrote it for us. So we took a different approach. We didn't say 'government knows best; we're going to tell you where the city needs to go.' We asked people, and they gave us advice.

"And our strategy is based on four very simple principles: The City government has to be proactive, so recently, for example, for the first time in the history of Canada, we've brought in tax incentives to help incent the construction of commercial office buildings. Partially as a result of that, we have the largest building boom in commercial office buildings in the last twenty years . . . . So the first principle of our agenda is that the City government must be proactive. It must work hard to ensure the success of this city.

"The second principle is called 'World Toronto.' We have to recognize that one of our great strengths is that we have the world here. And in a world that is increasingly interdependent, as we can see from the difficult economic issues being faced in the United States and around the world, Toronto has to think and act globally.

"The third principle is 'Creative Toronto,' based on the fact that we are one of the world's major centers of film production, and the Toronto International Film Festival has become the best film festival in the world, from the point of view of business production.

"And the final principle is called 'One Toronto,' and that stands for the proposition that we don't create wealth and prosperity in our city for its own sake. We create it to ensure that every single Toronto resident has real opportunity and real hope.

TOWER RENEWAL PROJECT

"I would just like to speak to one project that we are doing that brings all of these principles together. It is called Tower Renewal. In fact, it is called Mayor's Tower Renewal. In Toronto, we have about 2,000 high-rise buildings that were built in the 1960s and 1970s. They are called concrete slab apartment buildings. . . . They were built at a time that energy was cheap, and in Toronto they are mostly heated by electricity.

"Concrete has no insulating power whatsoever. And in Toronto, as part of being a proactive government, we are extremely concerned to do everything we can to fight climate change, which is probably the greatest threat that humanity has ever faced. So we have learned through academic research at the University of Toronto that if we reclad those buildings on the outside, we will be able to lower the energy consumption in the Toronto area by between 3 and 5 percent, which is an extraordinary contribution to the fight against climate change.

"Those apartment buildings, however, are often located in neighborhoods in Toronto that are struggling to find decent jobs for the residents. And as Canadians, we value social justice and inclusion. And our principle of One Toronto stands for the idea that you need to bring hope, opportunity and employment to those neighborhoods.

"What the Tower Renewal project will allow us to do, while doing the right thing for the environment, is

create good quality, high-wage jobs right in the neighborhoods where people are living who need hope and opportunity the most. Many of those neighborhoods are also neighborhoods in which newcomers live. And newcomers who come to Canada and Toronto are full of energy; they are entrepreneurs, they are passionate; they want to succeed and have a chance for their families to succeed. And as part of this project, it will allow us to rezone around the base of the apartment buildings to allow immigrant entrepreneurs commercial opportunities to create businesses and create jobs for themselves and their families. We will also have the opportunity . . . to take . . . private green space and make some of it public space like parks, creating assets for neighborhoods and communities that need them the most.

"And I am mentioning that program because . . . because we are not just doing it in Toronto. We are doing it in partnership with forty large cities around the world, called the C-40 group of cities, in partnership with the Clinton Climate Initiative. It symbolizes to me what is best about city government and what is best about our city. We are being active, we are doing the right thing to meet an important challenge, and at the same time, we are creating jobs for those who need it the most. . . ."

"So," he concluded, "when you walk the streets, and see the people of Toronto, who are active, who are happy, who have produced a city that is a vital and interesting place in which to live, you will have some understanding of how it got that way."

My father was a trial lawyer in Belleville, Ontario, a town about two hours east of here, on the north shore of Lake Ontario, and I grew up hearing my dad's stories about what he did for a living. I saw him in action a few times, and I was always impressed by his presence in the courtroom and his eloquence. He used to tell me a few times, maybe with a touch of self-satisfaction, that trial lawyers were the last of the gunslingers. And that impressed me, too; I always had an image in my mind of trial lawyers as a Clint Eastwood-type figure, staring down the competition, so when I was young, I wanted to be a trial lawyer like my dad.

But then, growing up, I heard all the lawyer jokes, over and over, and I have to say, they affected me a little bit, and by the time I was in University, I thought the last thing the world needed was another lawyer like myself. So I hesitated to apply to law school. I went to grad school instead.

Then about four years ago, a good friend of mine, Andrew O'Bryan, who had just graduated law school and was articling at his dad's firm, back at Belleville . . . encouraged me to write the LSATs, and I did. That gave me a new focus, and I haven't looked back since then. I find the law to be tremendously intellectually absorbing; I probably always will.

James Tausenfreund, Best Overall Oralist,
Gale Cup Moot Court Competition

STUDENT WINNERS AT TORONTO MEETING

Monika Rahman and Mikel L. Stout

Winners of the National Moot Court Competition, Gale Cup Moot Competition, National Trial Competition and Sopinka Cup Competition were honored at the Annual Meeting in Toronto.

Chicago-Kent College of Law registered double wins—National Moot Court and National Trial Competition. In the National Moot Court contest, Chicago-Kent students **Joanna Brinkman, Lalania Gilkey-Johnson** and **Rachel Moran** made up the winning team. Moran was chosen Best Speaker. In the National Trial Competition, **Reya Kalput** and **Joshua Jones** composed the winning team, with Jones named Best Oralist.

The Gale Cup winning team consisted of **Paul Bryant, Sarah Glassman, Andrea Skinner** and **James Tausendfreund** from the University of Ottawa, with Tausendfreund as Best Oralist.

The Sopinka Cup went to the team of **Monika Rahman** and **Mareike Newhouse** of McGill University of Montreal, with Rahman being named Best Oral Advocate.

CANADIAN BAR PRESIDENT *on the* ROLE *of* LAWYERS

***Guy Joubert**, Atkins, MacAulay & Thorvaldson, LLP, Winnipeg, Manitoba, President of the Canadian Bar Association, greeted the College's Toronto meeting. His remarks, like those of a number of other speakers, addressed to the role of lawyer, follow:*

Guy Joubert

I fully understand that a litigator's job is to advance the rights of his or her clients and to do so to the fullest extent of the law, up to and including a trial and appeals. Courtroom trials are obviously not always necessary, of course. In fact, we know that a great majority of cases actually settle out of court.

Settlements happen for many reasons. One side runs out of money, time or patience. A cause of action or a line of defense eventually shows itself to be without foundation. A pre-trial hearing makes it abundantly clear to one side or the other which way the wind is actually blowing. But first and foremost, settlements happen because lawyers encourage them.

There are many effective tools available to counsel, such as mediation. . . . It is an indispensible mechanism for increasing access to justice, and oftentimes it is an appropriate way to resolve a dispute. But as you know, cases are not black and white. Litigators of-

ten work in grey areas, where they assist clients to navigate towards a compromise.

Seasoned counsel will always say that their best cases are the ones that are never argued, but rather settled. Not every case merits the dignity and the effort of a full judicial hearing, and we should not pretend otherwise. But . . . there are times when you simply must go to Court. And when that happens, we are duty-bound to ensure that litigation focuses on finding the resolution that satisfies the best interests of the parties. We can never allow litigation to be shortchanged for other causes or interests.

Let me identify two potential issues in this regard. First, some lawyers improperly help to prolong or discontinue actions. We all know that the great majority of litigators . . . always put their clients' interests before their own. It is a fundamental element of professionalism, the true underpinning of our calling.

But some lawyers, albeit a minority, do not heed to this basic tenet. Their advice often corresponds more closely to their own ambitions or financial goals, rather than those of their clients. And as a result, their clients often end up rejecting reasonable settlement offers or accepting unfair ones.

Second, some clients do not approach the Court in good faith, *extirpe causa*. They set out to vex and be frivolous. They pursue an agenda unrelated to the cause or to the case at hand. Their lawyers interpret their professional duty to mean that they must always give these clients maximum assistance and zealous advocacy.

I think we all agree that blind advocacy is not the role of lawyers. While always hewing closely to our clients' wishes, we cannot forget that society, too, has an interest in our courts. They are not to be used as a means to another end, because they are an end into themselves: the dispensation of due justice. To assist a baseless or disingenuous claim or defense is truly to undermine the public confidence in the system.

In each of these two scenarios, it is up to us, the leaders of the bar, to denounce these tactics whenever they manifest themselves. We must be vigilant and ready to publicly defend professionalism, and condemn its violation. The ACTL's mission statement clearly speaks to this. . . . The public in general, and clients in particular, look to us for leadership in this regard. They want us to believe that their day in court means something: a chance to tell their story, to be fairly and genuinely heard before an impartial judge. . . .

[T]hat is the justice that the public has the right to access. That is the justice that we must work hard to guarantee. That is the duty of litigators who are also officers of the court. Trust is hard to earn and it can be easily lost. The litigation bar has worked very hard to engender its clients' trust and to establish its good faith with the public at large. Maintaining this trust must always remain at the forefront of all of our efforts and of all of our priorities.

I know that the Canadian Bar Association, and the American College of Trial Lawyers take that duty seriously. It is in that spirit of collegiality and of shared professionalism that I welcome you once again to Canada.

PREMIER OF ONTARIO *welcomes* FELLOWS

***Dalton J. P. McGuinty, Jr.**, a lawyer and five-term Premier of the Province of Ontario, welcomed the College to Toronto. Excerpts of his remarks follow:*

Dalton McGuinty

Ce matin j'ai le grand plaisir en nom des treize millions d'Ontariennes et Ontariens de vous souhaîter la bienvenue dans notre province.

Know that you are among friends here. . . . As a premier, leading a government informed and inspired by the rule of law, as a lawyer, and as someone who has had countless opportunities to meet trial lawyers, both in private practice and in public service, I want to take this opportunity to thank you. Thank you for upholding the highest standards of our profession. Thank you for pursuing your craft with passion and purpose and integrity.

The pursuit of justice, the demands of practice, and life itself, can have a corrosive effect on our lawyers. These can rob you of your idealism, take from you your hopefulness. But you have resisted the siren's call of cynicism.

You continue to embrace the ideals of the rule of law, and justice for all. By remaining hopeful yourselves, you give us hope that in the face of injustice you will win for us justice.

In preparing these remarks . . . I came across this lovely quotation from Henry Brougham, a politician, lawyer, and Lord Chancellor of Great Britain in the 1830s. He once said: "It was the boast of Augustus that he found Rome of brick, and left it of marble. But how much nobler will be a sovereign's boast when he shall have it to say that he found law a sealed book, and left it a living letter, found it the patrimony of the rich, and left it the inheritance of the poor, found it the two-edged sword of craft and oppression, and left it the staff of honesty and the shield of innocence.". . .

I leave you with this request: I ask that you continue to work together and to inspire each other, that you uphold the standards of excellence that you cherish, that you be fair and wise, compassionate and true with the people you serve, and that you always, always, be courageous in your pursuit of justice.

You will hear no lawyer jokes from me. I have heard them all, mostly from my mother. Four of her sons are lawyers. And that was never part of her grand plan. You see, we were all meant to care for her. In my mom's eyes . . . I was to be the doctor. Dylan was to be the dentist, Michael, the physiotherapist, and David, to care for her eternal soul, the priest. These days, my mom says to me, "At my age, I could use a doctor. What am I going to do with a premier?"

Dalton J. P. McGuinty, Jr.

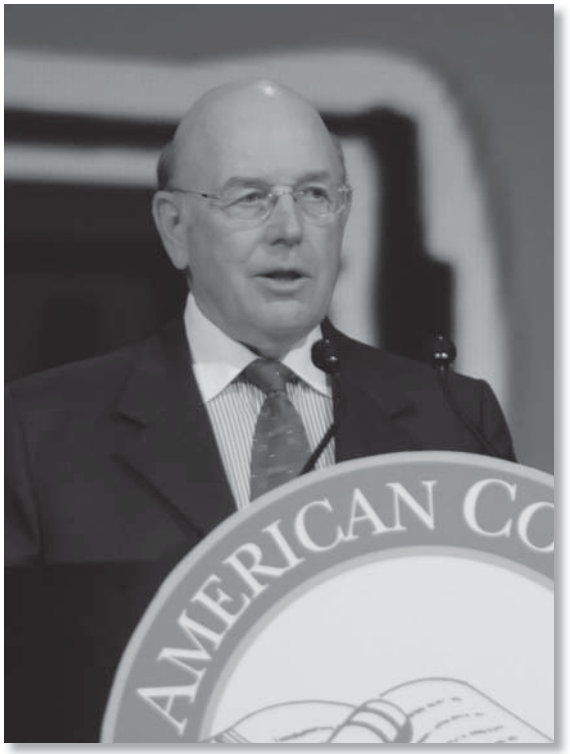
bon mot

The following message was sent by Fellow Robert J. Beckham of the Jacksonville, Florida office of Holland & Knight to every litigation attorney in his firm's nationwide offices:

"The Summer issue of *The Bulletin*, published by the American College of Trial Lawyers, contains a riveting résumé of the award presented to (and the remarks delivered by) Judge George W. Greer, the judge who presided over the interminable and tumultuous proceedings in the *Terri Schiavo* case. Copies of those two articles are attached. These should be read by any lawyer who is interested in either judicial integrity or judicial independence, as well as by lawyers who wish to read a stirring tribute to the best of our profession!"

ONTARIO CHIEF JUSTICE ADDRESSES COLLEGE ON THE ROLE *of a* CIVIL LEGAL SYSTEM

The address of Chief Justice ***Warren K. Winkler****, Court of Appeals of Ontario, to the Annual Meeting of the American College of Trial Lawyers on September 26, 2008 in Toronto emphasized that what to lawyers and judges are legal problems are to litigants life problems and that a justice system must focus on service to them.*



Warren Winkler

I begin . . . by observing that virtually every day ordinary people among us encounter problems in their lives which make it necessary for them to come to the legal system for assistance. For example, a teenager is seriously injured in a hockey game, and her parents need money to build her a wheelchair ramp at home. A couple's marriage breaks down. They need to manage conflicts about how to raise their children. A seller promises that a house has a brand new roof, and the buyer needs to fix the unexplained leaks.

LEGAL PROBLEMS SEEN AS LIFE PROBLEMS

Only a lawyer would think that these are legal problems. For everybody else, even us when we are not wearing our lawyer/judge hat, these are life prob-

lems. A good justice system can help people with their life problems. A justice system that loses sight of the people it is supposed to serve and focuses instead on itself and its own process is not worthy of the name.

My point is simply this, that our courts serve the public. The civil justice system meets the needs of most people more or less effectively. Unfortunately, though, for a growing number of people, the civil justice system is becoming less and less accessible. They are finding that the system is too expensive and it is too slow to provide them with any real help.

I don't want to suggest for a minute that our civil justice system is a failure. There is no shortage of critics who speak of nothing besides its failings. When they do, they distort, they oversimplify. They fail to appreciate the justice system's enormous complexity and its successes.

COST AND DELAY

I return again to the somber fact that our justice system fails to be accessible to many and that pressures on the system continue to mount. The number of people who cannot afford a lawyer and are forced to represent themselves in important legal proceedings has ballooned in the last ten years. Many people, for whom the justice system is not accessible do not pursue their rights at all or they abandon their cases partway through when their money runs out.

As you well know, this is one of the main causes of the vanishing trial. I congratulate the College on its leadership in addressing this very serious concern . . . . Indeed, I have written an article myself on this problem, the problem of the vanishing trial, that was published in the most recent edition of *The Advocates' Journal.*

Everyone favors access to justice. The phrase has become a mantra with judges, government officials and bar associations. But like so many other words or expressions, the phrase has become so commonplace that the urgency of its meaning has tended to become blunted or worn. We cannot allow access to justice to become a cliché, devoid of meaning and of significance.

Access to justice undoubtedly means different things to different people. But for me, it simply connotes the laudable notion that people can and should resolve conflicts fairly, affordably and quickly through a court process. But how do we promote these real goals in practice?

CANADIAN INNOVATIONS

In searching for ways to do things better, I suggest that we begin by looking at our successes. What have we done right in the past? What, in our existing system, can we build upon? In Ontario, over sixty percent of the civil lawsuits proceed under simplified procedure rules. These provide faster, less expensive mechanisms for getting cases to trial.

