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SUMMER 2009

THE BULLETIN

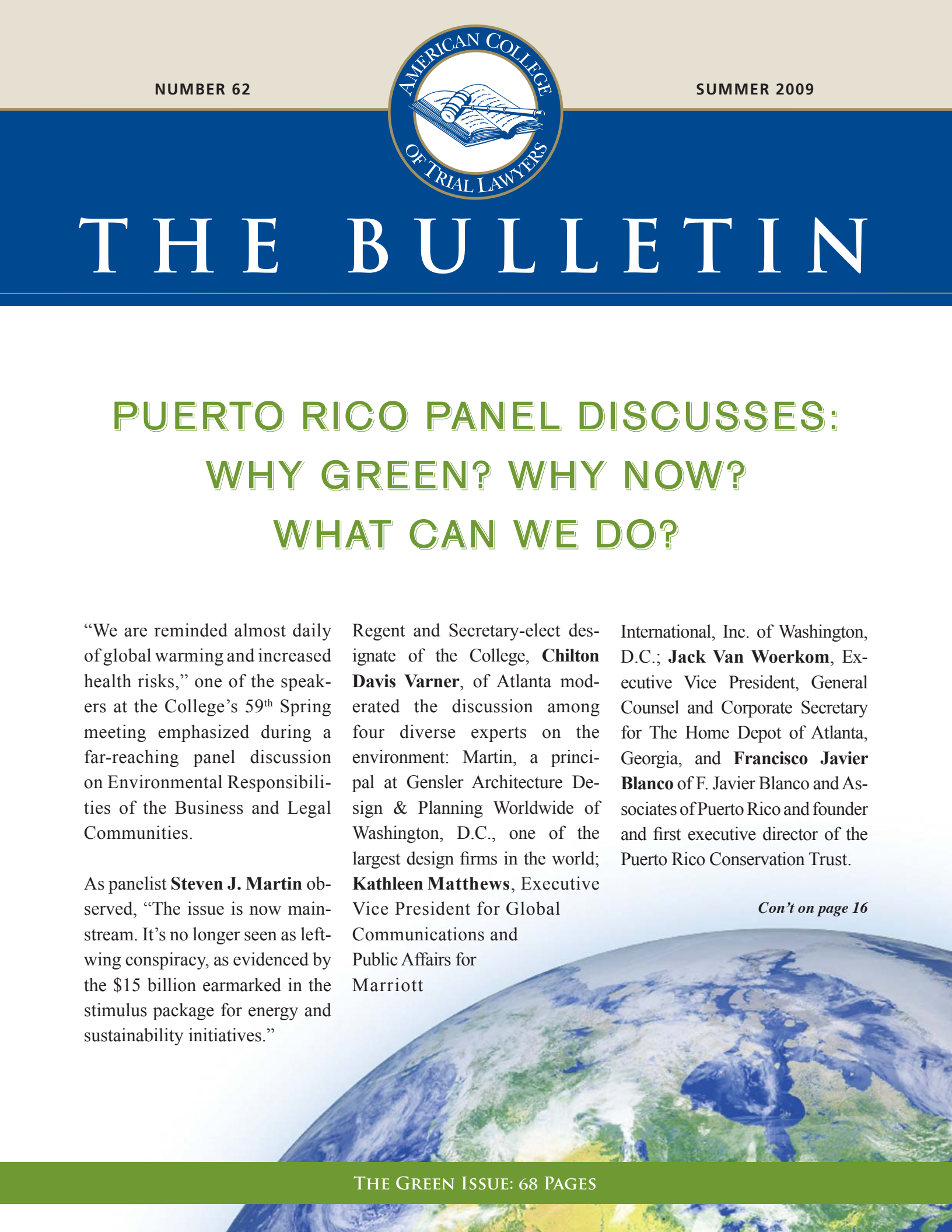
PUERTO RICO PANEL DISCUSSES: WHY GREEN? WHY NOW? WHAT CAN WE DO?

"We are reminded almost daily of global warming and increased health risks," one of the speakers at the College's 59th Spring meeting emphasized during a far-reaching panel discussion on Environmental Responsibilities of the Business and Legal Communities.

As panelist **Steven J. Martin** observed, "The issue is now mainstream. It's no longer seen as left-wing conspiracy, as evidenced by the $15 billion earmarked in the stimulus package for energy and sustainability initiatives."

Regent and Secretary-elect designate of the College, **Chilton Davis Varner**, of Atlanta moderated the discussion among four diverse experts on the environment: Martin, a principal at Gensler Architecture Design & Planning Worldwide of Washington, D.C., one of the largest design firms in the world; **Kathleen Matthews**, Executive Vice President for Global Communications and Public Affairs for Marriott International, Inc. of Washington, D.C.; **Jack Van Woerkom**, Executive Vice President, General Counsel and Corporate Secretary for The Home Depot of Atlanta, Georgia, and **Francisco Javier Blanco** of F. Javier Blanco and Associates of Puerto Rico and founder and first executive director of the Puerto Rico Conservation Trust.

Con't on page 16



THE GREEN ISSUE: 68 PAGES

FELLOWS TO THE BENCH

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

Hon. Thomas J. Bice, Judge of the Second Judicial District of Iowa, Fort Dodge, Iowa.

Hon. Ann M. Donnelly, Judge of the Court of Claims, Bronx Supreme Court, Bronx, New York.

Hon. Laird T. Milburn, Federal Magistrate Judge, Grand Junction, Colorado.

The Hon. Mr. Justice Peter G. Voith, Justice of the Supreme Court of British Columbia, Vancouver, British Columbia.

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

In this issue we highlight the Spring Meeting in Puerto Rico. Several of our articles focus on Puerto Rico, home to many members of the College, which may, however, be less familiar to many of us. The address of Puerto Rico Chief Justice **Denton**, the presentation of the panel on the legal status of Puerto Rico, especially the moderator's introduction, and the portion of the panel discussion on environmental issues that dealt with Puerto Rico will be particularly enlightening.

The panel discussion on the concept which is the subject of the lead article may give you a new perspective on the terms "green" and "sustainability."

The report of the College's Task Force on Discovery, which in fact deals with the entire range of civil procedure, was adopted by the Board of Regents at the Spring meeting. The intent of this task force was to generate a dialogue about possible remedies to the growing costs and delay that have gradually choked off the civil trial process in many jurisdictions. The report has garnered substantial ongoing attention from both the national press and those charged with rulemaking at both the federal and state levels. It would serve the College well if every Fellow who is involved in the civil trial process becomes familiar with this report, which is described in this issue.

PUERTO RICO MEETING *a* SUCCESS

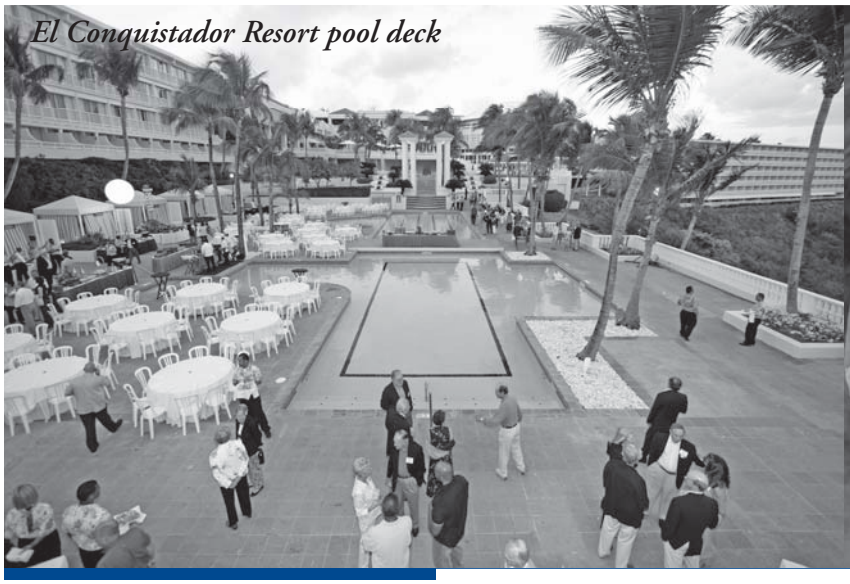
Seven hundred and twelve Fellows and their guests gathered February 26-March 1 at El Conquistador Resort in Fajardo, Puerto Rico for the 59th Spring meeting of the College. It was the College's first visit to that island since 1976.

On Wednesday evening, the Board of Regents, which had been meeting since Monday, entertained former Regents and current State, Province and General Committee Chairs at a reception and dinner.

The Thursday evening welcome reception featured stations for each region, so that Fellows could easily find old friends and identify and welcome those among the inductees who came from their respective states and provinces.

The Friday morning program got off to a spectacular start as a group of salsa dancers dashed onto the stage to give a frenetic demonstration of that current dance rage. Their performance prompted President **John J. (Jack) Dalton** to ask the rhetorical question, "Aren't you glad that Joan [President-Elect **Joan A. Lukey**, who accompanied him on the dais] and I didn't get drafted for that part of the program?"

After an opening invocation by Fellow **Alvaro R. Calderon, Jr.,** San Juan, Puerto Rico, the College was welcomed by **Señora Lucé Vela**, the first lady of Puerto Rico, wife of Governor Luis



El Conquistador Resort pool deck

Regent Bruce Felmly and wife Susan

Fortuño and herself a lawyer.

She was followed by **Hon. Federico Hernández Denton**, Chief Justice of the Supreme Court of Puerto Rico. A graduate of Harvard and of the Harvard Law School, he dwelt on the impact of the current world economic crisis on the integrity and independence of the courts. Indeed, world economic problems were a recurring undercurrent in a number of the program presentations. Chief Justice Denton's remarks, as well as those of a number of other program participants, may be found elsewhere in this issue.

His remarks were followed by a panel discussion of the perennial controversy over the future status of Puerto Rico. Moderator **Dr. Efrén Rivera-Ramos**, Professor of Law at the University of Puerto Rico School of Law, set the background for the discussion by outlining the history of the relationship between the United States and Puerto Rico, beginning with the Treaty of Paris of 1898, in which the United States acquired control of that island.

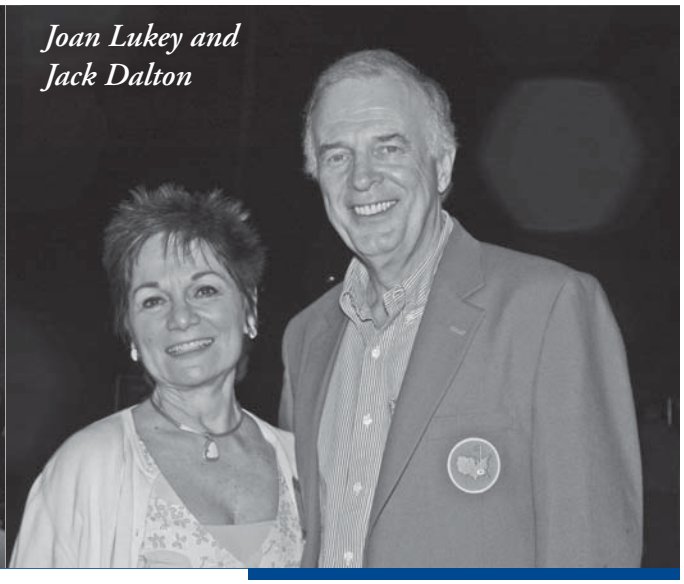
Senator Eduardo A. Bhatia-Gauthier, deputy minority leader of the Popular Democratic Party in the Puerto Rico Senate, argued in favor of commonwealth status for Puerto Rico. **Dr. Carlos Iván Gorrin-Perralta**, Professor of Constitutional Law at the Inter-American School of Law in San Juan, argued for independence. **Hector Reichard, Jr.,** FACTL, former Secretary of Justice for the Commonwealth of Puerto Rico, argued in favor of statehood. All agreed that the issue should be submitted to a referendum and resolved.

The Friday morning program closed with a panel discussion that used the celebrated incident in which the State of Texas had raided the Fundamentalist Church of Jesus Christ of Latter Day Saints ranch near El Dorado, removing for a time all the children it found there, in response to what had turned out to be a series of hoax telephone calls. Moderated by Regent **Christy D. Jones**, Jackson, Mississippi, who set the factual scene, the discussion covered two aspects of the incident: the criminal and civil procedural questions raised by the raid itself and the deeper constitutional questions raised by the underlying issues of polygamy and "spiritual marriages" of children with older men at Yearning for Zion Ranch.

The panelists were: **Gerald H. Goldstein**, FACTL, San Antonio, who represents the church and one of its bishops in connection with criminal charges growing out of the raid; **Don J. DeGabrielle, Jr.**, Houston, Texas, until recently United States Attorney for the Southern District of Texas; **Hon. Nancy Gertner**, JFACTL, United States Judge for the District of Massachusetts; **Hon. Ronald B. Leighton**, JFACTL, United States Judge for the Western District of Washington, and **Hon. Kathleen McDonald O'Malley**, United States Judge for the Northern District of Ohio.