Advances have also been achieved for plaintiffs through the increased availability of contingency fees and class actions. What can we learn from these apparent successes? Are there any overarching principles we can apply more widely across the entire spectrum of civil cases. From the successes we have had, I suggest that the common threads are proportionality and professionalism.

PROPORTIONALITY

Proportionality is a term almost as popular as the phrase

"access to justice." Commonly, proportionality in the civil litigation context is understood to simply reflect that time and expense devoted to a proceeding ought to be proportionate, that is, relative, to what is at stake. Can anyone doubt the logic that a lawsuit should be planned and carried out in a manner that reflects the monetary value, the complexity, and the importance of the dispute? I should think that there exists a strong consensus within the legal community, the users of the system, and all of us, that proportional litigation is pivotal to ensuring true access to justice.

I would, however, like to add another factor that I believe should be considered by practitioners as they plan and seek instructions on the dimensions of a lawsuit. Lawyers must also assess the social impact of the case. For example, the issues which arise in a family breakdown or by the loss of an employee's livelihood, have tangible effects of great importance, even if the dollar amounts in those cases may be modest. It is necessary to specify and identify and balance the social and personal impact of the issues along with the other criteria that govern any analysis of proportionality.

Therefore, while I heartily endorse a proportionate approach to litigation, I hope that others share my view that the justice system must always be about much more than just dollars and cents.

PROFESSIONALISM IN AN ADVERSARIAL SYSTEM

Regardless of how we measure proportionality, there is also the question of what can be done to promote it. The unfortunate truth is that the adversarial process, if it is left to itself, often discourages proportionality. There is always one more issue to be raised or one more expert who can be consulted in an attempt to vanquish the other party.

Often, the most effective cross-examinations and the most persuasive legal submissions are the most straightforward ones. I have seen some lawyers accomplish more in two hours of examination for discovery, Canadian term for depositions, than some other lawyers accomplish in weeks. The lawyers who get to the point are the ones who have the expertise and who know what works and what doesn't work. They don't let their clients take charge of the case. They listen and act on cues from the bench about how a case is going. They importantly have enough experience and self-confidence to concede losing arguments and to focus on the winner.

Expert lawyering includes bringing critical judgment to bear and giving clear and candid advice about settlement options early on, before limited resources are eaten up by unproductive litigation steps. Not every case is winnable. Lawyers need to explain realistically, at the outset, about the prospects of a case.

I am, of course, in no way suggesting that lawyers should not be imaginative about novel cases or strategic about how to settle hopeless losers. But they need to recognize the difference at the outset and give clear legal advice before needless litigation steps have been taken and billed to the client. This is a question, I think, of professional training and experience. Bottom line, this is at the core legal ethics.

THE ROLE OF THE COURTS

At the same time, judges who get to the point are the ones who provide the cues and guidance which are required to keep counsel and parties focused on the real trial issues

and, at the same time, keep a truly open mind. The Court's rules and procedures can and must be modified to encourage proportionality, but it is the legal profession which must ultimately address the problem of disproportionate litigation. Lawyers must be better prepared to do what they are trained and paid to do, that is to provide thoughtful, timely, dispassionate and indeed proportionate legal advice to their clients.

Over the years, there has been a movement toward increased intervention by the courts to assist. . . the word is "case manage" . . . in the progress of individual lawsuits, whether or not they require the court's firm hand. However, in my opinion, while judges may know more about the system than the clients do, counsel invariably have a more detailed and nuanced understanding about the facts, the issues, and the personalities that are driving each individual lawsuit. Courts are not institutionally equipped to micromanage every lawsuit in the system. We do a disservice to all involved when we try to do that. We need to trust lawyers to do their jobs. When we have judges controlling the courtroom, and lawyers moving the cases forward proportionately and professionally, the role of the court in managing cases should be focused on case management when necessary, but not necessarily case management.

Highly complex cases or cases which have gone offside are good examples of the types of cases which require greater amounts of legal and judicial resources. But many cases just need to be heard and disposed of. The examples of Ontario reforms to which I referred, access to simplified rules, flexible case management, contingency fees and class proceedings are tangible examples of successful reforms from within our system.

These were guided, and indeed crafted, to further the principles of proportionate litigation and professionalism. Each was designed to simplify procedures, reduce litigation steps, ensure legal leadership from the Bar, achieve dispute resolution and provide affordable litigation and legal services to clients. These initiatives sought and succeeded in vastly improving the way some conflicts are resolved for Ontarians with real-life problems. They have squarely confronted the phenomenon of the vanishing trial.

THE OBLIGATION OF LAWYERS

We must not overlook the inability to access the justice system, culminating in a fair trial. To do so is a fundamental denial of justice. We have a professional responsibility, regardless of our specific areas of practice, to ensure that all members of our society can seek and obtain justice within the legal system. With inaction, we risk losing the foundation upon which our justice system is grounded, . . . the rule of law.

The Fellows of the College have an extraordinary responsibility. It is a cadre of skilled trial lawyers that stands between us as citizens and anarchy. By committing ourselves to the values of proportionality and professionalism we can truly say that we are privileged to be part of a vibrant civil justice system.

Thank you so much for having me here this morning, and inviting me to share these thoughts with you.

bon mots

He has two daughters, and two wonderful grandchildren, one of whom, when learning of his new role of Chief Justice, suggested, "Grandpa, you really have to learn to be more patient." Having appeared before the Chief Justice, from her mouth to God's ear.

Justice Winkler was born and raised in Pincher Creek, Alberta, a small town in southwestern Alberta, about an hour's drive from the Montana border, current population about 3,600. . . . Interestingly, that small town has also produced our current Chief Justice of Canada, Beverley McLachlin, and also a former Chief Justice of Alberta, Val Milvain. I had occasion to visit Pincher Creek last year, and, at the Chief Justice's suggestion, drank a lot of the water, hoping I might catch whatever is there. It hasn't worked.

To understand the Chief Justice, the person, you need only listen to what he has said about his formative years in Pincher Creek, and I paraphrase here: "Growing up in a small town teaches you how people can overcome their differences, settle their disputes, and get along. Why? They have no choice. There is nowhere to hide."

The Chief Justice is well known for his stories about his dogs. . . . One of his early dogs was named Pete, who he talks about having taken with him to settle a labor dispute, a very hot labor dispute. Walked into the room with Pete at his side. All of a sudden, all the angry truckers were petting Pete, and the dispute resolved about an hour later.

More recently, he has talked about his dogs Maggie and Gretzky. Indeed, every time you heard the Chief Justice speak, prior to his appointment as Chief Justice, there was in every mediation, in every hearing. . . always a story about Maggie and Gretzky. Since he has been elevated to the position of Chief Justice, many have noticed that perhaps he is a little more serious in his addresses, and we don't hear as much about the dogs. Indeed, someone in the Chief Justice's office has reported that there was a phone call recently. Someone had attended a couple of the Chief Justice's recent presentations, and called, and the conversation went something like this: "I really don't mean to bother you, but can I just ask a question?" "Yes," said the assistant. "Well, I just wanted to ask: I have heard the Chief Justice speak, and he hasn't mentioned his dogs. Are they doing okay?"

Fellow Jeffrey Leon, Toronto, introducing
Ontario Court of Appeals Chief Justice Warren K. Winkler

I would be remiss, were I not to give you a current update on Maggie and Gretzky, two Black Labradors . . . . Maggie is well. Gretzky is now 14 years old, and showing his age. We are both on the same meds, he on half dose, me on the full wham. . . .

A second word about Emily, my six-year-old granddaughter. Emily, of course, is the one who gives me instructions about how to conduct myself. This summer, she was resident at the farm where until recently I have raised purebred Hereford cattle and Appaloosa horses and Labrador dogs. Emily likes to ride around in my yellow pickup truck with me and take in the scenery and give me a play-by-play version of pretty well everything that is happening.

This summer, it was hot here, and we had the mishap, while driving in the truck, just the two of us, of blowing out the heater hose. And so the truck overheated. We had to stop, we had to be towed back. We had to get a ride; we had to phone from the neighboring farm. All of this was very traumatic for Emily.

And so when we were home and settled in, the truck had been taken to the garage, I heard Emily in the kitchen, saying to her grandmother, she said, "Grandma, Grandpa shouldn't be allowed to drive anymore. He ruined the truck. His driving is terrible. He shouldn't be allowed to drive anymore. He should be grounded."

And Grandma said, "Well, Emily, it wasn't his fault the heater hose. The truck is a 1981. The heater hose is old. It wore out". And she said, "Grandma, the truck cab filled up with steam. The heater blew out, the whole truck cab filled up with steam. There were water dripples dripping off the windshield. The entire truck cab was filled with humility."

. . . .

If Ontario were a U.S. state, it would rank second in size, after Alaska. . . . Now, there are some who have said recently here that we should merge with the United States, the argument being that we might put forward a candidate for vice-president.

. . . .

Less than two percent of the appeals from this court are heard by the Supreme Court of Canada. As the well-known country singer says, across the border, "We all have a right to be wrong now and then."

Chief Judge Winkler responding

bon mots

QUEBEC CHIEF JUSTICE *describes* EXPANDED ROLE OF CANADIAN COURT SYSTEM

*The Honourable **J. J. Michel Robert**, Chief Justice of Quebec, addressed the Toronto meeting, describing particularly for the visiting Fellows from the United States, the system of Provincial and Federal courts created in Canada from the time of its independence in 1867.*

Lynne D. Kassie, J.J. Michel Robert and President Mikel L. Stout

A Fellow of the College before his ascension to the bench, Robert had served as President of the Liberal Party of Canada.

After describing how the Canadian courts function in a multicultural, multiethnic, multilinguistic, and multi-religious nation, he observed:

"[W]e . . . see an extension . . . of the role of the courts and judges, who now have to decide socioeconomic questions involving the determination of common Canadian values. Social cohesion and peaceful relationships within the community become questions which are raised in legal proceedings before our courts almost every day.

"At the same time, we live through the globalization of the economy, whereby commercial and financial transactions know

no frontiers and boundaries, especially between Canada and United States. The law systems which are naturally domestic and national are not always well-adapted to this new environment. Jurisdictions of domestic courts, in my view, have to be revised, and a more international approach has to be adopted.

"If you add to these phenomena the communication revolution, whereby the flow of information is becoming instantaneous and planet-wide, the law practice in 2008 is very, very different from the one I experienced in 1962.

"There are many consequences to these new trends in the law practice and the resolutions of conflicts, including some affecting the ways and the means by which courts and other institutions will be called to resolve conflicts.

"We don't have time this morning to review all those consequences, except one, . . . and this is the need for a much greater level of exchange and cooperation between lawyers and judges of different countries, of course, in America, between Canada, Mexico and United States, but also on other continents, including Europe, Asia, and Africa.

"I think we North Americans . . . have a message to bring to the world in trying to integrate all those different people coming from all those countries. I think we have to bring a message of tolerance, a message of flexibility, a message of integration, a message of accommodation, but also at the same time maintaining our fundamental values: the rule of law, independence of the judiciary, impartiality of judges, equality of the individuals, and the respect of the dignity of the person."

MEET YOUR NEW SECRETARY:
THOMAS H. TONGUE

Tom Tongue of Portland, Oregon, who was elected Secretary of the College at the Annual Meeting last fall in Toronto, is only the second officer of the organization to be from Oregon. William H. Morrison, also from Portland, served as president in 1972-73.

"He (Morrison) would be smiling now to know that the young lawyer he mentored is working to further his beloved College," Tongue said.

"It is a high honor to be elected an officer of the College. I look forward to the opportunity to participate fully in the College's efforts to maintain and improve the administration of justice and in particular its efforts to preserve the place of trial by jury in our system."

Thomas Tongue

Tongue, a fourth generation lawyer, is a partner at Dunn Carney Allen Higgins & Tongue in Portland. He was inducted into the College in 1993 and served as state chair and Regent.

The winner of numerous legal professional awards, he is a 1965 graduate of the University of Oregon and received his J.D. in 1968 from the University of Wisconsin.

FIGHTING: HOCKEY'S VERSION *of* ALTERNATIVE DISPUTE RESOLUTION

* * * * * *

SHOULD VIOLENCE IN PROFESSIONAL HOCKEY BE CONDONED?

A debate on the issue whether violence (i.e. fighting) should be condoned in professional ice hockey provided the comic relief at the Friday morning program at the Toronto meeting.

Whistle-toting past president **David W. Scott**, Q.C. of Ottawa, resplendent in garb that vaguely resembled that of a hockey referee, turned in a performance as moderator that would have made Walter Mitty turn green with envy. The debaters, none of whom escaped totally unscathed from Scott's introductions, were:

FOR THE AFFIRMATIVE:

Brian Burke, Harvard Law graduate, a former player and general manager of the Anaheim Ducks, winner of the 2007 Stanley Cup, who was for five years in the 1990s chief disciplinarian of the National Hockey League.

Alan J. Lenczner, Q.C., FACTL, senior partner in the Toronto firm Lenczner Slaght, introduced by the fawning referee Scott as Canada's leading civil trial lawyer.

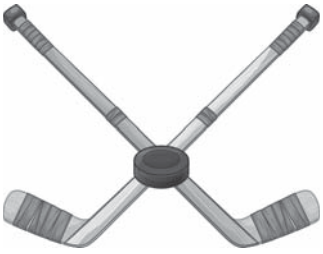
FOR THE NEGATIVE:

Damien Cox, nationally recognized hockey journalist, a frequent broadcaster on ESPN TV, a radio host on Prime Time Sports and the author of two books on hockey.

Edward L. "Eddie" Greenspan, Q.C., FACTL, senior partner in the Toronto firm Greenspan Partners, introduced by Scott as Canada's leading criminal trial lawyer.

CLOSING OVERVIEW:

J. P. Barry, former counsel to the National Hockey League Players' Association, managing director of Creative Artists' Agency and the top player agent in the NHL.



THE DEBATE

FOR: Opening, Brian Burke made the point that fighting, while heavily penalized, has been a traditional part of the professional game. Hockey is the only sport in which fighting does not result in ejection from the game. Conceding that he had the more difficult side of the argument ("Damien is going to get up here . . .and he will have a teddy bear up here with him, and he will talk about how everyone should sing Kumbaya"), he argued that fighting is not as prevalent as observers suppose and that the code of the sport is that skilled players are protected. On the other hand, he pointed out that some very skilled players also have a record of fighting. He explained that North American hockey is played on a smaller rink than in the rest of the world (his apparent point being that there are fewer places on the rink to hide).

He also suggested that if NASCAR wanted to avoid fatalities, it could limit race cars to 55 miles per hour, noting that nobody would watch the race.

In closing, he argued: "People go to professional sports to watch guys do things they cannot do . . . . This is a contact sport, fighting has always been allowed, though heavily penalized, and it actually regulates the more dangerous conduct that takes place in the game. . . . [L]et's not let the debate obscure one thing: These are the greatest athletes in the world, they are the greatest guys in the world, and they play the greatest sport in the world."

AGAINST: In rebuttal, Damien Cox began, "[A]ny of those who are here today who are not Canadian are probably fascinated by this, how we can sit and discuss these things *ad nauseam* about our sport of hockey that we love so much. Probably the fact that our Chief Justice Winkler has a dog named 'Gretzky' tells you something about our country. The fact that our Prime Minister is actually writing a book on hockey tells you something about our country. We are a little nuts about this stuff, and we get a little nuts about probably no other topic than fighting in the game."

"[Brian] talked about the very severe penalties of the game for fighting. Not very severe at all, actually: go sit down for five minutes, come back, get in another fight if you need to. That is generally what is done. The fact that it is a tradition, I think, is basically untrue. . . . [W]hile Brian will have you believe that it has been reduced and hardly ever happens anymore, the fact is, fighting in the National Hockey League was up 33 percent last year."

"[E]ven though I was involved in a few scraps when I was younger, I have sort of gradually come to detest what I see as the wanton and moronic violence that I think has really, sadly, deep roots in our game. And I find it condoned often by the same people who would get up in front of you if we were talking about gang violence, and want to talk about law and order in our streets, and, 'By goodness, we can't have vigilante justice.'"