On Friday evening the Fellows and their guests were ferried by boat from the El Conquistador Marina

Salsa dancers at opening ceremony



Joan Lukey and Jack Dalton

to Paradise Island, the private island owned by the hotel, for an evening of Caribbean refreshments and cuisine and dancing barefoot in the sand.

The Saturday morning program began with an uplifting presentation by **Thomas A. Mars**, Executive Vice-President and Chief Administrative Officer of Wal-Mart Stores, Inc., former general counsel of that company and chair of the American Bar Association Minority Counsel Program Steering Committee. His topic: *Doing Well by Doing Good: Why Clients Seek Diversity in their Law Firms.*

There followed a presentation by **Paul C. Saunders**, FACTL, Chair of the College's Task Force on Discovery covering the project of that committee. Carried out in conjunction with the Denver University-based Institute for the Advancement of the American Legal System, that project had involved an online survey of the Fellows who do civil trial work. It had culminated in the publication of a set of suggested principles to be considered in addressing the causes of cost and delay that have increasingly led to the vanishing trial syndrome. The report of the Task Force, which has since attracted widespread national attention, had been adopted by the Board of Regents at its meeting earlier in the week.

Ward Bower, a principal in the law firm consulting firm, Altman Weil, Inc., Newton Square, Pennsylvania, gave a report entitled *The Effect of the Economy on the North American Legal Profession.* In it, he both reported on the perceived effects of the economic downturn and made some short- and long-term predictions about the future of law firms in a changing environment.

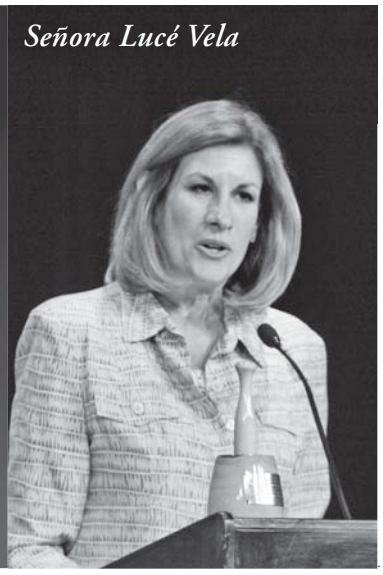
The Saturday program wrapped up with a panel discussion entitled *Environmental Responsibilities of the Business and Legal Communities.* Moderated by Regent **Chilton Davis Varner**, FACTL, Atlanta, Georgia, the participants were: **Francisco Javier Blanco**, San Juan Puerto Rico, architect and environmentalist and founder of the Puerto Rico Conservation Trust, who addressed efforts to rescue and preserve his island from environmental ravages; **Steven J. Martin** AIA, Washington, District of Columbia, a principal in an architectural firm, who directs his firm's regional practice in designing environmentally friendly physical facilities for law firms**; Kathleen Matthews**, Executive Vice-President Global Communications & Public Affairs, Washington, District of Columbia, a former Emmy-winning television news anchor; and **Jack Van Woerkom**, Executive Vice-President and General Counsel of The Home Depot, Atlanta, Georgia.

The Spring Banquet saw the induction of 81 new Fellows. The response for the new fellows was given by **Joseph C. Laws, Jr.,** San Juan, Puerto Rico, Public Defender for the District of Puerto Rico.

The next national meeting of the College is scheduled for October 8-11, 2009 in Boston, Massachusetts.


Alvaro R. Calderon, Jr.


Chilton Davis Varner


Señora Lucé Vela

Dear God, as Fellows of the American College of Trial Lawyers, we pray to you for help and inspiration, particularly in this very difficult time of economic crisis. Give us the wisdom and fortitude to endure and overcome this global storm. Give us the light and knowledge to be just in our profession. Give us the moral strength to be an example of rectitude in our society, and give us the sensibility to realize that there are many millions of people in the world that suffer hunger and poverty, and show us the ways in which we can help them. We thank you for all you have given us, and we pray for our families, our friends, for our leaders in government, and especially for world peace. Amen.

Opening prayer,
***Alvaro R. Calderon, Jr.,** FACTL*
San Juan, Puerto Rico

OFFICER NOMINATIONS SET

At the Annual Meeting in Boston, the officers' nominating committee will nominate the following Fellows to serve as officers of the College for the year 2009-2010:

PRESIDENT: **Joan A. Lukey**, Boston, Massachusetts
PRESIDENT-ELECT: **Gregory P. Joseph**, New York, New York
SECRETARY: **Chilton Davis Varner**, Atlanta, Georgia
TREASURER: **Thomas H. Tongue**, Portland, Oregon

These four and Immediate Past-President **John J. (Jack) Dalton** will constitute the Executive Committee for the coming year.

Under the College Bylaws the Board elects its officers upon nomination by the past presidents at a reorganizational meeting immediately following the annual business meeting. Only a Fellow who has previously served as a Regent is eligible to serve as an officer.

TASK FORCE REPORT GETS WIDE PUBLICITY

"The report has been like a breath of fresh air, and it has stimulated wide interest and a great deal of thought, a great deal of conversation about the topic . . . excessive cost. It's really caught the attention of the trial bar and of the corporate bar as well."

Paul Saunders

This observation by Thomas Allman, co-chair of the Sedona Conference Working Group on Electronic Document Retention and Production, quoted in BNA: Digital Discovery & e-Evidence, May 4, 2009, reflects the public's reception of the final report of the joint project of American College of Trial Lawyers Task Force on Discovery and the University of Denver-based Institute for the Advancement of the American Legal System.

That report, setting forth the recommended principles for reform of civil procedure, has received wide publicity in the media and has generated widespread interest among those charged with civil rulemaking in various jurisdictions.

Accepted and approved by the Board of Regents on February 25, 2009 and released for publication on March 11, the report was the subject of a presentation by **Paul C. Saunders**, the chair of the College's effort, at the College's Spring 2009 meeting in Puerto Rico.

In the intervening three and one-half months, an Associated Press story on the release of the report was

republished by 157 press, broadcast, television and other media outlets across the United States. The report has been the subject of articles in publications ranging from *The National Law Journal, BNA: Digital Discovery & e-Evidence, The New York Times, USA Today, The Washington Post,* and *The Wall Street Journal* to the Billings, Montana *Gazette* and the *Fort Mill (South Carolina) Times*. It has been linked on at least 29 blogs and already cited in at least three academic papers.

In draft form, the Principles outlined in the report had been the subject of a public hearing before the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, in which Saunders, Institute Executive Director **Rebecca Love Kourlis** and College Treasurer **Gregory P. Joseph**, a former chair of the College's Federal Civil Procedure Committee, had participated.

The released report was then a major subject at a Civil Rules Summit in early March, sponsored by the Institute, which was attended by over thirty delegates from the bench, academia, representative clients and the practicing bar. Attendees included members of the Judicial Conference's Standing Committee, including its chair, and the chair of the Civil Rules Advisory Committee, as well as six Fellows who had participated in the Task Force's work.

THE GENESIS OF THE PROJECT

The project was perhaps unique in the College's history, since it involved a joint effort with an outside institution. It had its genesis when former Colorado Supreme Court Justice Rebecca Love Kourlis, the Executive Director of the Institute, a national nonpartisan organization dedicated to improving the process and culture of the civil justice system in the United States, participated in the College's Spring 2007 meeting program. At that meeting, several speakers addressed the phenomenon of the vanishing civil trial. After then attending a meeting of the College's Federal Civil Procedure Committee and listening to the discussion, Justice Kourlis had offered the research and financial resources of her organization for a joint study with the College of this growing problem.

In response, then College President **David J. Beck** appointed an ad hoc College task force to work jointly with the Institute. Chaired by Fellow Paul C. Saunders, New York, New York, the Task Force included eighteen Fellows drawn from varied segments of the civil trial bar, including advocates of the viewpoints of both plaintiffs and defendants, and two judges, one from the United States, one from Canada. Notably, three of its members, **Phillip R. Garrison**, Springfield, Missouri, **Robert L. Byman**, Chicago, Illinois and **Francis M. Wikstrom**, Salt Lake City, Utah, have since been elected to the College's Board of Regents.

Although originally intended to focus primarily on problems with the civil discovery process, the Task Force quickly perceived that the subject could not be addressed in isolation, and the mandate of the project was thus broadened to examine other parts of the civil justice system that relate to and have a potential impact on discovery.

THE PROCESS

The Task Force meetings were jointly led by Saunders and Justice Kourlis. Members of the Institute staff assigned to the project staffed the meetings and provided research support. The expense of the meetings was borne by the Institute. College past president **E. Osborne (Ozzie) Ayscue, Jr.**, who is a member of the Institute's Board of Advisors, participated as its liaison to the project. Over the course of their work, the participants held seven two-day meetings and participated in additional lengthy conference calls, devoting hundreds of hours to the task. They began by studying the history of the Federal Rules of Civil Procedure, past attempts at reforms, prior cost studies, academic literature commenting

on and proposing changes to the rules and media coverage of the cost of litigation.

The first goal of the project was to determine from factual analysis whether a problem actually existed and, if so, to determine its dimensions. The Task Force therefore worked with an outside consultant to design and conduct a survey of the Fellows of the College engaged in civil trial practice to create a database from which to work. IAALS contracted with Mathematica Policy Research, Inc. to manage the survey and bore its full cost. Mathematica then compiled the results of the survey and issued a lengthy report.

The survey was administered over a four-week period in the Spring of 2008. The response rate was a remarkably high 42 percent. On average, the respondents had practiced law for 38 years. Twenty-four percent represent plaintiffs exclusively, 31 percent represent defendants exclusively and 44 percent represent both, but primarily defendants. About 40 percent of the respondents litigate complex commercial disputes, but fewer than 20 percent litigate primarily in federal court (although nearly a third split their time equally between federal and state courts).

For the most part there was no substantial difference between the responses of those who represent primarily plaintiffs and those who represent primarily defendants, at least with respect to the action recommended in this report.

SURVEY RESULTS

Three major themes emerged from the Survey:

1. Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test, while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.

2. The existing rules structure, including notice pleading as opposed to fact pleading, does not always lead to early identification of the contested issues to be litigated, which often leads to a lack of focus in discovery. As a result, discovery can cost far too much and can become an end in itself.

3. Judges, preferably a judge who will handle the case through trial, should have a more active role from the beginning of a case in designing the scope of discovery and the direction and timing of the case from the pleading stage through trial.

In September 2008, the Task Force and the Institute published a joint Interim Report, describing the results of the survey in much greater detail. It was the subject of an article in the Fall 2008 issue of the College *Bulletin*, Issue 60 at page 4, and was posted on the websites of both the College, www.actl.com, and the Institute, www.du.edu/legalinstitute. That report itself attracted wide attention in the media, the bar and the judiciary.

DEVELOPMENT OF SUGGESTED PRINCIPLES FOR REFORM

Recognizing the need for serious consideration of change in light of the survey results, the Task Force and the Institute continued to study ways of addressing the problems they highlighted. It had the benefit of participants who practice under various civil procedure systems in the United States and Canada, including both notice pleading and code pleading systems. It examined in detail civil justice systems in Canada, Australia, New Zealand and Europe, as well as arbitration procedures and criminal procedure, and compared them to our existing civil justice system.

The Task Force and the Institute ultimately agreed on a proposed set of Principles that would shape solutions to the problems it had identified. These Principles were developed to work in tandem with one another and are intended

to be evaluated in their entirety. The Task Force recommended and the College's Board of Regents agreed that the proposed Principles, which can be applied to both state and federal civil justice systems, be made the subject of public comment, discussion, debate and refinement by all the stakeholders with an interest in a viable civil justice system, including state and federal judiciaries, the academy, practitioners, bar organizations, clients and the public at large. The Principles are set out below.

NEXT STEPS

It was the hope of the Task Force and the Institute that their joint report would inspire substantive discussion among practicing lawyers, the judiciary, the academy, legislators and, most importantly, clients and the public. The participants believed that if so, these Principles might one day form the bedrock of a reinvigorated civil justice process and spawn a renewal of the flagging public faith in America's system of justice.

From the reception the report has received, it is apparent that it has indeed caught the attention of many stakeholders in the civil justice system. The report has already been downloaded from the Institute's website alone over three hundred times. Justice Kourlis and Paul Saunders have already responded to a number of requests for presentation of the Principles to various interested groups, and those requests have continued to come in. The Section of Litigation of the American Bar Association, whose incoming chair attended the Institute's Civil Rules Summit, is itself administering the survey in a modified form to its members.

At least thirteen jurisdictions have indicated an interest in considering a monitored pilot project to test the effectiveness of the Principles proposed by the Task Force and the Institute. In response to this interest, the Task Force decided to continue its work with the Institute. It is now working on a set of model rules that might be used in such monitored pilot projects.

It appears that rule makers, prompted in part by the Task Force report, are for the first time in a long while taking an objective look at the civil rules in their entirety, as opposed to addressing only discrete parts of them.

Fellows of the College are urged to study both the Interim Report and the Final Report, so that they may be prepared to assist in any studies or projects that these reports may inspire in their own jurisdictions.

— E. Osborne Ayscue, Jr.

THE SUGGESTED PRINCIPLES

The Principles suggested by the Task Force and the Institute follow in bold, with prefatory notes in italics. The extensive comments that explain these Principles and relate them to the results of the survey of the Fellows of the College to which they are intended to respond may be found on both the College's and the Institute's websites, **www.actl.com** and **www.du.edu/legalinstitute**.

The Purpose of Procedural Rules: Procedural rules should be designed to achieve the just resolution of every civil action. The concept of just resolution should include procedures proportionate to the nature, scope and magnitude of the case that will produce a reasonably prompt, reasonably efficient, reasonably affordable resolution.

1. GENERAL

The "one size fits all" approach of the current federal and most state rules is useful in many cases but rule makers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently.

2. PLEADINGS

The Purpose of Pleadings: Pleadings should notify the opposing party and the court of the factual and legal basis of the pleader's claims or defenses in order to define the issues of fact and law to be adjudicated. They should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should set practical limits on the scope of discovery and trial and should give the court sufficient information to control and supervise the progress of the case to trial or other resolution.

Notice pleading should be replaced by fact-based pleading. Pleadings should set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses.

A new summary procedure should be developed by which parties can submit applications for determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials without triggering an automatic right to discovery or trial or any of the other provisions of the current procedural rules.

3. DISCOVERY

The Purpose of Discovery: Discovery should enable a party to procure in admissible form through the most efficient, nonredundant, cost-effective method reasonably available, evidence directly relevant to the claims and defenses asserted in the pleadings. Discovery should not be an end in itself; it should be merely a means of facilitating a just, efficient and inexpensive resolution of disputes.

Proportionality should be the most important principle applied to all discovery.

Shortly after the commencement of litigation, each party should produce all reasonably available nonprivileged, non-work product documents and things that may be used to support that party's claims, counterclaims or defenses.

Discovery in general and document discovery in particular should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness.

There should be early disclosure of prospective trial witnesses.

After the initial disclosures are made, only limited additional discovery should be permitted. Once that limited discovery is completed, no more should be allowed absent agreement or a court order, which should be made only upon a showing of good cause and proportionality.

All facts are not necessarily subject to discovery.

Courts should consider staying discovery in appropriate cases until after a motion to dismiss is decided.

Discovery relating to damages should be treated differently.

Promptly after litigation is commenced, the parties should discuss the preservation of electronic documents and attempt to reach agreement about preservation. The parties should discuss the manner in which electronic documents are stored and preserved. If the parties cannot agree, the court should make an order governing electronic discovery as soon as possible. That order should specify which electronic information should be preserved and should address the scope of allowable proportional electronic discovery and the allocation of its cost among the parties.

Electronic discovery should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court's

adjudication, expense and burdens.

The obligation to preserve electronically-stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation; however, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.

Absent a showing of need and relevance, a party should not be required to restore deleted or residual electronically-stored information, including backup tapes.

Sanctions should be imposed for failure to make electronic discovery only upon a showing of intent to destroy evidence or recklessness.

The cost of preserving, collecting and reviewing electronically-stored material should generally be borne by the party producing it but courts should not hesitate to arrive at a different allocation of expenses in appropriate cases.

In order to contain the expense of electronic discovery and to carry out the Principle of Proportionality, judges should have access to, and attorneys practicing civil litigation should be encouraged to attend, technical workshops where they can obtain a full understanding of the complexity of the electronic storage and retrieval of documents.

Requests for admissions and contention interrogatories should be limited by the Principle of proportionality. They should be used sparingly, if at all.

4. EXPERTS

Experts should be required to furnish a written report setting forth their opinions, and the reasons for them, and their trial testimony should be strictly limited to the contents of their report. Except in extraordinary cases, only one expert witness per party should be permitted for any given issue.

5. DISPOSITIVE MOTIONS

The Purpose of Dispositive Motions: Dispositive motions before trial identify and dispose of any issues that can be disposed of without unreasonable delay or expense before, or in lieu of, trial.

6. JUDICIAL MANAGEMENT

A single judicial officer should be assigned to each case at the beginning of a lawsuit and should stay with the case through its termination.

Initial pretrial conferences should be held as soon as possible in all cases and subsequent status conferences should be held when necessary, either on the request of a party or on the court's own initiative.

At the first pretrial conference, the court should set a realistic date for completion of discovery and a realistic trial date and should stick to them, absent extraordinary circumstances.

Parties should be required to confer early and often about discovery and, especially in complex cases, to make periodic reports of those conferences to the court.

Courts are encouraged to raise the possibility of mediation or other form of alternative dispute resolution early in appropriate cases. Courts should have the power to order it in appropriate cases at the appropriate time, unless all parties agree otherwise. Mediation of issues (as opposed to the entire case) may also be appropriate.

The parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution.

All issues to be tried should be identified early.

These Principles call for greater involvement by judges. Where judicial resources are in short supply, they should be increased.

Trial judges should be familiar with trial practice by experience, judicial education or training and more training programs should be made available to judges.

FELLOWS IN PRINT

Frank G. Jones, of counsel and retired Fulbright & Jaworski litigation partner in Houston, has written *Lessons from the Courtroom*. Based on his 40 years of practice through more than 100 jury trials, Jones sets out lessons to be learned in the courtroom and tactics of the trade. The book is available from Kaplan Publishing.

Alan G. Greer of Miami, Florida has written *Choices & Challenges, Lessons in Faith Hope and Love* with Morgan James Publishing Company. Not the usual lawyer book, it explores relationships between God and each other.

bon mot

Last summer Joan [Lukey] called me and asked me to come speak about the Home Depot's environmental policies, and it reminded me: Joan and I were young associates . . . at Hale and Dorr in Boston . . . She was obviously a fast-rising litigator, and I was a corporate attorney, and she and all the litigators were doing all these exciting things, going to court and depositions. They always had great stories, and I was drafting board votes and proofreading prospectuses. Joan said one day . . . I don't mean to imply anything about age here, but Joan was senior to me, and she came into my office . . . and asked me, "Look, I've got a case that's going to be called for trial tomorrow. I can't make it. Can you just go cover this for me?" She said, "Really, don't worry about it. There's a whole list of cases on the list, and they probably won't get to you. If they do, just say 'ready' when called. Okay?" And she gave me the file, which then, and probably still now, was a mystery to me, and directions to get to the Middlesex courthouse and where the courtroom was. I went and sat in the courtroom. The first thing I learned is you can't read the newspaper in the courtroom. And . . . they went through the list of trials, and, you know, this one couldn't go forward for that reason, that couldn't go forward for that reason, and they got to this trial. And I started thinking of all the TV shows I had seen about trials and, oh, yeah, I could impanel a jury. Sure, no problem. Fortunately, the judge decided to take his lunch, and I was able to call Joan and she came and rescued me. But I was thinking of that today because she's done the same thing to me again.

Jack Van Woerkom, Executive Vice-President and General Counsel, The Home Depot, Environmental Responsibilities panelist

bon mot

AWARDS, HONORS *and* ELECTIONS

Terry O. Tottenham

Terry O. Tottenham of Houston, Texas, has been chosen president-elect of The State Bar of Texas and will take over as president in 2010.

John J. Jurcyk, Jr. of Lake Quivira, Kansas, has received the Distinguished Alumnus Award from the Kansas University School of Law.

Frank N. Gundlach of St. Louis, Missouri has been selected as the Washington University School of Law's 2010 Distinguished Alumnus.

Regent **J. Donald Cowan, Jr.** of Raleigh, North Carolina, was named 2009 NCBA Foundation CLE Volunteer of the Year.

John R. (Buddy) Wester of Charlotte, North Carolina, is the new president of the North Carolina Bar Association, succeeding Fellow **Charles L. Becton**, Raleigh.

William L. Osteen, Greensboro, North Carolina, retired United States Judge for the Middle District of North Carolina, Regent **John S. Siffert,** New York, New York, and **Harry H. Schneider, Jr.**, Seattle, Washington have received the American Inns of Court Professionalism Award for their respective Federal Circuits.

ROSTER UPDATE

Preparations for the 2010 edition of the ACTL Roster are underway. Address change notices will be sent to all Fellows mid July. Please mail any changes to the National Office so that we can update your listing. If you have changed firms or moved, please be sure to include your new e-mail address, telephone and fax numbers.

GOING GREEN, cont'd from cover

The following excerpts from the discussion are edited for brevity:

THE ARCHITECT-ENVIRONMENTALIST

Martin, who specializes in law firm planning, made the first presentation: As architects, we are keenly aware of the significant impact that buildings have on the environment due to the high percentage of energy and resources consumed by buildings and a high percentage of carbon emissions that buildings produce. This also gives us an incredible opportunity to make a difference in mitigating these impacts through a commitment to integrate sustainable strategies in every aspect of design and what we do.

There are many definitions to "sustainability," but I really like this one: Sustainability is meeting the needs of the present without compromising the ability of future generations to meet their own needs. We're all stewards, and what we do will significantly impact our grandchildren and their children.

I'd like to give you a glimpse into some of what is taking place in the building industry to address these issues of sustainability and then focus specifically on what some law firms are doing. . . . LEED is an acronym for Leadership in Energy and Environmental Design. It is a leading-edge system for designing, constructing, operating and certifying the world's greenest buildings. Developed by the US Green Building Council, LEED certification is now being pursued and adopted not just in the United States but in many countries around the world. There are four different levels of certification identifying degrees of sustainability from Certified to Silver, then Gold, and then, very difficult to achieve, is the Platinum level. . . .

Tenants in the market, and especially law firms, are actively pursuing green buildings and crafting leases to take full advantage of all the benefits that they have to offer. Nixon Peabody's new space in San Francisco is the first LEED-certified law firm in the US and expresses the firm's commitment to sustainability and environmental responsibility. The managing partner's mandate to us was to design a space built on the foundation of light. We pulled the glass conference centers back from the perimeter window to bathe the entire space in natural daylight and to afford panoramic views of the San Francisco Bay. This natural daylighting is complemented by low-wattage, high-efficiency lighting throughout the space. The floors are recycled walnut from a nearby orchard; and all paints, adhesives and carpets are low VOC [Volatile Organic Compounds], or nontoxic. The firm purchased 100 percent green power, wind power, to offset their electrical usage and to help subsidize green power enterprises. Even the conference room chairs are made of 50 percent recycled content.

With one of the oldest environmental law practices in the country, the firm's offices reinforce its core values. They have also launched a firm-wide initiative dubbed "legally green," and they've established green teams in each of their offices under the leadership of a Chief Sustainability Officer, a new position for a law firm. . . .

A growing number of firms are actively pursuing LEED. . . . First of all, they recognize their social responsibility and they recognize the substantial impact on environment . . . . You also want to align with your clients' goals, and it's been demonstrated that sustainable workplaces boost morale and help recruiting. You want to be leaders in what you do for competitive advantage, and cost-savings are substantial, a key driver, especially in this economy. . . .

[W]hat are the key benefits that you will realize? Studies have been conducted to measure the substantial economic benefit of reduced absenteeism and increased productivity as a result of working in a healthier and more

Steve Martin

Kathleen Matthews

sustainable, comfortable environment. You'll gain a reputation for being environmentally responsible and realize significant cost-savings over the life of your lease due to reduced operating expenses. And most of all, you'll enjoy the satisfaction of knowing that you are doing the right thing. . . .

What is the legacy that you will leave behind? We can be the change that we want to see in the world.

THE INTERNATIONAL HOTEL AND RESORT COMPANY

Kathleen Matthews, presented the approach of an international hotel and resort company:

As a company . . . increasingly we were learning that our guests expected us to go with green. Deloitte did a survey last year that showed that 95 percent of hotel guests expect companies to go green. Now, they're not yet willing in great numbers to pay more for it, but they're looking for those signs like you found in the rooms here, where you'll see something on your bed saying, "Put this card on the bed if you want us to change your linens every day. Leave it off the bed and we won't change them for three days," which is even better than usually what you get at home. Same thing with the towels in the bathroom, the fact that if you put them back on the racks, they will be reused. Think about all the water that's saved from just those of us here at this conference if we did that.

We also know that our employees are valuing it more and more. . . . sort of a new generation that's coming in, but also even as boomers who really want to feel good about the way we live and the way we consume, responsible consumption is very much on all of our minds. We did a survey of our associates this year for the first time and found out that the highest engager right now is the fact that they feel good about the company's efforts going green. We also found out that Monster.com did a survey showing that 92 percent of young profession-

als say they would prefer to work for an environmentally friendly company. They're looking more at what your green policy is than they are the 401(k).