"I would agree with Brian on a couple of things, and one is that hockey is, by nature, a violent sport, and the contact in the game is a huge and tremendous part of it. . . . [T]he guys who fight don't play with the stars, generally speaking, and mostly, they fight each other, usually to legitimize their position in a very, very well-paid job."

"So why am I against this stuff? . . . Generally speaking, hockey fights are boring . . . . I don't know why people who are so into it don't go watch mixed martial arts or anything. . . . What I do care about is the rest of the game."

Expressing concern for the young people who give up the sport because of the violence resulting from mimicking the professional game, he said in closing: "The greatest games ever played generally had no fights in them. The game is better than that, and it has been proven many times . . . in the greatest hockey ever played, by the greatest players ever to play the game."

FOR: Alan Lenczner, taking the analytical approach of an experienced civil trial lawyer, opened by observing he had attracted the best audience for his argument that he

could have hoped for, an audience of mostly people from the United States, whose right to bear murder weapons is enshrined in their Constitution. Thus, he argued: "[M]y task is really quite simple. I need only persuade our Canadian Fellows, most of whom, as young men, played aggressive hockey, but who have morphed into pinstripe socialists and elitists, to remember the past, when they were cocks of the walk and strutted their stuff."

"Let us not forget," he continued, "Hockey is entertainment. . . . [H]ockey fans pulsate whenever a fair fight or a bone-crunching body check occurs. And I draw a bright distinction between fair fighting on the one hand, and unprovoked, premeditated attack on the other. Let me give you three reasons why hockey needs fair fights:

"Tradition, the first one. For over 100 years, men have squared off on a hockey rink. Millennia before that, gladiators met at the Coliseum, spectators cheered, and death ensued. A hockey fight today rarely results in an injury, and at worst, a few stitches, a broken nose. Traditions must not be abandoned. Canada makes an impact in the world because it has dominated hockey. Without that hockey domination, Canada's image would be on a par with Denmark or Sweden, nations that go along to get along. Our national pride rests on one activity alone: hockey. We invented the game, we exported the game to the U.S.A. and to Europe. We revere our fighters. . . . So for tradition, nationhood, and entertainment, fighting in hockey is to be preserved."

"Two, serious scientific study has proven that enforcers enhance the performance of skill players. Wayne Gretzky, Bobby Orr, Mario Lemieux, Frank Mahovlich, all had space to operate because their line-mates warned opponents verbally not to cheap-shot the stars, not to spear, trip, jab. And if that wasn't sufficient, the enforcer intimidated the opponent by dropping his gloves, and giving the 'let's go' signal. It is funny how the threat of being punched in the face repeatedly can change someone's thought process."

"Three, a momentum changer and a crowd-pleaser. In an over-80-game season, a team will often come up flat at home for a period or more. The players lack enthusiasm, the crowd is bored and restless. They have paid, on average, over $100 a seat. The coach can't ream out his whole team on the bench in full view of the television cameras. He cannot, like in football, change quarterbacks. But he can send out a tough guy . . . who will pick a fight, drop his gloves, and square off. The crowd is electrified by this burst of energy. Other players drop their gloves and square off. Fighting breaks out all over the ice. The noise level rises dramatically, often accompanied by music over the public announcement system, such as 'Hit Me With Your Best Shot' or 'Hell's Bells.' The result? The lackluster players on the bench wake up, the home team rebounds and wins."

"Momentum changer. Crowd pleaser, and make no mistake, fans love hockey fights. Google the words 'hockey fight' when you get home tonight, and you will get more than 18,000,000 hits. . . . . Have you ever seen a fan leave a rink because a fight is taking place? Have you ever heard of someone giving up their season tickets because of too much fighting? I rest my case."

Lenczner then launched into a dissertation on the intersection of hockey and the criminal law, observing "The application of criminal law and its handmaiden, the courts of justice, have no place in the game of hockey." He went on to quote snippets from Canadian jurisprudence:

"It is clear that in agreeing to play the game, a hockey player consents to some form of intentional body contact, and at the risk of injury therefrom."

"Patently, when one engages in a hockey game, one accepts that some assaults, which would otherwise be criminal, will occur, and consents to such assaults."

[On implied consent] "That which is inherent to, and incidental to the game of hockey, with body contact, boarding, and maybe even a fight, if it is two players consenting to the fight."

"Players are deemed to consent to an application of force that is in breach of the rules of the game, if it is the sort of thing that may be expected to happen during the game."

"None of these criteria," he continued, "lend themselves to easy application. And when one factors reasonable doubt on top, no judge or jury can make a fair determination. . . . To me, the best instrument to govern conduct is the rule book, not the criminal law. The rule book encompasses the proper balance between what the owners want to permit to derive maximum revenue, and what hockey players will endure. . . . The rule book represents the proper balance of acceptable conduct established by the participants of the game, hockey players and spectators. Legislators and their serfs, prosecutors, so-called guardians of societal values, should have no role in the game of hockey."

AGAINST: Eddie Greenspan began by saying: "It has always been my experience that any debater who begins with a statistic is bound to lose, and I don't plan to lose. . . . By the age of 18, the average American has witnessed 200,000 acts of violence on television. Most of them occurred during Game 1 of the NHL Playoffs. People say that hockey without fighting is like the Ice Capades. I don't know what they are talking about. I have taken my granddaughter to the Ice Capades, and the Fairy Ice Princess throws a pretty good punch. We all know the great Rodney Dangerfield line about how he went to a fight and a hockey game broke out."

"When I go to a hockey game, do you know what I like to see break out? I like to see a hockey game break out. Hockey needs more good hockey, not more fighting. Hockey fights are like commercial interruptions. They are boring, useless, repetitive wastes of time, and have no place in the game. What is so appealing about it? What is so important or interesting about seeing two unskilled goons covered in protective gear, including helmets, see who can hurt their hand the most by punching the other guy's hard plastic helmet? That is real exciting. Every fight is the same predictable routine. Both fighters use one hand to grab the other guy's jersey, then they pull each other around in a circle, trying to land a punch, before they both fall to the ground and the refs pull them apart."

"Remember Gordie Howe? A hat-trick for him was a goal, an assist, and a fight. And in those days, it had its place. For one, the goons back then could play the game. I have a former client, Dino Ciccarelli, who logged more than 1,400 minutes in the penalty box. In total, he was just 15 minutes short of having spent a full 24 hours in the penalty box in his career, but he also could put the puck in the net, which he did more than 600 times. . . . By comparison, last year, Jared Boll led the league with 27 fights, finished the year with five goals, five assists, 226 penalty minutes."

"So what has changed? In a word, helmets. Helmets became mandatory in hockey for players entering the league, beginning in 1979. And with the grandfather clause, that meant many players were still helmetless into the early '90s. By the time Craig MacTavish, the last man to play without a helmet, retired in 1997 there was no longer any point to fighting in the NHL. You just can't land a punch anymore. It is like the Michelin Man fighting the Pillsbury Doughboy. No one can get hurt, so what is the point?"

Countering Lenczner's legal argument, Greenspan quoted his own authority:

"No athlete should be presumed to accept malicious, unprovoked, or overly violent attacks."

"No sports league, no matter how well organized or self-policed it may be, should thereby render the players in that league immune from criminal prosecutions."

"To engage in a game of hockey is not to enter a forum in which the criminal law does not extend. To hold otherwise would be to create the hockey arena a sanctuary for unbridled violence, in which the law of Parliament and the Queen's justice could not apply."

"Sports have a social utility. Some leniency is allowed. A hockey game may be socially useful, but any assault is not, and public acceptance of violence is no justification for its continuance."

"This debate isn't really about whether there should or should not be fighting in hockey. What it really is about is how to save hockey. We all know hockey has always been the redheaded stepchild of the sports world, and hockey fans are always defending their game, trying to convince people it is not soccer on ice. But when NASCAR, cars driving in circles 200 times, is more popular than hockey, the game is in need of help. When bowling and poker get better ratings than the NHL playoffs, the game is in need of help. You grow the game by getting kids into it, and if parents think hockey is a dangerous or needlessly violent game, they are not going to put them into hockey. . . ."

Greenspan ended by saying: "I don't even know why I am taking this position, other than I was asked to. Hockey players are pretty well paid these days, and they make for good clients. If you take fighting out of hockey, my court list will be reduced. And so personally, I am really for violence in hockey. . . . But that is what lawyers are supposed to do: take a position and argue it. I apologize for taking a legal position, but call me old-fashioned."

OVERVIEW: J. P. Barry, closed the debate by placing hockey in its historical perspective: "To predict the future, I think we should look to the past. History tells us that the very first hockey game took place in McGill University in Montreal in 1875. According to legend, immediately after the first goal was scored by a Mr. LeBlanc, he was knocked to the ice by a Mr. McGee, and fisticuffs ensued. This marked the flashpoint of two quintessentially Canadian debates: The French-English debate, and more importantly, the debate over fighting."

"For about 100 years after the first modern game, the great fighting debate was a pretty tame debate. The general sentiment was that . . . fighting was necessary, and in order to keep violence out of the game, you needed fighting. The debate on violence in hockey can find its modern origin . . . when a team full of intimidating enforcers pushed their way all the way to back-to-back Stanley Cups in 1974 and 1975. . . . The style of hockey that the Flyers utilized did affect amateur hockey, and resulted in multiple commissions and reports on violence. . . . [A] quote from the Pascall report on hockey violence . . . sums up the concerns that have existed: 'Hockey has created a culture where certain violent acts that are punishable if they occurred on the streets are part of the game when occurring on the ice.' There is no doubt that amateur hockey has taken a differ-

ent direction. Sweeping changes have resulted in bans on fighting and head shots. Pro hockey has taken its own course, and fighting and head shots are still part of the game."

"There is an increasing sentiment that those of us inside the game of hockey have lost touch with the mainstream. . . . It is clear that our insider's view is a lot different than the mainstream. And the fact is, fighting has changed a lot over the years. . . . Fighting is, quite simply, actually not a big issue amongst NHL players. The biggest issue by far, for NHL players, is head shots. Hockey is a very fast game, and illegal head shots are often part of the game. The league and the players have worked hard to educate a lot of new players about what is acceptable and what is not acceptable. . . . In '06-'07, there were 50,000 hits in the NHL, and fifty-two of those were reviewed for discipline. Last year, there were only ten. So the fact is, there has been a renewed emphasis in the NHL on speed and skill and respect. "

"Right now," he concluded, "our game is changing before our very eyes. I will predict that violent behavior will be on the wane, but I also will predict that fighting will stay part of the game."

Thus ended the debate.

bon mots

We are here to debate alternative dispute resolution, as we call it in hockey . . . fighting, while heavily penalized, is a traditional part of our game. . . . I had a great challenge, knowing how to explain [fighting in ice hockey] to people who have maybe never been on skates, and maybe never played our game . . . . It is like me trying to explain why goose hunting is fun to my wife. She said, "Let me get this straight. You get up at 4 o'clock, you dig a hole, you sit and you freeze you're a-- off all morning, and maybe you kill a couple of birds. Yes, sign me up".

Brian Burke, General Manager, Anaheim Ducks

* * * * * * * * * *

Well, I have attracted the best audience that I could hope for for this topic. I feel like I have stolen third base, and I haven't yet even come up to the plate. Because why? You are mostly Americans. You cherish and respect aggression. It is a genetic value. . . . The right to bear murder weapons is enshrined in your constitution. And no less a celebrity than Charlton Heston, and the most powerful organization in America, the National Rifle Association, ensures that guns are always available everywhere. And if that is not enough, the U.S. Supreme Court, in June of this year . . . recently held in a case called *District of Columbia v. Heller*, that the proper interpretation of the Second Amendment meant that concealed handguns in Washington were legal.

So all of you, my American colleagues, will fundamentally agree that a good hockey game requires aggression and fighting. Gee, even Governor Sarah Palin, a moose-hunting hockey mom, would be on my side. So my task is really quite simple. I need only persuade our Canadian Fellows, most of whom, as young men, played aggressive hockey, but who have morphed into pinstripe socialists and elitists to remember the past, when they were cocks of the walk and strutted their stuff.

Alan Lenczner Canadian Lawyer,
arguing for allowing fighting in ice hockey

bon mots

FELLOW JOHN MCGOLDRICK ON AIDS EPIDEMIC

THE END OF AIDS— THE EPIDEMIC TODAY, A VACCINE TOMORROW

Those present at the 2002 annual meeting in New York will well remember the address of ***John L. McGoldrick****, FACTL, then Senior Vice President and General Counsel of Bristol-Myers Squibb. His principle theme: "Excellent lawyers . . . grow out of being excellent human beings. . . . [T]here needs to be a place in the life of lawyers where they get something besides being lawyers. . . . I worry about young people coming into the profession who. . . get the idea that single-minded and total devotion to work is what will make them the best at what they do. . . . I think we sometimes give them reason to believe that that's true, but you know it's false. There needs to be this breadth of human experience."*

John McGoldrick

McGoldrick ended his presentation that day, by, as he later described it, "hijacking" the microphone to try to "convey to the College something that, in a way, has nothing to do with the College, . . the profound impact on . . . the era we live in, of the HIV/AIDS epidemic."

In the intervening years, McGoldrick has undertaken to live out the career advice he had given that day, and the College invited him back to Toronto to tell his story.

A high-profile thirty-year practicing trial and appellate lawyer, McGoldrick's mid-90s move to Bristol-Myers Squibb, the company that developed the first anti-retroviral drug, AZT, had brought him face to face with the AIDS crisis. AZT had transformed what had been a death sentence into a chronic, manageable disease for patients in the West, but

in the developing world, the picture was very different. In Sub-Saharan Africa, where 75 percent of AIDS deaths occur, there was neither the money nor the means of delivery for these drugs.

As Bristol-Myers' Executive Vice-President for Global Public Policy, he saw an entire continent at risk, and in 1999, he launched the company's groundbreaking $150 million "Secure The Future" initiative to fund research, training and community outreach in southern Africa. Under his leadership, the company made its AIDS medicines available in African countries below cost and its patents at no cost.

McGoldrick went on to chair the Accelerating Access Initiative, a global consortium of five international United Nations agencies and eight major pharmaceutical companies, whose mission was to work with African countries to increase access to HIV/AIDS care and treatment. Since its launch in 2000, 39 countries have developed national plans to increase access to care, which has resulted in many of those countries in a tenfold increase in the number of patients receiving these drugs.

The disease, however, continues to outpace the global response. Social and cultural norms in Sub-Saharan Africa produce a rate of infection of young women three times that of their male counterparts. McGoldrick realized that education and access to cheaper drugs could never be enough. The only hope of stemming the exponential increase in the rate of AIDS infection would be a vaccine, a medical option that women could initiate and control.

In 2006, McGoldrick decided to leave the private sector to devote his efforts full-time to the search for a viable AIDS vaccine as Senior Vice-President of External Strategy Development of the International AIDS Vaccine Initiative. The goal of this global partnership of academic, pharmaceutical and government institutions is to coordinate vaccine research and accelerate the development of a viable vaccine.

He began his address to the College by expressing the intent "of helping you come away . . . with some sense of the nature of the epidemic, of the fact that it is gaining on us, [that] we are still not winning against this virus, that we have had a long, difficult road, that we still have not solved the problem, but that we . . . will have a vaccine, save only the enormous serious question of when."

THE SCOPE OF THE PROBLEM

Advising caution about estimates of epidemics, McGoldrick asserted that there are between 33 million and 39 million people living with HIV today and that there are 7,500 new infections daily. "For every person who begins anti-retroviral therapy, four become infected."

"Women . . . are bearing the great brunt of the epidemic, . . . and particularly . . . in Africa. Depending on how you model it, we have the potential for as many as 10 million new infections a year by 2030. . . . [T]his epidemic is going to go on for a very long time without a vaccine. It may take new and potentially startling turns that it has not yet, and we will surely see, if we do the best we plausibly can do now short of a vaccine, a death toll that probably approaches and could far surpass 100 million people."