And we also have seen more and more evidence that Wall Street rewards this. As a company, we are getting lots of inquiries from investors, particularly the institutional investors, asking us what our environmental policy and sustainability policy is. And we're also finding that leading companies, companies like Wal-Mart, are actually doing better than companies that don't have sustainability baked into their DNA right now.

We also note it's at the top of the political agenda. It's part of Barack Obama's stimulus package to actually use energy and climate regulation to hopefully stimulate the US economy, create jobs and address global warming with some really aggressive goals out there, to reduce greenhouse gas emissions in this country by 80 percent by 2050 and a lot of investment in alternative energy and renewable sources. . . .

[W]e brought in Conservation International to help us map out what we should be doing in terms of an environmental strategy, to take those random acts of greenness and really move us to the next level. And our vision was to be the global hospitality leader that could demonstrate how responsible hospitality management and operations could be a positive force for the environment, but at the same time allow us to continue to grow and build hotels around the world and provide jobs around the world, in other words, to find that balance between being responsible, but also through growth as a company, and by our personal action to inspire the communities where we live and work. . . .

[W]e're trying to reduce greenhouse emissions by 25 percent in the next ten years, to expand our LEED certified hotels across all of our brands, to look at ways that maybe we could green existing hotels even more than we are now and to engage our top 40 vendors to supply price-neutral—price-neutral being the key particularly in this economy—and greener products. And again, Wal-Mart was very much our role model in that.

And then to be able to educate and inspire our employees and our guests to support the environment, to share our story with them so that they might take these lessons home. Imagine all those people who sleep on our pillows every night taking our lessons home, what a tremendous echo effect we could have.

And then with all of this, we decided we'd try to look at ways and explore ways that we might find offsets for our remaining footprint through protection of the rainforests. So the first thing we did was measure. We'd always measured how much money we were saving as a company, and in fact, Marriott has been an Energy Star sustaining member for years, the first hotel company to really be recognized by the Environmental Protection Agency for our energy conservation. But we took what had been a dollars and cents evaluation and did a first round of a carbon footprint, and we got it externally certified. . . . [W]e are able to see as a company that our footprint was 3 million metric tons, which we were able to compute was about 69 pounds per available room per night.

So we were going to try to figure out how we could engage our guests. If you're going to stay in our room one night, what would be your carbon footprint? So maybe we could get together about trying to offset that carbon footprint.

And then we also decided to move forward aggressively on green hotels, to go for LEED certification for as many hotels as we could, and we now have 29 hotels pursuing LEED certification. A year ago we just had one LEED-certified hotel in our portfolio. . . .

And then we moved into our supply chain. . . . [W]e as a company have tremendous scale in terms of our purchas-

ing and procurement opportunity. And so within the last three years, we've replaced all of the light bulbs in all of our hotels . . . with compact fluorescents, and we've had tremendous energy savings and greenhouse gas emission savings as well. We've actually just recently introduced a new recycled plastic key card, the cards that you use to get in the room. . . . Buying 24 million recycled plastic key cards halves that waste that we put into the landfill. We're also taking recycled water bottles, and they are now the stuffing in our poly pillows. We have coreless toilet paper rolls which give us more sheets per roll and gets rid of all that cardboard that was at the core of the toilet paper. . . . [W]ith our scale we've been able to do this all as a price-neutral and sometimes even cost-savings basis, and our suppliers are the ones that are coming to us saying, "What can we do to make sure that we keep your business?" . . . .

Jack VanWoerkom

And knowing that the destruction of rainforests, the burning and cutting of rainforests for farming, actually is also a contributor to climate change and greenhouse gas emissions, if we could protect rainforests on one hand, which would be the sponge for . . . the remaining emissions we had as a company, we thought we had a game-changing opportunity here. And to do it on a voluntary basis . . . we thought would be interesting. And we also thought it was a great way to get our customers engaged in the climate change debate, to help them learn and to help our associates learn, what is it that creates climate change.

And so we were approached by the state of Amazonas in Brazil to adopt 1.4 million acres of rainforest, and we had it certified through a new standard, so that it's the first Gold certified rainforest preservation forest for carbon emission reduction in the world. . . . We're hoping that law firms like yours might be interested in either joining us in our preserve or thirteen other preserves they have in the state of Amazonas, where they're trying to monetize the value of protecting the rainforest as part of climate change strategy, a strategy that you'll hear a lot of conversation around in December when we have the final round of climate change talks at Copenhagen. . . .

[W]e're trying to engage our guests in this process. We've jump-started the project with our $2 million contribution, and now we want our guests to take a look at that 69 pounds of carbon per night for their hotel stay, and for a dollar a day of their hotel stay help us offset the emissions from their hotel stay. . . .

It's been really an exciting process for us and something where we really are very proud to see what our industry is doing as well, because as we're rolling out these initiatives, we see other companies . . . also doing the same thing.

THE HOME IMPROVEMENT RETAILER

Jack Van Woerkom, General Counsel of the Home Depot,

spoke from the perspective of the world's largest home improvement retailer:

[W]e're an industry leader on sustainability issues. Because of that leadership position, we are able to effect change, not just in our own policies and how we operate our offices, like you do yours, but we can also effect change with the thousands of vendors with whom we do business, and we're also able to offer thousands of environmentally preferable products to our millions of customers.

We're committed to environmentally responsible practices. . . . [W]e do have an expert at the Home Depot on environmental issues, and his name is Ron Jarvis, and he's really been active for the company for about 11 or 12 years. . . . [H]e is not our environmental officer. . . . When he made his name in the environmental industry, he was our lumber merchant. He was responsible for those four aisles down at the end where all the contractors come. You have the big garage doors, and they back up their trucks and take the lumber out. And his job was gross margin. Not do-gooding, nothing like that, it was gross margin. So by having him in charge of this, we have embedded this in our business, in our P&L.

To help protect endangered forests and ensure that there will be timber for future generations, we issued a wood purchasing policy in 1999. From 1999 through 2008, we have been very successful in leading our vendors to understanding and practicing sustainable forestry throughout the world. . . . We committed to give preference to the purchase of wood and wood products originating from certified well-managed forests, eliminate the purchase of wood and wood products from endangered regions, and practice and promote the efficient and responsible use of wood and wood products. And, of course, we'll promote and support the development and use of alternative environmental products. . . . We sell less than one percent of the wood cut worldwide, and 94 percent of that comes from North America. Most of that comes from Canada. We have a high level of confidence in the sourcing of that wood in Canada, because Canada has a very strict and effective governmental policy there.

We also affect our customers. We've expanded our commitment to environmental sustainability with the launch of what we call Eco Options. It's a product classification whose items meet environmental performance criteria, allowing our customers to easily identify products that have less of an impact on the environment than traditional products and help them to make a difference in their own homes. Since the launch, we started at 2,000 products. We now have more than 4,000 products that bear this label. And to get a sense of that, a Home Depot might have 30 to 35,000 products in the store at one time, so that's more than ten percent of the store.

The products include no- and low- VOC [Volatile Organic Compounds] paints. . . . the environmentally preferred cleaners, Energy Star qualified products, products labeled by the EPA's Energy WaterSense program, organic plant food and much more. Each one of these products offers one or more of the following benefits: Sustainable forestry, energy efficiency, water conservation, clean air for a healthy home. . . . The CFLs (compact fluorescent light bulbs) . . . is a big seller for us, but it's high-efficiency toilets, biodegradable pots. . . .

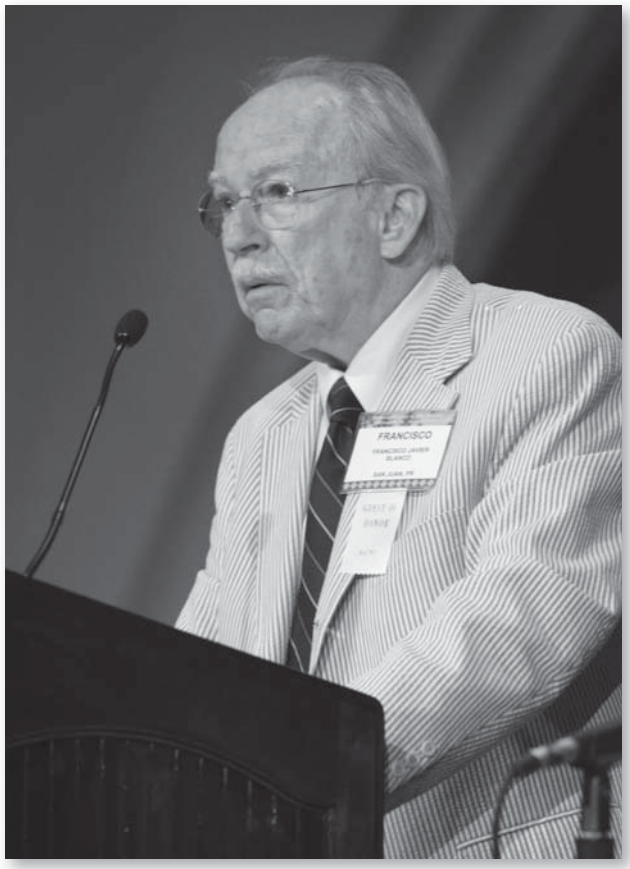
We are also responding to the energy crisis. The unprecedented cost of energy over the summer got everybody focused on it, and again, trying to deliver what our customers want. We've highlighted here a few energy-saving products that we've been featuring in our Fall and Winter [catalogs]. Echo Smart dimmable CFLs . . . will save $56 over a lifetime in your

energy cost. Steamwashers, Echo Sense tankless water heater. You may not know, but your water heater is the third largest energy expense in your house, and a tankless heater will reduce the expense by 70 percent. And high-tech thermostats.

We also walk the talk. We have LEED-certified stores, energy efficient stores. We recycle in our headquarters . . . . and [have] CFL light clouds . . . . We have six LEED-certified stores. They have special enhancements, such as special parking for fuel-efficient vehicles, low-VOC paints and adhesives, low-flow plumbing fixtures, white heat reflective roof, Dark Sky Friendly site lighting, recycling of construction waste, and we use local or regional materials to cut down on transportation. . . . [W]e've used what we've learned from these stores in the rest of our 2,000 stores around the country. . . . .

We also work on our store energy efficiencies. The overhead lighting we've converted to the 400-watt metal halide fixtures at a great savings. If you walk into one of our stores and see the lighting display, we call that the lighting cloud, and we switched all those out to CFLs. It's responsible energywise and we save money. So it's part of our business. . . .

We also offer the opportunity for our customers to recycle. We were the first national chain to offer on a national basis the ability to recycle CFL bulbs. CFL bulbs contain a small amount of mercury, and if you break one, you should be careful about how you clean it up. If you have one that burns out, you should bring it to our store and recycle it. We also provide the ability to recycle rechargeable batteries. We also recycle in the back of our shop. We recycle the cardboard, and . . . shrinkwrap and lumber wrap. . . . The great thing to know about this is people will pay you for it. And so it actually has an economic value to it.



Francisco Javier Blanco

Finally, we have a website where we try to educate our consumers and our vendors. . . . It is used by many colleges as part of the environmental curriculum . . . . We're doing a lot now, but this is a journey. We've done everything we can to make it part of our business, embedded in our business, and we believe we can always do more.

ENVIRONMENTAL CONSERVATION IN PUERTO RICO

Sr. Blanco, a pioneer in environmental protection and conservation told the Puerto Rico story:

My major involvement in conservation, but better still, in protection of nature, began in 1969 when the trustees of the Puerto Rico Conservation Trust chose me to be its executive director. Given the unique nature of this institution, it's important to know how it came about, for what purpose and what it has done. . . . [T]he trust is an NGO [Non-Governmental Organization], but it is

the brainchild of the US Secretary of the Interior, who in 1968 convinced the Governor of Puerto Rico to agree with him by establishing a private entity to protect nature in the island. Furthermore, he went on to convince the petroleum refiners and petrochemicals doing business in Puerto Rico to provide the funding for a period of ten years.

It was also agreed that the Governor and the Secretary would jointly appoint the three trustees and have a personal representative of each in an advisory council. Initial funding was $2.5 million and projected revenues 14 million, and these are 1968 dollars. Given these projections, the trustees decided to protect the island's nature through the purchase of land or controlling interest thereon, in other words, buy green.

The reason for adopting this policy lies in the basic realities of Puerto Rico. It's an island 35 miles by 100. 3,500 square miles, with a population of 3,950,000, one of the world's densest, and 1,130 persons per square mile. The problem does not reside in these numbers; it is in what these people do or don't do. In short, what matters is their behavior.

The car is the favorite means of transport, so there are 2.2 million of them. . . . Last year, for instance, they burned $3 billion worth of gas. This population, for the most part, is housed in the most inefficient way, the single-family dwelling on an individual lot. The resulting sprawl devours our limited land surface. It has drained lagoons, filled mandrels, paved over aquifers, leveled hills and mountains, razed forests, buried creeks and streams, destroyed habitats. It is a menace to our own quality of life. All this destruction offers ample justification for the trustees' determination to invest in land.

[Illustrating with slides of various properties, he continued.] Thus, exceptional properties were required. All were in danger under the pressure of development, be it for housing, industry or tourism. One was to be developed into a satellite city of 60,000 persons. Another was owned by a multinational petroleum refinery. Another had approved permits for a marina, golf courses and hotel complex. . . . One was a garbage dump for five municipalities, and so on and so on with the others. During my watch, the program saved sixteen sites for a total of 18,000 acres. Nevertheless, more land has to be secured, especially for the production of clean energy, not from biofuels, but to build windmill farms and solar rays, because we have plenty of that . . .

Even with all the Trust's nature reserves and possible future acquisitions of land by other entities for clean energy generation and other minimal-impact initiatives, Puerto Rico has a long way to go before being green in the sense of the word being used nowadays. To project how far we have to go, all you need to know is that with all the building construction that envelops the island, there is just one building that has been certified green of the Platinum category. There are just ten in line for certification by the US Green Building Council. If we in Puerto Rico continue to behave as we have done to now, being green in the future will be almost impossible.

CONCLUSION

The panel then responded to questions from the audience. One question on everyone's mind had to do with the impact on the depressed economy of green initiatives. The consensus answer was that sustainability is about cost-savings and financial benefits and that pursuing those green policies and investments that help a business to save money or that carry with them tax advantages is a plus in tough economic times.

PANEL WRESTLES WITH PUERTO RICO'S FUTURE:

A 51st State, A Territory, Independent?

Moderated by Dr. Efrén Rivera-Ramos, a professor of law at the University of Puerto Rico School of Law, a panel of top experts at the Spring meeting debated the question of Statehood v. Territorial Status in Puerto Rico.

Dr. Efrén Rivera-Ramos

Puerto Rico Senator **Eduardo A. Bhatia** spoke in favor of Puerto Rico becoming a commonwealth. Law professor **Dr. Carlos Iván Gorrín-Perralta** argued for independence and **Héctor Reichard, Jr**., FACTL, former Secretary of Justice for the Commonwealth of Puerto Rico, favored statehood.

Ramos, who has BA and JD degrees from the University of Puerto Rico, an LLM from Harvard University and a Ph.D. in law and theory from University College London, is a recognized expert on the constitutional and legal aspects of the political relationship between the United States and Puerto Rico.

Bhatia is a Popular Democratic Party deputy minority leader in the Puerto Rico Senate. A graduate of Princeton University and of the Stanford School of Law, he was a Fulbright Scholar at the law faculty of the University of Chile. From 2005 to 2008, he served in Washington as the Executive Director of the Puerto Rico Federal Affairs Administration, the official federal liaison of the Commonwealth of Puerto Rico.

Gorrín-Perralta is professor of constitutional law at the Inter-American University School of Law in Puerto Rico. A graduate of the College of the Holy Cross, he received his JD degree from the University of Puerto Rico and an LLM from Harvard University. He has served as legislative consultant for the Puerto Rican Independent Party delegation in the Puerto Rico Senate.

Reichard, Jr., Reichard & Escalara, San Juan, Puerto Rico, is a former Secretary of Justice for the Commonwealth of Puerto Rico and a president of the Puerto Rico Chamber of Commerce, he has also served in several leadership roles in the American Bar Association and taught at the Inter-American University and the Pontifical Catholic University School of Law, where he also serves on its board of trustees.

PANEL PRESENTATION

To provide a background for the positions of the panelists on the future of Puerto Rico, Ramos presented some key historical events that have defined or contributed to define the relationship between the US and Puerto Rico, making brief references to some of the main features of that relationship.

BASIC HISTORICAL EVENTS

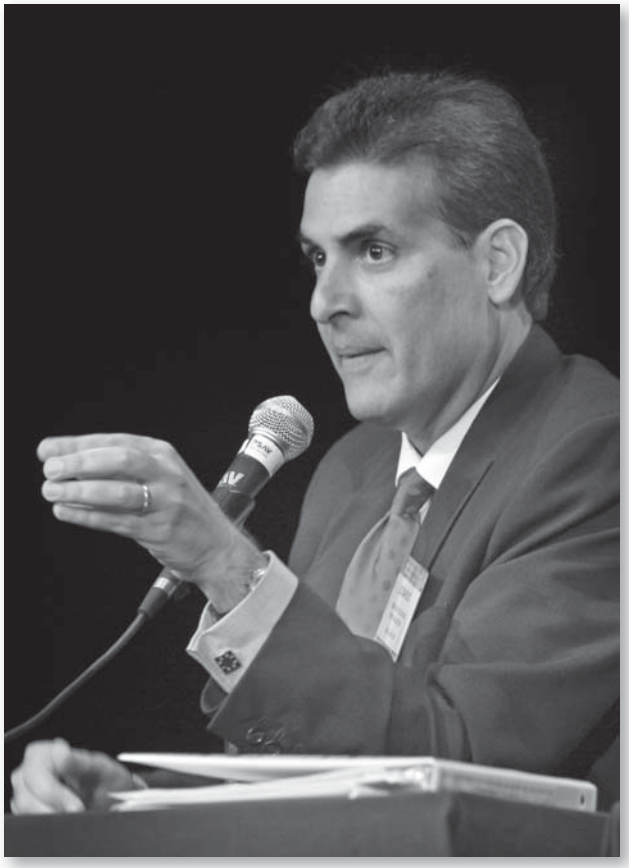
Puerto Rico was a colony of Spain for over 400 years. It was ceded by Spain to the United States in the Treaty of Paris of 1898, which concluded the Spanish-Cuban-Filipino-American War [Ramos' label for what North Americans call the Spanish-American War]. Puerto Rico had a military government for two years, and then in 1900, the United States Congress for the first time provided for a civilian government for Puerto Rico.

From 1901 to 1922, the United States Supreme Court had rendered a series of decisions collectively known as the *Insular Cases* -- the cases from the islands -- in which it concluded that Puerto Rico should be considered an "unincorporated territory" of the United States, a new category devised by the Court for those purposes. According to the Supreme Court, that meant, "that Puerto Rico belonged to, but was not a part of, the United States."

In 1917, Congress passed another Organic Act for Puerto Rico, the main consequence of which was to extend United States citizenship to inhabitants of Puerto Rico. And so, from 1917 on, people born in Puerto Rico became US citizens by birth.

Until 1947, the government of Puerto Rico was directly appointed by the President of the United States. It was not until 1946 that a Puerto Rican was appointed Governor of Puerto Rico, and in 1947, Congress for the first time authorized Puerto Ricans to elect their own government.

In 1950, Congress passed Public Law 600, authorizing Puerto Rico to adopt its own constitution. After a two-year process, Puerto Rico adopted its own constitution in 1952, and upon confirmation of that constitution by the government, Puerto Rico came officially to be known in Spanish as the *El Estado Libre Asociado de Puerto Rico*, which literally means



Eduardo A. Bhatia-Gautier

Carlos Iván Gorrín-Perralta

"freely associated state." In English, it was officially branded as "The Commonwealth of Puerto Rico."

THE CURRENT STATUS

Since that time, controversy has continued, with some alleging that the so-called "territorial" or "colonial" status of Puerto Rico had ended, and others saying that it had not ended. That discussion has continued to this day.

Puerto Rico has never participated in or held a federally sanctioned plebiscite on the question of the political future of Puerto Rico. There have been several locally organized plebiscites, the last in 1998. In that plebiscite, there were five options: One, territorial commonwealth, gained .01 percent of the vote. Two, statehood, gained 46.5 percent. Three, independence, received 2.5 percent. Four, "freely associated state," got a few votes. Fifth, "none of the above," got 50.3 percent of the vote!

The main features of the US-Puerto Rico relationship are: According to the Congress, the Executive and the Supreme Court of the United States, Puerto Rico is subject to what the Court has called the plenary powers of Congress under the Territorial Clause of the United States Constitution. Federal laws apply to Puerto Rico unless Puerto Rico is specifically exempted. A person born in Puerto Rico is a US citizen and has the right to bear a US passport. Residents of Puerto Rico may enter freely into the United States. Congress has exempted residents of Puerto Rico from payment of federal taxes on income produced in Puerto Rico. Residents of Puerto Rico, even though US citizens, do not have the right to vote for the President of the United States or to elect representatives of the US Congress, except for an officer known as the Resident Commissioner for Puerto Rico, who sits in the United States House of Representatives. He may

participate in House committees but cannot cast a final vote on legislation proposed in the House, even though that legislation may apply to Puerto Rico.

POSSIBLE OPTIONS FOR CHANGE

The three options that have traditionally been discussed have been: 1. statehood, becoming one of the United States; 2. independence, becoming an independent sovereign state, or 3. some sort of enhanced commonwealth that would have more autonomous powers than it enjoys at the present moment. A fourth option that has been discussed recently is akin to the freely associated status the Marshall Islands have with the United States and that the Cook Islands have with New Zealand.

THE OPTIONS DISCUSSED

Each panel member then addressed one of these historical options. Their remarks are edited for brevity.

Speaking for commonwealth status, Bhatia said, "[W]e have a mess when it comes to the status of Puerto Rico, and it's a mess that was created by the lack of US policy at the right time. . . . Eight years from now, it will be 100 years since Puerto Ricans became US citizens. Over 95 percent of Puerto Ricans for many reasons want to remain US citizens and want to participate as US citizens in the national system, 'national' being in this case the United States' system."

He argued that the US Congress should allow Puerto Ricans the option to vote for commonwealth status.

Professor Gorrín-Perralta then spoke in favor of independence.

"I must confess," he began, "that I'm not sure whether I'm in the right program. You see, the title of this program is Statehood v. Territorial Status in Puerto Rico, and I certainly don't want Puerto Rico to remain a territory of the US, nor do I want it to become a state of the Union. I want the people of Puerto Rico to exercise full sovereignty as an independent republic. Juridically, after all, the only option to which the people have a right, according to international law, is precisely independence."

"Only through full sovereignty," he concluded, "can we solve the problem with the establishment of independent republic of Puerto Rico with strong economic ties to the US, which is, of course, of mutual benefit to both countries. The experience of many small nations . . . has shown that by using sovereign powers to their advantage in the new globalized economy, these nations have soared past us while we remain in the economic stagnation of a failed colonial regime. . . . The time has come to end . . . the anomaly of colonialism in the oldest colony of the world."

Reichard then spoke in favor of statehood for Puerto Rico.

"[T]he word is 'equality.'" By way of illustration, he shared his story of how he had become Puerto Rico's delegate to the American Bar Association, only to discover that there was no provision for Puerto Rico to participate in the rotation of seats on the ABA Board of Governors. Ultimately, he became the first minority person ever to sit on that Board.

His thesis was, "We are part of the United States, and we claim our right to be equal under the flag. And if what we postulate as the principles of this nation is true, it is to our shame that I am here today pleading for statehood. We should have

been a state many, many years ago. . . . Puerto Rico right now is in the mainstream of the United States in terms of the laws applicable to this island. Very few laws are not applicable. We have an Article III court, but we lack representation. We cannot vote. Our benefits are less than other citizens of the United States. . . . [T]here is a genius to the US Constitution. That constitution is blind to differences. It means culture is not an issue. It means that the language is not an issue. . . . If there are differences that need to be attended other than what we claim as non-negotiables, there are enabling acts. There are different ways to do it."

Héctor Reichard, Jr.

Ramos ended the discussion by asking each panelist, "What in your minds should be the next step in this process?"

Bhatia: "I am begging locally for a case that will make it to the Supreme Court. I know that we usually should go through the different channels, political channels and Congress and whatnot. I've spent so many years doing that, and I'm just frustrated. I think the Supreme Court should at some point make it very clear: Is it possible or is it not possible for Puerto Rico to have a relationship other than a territory, other than a state, under the US Constitution? If the answer is no, fine. Then we'll move on. If the answer is yes, make it very clear. But I think this sort of state of limbo is created more by the lack of action of the United States than by the lack of interest in Puerto Rico. . . . This is not about self-determination. It's about mutual determination. I think it's time for Washington to put Puerto Rico on its radar and make sure that something happens regarding the definition of what the future should look like."

Gorrin-Perralta: "I agree. Congress must be pressed into a corner. They have refused to act. . . . I think the Puerto Rican people . . . should come open to a constitutional convention and decide what we want to do. And then, with the support of the theoretical legitimacy of a constitutional convention, go to Washington and force a Congress to act, to respond to whatever proposal the constitutional convention might put into discussion. If it's rejected, good. If it's modified, then let's talk about it. But let's put the case in the agenda."

Reichard: "Yes. I support fully the constitutional convention. I think that's the right way to go. And as soon as that is clear, I think it should be before Congress."

bon mot

I have learned many years ago that we in Puerto Rico shouldn't presume that everybody knows a lot about our country. Years ago when I was studying in London, a German friend of mine introduced me to a British friend of his. And when he introduced me, he said, "This is my friend . . . He's Puerto Rican." So the British young man looked at me and asked, "You're Puerto Rican? Puerto Rican, you say?" And I said, "Yes, Puerto Rican." And he said, looking at me and very candidly and very sincerely, he asked me, "And what part of New York are you from?" From that time on, I knew that no presentation about Puerto Rico should assume anything, any kind of knowledge about us.