Turning to the impact on life expectancy of the HIV/AIDS epidemic, he noted, "After many years of increasing life expectancy in much of the developing world, we have seen precipitous drops in some places. Botswana, . . . a genuinely democratic country, a country with actually significant resources as African countries go . . . this is a projection, but it has seen its life expectancy reduced from the low seventies to the mid- to low thirties."

"What is clear," he continued, "is that the economic impact . . . of this epidemic is just extraordinary. The numbers . . . are just striking, the equivalent of twenty-four 747s crashing, with all lost, every day . . . over and over and over, day in, week in, month in, year in, year out, extraordinary numbers."

"I think . . . one of the reasons that many of us who have devoted some of our time and effort to this have gotten there not so much by an intellectual understanding of the numbers and of the epidemic, but by seeing it up close and personal one way or another. . . . I went to Africa a lot, since I was overseeing programs there, and I made it a point of getting to the real interface of the epidemic, in the huts and the villages and the townships and the shantytowns, and anybody who has done that comes away with memories seared in your brain. . . . [I]t is an experience that those who have seen the epidemic up close and personal have, and it is those things, more than the numbers themselves, which show the power of the epidemic. They are very hard to convey when one hasn't seen those things one's self. I think this is one of the reason why in the rich world today, AIDS, which has been significantly dealt with by anti-retroviral drugs, is not thought of emotionally at least as the profound historic epidemic it is."

HIV/AIDS IN THE DEVELOPED WORLD

Reviewing the history of the virus, McGoldrick reminded the audience that it was discovered in 1981/82. From then "until the mid-nineties, it was a death sentence. If you were HIV-infected, you would die of that disease. . . . With the advent of the anti-retroviral drugs, . . . it became possible in the right circumstances to make the disease morbid, lifetime, but not mortal. And that has happened for many of those lucky enough to live in developing countries. It is not perfect. . . . The virus mutates around the drug, every drug we have, and emerges new, and the drug regimen has to be changed more or less every twelve months, variably. Those drugs aren't all fun, and sometimes we run out of drugs that will work for an evolving viral population in that patient and the patient does succumb. But it surely prolongs life and, for many people, to a normal life expectancy with relatively little change."

THE CHALLENGE IN THE DEVELOPING WORLD

"One message I bring you today," he continued, " . . . is that that cannot be done in much of the developing world. And it is not for lack of will; it is not for lack of money; it is not for lack of drugs. All of those things make a huge difference in how many we treat, but it is because the health-care infrastructure and the infrastructure broadly in many countries simply cannot deal with the whole panoply, the whole history of the disease and what must be done. . . . {W]e cannot treat our way out of the epidemic in much of the developing world. We have, I submit, a moral obligation as a world to treat everyone we possibly can in the meantime. But 'in the meantime' has no meaning unless there is an end. And I think many believe, and I surely believe, that we will not have an end to this epidemic without a vaccine."

"If we were to treat everybody the world has set out to treat by 2015, which is not everybody who needs it, . . . we would be spending 54 billion dollars a year just on that. . . . [I]n 2010 . . . a third of all the development budgets of all the world's countries, meaning all the aid that goes to developing countries for any purpose whatsoever, food, water, anything, would be consumed by simply the drugs on an annual basis, not the cost of drugs, but the cost of delivery of drugs; the drugs are essentially free today. It is a huge burden. And that is year after year, and would grow."

VACCINE—THE ELUSIVE SOLUTION

"So, a vaccine, a hundred percent vaccine, . . . is what we are striving for. . . [I]f we have partial effectiveness, which is surely attainable, we will have immense savings in life. . . . I ask you to go away . . . at least hearing clearly . . . that this epidemic rages on; it is growing; we are losing in the race against it."

McGoldrick went on to explain that the HIV virus "is unlike any other virus we have dealt with. It is magnificently evolved. It foils every highly evolved aspect of our own immune system, and it presents enormous new difficulties to vaccine science. . . . We know that all humans have a long period . . . after they have been infected, but before they have AIDS. Their immune systems are dealing with the virus to some degree, so our immune system is doing something right. . . . Another thing we learn . . . is that there is a very interesting breed of person about in the world. . . . They are infected and they don't get sick. And we have some instances where we know that that has gone on for 25 years. . . . So these people are fighting off the disease. They are doing what we would ask a vaccine to do, in some respects."

"There is, he continued, "a phenomenal explosion of this virus when it enters the body. One virion, that is one viral cell, will create 1,000 new cells in 20 minutes. Lifespan is around a day, day-plus. At steady state, 10 billion new copies are being created every day. . . . [I]t makes mutation errors all the time. And in one day, it will make every theoretically possible mutation error that can be made, all leading to its ability to evolve around drugs and vaccines. . . . We have somewhere between six hours and probably two days to prevent the seating of the virus in the body. If we don't get it then, we have it for life. Now, we may be able to have a vaccine which will be able to keep it down while we have it, but we won't be able to prevent it unless we get it in that period. So there are serious scientific challenges."

Noting that we have in the past "dealt with viruses by simply taking a hunk of the bug and sticking it in somebody's arm and your own body creates the immune response, remembers it, when that bug comes back, it fights it off," he continued, "You can't do that with HIV. You can't put HIV, even in a weakened form, into a person. The risks are too great." "We have," he explained, "actually learned a huge amount about this virus. We know more about it, arguably, than we know about any other organism, including man, so, another reason for optimism."

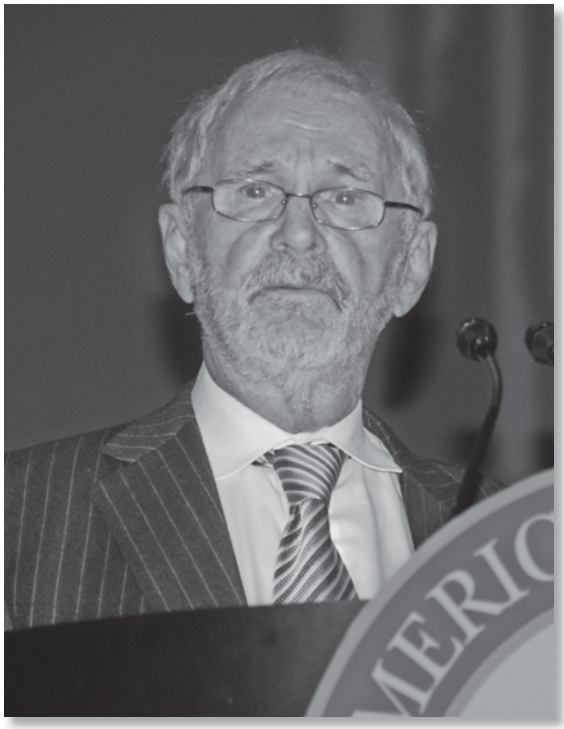
WHAT CAN WE DO?

McGoldrick went on to outline the research for a virus, most of it in countries where there are different forms of the mutating virus. Concluding, he remarked, "A question which would be fair to ask is, . . . 'But what can I do?' There is no easy answer to that. Most of our needs are for ideas, not so much for money, though money is needed. . . . I think most of all, . . . as people who are generally respected in your communities, if you could . . . in your incredibly busy lives . . . learn a little bit about this epidemic, a little bit about the work that is ongoing, and be in a position to speak truth to error, not error that is intentional, but simply out of perfectly understandable ignorance, because it is true that in North America particularly, . . . the fact is it seems like something that is sort of behind us. You do hear that played back to you all the time. It is not. It is one of the great tragedies of our time. It needs to be addressed. And there is hope at the end of what is still a pretty long tunnel."

THE ARTIST AS AN ADVOCATE OF TRUTH *and* JUSTICE

NORMAN FREDERICK JEWISON

"Filmmakers and advocates share many things in common. We create theatre that touches people's lives, on film and in the courtroom. . . . [O]n the one hand, we can each pander to the most base instincts of people, and on the other hand, we have the ability to make a difference, to behave in a way that gives life to the ideals that would be the foundation of our system of justice."



Norman Jewison

A bearded, white-haired eighty-three-year-old Toronto native, iconic Canadian film producer **Norman F. Jewison**'s career as a writer and director in both television and film has taken him from Toronto to New York, to Hollywood, to London and finally back to Canada, where he now lives. The director of over twenty-five movies, many of them highly acclaimed Oscar winners or nominees, he began his career in television, producing such programs as *Your Hit Parade*, and the *Andy Williams Show*, as well as specials featuring performers such as Harry Belafonte, Jackie Gleason and Judy Garland in her 1961 "comeback" special. He is the recipient of the Irving G. Thalberg Memorial Award for lifetime achievement in the film industry and is a Companion of the Order of Canada.

"Examining together," as he put it, "what it is that we can collectively learn about the way in which an artist approaches the search for justice," Jewison's

remarks to the Toronto meeting, illustrated with clips from some of his best-known films, all dealing with issues of justice, held his audience spellbound and was received by a prolonged standing ovation. Those remarks, slightly edited, follow:

NORMAN JEWISON: We live in a time when, strange to say, many cultivated people consider truth to be unworthy of respect. . . . This is all old news, and we are accustomed to it, but all the judgments that we make personally about ourselves surely have to be based on the facts. What is valid? What is true? Our moral judgments, all those things we decide about our own well being, whether to increase our wealth or protect our health or serve our interests in some way, are based on what we believe to be true.

ART AS A FORM OF TRUTH

Carved into the red limestone . . . at the main entrance of Victoria College at the University of Toronto [of which Jewison is the Chancellor] are the words, "The truth shall make you free." So, when I was struggling for a theme about today's talk to such an august assembly . . . I thought maybe I should try and deal with truth and the artist as an advocate of truth and justice.

President Kennedy said in October, 1963, the year that he was assassinated, "We must never forget that art is not a form of propaganda; it is a form of the truth," an interesting observation from the President of the United States. When Albert Camus received the Nobel Prize for Literature, he said, "He who has chosen the fate of the artist because he felt himself to be different soon realizes that he can maintain neither his art nor his difference unless he admits he is like others."

That is why true artists scorn nothing. They are obliged to understand rather than judge. Maybe that is why the artists—you know we are always the first group rounded up when a totalitarian regime takes over—artists, free thinkers, those who hold justice for all as important, they always become the dissidents, the rebels and those that challenge authority.

When I made a film called *The Russians Are Coming*, they called me a "Canadian pinko" in Hollywood. They said the film was pro-Communist, yet the premiere of the film was in Washington with the Vice President of the United States as the guest of honor. And then the film was smuggled by the Russian ambassador to Russia, and two weeks later, I was invited to Moscow at the height of the Cold War. . . .

When I made *In The Heat of the Night*, they said there was going to be a wave of white backlash, and the film was refused distribution and advertising in certain southern states. But it went on to win the Oscar for best picture. I remember when I did the first Harry Belafonte [television] show, they threatened to throw chains across the transmission lines in Alabama, and that . . . American television, wasn't ready to mix black and white together. It won four Emmy awards.

When I made *Fiddler On The Roof*, they said it was anti-German, anti-Russian, anti-Christian. I shouldn't show pogroms. You know, in the play, *Fiddler on the Roof*, which was very popular in Germany, there were a lot of laughs and singing and entertainment, and the pogrom was simply a crash of a glass and a scream offstage. But the film version did not do much business in Germany, because the film dealt, I be-

lieve, more with the truth, because in films, we have to be somewhat historically accurate. If there is a pogrom, you have to show a pogrom. Sometimes in the theatre it is difficult to do that, but in film we can, and sometimes it offends people because it is tougher to take when you get closer to the truth.

THE ARTIST'S APPROACH TO THE SEARCH FOR JUSTICE

It has always seemed to me that many trial lawyers have a secret desire to be in show business. . . . [L]et me take a turn at doing something that it appears to me that you tell me you do. Let's together examine the record of four of my films and see what it is that we can collectively learn about the way in which an artist approaches the search for justice.

Five of my films are in their essence a personal observation on essential and fundamental issues of justice. In these films, I have dealt with topics ranging from the irrationality of the Cold War to the potential of inequality and prejudice to pervert the course of justice. As a Canadian, I always felt we could view more objectively the problems that face our American neighbors.

During the Second World War, I served in the Canadian Navy for about a year and a half. I was demobilized and I had the opportunity to hitchhike through America, and it was during this journey to the southern states that I experienced my first encounter with a segregated society. I was only eighteen years old, and I was standing by the side of the road, in my heavy blue Canadian Navy uniform, and it was a sweltering day. It was just outside of Memphis somewhere, and a bus stopped and I get in. I headed for the back seat by an open window, and a few minutes later, the bus stopped and a red-faced, beefy driver looked at me in the mirror and he said, "Are you trying to be funny, sailor?" I was confused. There were three or four white people in the front of the bus staring at me and he said, "Can't you read the sign?" A few black people around me looked uncomfortable. I didn't know what to do. And then I noticed a small tin sign, hanging from the roof of the bus on two little pieces of wire. And it had been hand lettered. And it read, "Colored people to the rear".

So I didn't know what to do, except to get off the bus and watch it pull away. And as I stood there in the dust on that country road in Tennessee, I thought about the newsreels I had seen showing so many young black men in uniform being shipped off to war to defend their country and possibly give their lives in the process. Yet when they returned home to Tennessee, they would have to sit in the back of the bus and they couldn't get a cup of coffee at Woolworth's. So I think it was there, it was there on that highway, on the highways of Alabama and Mississippi and Louisiana that my desire to make films like *In The Heat of the Night* and *A Soldier's Story* really took root.

IN THE HEAT OF THE NIGHT

In The Heat of the Night was my first film in which the justice system came directly under scrutiny. In this picture, a smart, sophisticated, black homicide detective from the north, Virgil Tibbs, has the bad luck to be passing through a very small, racist Mississippi town on the night when a prominent white businessman is murdered. And Sydney Poitier [Tibbs] was arrested on a suspicion of murder while waiting at the train station after visiting his

mother. Now, those of you who have seen the film will recall the scene when Sydney is brought in front of the local southern sheriff, played by Rod Steiger. Let's look at that scene.

In the film clip that followed, the Sheriff sitting in his office, one foot on his desk, sipping a soft drink, insolently interrogates Tibbs, accusing him of having murdered for the $200 found on his person. Sheriff: "Colored can't earn that kind of money. That is more than I make in a month. Where'd you earn it?" Tibbs: "Philadelphia." Sheriff: "Philadelphia, Mississippi?" Tibbs: "Philadelphia, Pennsylvania. . . . I'm a police officer." [dropping his badge and ID card on the Sheriff's desk]. Scene closes.

JEWISON: So, here we have a confrontation between a black man and a white man, and they are both officers of the law. I have always believed that the idea behind a film is more important, perhaps, than the story of the film itself. 1966 was a period of time in America where we were going through a civil rights revolution. In the midst of black and white people confronting the sharp edge of racism, some local law enforcement officials were training water cannons and releasing attack dogs against unarmed men and women who were simply trying to assert their legal rights.

It was Christmas of 1966, I was in Sun Valley, Idaho with my children on a ski vacation, and I met Bobby Kennedy. My kid broke his leg in a ski race and his kid broke his leg in a ski race, so we met at the doctor's office and we were just sitting there, talking, and Bobby said, "What do you do?" I told him I was a film director and I told him a little bit about the story of a film I was going to do called *In The Heat of the Night* . . . . And he picked up the significance of the film immediately. "And Robert Kennedy [said], You know, it is very important, Norman, [imitating Kennedy's Boston accent] that you make this film," and he began wagging his finger at me. "Time is right for a movie like this. Timing is everything, in politics and in art and in life itself." . . .

[W]hen the film was released a year later, and it received overwhelmingly favorable reviews . . . the New York Film Critics invited me to New York to accept the award for best dramatic film of 1967. . . . [T]he person who presented the award was the Senator from New York, Robert Kennedy, and he said, "See, I told you, Norman," he whispered in my ear, "timing is everything."

So, you all know a lot about timing. You are experts at timing. This was not the first film to deal with racism in America or the belief that every person must be respected, regardless of his or her color. . . .In one of the scenes that I remember the most about *In The Heat of the Night*, it was a slap, a slap that was heard around the world. Let's just take a look at that moment.

In the next film clip, the white Sheriff and the black Detective Tibbs, in a coat and tie, are in a greenhouse, facing an older a white man. The white man's male black house servant, dressed in a white coat, holding a tray of liquid refreshments, is in the background. White man: "Why did you two come here?" Tibbs: "To ask you about Mr. Colbert. White man: "Let me understand this. You two came here to question me?" Tibbs: "Some people, let's say the people who work for Mr. Colbert, say you were the person least likely to mourn his passing. Was Mr. Colbert ever in this greenhouse, say last night?" In a split second, the white man impulsively slaps Tibbs in the face and Tibbs reflexively slaps

him back. White man to Sheriff: "You saw it. What are you going to do about it?" Sheriff, reluctantly: "I don't know." White man to Tibbs: "I'll remember that. There was a time when I could have had you shot." Tibbs turns and leaves, followed by the Sheriff, and last, hesitating for a moment, shaking his head slightly, the black servant turns and leaves without a word.

JEWISON: Well, that film went on to win five Academy Awards, including Best Picture, proving Robert Kennedy right. . . . But that was 1967. A few days before Oscar night, tragedy blotted the Oscars from everyone's mind that year. Martin Luther King was assassinated, and the ceremonies were postponed from Monday to Wednesday and a chartered plane flew east for the funeral from Los Angeles. It was very quiet on that plane, and I remember we were all overcome with a sense of hopelessness, a sense of anger and bitterness. No one could save the country now. And there was Quincy Jones and Lena Horne and her composer husband, Lennie Hayton, Marlon Brando, Caesar Chavez, Hal Ashby and Pascal Wexler, myself. And then in Atlanta we joined the others in that long, dusty post-funeral march following Dr. King's casket on a wagon pulled by two mules. We marched arm and arm with Bobby and Ethel Kennedy and Harry Belafonte and Sammy Davis and hundreds of civil rights activists, and it seemed that day that it was now Bobby who carried everyone's hope for the future of America.

The progress in civil rights since the release of this film has been incredible. . . . [D]uring those years of struggle a great deal of courage was displayed by many young and gifted attorneys who fought the battles of racism in the courthouses of America, and from those small towns of Mississippi all the way to the Supreme Court of the United States. They often put themselves in the path of danger to advance the struggle for an integrated society. Those of us in the artistic community had a great privilege of lending our voices to this cause and working with an integrated team of artists to produce films that humanized what had become a very divisive issue and was, in retrospect, I think, one of the finest hours of popular filmmaking. We knew at the time that the technical skills of our craft, which we had acquired through countless hours of making light comedies and television specials and intriguing mysteries, were now enlisted into a higher calling.

I ask you to reflect on what the fact that a black man is running for the President of the United States means to those of us who were engaged in those early struggles, what it means to the people of America and citizens of the world.

. . . AND JUSTICE FOR ALL

All of you are aware that I drew on the American Pledge of Allegiance for the title of one of my films, which was ironically called . . . *And Justice For All*. . . . Now, the task of the artist is to highlight when the perspective of those that control institutions do not line up with the perspectives of those whom those institutions are designed to serve. Films are a form of artistic expression. And in the world of a visual art, we have progressed beyond the point where we assess the quality of a painting by determining how closely it depicts the visual reality of a scene. Much of the great visual art makes its contribution by challenging the viewer to approach a subject in a creative manner.

In making . . . *And Justice For All*, I wasn't making a training film on how to con-

duct a trial according to the best practices taught in law schools. I wasn't making a documentary. I was trying to create a satirical comedy that dealt with many of the absurd realities that plagued the American legal system of the day. We undertook extensive research. We kicked over the rock of the American justice system as it lay on the ground in 1979 and depicted much of what we observed.

Let me share with you what I personally observed in conducting research for this film. I spoke with five criminal court justices, two in Brooklyn, one in the Bronx, two in Manhattan. Three out of the five were personally armed. I sat through a number of cases and witnessed plea bargaining in crowded hallways, where people's lives were being traded like at a Moroccan fair. I came to the realization that while people's lives are being affected in the most profound ways in the criminal courtrooms of America, for the lawyers, the courtroom was a form of theatre. While the lofty ideal of the Constitution was a declaration of justice for all, winning was everything in America. And there is no difference in sports, business or politics. Winning is everything: movie grosses, TV ratings determine which voices are heard. Who has got the biggest gross? This, of course, has the potential to distort the whole creation of art. And the legal field is no different. Those attorneys who are the most skilled at manipulating people's opinions are handsomely rewarded by those who have the resources to retain them.

The theatre of the courtroom seemed to reach a new low during the O.J. Simpson trial in 1995. And I am sure that many poor black or Latino kids who found themselves in that courtroom long after the news organizations had departed for the next celebrity trial and feeding frenzy . . . did not receive the quality of justice that was offered to Mr. Simpson.

In the course of my research, I also observed there was another struggle taking place in the courtroom. There is a human struggle in the hearts and minds of many gifted and committed trial lawyers, and this has to do with their knowledge of truth. When their talents are used in a manner that disquiets their inner beings, I think they become uneasy. Now, to an outside observer, there is a danger of hypocrisy in the judicial system when the best lawyers are employed to defend the guilty. . . . But since conflict is at the heart of all good storytelling, it is this essential conflict which informed one of the most controversial scenes I have ever filmed. So [laughing] let's take a look at Al Pacino as a deeply disturbed advocate in the climax of . . . *And Justice For All.*

In this film clip, Al Pacino, defending a well-dressed older white man against a charge of rape, is addressing the jury. "Simple isn't it? Only it's not that simple. . . . [W]e have a problem here. You know what it is? Both sides want to win. . . regardless of the truth . . . regardless of who is guilty and who is innocent. Winning is everything. . . . I have a case to end all cases. The one thing that bothered me: Why would she lie?. . . . Yesterday I found out why. She doesn't have a motive. You know why? Because she's not lying. Ladies and gentlemen of the jury, the prosecution is not going to get that man today. No, because I'm going to get him. My client. . . is guilty." Judge, banging his gavel: "You are out of order." Pacino: He is guilty. He told me so . . . [said] Let's make a deal."

JEWISON: I know that many of you, like the American Bar Association in 1979, really disliked the depiction

of an attorney who abandons his professional oath in the course of a trial. But perhaps you will agree with me on two things: First, the purpose of art is to challenge conventional wisdom. And second, while the character may have deserved to be disbarred, the actor portraying him, Al Pacino, deserved the Academy Award nomination which he received for this performance.

A SOLDIER'S STORY

A Soldier's Story is a film that takes the traditional prejudices of American racism that we dealt with in *In The Heat of the Night*, and it delves a little deeper. We shot this film in Arkansas . . . . I couldn't have made this picture without [then Governor] Bill Clinton, because we didn't have very much money. . . . I needed about 500 troops marching out at the end of the picture, and I just couldn't afford them. And I told the Governor that it would be nice if the young black people in America could see what their grandfathers and their uncles did in World War II when they marched out. He said, "Well, I think we can help you with that." And he called in the head of the National Guard and the General called out a brigade of the guards and sent the white boys home. So, he saved us [laughing] and made it possible for us to make this film, really.

You know, the film is constructed like a mystery. When a black sergeant is murdered on a segregated military base, the immediate presumption of guilt falls on the local white Klan members. And this conclusion is borne out of the assumption that the conventional tension between whites and blacks has boiled over as a result of the murder. And few people realize that the great social democrat, Franklin . . . Roosevelt, was the supreme commander of a fully segregated armed force. It was not until the 1950s, in the Korean War, when Harry Truman finally integrated the U.S. Army. The subtext of this film is an exploration of this legacy. The audience is introduced to this tension during a celebration of victory by an all-black baseball team. Let's take a look at this scene from *A Soldier's Story* . . . .

Black Sergeant Waters enters barracks. Black soldiers are lounging around in their baseball uniforms. One, CJ, has a guitar. They are singing. Sergeant: "Knock it off. We don't need any more of that guitar sittin around the shack music today, CJ." He orders them to get dressed for a work detail, painting the hallway of the white officers' quarters. Soldiers [singing]: "Let the great colored cleanup troops do it. . . . anything you don't want to do." Sergeant: "Let me tell you fancy-assed ball-playing n-----, . . . this country is at war. You n------ are soldiers. . . . " CJ: "What kind of a colored man are you?" . . . . Sergeant: "You trying to mock me, CJ? Whatever an ignorant low-class geechee like you has to say isn't worth paying attention to, is it?. . . . If it wasn't for you southern n------ white folks wouldn't think we were all fools." During this exchange, Private Peterson, played by Denzel Washington, comes to CJ's defense.

JEWISON: You know, it was an amazing play by Charlie Fuller. This young black captain, Captain Davenport, is sent from Washington to investigate the murder. He is a young lawyer-soldier, and he becomes focused on two white officers who had encountered the dead sergeant on the night of the murder. But despite his suspicions, the young captain stayed true to his training as a lawyer, and he continues intently to question all involved. And while his personal prejudices may have led him to presume guilt, his better instincts as a lawyer caused him to hold a presumption of innocence of

the white suspects until his investigation was completed.

The ultimate revelation at the end of *A Soldier's Story* is not only the identity of the actual villains, but the difficult personal acknowledgement of the destructive force of racism. The heart of a black man, the captain learns, is equally susceptible to the disease of hatred. Let's just take a look at the last scene, of this revelation on Howard Rollins Jr.

In the interim, CJ has died, apparently as the result of a mission the sergeant sent him on. In a flashback during the interrogation of one of the black soldiers by Captain Davenport, that soldier and Peterson, on patrol, have come upon Sergeant Waters in the nighttime. He is rolling on the ground, covered with dirt, obviously drunk, throwing up. Peterson: "Big bad Sergeant Waters down on his knees." During the confrontation, Sergeant Waters: "CJ, he could never make it. He was a clown, a clown in blackface, a n-----." At the end of the confrontation, Peterson pulls out his pistol and shoots the helpless sergeant.

The interrogation continues, and the soldier confesses. Peterson is brought in. Lawyer: "You call that justice?" Davenport: "I didn't kill much. Some things need getting rid of. Man like Waters never did nobody no good anyway, Captain" Lawyer: "Who gave you the right to judge, to decide who is fit to be a negro and who is not?" The two are led away.
In the final shot, Captain Davenport walks over to the window and stares out silently. Slowly a tear begins to trickle down his cheek.

JEWISON: That demonstrated the problems of a segregated military.

I would like to end today with a few thoughts on *The Hurricane*. . . . The film is based on the plight of the wrongfully accused Rubin "Hurricane" Carter from New Jersey, who spent most of his life in prison for murders he did not commit. And, again, the theme was racism and economic inequality perverting the justice system. . . .

[E]arly in the project Rubin Carter came up to my farm in Caledon. It was a sunny spring day, and we went for a long walk around the Caledon Hills. And he was a quiet, thoughtful man with a ready smile who seemed at peace with the world, as if the violent past of his early youth had become only a story, as if the anger that fuelled him as a fire, the anger that drove him nearly insane in his cell, had been buried long ago. And he talked about growing up black in New Jersey, about the first time he crossed a white officer, about the first time he was in jail, and how he had been convicted in jail for a double murder when he was on the peak of being the middleweight champion of the world. He talked about the sense of hopelessness in solitary and the certainty he would never come out alive and his reading and his determination that he would be able to see through walls and sense the sunlight that was denied him. He believed he had been able to do that once he had dealt with his anger, the hatred that he returned to those who had hated him and put him behind those walls.

That turning point came in a key moment in the movie. It is another *tour de force* for Denzel Washington. Let's take a look at the scene with Denzel and his two lawyers in the New Jersey penitentiary.

Carter's lawyers are urging him not to go into Federal Court with the new evidence of innocence that has been uncovered because they fear that that court may be prevented by the applicable law from hearing it, and he will be left with no recourse in state

court. Carter [speaking through a microphone from behind bullet-proof glass]: "Then we transcend the law. We get back to humanity. . . . I believe once he [the federal judge] looks at it he will have seen the truth. He can't turn his back on me. . . . Listen to me. I am fifty years old. I've been locked up for thirty years. I put a lot of good people's lives at risk [people who have come forward with evidence]." In the end he insists on taking his case into Federal court and his lawyers reluctantly agree.

JEWISON: Well, in this film we revealed what the desperation of years of playing by the legal rules have resulted in: a profound injustice. And this required a leap of faith that, while justice could not be found in the state court, maybe, just maybe, the truth could prevail in another forum. In closing, I want you to take a look at and to see, to portray the willingness of Rubin Carter to take a risk in this bold legal move, with the full knowledge that it was his last desperate attempt. In the last scene of the film, we see the judge coming to give reasons for Carter being found not guilty.

Judge: "This Court does not arrive at its conclusion lightly. On the one hand, Rubin Carter has submitted a document alleging racial prejudice, coercion of testimony and withholding of evidence. On the other hand, Mr. Carter was tried twice by two courts and convicted and those cases were upheld by the New Jersey Supreme Court. However, the extensive record clearly demonstrates Rubin Carter's conviction was predicated on an appeal to racism, rather than reason, and concealment, rather than disclosure. To permit convictions to stand which have as their sole foundation appeals to racial prejudice is to commit a violation of the Constitution as heinous as the crimes of which the defendants were tried and convicted. I hereby order Rubin Carter released from prison."

JEWISON: Well, yes, ladies and gentlemen, that is Rod Steiger portraying the courageous Federal Court Judge, H. Lee Sarokin.

My journey has come full circle today. Despite the probing and the prodding of the legal profession, despite tearing away the mask of hypocrisy in some of the legal institutions and despite lamenting and rising up against the role of racism and economic inequality in the prevention of the justice rather than the promotion of justice, despite all this, as an artist, it is in the theatre of the courtroom that we ultimately portray the place where justice is found.

Filmmakers and advocates share many things in common. We create theatre that touches people's lives, on film and in the courtroom. As the lead character from *Fiddler on the Roof*, Tevia, might put it, on the one hand we can each pander to the most base instincts of people, and on the other hand, we have the ability to make a difference, to behave in a way that gives life to the ideals that would be the foundation of our system of justice.

In the end, it is the old plain values that penetrate. And all I can think of is Cassius grudgingly reminding us that the fault is not in the stars, but in ourselves.

Duty and honor do not corrode as easily as motives that prompt men otherwise. It is better to be than to seem. To live honestly and deal justly is the meat of the matter. That was said a long time ago by a very wise man. Of course, I should point out that his fellow citizens poisoned Socrates, which may explain why I am not going to say any more.

Thank you so much.

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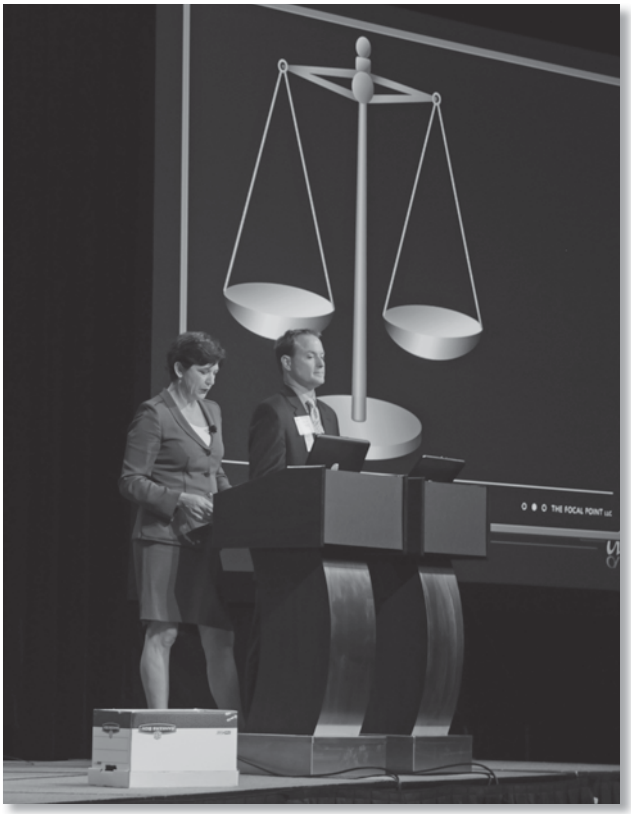
ARE YOUR JURORS AWAKE? PERSUADING *by use of* 21ST CENTURY TECHNOLOGIES

A demonstration of the use of cutting-edge technology to illustrate and enhance testimony and argument in trials anchored the Saturday program at the Toronto annual meeting.