Dr. Efrén Rivera-Ramos, panelist

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First, my father is a staunch supporter that Puerto Rico should be a state of the Union. My mother fought her whole life for Puerto Rico to be an independent nation, and I believe that Puerto Rico should be a commonwealth like it is right now. My family is not unlike many Puerto Rican families. This is something that we discuss during breakfast, during lunch and during dinner, every day. So those of you who are from Quebec or from Canada, you know what I'm talking about.

Senator **Eduardo A. Bhatia-Gautier**

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If I were to ask those of you from abroad what you knew about the present relationship before Professor Rivera-Ramos' presentation, I would probably get many different answers, most likely very brief, probably contradictory. It's okay. The law regarding the power of Congress over the territories is a very well-kept secret which is absolutely absent from the canon of study of constitutional law in American law schools.

Judge Juan Torruella of the First Circuit Court of Appeals wrote many years ago that it's "in the penumbra of legal priorities well below the rule against perpetuities," whatever that is.

Professor **Carlos Iván Gorrin-Perralta**

DOING WELL *by* DOING GOOD: WHY CLIENTS SEEK DIVERSITY IN THEIR LAW FIRMS

"'Diversity' . . . I wish we could call it 'inclusion,' because that's really what it is."

***Thomas A. Mars**, the First Executive Vice President and Chief Administrative Officer of Wal-Mart Stores, Inc., urged the Fellows attending the College's Spring meeting to become visible and active in affording deserving women and people of color the opportunity to compete on a level playing field in the profession.*

Thomas A. Mars

Mars, who had been general counsel of Wal-Mart from 2002 until his promotion a month before he spoke, currently chairs the American Bar Association Minority Counsel Program Steering Committee.

Posing the question, "Why do corporate clients seek diversity in their law firms?", he quickly asserted that the more important question is why diversity should be at the top of the minds of Fellows of the College and their law partners. "[T]here are really just two reasons," he continued, "and if you leave here and embrace one or the other, I'll be satisfied that I've accomplished something. I'd prefer that you embrace the second reason.

"[T]he first reason," he stated, "is simply self-preservation. If you haven't noticed, the unprecedented economic conditions that our country is facing right now have changed the competitive landscape in the legal market almost overnight.

. . . It is becoming increasingly difficult for one firm to distinguish it from another firm. . . . Nobody . . . you want to represent makes hiring and firing decisions based on those magazine ads, particularly the diversity ads. Whatever you might think, we think that people of your caliber are transferable from one firm to the next. We think that your pricing strategies are all roughly the same. . . . So how do you distinguish yourself from the competition? There's no better way to do it than through diversity. . . . [A]s a matter of being able to prosper in these tough economic times . . . my suggestion is you sell those nonbelievers on the economic theory that this is the single most effective way to distinguish yourself from the competition . . . ."

Mars' second reason to embrace diversity: giving people of color and women the opportunity to grow is the right thing to do. He used his own story to explain his passion for giving others a chance to prove themselves. When he decided to go to law school, he was a policeman in Virginia. Three Virginia law schools rejected him because his grades and his LSAT score were not good enough. "By those conventional standards I wasn't supposed to succeed as a lawyer." He entered the University of Arkansas, the only school that would admit him, graduated first in his class, was editor-in-chief of the law review, made the top score on the bar exam and clerked for a judge on the Tenth Circuit Court of Appeals. He began his career as a trial lawyer working for Hillary Clinton and Vince Foster, FACTL, at the Rose Law Firm in Little Rock.

"You know, those people that made those decisions in Virginia, they were wrong, and I was bound and determined to prove to them that they were wrong."

"I haven't," he continued, "been qualified for any job that I've been given in the last ten years. . . . When I was promoted to general counsel four months after joining Wal-Mart, I was called down to [CEO Lee Scott's] office. . . . and he said, 'Mars, the general counsel . . . is going to retire and . . . we're going to promote you to that position.' . . . I said, 'Lee, I don't know what to say. I'm surprised, grateful.' I said, 'You know, I'm not the least bit qualified on a number of topics, like corporate law. I don't know anything about that. I'm not a tax lawyer. I don't know anything about logistics law. I don't even know if you call it that. I'm just a trial lawyer, and I'm sort of struggling to keep my head above water doing this job you hired me to do four months ago.' At which point, so help me God, he sat there in his chair, pulled his glasses down and said, 'Look, Mars, give us a little credit. We know you're not qualified for this job. . . . We've been watching you for four months, and we know what your weaknesses are.'"

"Then he said, 'The only difference between putting you in this job and going out and getting somebody who's got the right credentials by conventional standards is it will take us four months to figure out what their weaknesses are, and we're not sure whether those weaknesses, whatever they are, can be overcome. Yours can be, but you're going to have to do this, that and the other thing, and I'll teach you. So whether you want the job or not, you're going to get it.' And I got it at 2:00 that afternoon with no ceremony."

"[O]ne of the things that I have been reminded about time and time again," Mars continued, "is just the importance of not locking into those conventional standards."

Along the way, Scott had told him, "In this job as general counsel . . . it's inevitable that some day you'll see an opportunity to use Wal-Mart's commercial influence to benefit not only Wal-Mart, . . . but the world in general, and there are two things I want you to know about that. First, when, not if, *when* you come to that crossroad, you have my permission to pursue that, whatever it is, whether it's health care or whatever. And secondly, if you don't, I'm going to be really disappointed in you."

That opportunity came when a woman lawyer at Wal-Mart introduced him to the "diversity world" and through that introduction allowed him to see what he had really been missing, "an incredible talent pool." "[O]ver time," he continued, "what I learned . . . is this: If there's one thing you can

do to advance diversity in the profession and have a purpose-driven career, it is to give a lawyer of color or a woman lawyer an opportunity before they're ready or qualified by conventional standards."

"I wasn't comfortable when I was dragged to Chicago several years ago to the minority counsel program meeting there by this courageous woman lawyer . . . who had the guts, frankly, to arrange a speaking event for me without telling me. The first time I found out about it was when my secretary came in and asked me where I wanted to stay in Chicago. It took somebody that courageous in my life to lead this horse to water."

"Now," he continued, "[O]ne-third of the lawyers in our legal department are lawyers of color. . . . It hasn't been less than one-third for almost four years. And how did we get that done? We upgraded the talent. Now, does that defy some of your preconceived notions? We upgraded the talent."

Imploring his audience, he continued, "I want you to join in that opportunity, and I want you to do something about it, because the American College of Trial Lawyers, . . . more than any other organization in America, in my opinion, . . . can be the difference that makes a difference for the deserving women and lawyers of color in our profession who just want to operate on a level playing field."

"[W]e owe it to them, and you, more than anybody, because of your success, owe it to them, too, because I doubt there's a person in this room that doesn't have some part of their background that's much like the story that I told you. Somebody gave you a helping hand. Somebody gave you an opportunity when you really weren't ready and really weren't qualified, and how soon we forget."

How to go about this? "The first thing you've got to do is get out of your . . . office, and you've got to immerse yourself in an environment where you're not in your comfort zone. . . . Go back to your law firms. Challenge your partners on this. Decide yourself that you're going to be visible and active. Go mentor some associates. Load up a bus, like we did, and go to Selma, Alabama. You go down there for two days, and you'll come back a changed person, I guarantee you. Go to a minority bar association meeting. Don't just show up, sit in the back of the room and read your email. Go and sit down with some young African-American, Asian, Hispanic lawyers. Or go to the National Association of Women Lawyers meeting and sit down and hear what they have to say."

"I've had an incredible ride at Wal-Mart," he reflected, "been given opportunities to do things that I'd never even dreamed of doing, but when I look back on my career, whenever I retire, I'm sure that the thing that I'll value the most is the lessons I've learned and the experiences that I had working in diversity."

bon mot

[T]his is the first event that I've attended outside of Wal-Mart since being promoted [from general counsel] to chief administrative officer . . . . I noticed a big difference immediately when I went to the reception the other night, because . . . as general counsel, when you attend an event where trial lawyers are present or lawyers of any kind are present and you're the general counsel with a $350 million budget for the US alone, unless there are other general counsels there, you're almost always the most popular person in the room. . . . [A]s I was being introduced to some people the other night as the chief administrative officer, I noticed that the typical response was more along the lines of, "Gee, it's very nice of you to be here. If you'll excuse me, I need to go mingle."

Thomas A. Mars,
Wal-Mart Stores, Inc.

ACCESS TO JUSTICE INITIATIVE RESULTS IN EXONERATION *of* YOUNG MAN

A project of the American College of Trial Lawyers Access to Justice Committee recently resulted in the exoneration of Joshua Kezer, a young man who spent nearly half his life in jail for a murder he did not commit.

Charles A. Weiss

A team from the law firm of Bryan Cave LLP in St. Louis led by ACTL Fellow **Charles A. Weiss** worked on the case for about two and a half years before obtaining a 43-page court opinion and order from Cole County Missouri Circuit Judge Richard Callahan vacating the conviction of Joshua Kezer on February 17, 2009.

Kezer was arrested shortly after turning 18 years old in March 1993 and charged with the November 1992 killing of Angela Michele Lawless, a 19-year-old college student from Benton, Missouri in Scott County. Lawless was found shot to death in her car at the top of an exit ramp, just off Interstate 55 near Benton. Despite the fact that there were no witnesses to the murder, no motive and no physical evidence to link Kezer to the crime, a jury on June 13, 1994 convicted Kezer of the murder of Lawless and he was sentenced to 60 years in prison.

Kezer had spent nearly 16 years incarcerated, from the time he was arrested in March 1993 until he walked out of the Jefferson City, Missouri Correctional Center on February 18, 2009, the day after Judge Callahan's order. He had just turned 34 years old.

Kezer's case found its way to the ACTL's Access to Justice Committee after Jane Williams, a social worker from Columbia, Missouri who visited the penitentiary in Jefferson City, Missouri, met Kezer, listened to his story, and then obtained the court file from Kezer's trial defense attorneys and prepared a summary of the case. Unable to find attorneys in Columbia who would take on the case pro bono, Williams, through a friend, was introduced to Ken Parsigian, a Boston, Massachusetts attorney who is known for his pro bono work and who had won the freedom of a prisoner who had spent two decades on death row. Parsigian read Williams' summary and spoke with her several times on the phone. He then contacted **James A. Wyrsch**, who at the time was Chair of the ACTL Missouri State Committee, who, in turn, enlisted Weiss and his Firm, Bryan Cave LLP, to take on the case.

Weiss, and other attorneys at Bryan Cave, including Steve Snodgrass, Jim Wyrsch (a younger cousin of the ACTL Wyrsch), Chris Baucom and Daniel Harvath, began working on the case in September 2006.

By the time the Bryan Cave team got involved, Kezer's conviction had been affirmed years earlier by the Missouri Court of Appeals, and the time for bringing any state statutory post-conviction remedy proceeding had expired. The only hope of relief for Kezer was to find a material constitutional violation regarding his conviction, such as the withholding of material exculpatory evidence, or to prove that Kezer was actually innocent of the crime.

The evidence against Kezer at the time of trial was extremely weak. Although he had spent time in or near Scott County, he was living in Kankakee, Illinois at the time of the murder; and he presented several alibi witnesses who placed him there the day of the murder. There was no physical evidence linking him to the crime. Although evidence at the scene showed that there had been a struggle and ample physical evidence was collected, none of the fingerprints, palm prints, hair or blood from the car or DNA from under the victim's fingernails matched Kezer. The only physical evidence the prosecution introduced against Kezer involved a few invisible specks of a substance that reacted with Luminol on Josh Kezer's leather jacket and on the armrest of the white car that belonged to a friend of Kezer that the prosecution theorized Kezer had borrowed to commit the crime. This physical evidence was seized and tested months after the murder. The prosecution's own expert testified that he could not conclude that the substance was blood. He said the substance could have been any substance that contains oxidation, including vegetable stains. Nevertheless, the prosecution repeatedly misstated the evidence to the jury, arguing that the specks were in fact blood.

Kezer was arrested in Kankakee, Illinois, where he was living with his father, and brought to Scott County. He could not make bail and spent 15 months in jail awaiting trial. A cellmate, Wade Howard, upon questioning by the Sheriff, asserted that Kezer admitted to him he had killed the Benton girl.

The Bryan Cave team, with funding help from the Innocence Project in New York, retested the DNA from the victim's fingernails and the spots that glowed

from Luminol on the armrest of the car and the leather jacket. The tests confirmed that the DNA excluded Josh and that the spots from the armrest and jacket were negative for the presence of blood.