Technology demonstration

Moderator **William B Smith**, FACTL, San Francisco, California, **Nanci L. Clarence**, FACTL, also of San Francisco, and **Douglas H. Arnest**, owner, vice-president and consultant of High Impact, Inc., Englewood, Colorado, delivered a fast-paced demonstration of an array of computer-based programs and techniques now available to trial lawyers. Their presentation ranged from the familiar to concepts that were undoubtedly outside the knowledge of many in the audience.

The presentation began with two pieces of humor, one intended, the other apparently not. The participants appeard onstage, one carrying a stack of heavy file boxes full of paper exhibits, one an easel and one a foamboard-mounted exhibit. As if on signal, the stack of boxes tumbled and the easel and exhibit fell

off the stage. Ms. Clarence then asked: "Ladies and gentlemen, is this how you are still trying your cases?"

The unintended humor resulted when the first electronic exhibit would not come up, prompting one of the participants to utter, *sotto voce*, "Gotta love this technology. It's not coming up." Eventually, however, it did come up.

Smith launched the program by observing: "[N]ew technology . . . is more effective, more efficient, and more flexible. It is effective because eighty-five percent of what we learn, we learn visually. And your audience has changed. Eighty percent of your jurors are younger than forty-six in many jurisdictions. And many of us in this room still live in Wordland only, whereas the majority of your jurors are outside of Wordland. They are living in a visual word. They learn from computers. They learn from TV screens. They learn from Kindles. . . . It is a brand new world."

"Electronic presentation of evidence," he continued, "results in increased attention, increased retention, and increased comprehension. . . . It is more efficient. You don't need to lug around boxes like we did around the stage. One disc holds 60,000 pages of documents. It is efficient because you can cut thirty to fifty percent trial time, and you can get three to four times as much evidence into evidence in the same period of time. It is flexible."

Starting with a demonstration of text pulls using the familiar Trial Director, he demonstrated how the relevant portions of a document can be highlighted, enlarged, cleaned up and colorized to allow the court and jurors to focus on the important portions.

He then went on to demonstrate how electronically created exhibits can be changed in midstream if the evidence makes a change necessary. Using a variety of digital files, Arnest showed how an X-ray film could be converted to make unnecessary the use of a lightbox to display it in court and how digital files created by a medical illustrator can be used to demonstrate the magnitude of a physical injury without enlarged exhibit boards.

Arnest went on to demonstrate a technology new to the courtroom called Flash, which overcomes the difficulty of visualizing the level at which a CT scan has been taken by preparing a non-linear, interactive presentation that is easy to navigate and visually stimulating. He showed how Flash can be used to demonstrate an individual's traumatic brain injury and the surgeries the injured person endured. "Simply put," he explained, "Flash enables you as an attorney to provide more information in less time, and that results in greater comprehension. He used a 3-D animated skull fracture inflicted by a golf club to show how this technique can be used to move through the plaintiff's brain, looking at each level, seeing the depth and extent of the brain injury, and visualizing the shape of the golf club in the injured person's skull.

Smith pointed out that besides the obvious advantages of being more effective, efficient and flexible, this technology allows counsel to illustrate difficult concepts and theories. He showed, for instance, how a digital graphic could be used to demonstrate the difference between the important terms

"equivalent" and "identical," concepts that are often confused in a patent case.

The panel went on to illustrate, using electronic exhibits, how such technology could be used to explain scientific concepts, in the example used, to demonstrate how both the mental illnesses Parkinsons, which a jury understands, and schizophrenia are caused by chemical imbalances, making a defense of schizophrenia as a disease understandable to a jury.

Ms. Clarence demonstrated how one e-mail that was being used to establish a defendant's intent to deceive, could be put in context by loading into an exhibit blue dots representing every e-mail sent by the defendant in the relevant time frame, with the ability to pull down each pixel to show the attached message, thereby illustrating the the futility of trying to show have an intent to deceive using one e-mail from a sea of e-mails.

She showed how graphics could be effectively used in a closing argument to analyze legal concepts, such as "beyond a reasonable doubt," using a set of scales and adding facts to each side of the scales.

The panel demonstrated the use of impact photos, including photos that tell the story with one photo, side-by-side photos to show dramatic changes and enlarged photos that highlight small details that destroy the credibility of oral testimony. They demonstrated the use of graphics, supported by testimony to illustrate a sequence of events.

Ms. Clarence demonstrated the dramatic use of a timeline going back in time, to which was attached at the appropriate place every incident supported by testimony that led to the conclusion that defendants in a celebrated second degree murder case had prior knowledge that their dogs were capable of killing. Smith illustrated the use of a timeline going forward establishing a compelling chronology leading to a conclusion of unlawful commercial activity. In each case, technology enabled counsel to click on the box illustrating each relevant event in walking through the timeline and to delete any event that was not allowed in evidence without necessity of redoing the entire exhibit.

Ms. Clarence demonstrated how counsel could make jury instructions come alive by putting each element in a box, creating building blocks that could be tied to evidence proving or disproving each element, progressively presenting in a compelling way how the jury could apply complicated legal concepts.

The panel showed how visuals could be used to humanize a client by telling his or her life story and how complicated business transactions could be explained, element by element. They demonstrated, for instance, how a jury could be made to understand a commercial loan transaction by breaking it down into its simple sequential component parts.

Their next subject was the use of videos to tell a story—a television newsclip or a surveillance camera record of an event. From that they segued into the use of visual storytelling animations to tell a story, for instance the illustration of how a machine works, explaining the concept of 3-D modeling by an animator or the animation of a collision. The models used for this purpose can be made accurate to within a

millimeter by the use of laser scanning

They paid particular attention to the use of this technique in *Markman* hearings in patent cases to educate the court efficiently and accurately about the meaning of patent claims at issue, relating the claims to a visual illustration, so that the judge does not make his or her own interpretation from the claim documents.

The panel warned that on occasion modeling and visual animations may indeed point up weaknesses in one's own case. They explored the use of one's own expert to discredit an opponent's visual animations or to prepare one's own animation to refute that of the opponent. It is crucial, they emphasized, that every fact depicted in your animation be supported by evidence, the absence of which may be detected by slowing down the animation. In short, these are tools for use in a courtroom. They are the medium, not the message, and they do not form your trial strategy; they simply illustrate it.

From there, the panel delved into esoteric new technology that is becoming available, called three-dimension volumetric rendering, which enables the demonstration of injuries in a whole new light. First, the individual's CT or MRI scans are scanned into a computer. Then each image is isolated. Then the injured areas of the brain are outlined on each isolated film. Then the computer is instructed to stack and merge the isolated images. The final product is a three-dimensional object with the areas of the injury isolated, identifiable, and quantifiable. In the exhibit they used, one could see blood and air contained within the brain in a 3-D model of an actual plaintiff's brain.

From there, the panel delved into the concept of live holograms. Already the Musion Eyeliner uses a high definition holographic video projection screen that allows spectacular, three-dimensional, moving images to appear within a live stage setting. This new technology brings dramatic, previously unseen 21st Century video film effects to live events, including audiovisual artistic performances, conference or trade show presentations, retail displays and large scale digital signage. Soon," Arnest predicted, "it will be in courtrooms. Experts will be able to testify from their offices. Criminals can have their day in court while safely behind bars."

Next, Ms. Clarence explained immersible virtual reality which can create three-dimensional immersive interactive worlds online. "I would say . . . it is a very useful medium, one that needs to be explored, because it allows us to not only tell jurors what they are going to see, not only display in 3-D, but to actually give them, where subjective perspective and point of view are at issue, the ability to be in the space, to see what witnesses see and then move and see what this witness saw, to put the fact-finder in the actual environment, in real time. The Rules of Evidence aren't yet written for this and we haven't seen them in an actual courtroom, although they have been used in mock trials and studied, including by some of the organizations . . . [of] trial court associations. We will be seeing this technology coming into our courtrooms, and we need to start thinking about how we are going to use [it]."

COLLEGE INDUCTS 99 AT TORONTO MEETING

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INDUCTEE RESPONSE: GRATITUDE, HUMILITY *and the* RULE AGAINST PERPETUITIES

Inductee James S. Ehmann, Q.C., Regina, Saskatchewan, gave the traditional response for the newly inducted Fellows at the Toronto annual meeting. As is the tradition, his response, excerpted below, was laced with both humor and insight.

James S. Ehmann

I have decided to base my remarks on three subjects. First, expressions of gratitude, second, reflections on humility, and third, the rule against perpetuities. . . .

GRATITUDE

. . . Lawyers in the United States and Canada enjoy practice in free and democratic societies in which the rule of law prevails. However novel or unpopular the case may be, we are free to bring it, usually without fear of harm or imprisonment. So I begin on our behalf with an expression of gratitude for the freedom and rule of law that we experience in our great countries.

The point begs grateful recognition of the role played by lawyers and judges, past and present, many in this room today, in discerning, shaping and applying the law. There was Chief Justice Cardozo, who pronounced that the risk to be perceived defines the duty to be obeyed and then gave us the rule against indeterminate liability to keep us within reasonable bounds. There was Lord Atkin, who proclaimed that producing bottled drinks containing rodents was unneighborly. And then, the Supreme Court of Canada, years later affirming the point, but finding that mere distress over a bug in your pop does not make for a bulge in your bank account. . . . .

The next "thank you" on our behalf is to those members of the College who initiated our invitation to join. . . . There is no sweeter honor than one which comes from one's peers. We Inductees thank the College, and especially those within it who suggested our candidacy for Fellowship for bestowing on us such an honor.

The next "thank you" is to the friends and colleagues of our group who undertook putting together the case for the eligibility and suitability of each of us according to the criteria of the College. We have all experienced advocating a cause without fee. Often there is great satisfaction in pro bono work. But a variety of circumstances can put a pall on the Good Samaritan role. Imagine working for free in circumstances where (1) your service goes unnoticed because you cannot disclose it to the client, who must be kept completely in the dark, (2), the case to be made is that the candidate, a trial lawyer, is exceptionally good, in fact, the best; and (3), in some situations like my own, the testimony is thin and hard to come by.

This was the singularly selfless lot of those of our colleagues who undertook the proof of the eligibility and suitability of each of us for fellowship in the College. To those Cinderellas who prepared us ugly stepsisters for the ball, we say thank you, and best regards.

HUMILITY

I live and practice law in Saskatchewan, here in Canada. Members of this College who I have come to know over the last twenty-eight years, have always stood out as great trial lawyers and distinguished citizens. To now join ranks with them is a real ego-boost, which suggests that it might be time now to summon up a bit of humility. . . .

Before leaving the subject of humility, I would like to tell a story about me, me, me. It was almost twenty-five years ago, and I was trying my first big civil case. . . . I was soaring along in my cross-examination of an expert witness, certain that I was eviscerating the man and all of his opinions. I paused to glance over at my co-counsel expecting to hear a whisper of approbation, or to at least fetch a nod of approval. Instead I was greeted by a disapproving glare accompanied by an unmistakable gesture [at the throat] signaling that I should immediately sit down and shut up. I was hurt. And after some twenty years of reflection, then realizing that my co-counsel Diana Lee had been right, I convinced her to marry me. I am no longer hurt when she makes the same gesture, accompanied by the same command. I know now that she is always right.

THE RULE AGAINST PERPETUITIES

Humility, of course, is not the same as humiliation. This brings me to the rule against perpetuities, mentioned this morning by Chief Judge Kaye of the New York Court of Appeal in the course of her riveting remarks. I thank her for her telepathic awareness of my zeal for this field of the law and for leaving it unplowed so that I might put the first shovel in this fertile ground tonight. I invite those of you to whom these words are familiar to join me in saying, "Every interest must vest, if at all - that's the tricky part - within twenty-one years and a life in being." The mere utterance of the words is spine-chilling.

I remind us of the Rule against Perpetuities tonight to teach the lesson taught a few years back by the steamy Hollywood thriller Body Heat. It is certainly true that vice has been the downfall of many a great trial lawyer. Similarly, some fine lawyers have sunk to humiliation, owing to weakness of the flesh. But for the lawyer played by William Hurt in Body Heat, it was neither vice nor the overpowering sexual allure of the temptress played by Kathleen Turner that brought about his ruination. No, it was his failure to recognize the application of the Rule against Perpetuities.

And so, in a gesture of concerned fellowship, I take this opportunity to remind the Fellows of the College that every interest must vest, if at all, within twenty-one years and a life in being. Recognizing the application of the rule against perpetuities to contingent remainders, I would like to now vest the epilogue to these remarks before it is too late.

MEASURING SUCCESS

Milton Berle, claiming to quote a lawyer, said, "Practicing law gives me a grand and glorious feeling. Give me a grand and I feel glorious." The humor in this statement derives, like most good humor, from a nasty element of truth. Martin Luther King pointed to the same human weakness when he said, "We are prone to judge success by the index of our salaries or the size of our automobiles, rather than by the quality of our service and relationship to humanity."

Another giant of the last century, Pope John XXIII, once said, "It would scarcely be necessary to expend doctrine if our lives were radiant enough. If we behaved like true Christians there would be no pagans." The late pontiff's statement is no less true in a secular context. For trial lawyers, I think this means striving for excellence, caring deeply about our clients and setting a good example.

Commitment to excellence, service and example is obviously at the core of this distinguished College, dedicated as it is to maintaining and improving standards of trial practice, the administration of justice and the ethics of the profession. We Inductees are therefore not only honored today, but inspired. For both reasons we proudly celebrate our induction and look forward to truly rewarding fellowship in the College. On behalf of all of us I extend our deep respect and our humble thanks.

After my call from President Stout ended, I basked for a moment in the glory of the occasion, and then a clinch of tension took hold of me. The American College of Trial Lawyers file had suddenly become the most stressful file on my desk. Well, I dealt with that as we lawyers do. I started to do a bit of work in preparation. By the time we arrived in Toronto Friday night I was reasonably confident. I was ready to go. Then I heard, as all of you did, a stream of some of the most eloquent, witty, pithy and powerful oral presentations I have ever heard. My confidence ebbed away, but Fellow Rufus Pennington, to whom I was happily introduced last night, came to my aid. He reminded me that in the history of mankind only fifty-eight individuals have had the unique privilege of delivering this speech. He pointed out that the audience would be filled with living legends of the Bars of Canada and the United States of America, not to mention eminent Judges of both of our Supreme Courts and a number of other dignitaries of exquisite oratory skill. I wanted to run and hide. And then being a reasonably quick thinker, I thought, "No, I should run and find Norman Jewison. Maybe he could write a speech for me." Finally Rufus reminded me that dropping the ball on this occasion would surely be the greatest humiliation of my entire life. I thank Rufus for bucking me up that way. . . .

* * * * * * * * * * *

For a lesson in humility, I would like to share a story told by Don Shula about himself. . . . Don Shula, now retired, is one of the greatest and most well- known football coaches in the history of the NFL. . . . A number of years back during the off-season, Mr. Shula, his wife and five children went to the State of Maine for a vacation. One day during that holiday inclement weather foiled their plans, so the Shula family went to a local theater to enjoy a movie. As they entered, the house lights were still on, enabling them to see that there were just a few moviegoers scattered through the theater. Naturally, those already seated took note of the new arrivals. As the Shula family took their seats, clapping of hands rose to a swell of applause. Don turned to his wife as the clapping continued and said, "Isn't it nice that they know and appreciate me here, all the way up in the State of Maine?" One of the patrons then approached Mr. Shula and extended his hand. Don rose and shook the man's hand, saying, "Hi, I'm Don Shula. My family and I sure appreciate the warm welcome." The man replied, "We don't care who you are mister, but we're sure glad that you and your family came, because just before you walked in the theater manager announced that if seven more customers didn't show up there would be no movie."