After gathering the post-trial evidence, the Bryan Cave team in April, 2008 filed a 63-page petition for habeas corpus in Cole County Circuit Court. The state of Missouri was represented by the Missouri Attorney General's Office. The Bryan Cave team argued for the overturning of Kezer's conviction on the grounds that material exculpatory evidence was withheld from the defense and all the new evidence taken together demonstrated Kezer's actual innocence under the standards discussed by the United States Supreme Court in *Schlup v. Delo*, 513 U.S. 298 (1995) and the Missouri Supreme Court in *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. Banc 2003).

The Bryan Cave team had interviewed dozens of witnesses and taken depositions of more than 20 persons. The court conducted a three-day hearing on December 2, 3, and 11. Fifteen live witnesses were called to testify and in addition testimony was introduced through eleven depositions.

On February 17, 2009, Judge Callahan issued his findings of facts, conclusions of law and judgment in which he concluded that the nondisclosure of exculpatory materials constituted a violation of Josh Kezer's constitutional due process rights within the holding of *Brady v. Maryland* and, for that reason alone, he vacated that Josh Kezer's convictions for the murder of Mischelle Lawless and the related armed criminal action. In addition, Judge Callahan found that Kezer had met the heavier burden under *Amrine* of demonstrating actual innocence by clear and convincing evidence and ordered that the conviction and sentence could not stand and were thus set aside.

In his opinion, Judge Callahan stated:

Trial by jury is a fundamental tenet of our criminal justice system. A populist notion in its very essence, the right to be judged by one's fellow citizens serves as an important check on the State's power to deprive its citizens of their liberty. A jury trial is intended by purpose and design to limit the power of prosecutors and judges to incarcerate. Just as important, however, is what the right to jury trial is not. A jury trial is not a shield for prosecutors to avoid difficult charging decisions, and deference to a jury verdict is not a substitute for meaningful judicial review. In the final analysis, our system of trial by jury is there to protect citizens from its own government, not to protect government from its own mistakes.

There is little about this case which recommends our criminal justice system. The system failed in the investigative and charging stage, it failed at trial, it failed at the post trial review, and it failed during the appellate process. The only bright note is the Scott County Sheriff Rick Walter who after being elected sheriff, reopened the investigation. Largely through his efforts, along with those of Petitioner's counsel, is the system finally righting itself with respect to Josh Kezer. Tragically for the family of Michelle Lawless, the real killer or killers remain at large.

REGIONAL ROUNDUP

Constitutional scholar and former solicitor general **Walter Dellinger** was the main speaker at the Spring gathering of North Carolina Fellows in March at Savannah, Georgia.

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Fellows from Arizona, California and Nevada joined President **John J. (Jack) Dalton** and Marcy as well as Regents **Paul S. Meyer** and **Robert A. Goodin** in the Red Rock Country of Sedona, Arizona for a Southwest Regional Conference over the weekend of April 17. Conference Co-Chairs **William G. (Greg) Fairbourn** (Arizona Committee Vice-Chair) and **Michael J. (Mick) Rusing**, treated the Fellows to an unforgettable weekend including a sunset Friday night reception and Saturday banquet (with National Geographic quality weather to boot).

Arizona Committee Chair **Michael L. Piccarreta** introduced **Gerald H. (Gerry) Goldstein**, FACTL San Antonio, Texas, to kick off the Saturday morning speakers' program with a riveting deconstruction of the nationally hot topic FLDS raid. Arizona Appellate Justice **Andrew D. Hurwitz** discussed the progress of the bench and bar in Arizona's attempts to improve professionalism, and the audience enjoyed an energetic discussion about the recent work of the College in this area between Justice Hurwitz and President Dalton. California Appellate Justice **William W. (Bill "Beds") Bedsworth**, concluded the program with a touching talk about the many travails of life, and the opportunity we all have to appreciate the present and make the most of our time on Earth.

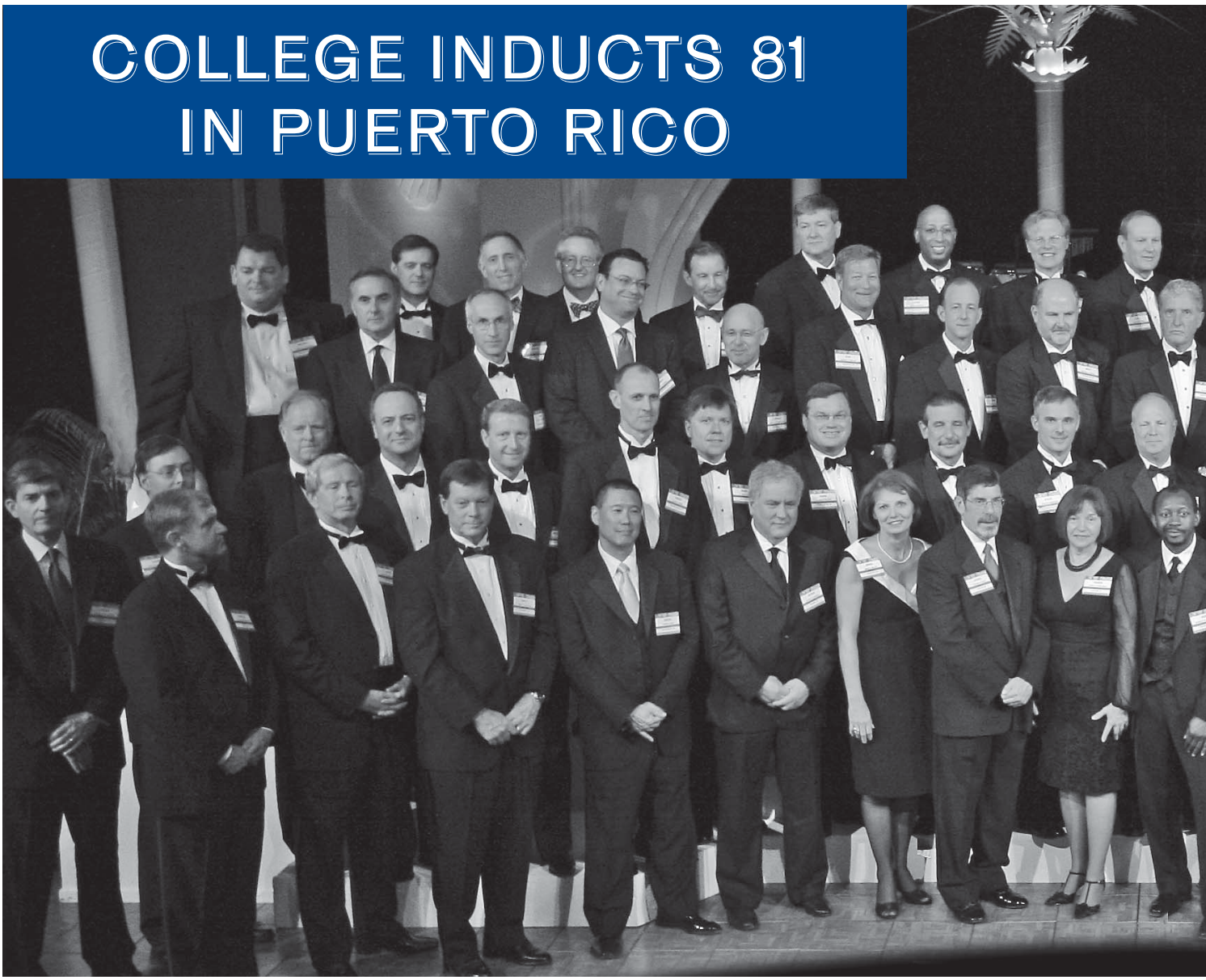
Brave souls ventured into the Red Rocks on a hike led by **Michael R. Murphy** and past Committee Chair **Robert E. Schmitt**.

Will you please join me in a moment of counting our blessings. We are indeed grateful to come together once again to enjoy the fellowship and collegiality that has long been a hallmark of the American College.

Thank you Lord for bringing us safely to this beautiful location to share time with each other, both professionally and personally. Please keep us ever mindful of the opportunity we have as lawyers to do good in the world, resolve disputes civilly and to serve the best interests of our clients. Help us to do these things to the best of our ability professionally, and help us understand that in order to bring honor to our profession we must always be thankful for those who are chivalrous, love us and keep us safe. Now bless us to your intended use and us as your faithful servants. All of this we ask in the name of the One who is God to us all. Amen.

Susan F. Brewer, FACTL
Invocation at Induction Banquet

COLLEGE INDUCTS 81 IN PUERTO RICO



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PUERTO RICO CHIEF JUSTICE WELCOMES COLLEGE:

ADDRESSES THREATS TO JUDICIAL INDEPENDENCE IN THE TIMES OF ECONOMIC HARDSHIP

*The Honorable **Fedérico Hernández Denton**, Chief Justice of Puerto Rico, welcomed the College's Spring meeting to Puerto Rico in an address that focused on the growing threat to judicial independence, exacerbated by the current world economic crisis.*

Hon. Fedérico Hernández Denton

Referring to the College's dedication to the fundamental principles of judicial independence and meaningful access to justice for every citizen, he observed, "This audience knows very well that our citizens depend on strong courts to uphold the Constitution and to rule on cases fairly and impartially, based solely on the facts and the law. . . . [S]trong courts are an essential part of our democratic system, for they provide vital balance in our government through the system of checks and balances."

"We should never," he warned, "take a strong and independent judiciary for granted." Referring to the global financial crisis and quoting Massachusetts Chief Justice Margaret Marshall, he continued that, in her words, "A perfect storm of circumstances threatens much that we know, or think we know, about our American system of justice."

"Most states and countries," he observed, "are facing shortfalls in their budgets for this year, and severe fiscal problems are very likely to continue into the following year as well. Courts . . . have not been exempt from this troubling reality. Trial lawyers and litigators know that their clients and cases will bear the direct consequences of the current fiscal crisis if courts do not remain strong, impartial and independent."

Referring to the College's policy paper entitled *Judicial Independence: A Cornerstone of Democracy Which Must Be Defended*, he observed, "This publication eloquently expressed that judicial independence is not established for the benefit of judges, but rather for all of us. It is the citizens who are the intended beneficiaries of fair and impartial administration of justice, consistent with the rule of law. . . . Consequently, we do not hesitate to recognize that judicial independence is strictly intertwined with judicial accountability. It is our responsibility to promote confidence in the quality and professionalism of the bench, in the courts' productivity, in the quality of the justice being provided and in the demonstrated ability to make efficient use of very scarce resources. Such an environment is only possible if courts and lawyers work together in establishing a reputation for excellence in the management of our court business, not just now, but on a continuing basis."

"The extreme revenue shortfalls currently facing the public sector," he warned, "pose an additional challenge in the path to an independent legal system." To address this problem, he asserted, "All public entities, including the judicial branch, must make painful and difficult choices to bear their fair share of the fiscal crisis affecting governments everywhere."

"However," he continued, "some court systems are being asked to take on a heavier burden, effectively threatening the stability and independence of the judiciary. In the past few months, the judicial branch of New Hampshire announced that it would halt all civil and criminal jury trials for a month to save on per diem payments to jurors. Budget cuts in Florida have left 280 court personnel without jobs. In Minnesota, three judicial districts have been shut down for half a day each week, a courthouse has been permanently closed and various several arbitration services have been terminated. . . . These are just a few examples of how the economic downturn has reached the courts in the United States . . . . In most of these cases, such drastic measures were a direct result of inadequate funding. . . ."

"Judge Learned Hand," he continued, "once warned us that if we are to keep our democracy, there must be one commandment: 'Thou shall not ration justice.' Today those words of wisdom are more relevant than ever as states and countries all over the world, including Puerto Rico, deal with economic crisis of unprecedented proportions. It is worrisome that some courts in our countries are reaching the point of being almost unable to function at even minimally adequate levels."

"This is particularly more troubling," he warned, "during the times of economic distress when people turn in even greater numbers to their courts for relief and for protection. Jonathan Lippman, . . . Chief Judge of the Court of Appeals of the State of New York, . . . recently compared state courts to the 'emergency rooms' for society's worst ailments: substance abuse, family violence, mental illness, mortgage foreclosures and so many more.'"

"In Puerto Rico," he informed his audience, "this disconcerting trend has been increasingly evident. For example, from 2002 to 2009, there has been an increase of almost 90 percent in cases related to home foreclosures every year. Contract disputes, child support cases and criminal cases related to robbery, burglary and shoplifting offenses are also steadily congesting our court system all over Puerto Rico. This is certainly a consequence of our present economic situation."

Quoting Chief Judge Lippman, he raised several questions that are pertinent for court systems everywhere in times of unprecedented fiscal crisis: "How can we appropriately fulfill our constitutional mission in the face of these plagues of modern-day life and remain relevant and responsive to the evolving needs and expectations of our citizenry? How do we embrace innovation and re-engineer the way courts do our business in a cost-effective, accessible and efficient manner that promotes institutional accountability and respect for the rule of law?"