James S. Ehmann

bon mots

IN MEMORIAM

In this issue we note the passing of forty-five Fellows ranging in age from sixty-one to one hundred, twenty-six of them eighty or older. Eighteen are known to us to have been veterans of World War II. They include two who were wounded, one in Normandy, one who was involved in the Battle of the Bulge and the Battle at Remagen Bridge, one who participated in the daring rescue of Doolittle's Raiders from behind enemy lines, one who helped to pioneer the use of helicopters in warfare and one artillery officer who helped revolutionize mountain warfare in the war in Italy. They came home with an array of battle stars and medals, including a French Croix de Guerre, an Italian Cross and a Chinese Order of the Flying Star. One was a liaison to the French Army and one was reputed to be the youngest major in the U.S. Army at age 23. Four more are known to us as veterans of the Korean Conflict and another six have served in peacetime. We have lost Fellows who defended clients ranging from Jimmy Hoffa to Dan Rather, the judge who was designated to try Ku Klux Klan and Nazi members involved in a 1979 incident of racial violence, past presidents of the American Judicature Society and the Canadian Bar Association and a ninety-one year old retired patent attorney who had the foresight to acquire additional schooling in electronics and ultra high frequency after law school before most people had ever heard those terms. The funerals of at least two were marked by flags flown at half mast in their home states. Aside from their legal careers, one was a polio victim who overcame his handicap to earn four college letters and pitch a no-hit, no-run baseball game, one who was a Big 8 Conference official in thirteen bowl games, one who had published forty-seven book reviews in his local paper left a collection of four thousand books and one who scripted case scenarios for "Miller's Court." Finally, one ninety-five year old was named for an uncle who was a drummer boy in the Civil War! We continue to struggle to collect information about older Fellows, particularly those who in retirement lose touch with their old law firms. Undoubtedly some of those have stories as compelling as the ones we recite here. We continue to need your help in this respect.

William N. Avera (75), Avera & Smith, LLP, Gainesville, Florida died January 7, 2009 in an automobile accident at age 81. Upon graduating from high school during World War II, he immediately joined the U.S. Navy. After the war, he attended undergraduate and law school at the University of Florida. Representing principally plaintiffs, he had served as President of the Academy of Florida Trial Lawyers and was also a Fellow of the International Academy of Trial Lawyers. His survivors include his three children.

Hon. Griffin Boyette Bell, (77), Atlanta, Georgia, a past president of the College, died January 5, 2009. His obituary may be found elsewhere in this issue of *The Bulletin*.

Raymond W. Bergan (74), a retired partner in Williams & Connolly, Washington,

D.C., died May 2, 2008 of stomach cancer at age 77. A graduate of Holy Cross College in Worcester, Massachusetts and of Georgetown Law School, he served three years as a JAG officer in the United States Army. A friendly, likeable 6′ 5″ lawyer, he was regarded inside his firm as a phenomenal mentor of younger lawyers. In five decades as a lawyer, his practice ranged from representing former Teamster leader Jimmy Hoffa and other labor leaders and Fairfax County politicians in a notorious 1960s bribery case to the defense of a major auto distributor in a series of two dozen dealer lawsuits. He had served as a board member of Marymount University and of the Opera Theater of Northern Virginia. His survivors include his wife, Mary Elizabeth, three daughters and a son.

Glenn A. Burkart (71), Burkhart & Hunt, Springfield, Missouri, died November 22, 2008 at age 86. A graduate of the University of Missouri and of its law school, his education had been interrupted by World War II, in which he served in the U.S. Army. After nineteen years of practice he was appointed to the circuit court of Greene County. He later returned to private practice. He had been president of the Missouri Bar Foundation and had been active in a variety of civic and charitable organizations. A widower, his survivors include a son and a daughter.

Emile R. Bussiere (89), Bussiere & Bussiere, PA, Manchester, New Hampshire, died October 26, 2008 at age 76. A graduate of St. Anselm College and Boston College Law School, he had run for governor of New Hampshire in 1968. He had also served on the President's Export Council. His survivors include his wife, Joan, one son and four daughters.

John Joseph Carlin (82), a Fellow Emeritus retired from Carlin, Helistrom & Bitner, Davenport, Iowa, died June 4, 2008 at age 75 after a brief illness. A graduate of St. Ambrose College and of the University of Iowa Law School, he served in the U.S. Army Golden Missile Division during the Korean Conflict. He had served two terms on the Iowa State Bar Board of Law Examiners and on several civic boards. His survivors include his wife, Joanne, a son and three daughters.

Andre P. Casgrain, Q.C. (83), Cain Lamarr Casgrain Wells. Rimouski, Quebec, died October 23, 2008. He was born in 1924. Educated at Lavalle University, he took his law degree at McGill University.

Edmund N. "Ned" Carpenter, II (69), retired from Richards, Layton & Finger, Wilmington, Delaware, died December 18, 2008 at age 87 after a three-year struggle with pulmonary fibrosis. He was the son of the first person outside the DuPont

family to be president of DuPont. A graduate of Princeton, of which he was a trustee emeritus, he entered the Army in World War II as a private and emerged a captain. Working in military intelligence, he participated in covert rescue missions flown in Dien Bien Phu, formerly French Indo-China. He was part of a small team that rescued the celebrated downed Doolittle Raiders who had been trapped behind enemy lines following Pearl Harbor. He was awarded a Bronze Star, the Soldiers Medal and the Chinese Order of the Flying Cloud. After Harvard Law School, he began his career in 1949. He retired from active practice in 1991. In the intervening years, he had returned to service during the Korean Conflict, had served once as a state Deputy Attorney General and later as a Special Attorney General, as president of the Delaware Bar Association and as president of the American Judicature Society, which awarded him its Justice Award. He helped to create and was the first chair of a judicial selection committee that changed the way Delaware chose its judges. In 1991, the year he retired from practice, he chaired a bar committee that examined the problem of unprofessional and uncivil conduct by lawyers and drafted a Statement of Principles of Lawyer Conduct that was endorsed by the Delaware Supreme Court. He was three times chair of the College's Delaware State Committee. Years after his retirement he was a founding board member of Stand Up for What's Right and Just, an organization that advocates reform in the criminal justice system. He was a quiet, often anonymous philanthropist and a frequent author of letters to newspapers, arguing passionately for things he believed in, such as the repeal of mandatory minimum sentences for drug offenses. Indeed, his letter urging the decriminalization of drugs was published a week before his death. As a lawyer, he was known for taking on unpopular causes. The citation when he was awarded the American Inns of Court Professionalism Award in 2003 concluded, "In Delaware, the benchmark would be to become 'as professional as Ned Carpenter.'" At his death, the Delaware Supreme Court ordered all state courthouse flags in the state to be flown at half-staff and the *Wilmington News and Journal* began its tribute: "Even if they never heard of him, countless Delawareans owe a lot to Ned Carpenter." His survivors include his wife, Carroll, four daughters and two sons.

Richard M. Clinton (87), Seattle, Washington, died December 22, 2008 of melanoma at age 67. A graduate of the University of Wisconsin and of its law school, he had earned a masters degree in tax from George Washington University. He had worked at the U. S. Department of Justice and with the Seattle firms Bogle & Gates and Dorsey & Whitney, where

he was a litigation partner with a widely varied practice. His survivors include his wife, Barbara, and three daughters.

John W. Condon (75), a Fellow Emeritus from Hamburg, New York, who had practiced with Condon, LaTona & Pieri, PC, in Buffalo, died January 14, 2009 as the result of an automobile accident at age 86. His wife also died in the accident. A veteran of World War II, he had graduated from Canisius College, from which he had received a distinguished alumni award, and Albany Law School. A founding member of the National Association of Criminal Defense Attorneys, he had represented diverse clients, including the Allman Brothers Band, in numerous high-profile cases.

Arthur William Cox, Q.C. (77), a Fellow Emeritus, retired from Cox, Downie & Goodfellow, Halifax, Nova Scotia, died October 8, 2008 at age 87. After graduating from Acadia University, he served in the Canadian Army in World War II. Wounded in combat in Holland, he served as a battlefield instructor in England for the remainder of the war. He began his legal education at New College, Oxford and completed his law degree at Dalhousie Law School. He later served in the Canadian Militia with the Princess Fusiliers, attaining the rank of lieutenant colonel at age 34. Made a Queens Counsel in 1965, he served as president of the Nova Scotia Barristers Society, chaired the committee that led to the introduction of Provincial Legal Aid in Nova Scotia and was for ten years chair of the Law Foundation of Nova Scotia. He was a founding director and president of the Law Societies of Canada. He served for several years as a member of the Canadian Bar Association Council and then served as president of the CBA. He was also an honorary member of the American Bar Association. He was the first recipient of the Distinguished Service Award of the Nova Scotia Branch of the Canadian Bar Association and was a recipient of the Queen's Golden Jubilee Medal. He had served as an elder and chairman of the stewards of his Presbyterian church. He had served Acadia University as a member of the executive committee of its Board of Governors. In politics, he was for ten years treasurer of the Nova Scotia Progressive Conservative Party and a past vice-president of the Progressive Conservative Association of Canada. In his later years he wrote a column for his local newspaper. His survivors include his wife, Margie, and four daughters.

Douglas Danner (82), a Fellow Emeritus retired from Powers & Hall, PC, Boston, died March 29, 2008 at age 83. He was a graduate of Harvard University and of Boston University Law School. His survivors include his wife, Mary, and two sons.

Charles Donelan (77), a Fellow Emeritus from Boston, died November 12, 2008 of complications from Parkinson's disease at age 77. A graduate of Yale, he had served as a submarine officer before attending law school at Georgetown. After law school, he began working at the Department of Justice under Attorney General Robert Kennedy, principally trying antitrust cases. In private practice in Worcester, Massachusetts, he had taken the cases of unpopular defendants such as conscientious objectors in the Vietnam era. He had headed the Worcester Chamber of Commerce. In 1982, he moved to the Boston area to found an office of Day Berry & Howard (now Day Pitney) Connecticut's largest law firm. There he had an international practice centered on the European reinsurance market. A widower, he is survived by three sons and a daughter.

Hon. Thomas Aquinas Flannery (68), retired United States Judge for the District of Columbia, died September 20, 2007 at age 89. The son of a carpenter, he studied law at night without going to college, graduating in 1940 from Columbus University Law School, now a part of Catholic University. He served as a combat intelligence officer in the Army Air Force in Europe in World War II. After the war he was in private practice before becoming an Assistant U.S. Attorney, trying more than three hundred cases over a seven year period. After that, he practiced law with Hamilton and Hamilton until he was appointed U.S. Attorney by President Nixon in 1969. He was then appointed to the federal bench in 1951. He presided over many celebrated trials, including the criminal trial of former Reagan White House adviser Lyn Nofziger and that of a District of Columbia judge charged with accepting an illegal gift while on the bench. His civil cases included a $1.5 billion oil price scam judgment against Exxon and the dismissal of a suit by the parents of a premature baby who had contracted HIV from a blood transfusion. In 1983 and 1984 he was sent to North Carolina on special assignment to try the nine Nazis and Ku Klux Klan members charged with civil rights violations after a 1979 Klan rally in Greensboro turned violent. A widower, Judge Flannery is survived by a son and a daughter.

Richard W. Galiher (53), a Fellow Emeritus retired from Galiher, Clarke & Galiher, Chevy Chase, Maryland, died October 30, 2008 at age 95. An undergraduate and law graduate of the Catholic University of America, where he lettered in baseball and basketball, he was named for an uncle who was a drummer boy in the Civil War who is buried at Arlington Cemetery. In a career that spanned over fifty years, he had practiced in both Maryland and the

District of Columbia. His most notable cases include representing the trustees of President Richard Nixon's 1972 re-election campaign and representing Eastern Airlines in lawsuits arising from a fatal 1949 crash at Washington National. He had been president of the Bar Association of the District of Columbia, whose Lawyer of the Year Award he received in 1975. He served in the ABA House of Delegates and was a past chair of the ABA Tort and Insurance Practice Section. He had also been president of the International Association of Defense Counsel. Active in many professional, religious and social organizations, he was a former director of the Legal Aid Society of the District of Columbia and general counsel of the International Association of Chiefs of Police. He was a past chairman of the board of trustees of his alma mater, Catholic University, which had conferred on him its Alumni Achievement Award, a Distinguished Service Award, the President's Medal, the James Cardinal Gibbons Medal and an honorary degree. A widower, his survivors include a son and four daughters.

Michael R. Gallagher (64), Chagrin Falls, Ohio, retired from Gallagher, Sharp, Fulton & Norman, Cleveland, Ohio, died October 27, 2007 at age 85. Educated at Kent State University and the University of Michigan School of Law, he had been a director of the Defense Research Institute, a vice-president of the Lawyer-Pilots Bar Association and a member of the executive committee of the International Association of Insurance Counsel.

Loyal H. Gregg (72), Pittsburg, Pennsylvania, a Fellow Emeritus long retired, died February 7, 2005 at age 86. He was a graduate of Washington & Jefferson and of the University of Pittsburg Law School.

William O. Guethlein (79), a Fellow Emeritus, retired from Boehl, Stopher & Graves, and later of counsel to Phillips, Parker, Orberson & Moore, Louisville, Kentucky, died February 4, 2009 at age 81. A veteran of World War II, he attended the University of Louisville thereafter, along the way working as a lifeguard, a bartender, a floor-walker in a ladies clothing store and an apprentice glass blower. He had defended many high-profile professional liability and product liability cases. His survivors include a son and a daughter.

H. Martin Hunley, Jr. (77), a Fellow Emeritus from New Orleans, died August 23, 2005 at age 87 after a long illness. A high school valedictorian at age fifteen, he completed undergraduate school at Louisiana State University at nineteen. An Army officer, he served as a liaison officer with the French Army in World

War II and was awarded the Croix de Guerre. Discharged as a Major, he was valedictorian of his law class at Tulane, editor of his law review and a Member of the Order of the Coif. He had last practiced with Lemle & Kelleher, LLP in New Orleans. He was a past president of the New Orleans Bar Association and a past member of the Louisiana State Bar Association House of Delegates. A widower, his survivors included five sons and two daughters.

William L. Jaeger (98), retired from Townsend, Townsend & Crew, San Francisco, California, died January 11, 2009 at age 65 of cancer. A graduate of Santa Clara University, where he was president of the student body, and of the University of California's Boalt Hall, he began his career in the Antitrust Section of the United States Department of Justice. His survivors include his wife, Julie, two daughters and a son.

William A. "Pete" Johnston (79), Harrison & Johnston, Winchester, Virginia, died December 24, 2008 after a brief illness at age 79. A destroyer officer in the Korean Conflict, he was a graduate of Rice University and of the University of Virginia Law School. He was for thirty-five years chairman of the board of Valley Health System and Winchester Medical Center and had served on the standing committee of the Episcopal Diocese of Virginia. He had received an honorary Doctor of Laws degree from Shenandoah University. His survivors include his wife, Elizabeth, and two sons.

Franklin Jones, Jr. (72), Marshall, Texas, died December 18, 2008 at age 77. A graduate of the University of Texas and of its law school, he practiced his entire career in a firm founded by his grandfather in the late 19th Century in which his father had also practiced. He had served as president of his local and regional bars and was the 100th president of the State Bar of Texas. He had served for eighteen years on the Texas Supreme Court Advisory Committee and for three years on that court's Grievance Oversight Committee. He had served as the Texas State Bar Delegate in the ABA House of Delegates and as a member of the governing council of the ABA Litigation Section and as a trustee of the Texas Center of Ethics and Professionalism and of the University of Texas Law School Foundation. In 2004 he received the Texas Bar Foundation's Fifty-Year Lawyer Award. Also active in civic affairs, he was the Marshall Chamber of Commerce's Citizen of the Year in 2002. His survivors include a son and a daughter.

James L. Magee (91) Graham & Dunn, Seattle, Washington died October 24, 2008.after a multi-year battle with non-Hodgkin's lymphoma at age 74. He was

a graduate of the University of Wisconsin, majoring in Russian. After graduation, he entered the United States Air Force, became a jet pilot and then finished his three-year tour of duty as an Intelligence Officer in the Strategic Air Command. After Harvard Law School, he joined the Seattle firm Graham & Dunn. A Fellow of both the College and the International Society of Barristers, he served on a number of College committees and was for two years chair of the College's Professionalism Committee. He was an avid participant in outdoor sports and had served four terms as Senior Warden of his Episcopal church. His survivors include his wife, Rose, two sons and a daughter.

Hon. Kenneth McNeill Matthews (77), a Fellow Emeritus from Truro, Nova Scotia, died September 28, 2008 at age 86. He served as a pilot officer and flight instructor in the Royal Canadian Air Force in World War II, then took his law degree at Dalhousie University Law School. He was appointed Queens Counsel in 1964. After thirty-six years in private practice, he was appointed to the Nova Scotia Court of Appeal in 1985, on which he served until his retirement in 1997. He had served as President of the Nova Scotia Barristers Society and had been the Canadian chair of the International Society of Barristers. He has served for thirty years as a trustee of his church. A widower, he is survived by a son and three daughters.

John A. McClintock, (81), Hanson, McClintock & Riley, Des Moines, Iowa, died October 23, 2008. Born in Des Moines July 5, 1931, he was a graduate of Grinnell College and of the University of Iowa Law School. Between undergraduate and law school he had served in the United States Army Counterintelligence Corps during the Korean Conflict. The owner of a sporting goods store as well as being a fifty-year trial lawyer, for twenty-two years he was a football official in the Big 8 Conference, during which time he officiated in thirteen bowl games. He later served as supervisor of Big 8 football officials. He was a past president of his local bar, the Iowa Academy of Trial Lawyers and the Iowa State Bar Association. He was the recipient of the Award of Merit given by his state bar and of the first annual Amicus Curiae Award given by the Iowa Supreme Court. A Shriner, he was heavily involved both in Iowa and nationally in that organization's sponsorship of high school football all-star games. He was also an ordained elder of Westminster Presbyterian Church. His survivors include his wife, Beverly, two daughters and two sons.

Dugald S. McDougall (62), a Fellow Emeritus resident in Haines City, Florida, died September 15, 2007 of heart failure at age 91. A retired Chicago patent attorney and philanthropist, he was a graduate of

the University of Chicago undergraduate and law schools who had studied electronics and ultra high frequency techniques at Harvard and MIT. He was a naval officer in World War II. A widower who had remarried, his survivors also include four sons.

Hon. Flake L. McHaney (69) a Judicial Fellow retired from the 35th Judicial Circuit Court in Kennett, Missouri, died November 23, 2008 of respiratory complications. After graduating with distinction from the University of Missouri, he served as an operations officer, 347th Field Artillery Battalion, with the 91st Infantry Division in North Africa and Italy in World War II. In Italy, he helped to revolutionize mountain warfare techniques. When he was promoted to the rank of major at age 23, he was believed to be the youngest ever to reach that rank. He received the Legion of Merit, a Bronze Star and the Italian Cross. Graduating from Harvard Law School, he practiced law in Kennett until his appointment to the bench in 1972. A member of the American Law Institute, he was also a member of the American College of Trusts and Estates Counsel and had served on the Board of Governors of the Missouri Bar, as well as in a variety of civic and charitable organizations. He had received an Alumni Service Award from the University of Missouri College of Arts and Sciences. His survivors include his wife, Ada, and two sons.

Ray H. Moseley (75) a retired attorney and judge, died October 12, 2008 at age 87 of complications from heart disease. A graduate of the University of Tennessee Law School, where he was editor of his law review, he had been a Navy fighter pilot and flight instructor in World War II, serving in the Atlantic, Caribbean and American Theaters. A member of an experimental squadron set up to study the effectiveness of helicopters in combat, he earned the thirty-eighth helicopter license in the world. He served on President Truman's staff at the South American Peace Conference in 1947. After beginning his practice at the new city of Oak Ridge, he moved to Chattanooga. After many years in Chattanooga with Hutcheson, Moseley, Pinchak & Powers, he moved to Knoxville and joined his son's firm, Lacy & Moseley. He had served on the Tennessee Court of the Judiciary. He was Honorary Chairman of the National Medal of Honor Museum and an elder in his Presbyterian Church. His survivors include his wife, Lois Virginia, three sons and a daughter.

Hon. Howard G. Munson (72), a Judicial Fellow who was a retired United States District Judge in Syracuse, New York, died October 5, 2008 at age 84. Graduating from high school at 16, his education at the University of Pennsylvania was interrupted by World War II. Wounded in the invasion of Normandy, he recovered and rejoined his division, the US Army's

79th, in time to march through France, Holland, Belgium and into Germany and Czechoslovakia, returning with four battle stars, a Bronze Star and a Purple Heart to finish his undergraduate education at Penn. After graduating from law school at Syracuse University, he practiced law in Syracuse for twenty-four years. He had served as president of the local board of education, as chair of the board of a local television station and in many other civic endeavors. Appointed to the bench by President Gerald Ford in 1976, he later served as chief judge for eight years, took senior status and retired after thirty-one years of service. A widower, his survivors include two sons and a daughter.

Arthur H. Nightswander (69) a Fellow Emeritus from Laconia, New Hampshire, whose career spanned seventy years, died December 8, 2008 at age 100. He had practiced in Laconia with Nightswander Lord Martin & Killkellay and then in Hanover with Stebbins, Bradley, Wood and Harvey. A general practitioner, he had appeared in the United States Supreme Court arguing cases involving freedom of speech and assembly. A past president of the New Hampshire Bar, he had received its distinguished service award, as well as an award from the New Hampshire Civil Liberties Union. He had chaired the College's New Hampshire State Committee. A founding member of the New Hampshire Music Festival, he had been president or chair of such diverse organizations as the Lakes Region General Hospital, The Spaulding Youth Center, the Laconia School Board, the New Hampshire Social Welfare Council and the local United Way. A widower, he is survived by a son and a daughter.

Norman Anthony Palmiere (82), Rochester, New York, died November 2, 2008 at age 74 after a brief illness. A graduate of St. John Fisher College and Syracuse University College of Law, he began his career as an assistant district attorney. Known for his willingness to take on unpopular cases, he had tried many high-profile tort cases representing plaintiffs as well as defending a number of notable criminal cases. In 1989 he became the first recipient of the Robert C. Napier Award presented by Criminal Defense League for outstanding achievement in advocacy of the rights of the accused. His survivors include his wife, Mary, and five sons, three of whom are lawyers.

John G. Poust (67), a Fellow Emeritus from Lake Forest, Illinois, retired from the Chicago firm Rooks, Pitts & Poust, died July 27, 2008 at age 87. He was a graduate of Northwestern University and of its law school who had once served as the College's Upstate Illinois State Chair.

Richard Ayres Reid (76), a Fellow Emeritus retired from Royston, Mueller,

McLean & Reid, Towson, Maryland, died December 15, 2008 of complications following a stroke at age 77. A graduate of Yale and the University of Virginia Law School who had served as a JAG officer in the Navy, he specialized in eminent domain cases. His survivors included two sons and a daughter.

Kent Jay Rubens (04), Rieves, Rubens & Mayton, West Memphis, Arkansas, died November 5, 2008 of a cerebral aneurism at age 61. He was a graduate of the University of Arkansas and of its law school, where he was a member of the law review. He had clerked on the Arkansas Supreme Court and had served in the state legislature for six years. A member of both the College and ABOTA, he has been president of his local bar and in 1989 had served as Special Chief Justice of the Arkansas Supreme Court. The College became aware of his cerebral accident through a series of emails to Arkansas Fellows and ABOTA members sent during a four-day vigil during which he was being kept on life support until his wife arrived from a trip abroad, the final email ending, "Our dear friend, Kent Rubens, became an organ donor today." His survivors include his wife, Belinda, and her two children.

Daniel J. Ryan (78), a Fellow Emeritus, retired from Ryan Brown McDonnell Berger & Gibbons, PA, Philadelphia, Pennsylvania, died February 2, 2008 of cancer at age 81. A graduate of the U.S. Merchant Marine Academy and of Temple University Law School, he was a retired lieutenant commander in the U.S. Naval Reserve. Earlier in his career, he had been the managing partner in LaBrum & Doak. He had served as chairman of the Defense Research Institute, as president of the Pennsylvania chapter of ABOTA and as president of the Association of Defense Trial Lawyers. His survivors include his wife, Katy, a daughter and two sons.

Hon. Edward L. Ryan (62), a retired Circuit Court Judge for the City of Norfolk, Virginia, died September 18, 2008 at age 95. Educated at the University of Richmond and the University of Virginia Law School, he was an officer in the U.S. Navy in World War II. He had practiced with White, Ryan & Reynolds before going on the bench in 1968 and had been president of his local bar and a member of the Council and of the Executive Committee of the Virginia State Bar. He had contributed forty-seven book reviews to his local paper and left a collection of four thousand books. A widower, his survivors include two daughters.

Peter J. Samuelson (79), a Fellow Emeritus from Santa Barbara, California, born in 1938, died November 16, 2007.

Marshall Simonds (77), a Fellow Emeritus living in Morrisville, Vermont, died

October 1, 2008 at age 78. A graduate of Princeton and Harvard Law School, he had a forty-five year career with Goodwin Procter, LLP in Boston. He had served as general counsel to the Massachusetts Crime Commission and special counsel to the Boston School Committee. He had lectured and taught trial skills at Harvard Law School and had moderated and presented case scenarios for Boston Public Television in a series called "Miller's Court." He had a lifelong dedication to Labrador retrievers and was the owner of thirteen field champion dogs. He was a delegate to the National Kennel Club, a judge and competitor for over forty years in Labrador field trials and a member of the Field Trial Hall of Fame. His survivors include his wife, Katharine, three sons and a daughter.

Robert Kenneth Skolrood (78), a Fellow Emeritus died February 20, 2008 in Venice, Florida, to which he had retired, of cancer of the kidney at age 79. Long known for his representation of fundamentalist Christians on issues that included nativity displays, gay rights, school prayer and secular humanism, he was a graduate of Ohio Wesleyan University. He had served two years in the U.S. Army during the Korean conflict, rising to the rank of sergeant. Graduating from the University of Chicago Law School, he practiced in Rockford, Illinois for twenty-three years. He then moved to Tulsa, Oklahoma to teach at Oral Roberts University Law School, a year later becoming Mr. Roberts' personal lawyer. Five years later he moved to Virginia Beach, Virginia to help establish the National Legal Foundation, founded by Pat Robertson, of which he became executive director. In the mid-nineties he had moved to Roanoke, Virginia, where he was a partner in Scogin & Skolrood until his retirement. His survivors include his wife, Marilyn, two sons and a daughter.

George Rogers Clark Stuart (70), a Fellow Emeritus, retired from Penn, Stuart, Eskridge & Jones, Abingdon, Virginia, died August 23, 2008 at age 83. His education at Hampden-Sydney College interrupted by World War II, he served in the 1st Infantry Division in Belgium and Germany, participating in the Battle of the Bulge and the Battle at Remagen Bridge. After the war, he finished his undergraduate education at Williams College and began his legal education at Oxford, where he earned both bachelors and masters degrees, then graduated from the University of Virgina Law School, where he was a member of the editorial board of the law review. He began his practice in Lebanon, Virginia, then moved to Abingdon. He served two terms in the Virginia House of Delegates and was a past president of the Virginia Bar Association. Active in many business and civic endeavors and in his church, he

had for many years served as attorney for the Industrial Development Authority of Washington County. His survivors include his wife, Mary, two daughters, a stepson and a stepdaughter.

William W. Vaughn (75), O'Melveny & Myers, LLP, Los Angeles, a former Regent of the College, died of cancer January 3, 2009 at age 78 at his Pacific Palisades home. A graduate of Stanford and UCLA Law School, where he was associate editor of the law review and a member of the Order of the Coif, he had served in the U. S. Army after law school. Specializing in complex cases, he had successfully defended a number of First Amendment cases, including defending CBS and the Smothers Brothers and successfully defending Dan Rather in a celebrated libel case growing out of a Sixty Minutes segment on insurance fraud. He had also successfully defended a massive antitrust case against IBM. Described by his partner, former Secretary of State Warren Christopher, as a mentor of a generation of trial lawyers, he had chaired O'Melveny's litigation department for seven years. He had also served in many leadership positions in his local bar and had chaired the ABA Litigation Section's Committee on First Amendment and Media Litigation. In 1991, he had received the American Jewish Committee's Learned Hand Award for Outstanding Professional Achievement. In 1962 he had married Claire, a recent widow with three young children, and together they had three more children, one of who predeceased him. In addition to his wife, his survivors include three sons and two daughters.

Alexander "Sandy" Wellford (83) a Fellow Emeritus retired from Christian & Barton, LLP, Richmond, Virginia, died December 31, 2008 at age 78 after a long illness. Educated at the University of Virginia, both undergraduate and law schools, he had served in the U.S. Army in post-World War II Germany. A member of the Order of the Coif, he had served as a law review editor. His practice had included a wide variety of business and labor and employment cases. Representing the Richmond Newspapers, Inc., he had participated in many First Amendment cases, including laying the groundwork at the trial court level for *Richmond Newpapers v. Virginia*, the seminal U.S. Supreme Court case that established the public's right of access to court proceedings. He had received the George Mason Award from the Virginia Society of Professional Journalists. An avid fisherman and duck hunter, he was a trustee emeritus of Ducks Unlimited. His survivors include his wife, Georgiana, three sons and a daughter.

John D. Winner (78) a Fellow Emeritus retired from Winner, Wixson & Pernitz, Madison, Wisconsin, of which he was a founding member, died July 7, 2007 at age 85. A graduate of the University of Wisconsin, where he was class president, he

served three years in the US Army infantry in World War II, earning a Bronze Star. Retaining his military status after graduating from law school and beginning the practice of law, he returned to active duty during the Berlin Crisis of 1961-62, serving as Staff Judge Advocate in the 32nd Infantry Division and retiring thereafter as a lieutenant colonel. He had also served as district attorney and as a Deputy Attorney General for the State of Wisconsin. He had received a Certificate of Commendation from the Governor of Wisconsin for his years of service in the legal profession. His survivors include his wife, Marcelaine, and two sons.

Carl Roger Wright (68), a Fellow Emeritus of Wright & Mills, PA, Skowhegan, Maine, died December 5, 2008 at age 83. A graduate of Colby College and the Boston University Law School, he was a polio victim who had overcome his disability to win four varsity letters in College, two in basketball and two in baseball. He once pitched a no-hit, no-run game and in his senior year had a 7-0 record. Over a stretch of twenty-four years, he saw every single World Series game. A former president of his local Bar, he had held numerous positions at the state bar level and had chaired the Colby College Alumni Council and served as a Colby College overseer. He had coached a variety of youth baseball teams over a span of eleven years and had chaired the College's Maine State Committee. His survivors include his wife, Rita, a daughter and a son.

F. Thomas Young (81) an Emeritus Fellow, retired from Young, Thagard, Hoffman, Scott & Smith, died October 26, 2008 at age 73. A graduate of the University of Georgia Law School, he was a member of both the Georgia and Florida Bars and had served on the Board of Governors of the Georgia Bar. His survivors include his wife, Debbie, three sons and two daughters.

Philomene Asher "Phil" Gates, New York, New York, widow of Samuel E. Gates, who died a few weeks before he was to become president of the College and for whom the Samuel E. Gates Litigation Award is named, died February 17, 2009 at age 90. For years she had regularly attended the College meetings at which the award was given. A lawyer herself, a published author and a person of boundless energy and enthusiasm, active in many community and civic causes, including the New York Legal Aid Society, she remained a loyal supporter of the College all her life. Her son-in-law reported that she died of natural causes and that "the heavy burden of her health problems, which she refused to let get in her way, finally took their toll. . . . She collapsed and died . . . while dressing to go to a cocktail party at the Century—for Phil, the equivalent of 'dying with her boots on.'" A memorial service has been scheduled for May 11, 2009 at St. James Episcopal Church in New York City.

THE BULLETIN
of the
AMERICAN COLLEGE OF TRIAL LAWYERS
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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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