"The judicial branch of Puerto Rico," he assured the audience, "has responded to these challenges with firmness and fiscal responsibility. Up to this moment, our cost-savings measures have been effective in spite of our limited budget that receives less funding than the police and the correction departments combined. . . . Since the outset of the current fiscal downturn . . . we have cut spending and continued to make necessary adjustments for the most efficient use of our scarce resources. . . . [S]ince the judiciary has historically worked with a limited budget and low salaries for judges and court personnel, any further reduction of our resources will definitely resort in a rationing of justice."

"[T]he strength and institutional independence of our courts," he observed, "are also rooted in the administrative and budgetary autonomy of the judicial branch. In 2002, the legislature of Puerto Rico approved a statute implementing an automatic funding formula for the judicial branch, allowing us to undertake austerity measures without compromising the ability of our courts to provide effective justice. This measure has proven to be an effective safeguard against the possibility of improper economic pressure on the judicial system. The funding formula that we have also guarantees the institutional independence of the courts and enables us to pursue precisely those goals with flexibility and transparency."

He continued that the courts of Puerto Rico are modernizing by adopting the latest technology and, in addition, are rewriting their rules of evidence and working to revamp totally civil and criminal procedure. "During these perilous times," he asserted, "our common goal is to conduct our business in a cost-effective and accessible manner that promotes institutional accountability and fairness, as well as respect for our independence and the rule of law."

In closing, he urged the audience, "to continue supporting and defending the role of our courts in our democracy. We need your support, particularly during this troubling time of financial crisis. If we want to preserve the system of justice that . . . has guaranteed and upheld the rule of law in our respective jurisdictions with independence and transparency, organizations such as the American College of Trial Lawyers must play a fundamental role."

SPECIAL INDUCTION FOR TENNESSEE JUDGE

President **John J. (Jack) Dalton** made an impromptu trip from his Atlanta base to Chattanooga, Tennessee on January 21 to preside over the special induction of a new Fellow.

John W. McClarty was slated to be inducted on February 28 at the College's Spring meeting in Puerto Rico, but in January he was selected by Governor Phil Bredesen to serve on the Tennessee Court of Appeals. He was scheduled to be sworn in on January 27, and so Regent **Philip J. Kessler**, Tennessee State Chair **Gayle Malone** and Chattanooga Fellows **Roger W. Dickson** and **Jerry H. Summers** called Dalton and asked what could be done.

In response, Dalton drove to Chattanooga and administered the oath to McClarty with his son looking on. "Many Chattanooga Fellows that knew Judge McClarty showed up," Dalton said.

Governor Phil Bredesen and John W. McClarty

McClarty and his son went to Puerto Rico, but had to leave before the induction ceremony because of a death in the family. "So he might not have made the induction ceremony in Puerto Rico," Dalton said, "but he didn't need to since he was already inducted!"

bon mot

I'm always kind of hesitant about predictions. To give you some idea of the risks of doing that, let me share with you a prediction that I heard about 15 or 20 years ago. It was from the then-president of the Law Society of England and Wales, a guy named Tony Gurley. His prediction was, for the law office of the future, and that it would consist of three components. There would be a lawyer, there would be a computer, and there would be a dog. Now, the computer would be there, of course, to dispense legal advice. The dog would be there to keep the lawyer away from the computer. And the lawyer would be there for, of course, to feed the dog.

Ward Bower, Altman Weil, Inc.

EFFECT OF RECESSION ON LAWYERS

NOTED LAW FIRM CONSULTANT SPEAKS

"A few months ago when I was asked to address this topic [The Effect of the Economy on the North American Legal Profession], I had no idea how much more interesting it was going to become by the time I had to deliver these remarks. . . . [O]ne of your Regents has assured me that, as the top trial lawyers in America, all of you are extremely intelligent and capable of discerning subtle differences, such as, for example, differences between the message and the messenger."

Ward Bower

With this opening note of gallows humor, **Ward Bower**, a principal in Altman Weil, Inc., Newton Square, Pennsylvania, a lawyer and consultant to some of the largest law firms in the world, addressed the impact of the current economic situation on the legal profession in the United States and Canada and how best it might weather these times.

EFFECT OF ECONOMY ON 2008 RESULTS

Summarizing the historic events of 2008, especially the last half of that year, he observed, "We saw the overnight obliteration of trillions of dollars in wealth. We saw government commitments of trillions more to try to deal with this. We saw the sub-prime mortgage and credit crises bring down major financial institutions . . . We see the existential threat to the big three auto makers, the volatile commodity markets. How can a barrel of crude oil fluctuate between under 40 and over 150 dollars a barrel in a period of six months?"

Painting a somewhat rosier picture of Canada, he continued, "On the other hand, this is one time that it's good to be Canadian. Although the auto industry in Canada has taken some hits and is likely to take some more, and the oil and gas economies are taking a hit with oil at under $40 a barrel, the banking sector is what the *Financial Times*

called last week 'the envy of the developed economies, mainly due to an effective regulatory environment,' certainly much more effective than what we've seen here in the United States."

"We also saw" he continued, "the demise of major law firms, Heller Ehrman, Thelen Reid & Priest, Thacher Profit & Wood. . . . [S]ome of these are 150-or-more-year-old firms, in some cases no longer with us, and they all met their demise in the second half of 2008."

Cautioning that he was going to talk more about larger law firms because the economics of their operations are more transparent, at least to the extent that the data they give legal publications is reliable, he suggested that the observations he would discuss apply as well to smaller firms.

Drawing on data available at the time, his major points were:

- 2008 gross fee revenues within plus or minus 5 % of those of 2007.
- Billable hours clearly down.
- Rates frozen, either because of direct communication from clients or because law firms have figured out that increases are not realistic.
- Costs up, mostly relating to employment costs, mainly benefits, particularly health care benefits, and to information technology.

The end result: profits per equity partner for 2008 are with few exceptions either flat or down, in some cases down as much as 25 percent or more. The most profitable firms, many of which were focused primarily on transactional work in the financial markets, have taken the biggest hits.

Walking his audience through the math, he pointed out that at a 40% margin (40% of fee revenues flowing to partners as profits), all other factors staying equal, a 10% reduction in revenues translates to a 25 % reduction in profits per partner.

Managing by reducing costs, he noted, is difficult. Aside from personnel costs, most law firm costs are fixed costs. The benefits of force reductions do not show up quickly because of termination costs, including severance packages. The end result is that many firms could not reduce their costs fast enough to cover reductions in revenues in order to avoid detrimental impact on their profitability.

HOW LAW FIRMS HAVE REACTED

Law firm reactions to the declining economy have been:

- Layoffs.
- Capital calls, in which equity partners are asked to ante up more capital to provide a cushion, in some cases at the insistence of the firm's lenders.
- Associate salaries frozen.

As to the latter, he observed that many firms have concluded that their starting salaries got too high. Since there are only so many billable hours in a year, the billing rates these salaries require are such that clients have started to refuse to have first and second-year associates working on their engagements.

IMPACT ON CORPORATE CLIENTS

Bower observed that in many cases corporate chief legal officers are under orders to cut legal costs 10 percent to 20 percent. Since they were already running lean corporate law departments, those cuts have to come from the legal fees that they are paying to law firms. Corporations are not accepting law firm rate increases. Alternative fee arrangements are becoming more common. Requests for proposals are reflecting a convergence process, a reconsolidation of outside legal work in a smaller number of law firms. This enables clients to manage outside legal work better and gives them more leverage with those firms that do a greater proportion of their legal work.

The convergence process, he warned, carries risks as well as rewards. The law firm has to make a commitment in terms of space, infrastructure, equipment and other fixed costs, as well as hiring people to do the work. When the client later asks the firm for an overall reduction in fees to keep the business and asks for a say in staffing and strategy, the end result is a 'captured' law firm. He noted that some law firm mergers,

entered into to reduce the relative importance of a single client, have been driven by the threat of client capture.

Another manifestation of cost-reduction moves by corporate clients has been outsourcing of legal process both domestically and overseas, particularly to countries that have a common law tradition and common law education, where English is the language of the courts, where people have training, skills and experience and where legal services can cost a fraction of what American lawyers' services would cost.

Bowers also noted a flight to quality at the top of the profession, the tendency to hire the best lawyers in the kind of situation where that is called for, and a flight to efficiency at the bottom end of the marketplace. Those firms that do not have world class quality at the top end and cannot operate efficiently at the bottom end find themselves caught in an economic squeeze. This phenomenon, he noted is the one manifestation of the present economy that exerts similar pressures on Canadian firms.

PROSPECTS FOR THE FUTURE

His predictions for 2009 were:

- Revenue: flat will be good in 2009.
- Headcounts will be down as a result of layoffs and slower hiring.
- With fewer lawyers working, hours are going to be down.
- Rates will be flat.
- Profitability in major US law firms will be off five to 15 percent from 2008.

In the longer term, hours times rates with a lot of leverage may not remain the economic model for the American law firm. We may see American law firms that are a little bit smaller. We may see them configured differently with different ratios of associates to partners, perhaps with fewer partners. The pricing model will be different, with an emphasis on quality and efficiency, pricing based on value delivered in the eyes of the client, rather than on the cost to the law firm of its inputs into the provision of the service.

No one expects this economy to begin recovery until the second half of 2010, and law is a lagging sector. When the economy goes in the tank, law firms still have a pipeline of transactions and cases they are working on, and it is not until that pipeline dries up that the recession begins to affect them. By way of illustration, the economy started slowing in early 2008, but it was not until the last half of the year that its impact hit law firms.

When the economy comes back, because of the lagging nature of the legal sector, it will take six to nine months for the increased deal flow to generate work that, in turn, turns into revenues. Consequently, Bower predicted that the legal segment of the marketplace will not recover until 2011. There are, he noted, economists who are predicting an even deeper and longer recession.

As far as Canada is concerned, the major factor with which its firms will deal is convergence.

CHANGES IN THE LEGAL MARKETPLACE

The legal marketplace has changed as a result of this. Consolidation has accelerated, much of it driven by the economy. There were 60 law firm mergers in 2007, 72 in 2008 and twelve the first month of 2009. Geographic expansion has accelerated. Seventy law firms with national footprints compete in New York, Washington and California with strong indigenous firms. Many other regional or local law firms are looking at developing national footprints to compete for corporate business. Much of this is driven by a desire to benefit from corporate law departments' move towards reconsolidation of their legal work.

Bankruptcy work has picked up. Litigation has not done so to the extent that it did in earlier recessions, but Bower expects a great deal of litigation ultimately to come out of what happened in the financial services industry. He predicts a shakeout or business failure of law firms that cannot make it in this environment. We have not seen the last of the demise of major firms.

BOWERS' ADVICE TO LAW FIRMS

"In this kind of an environment, every law firm needs two plans. One is a survival plan, involving restructure, reorganization, which a lot of law firms are doing, out-

sourcing of staff and associate activities, both domestically and internationally. Firms are also diversifying to become less vulnerable to regional and industry threats of the kind that brought down New York-based firms that were focused on finance services and did not have the diversification to enable them to survive the financial crisis."

The other is a recovery, repositioning, reconstruction plan. Firms are targeting new segments in the marketplace, such as information technology and alternative energy infrastructure. The change in administrations in Washington provides opportunities, with re-regulation of financial services, the inevitable tax law changes, renewed environmental regulation and enforcement, potential resurgence of antitrust, possible rollback of tort reform, healthcare regulation and legislation and increased emphasis on white collar crime.

In Canada, Bower noted a little different story, suggesting that "continued disciplined strategy of management is the order of the day, mainly because that legal market is in a much better situation than in the US."

A VIEW OF THE FUTURE

Bowers ended by sharing the results of a study conducted by Decision Strategies International, based in Conshohocken, Pennsylvania, that Altman Weil had commissioned to explore what the legal profession might look like in 2020. After isolating top trends and uncertainties, it identified two determinate uncertainties which would frame the marketplace in the future, the delivery model for legal services, either aggregated or disaggregated, and the regulatory environment, either heavily regulated and fragmented, as it is now among different jurisdictions, or global and laissez-faire.

This analysis produced four possible scenarios:

- **Mega-mania**, service delivery aggregated in large firms with a heavy jurisdiction by jurisdiction regulatory environment. That scenario would predict that by the year 2020, there would be five to ten global megafirms of 20,000 lawyers or more each, with a hollow middle and solo and small firms as bottom-feeders. Bowers suggested as a present model the accounting industry.

- **Exotropia**, a disaggregated delivery model (many firms), with heavy and non-harmonized multi-jurisdictional regulatory environment. This could result from a backlash against big business and globalization in the wake of Enron, WorldCom and scandals in the financial industry. It could involve the breakup of major law firms. Individual experts would control the top end of the marketplace. Bowers suggested as a current model the healthcare industry, where people seek out the top expert for their surgery.

- **E-marketplace**, a disaggregated, laissez-faire global environment, utilizing technology, with massive disruption of the practice and incursion by non-laywers. Bowers suggested as a model travel agents and video stores.

- **Techno-law**, Delivery aggregated in large providers in a global laissez-faire environment. Here, the biggest legal service providers might not even be law firms. Non-lawyer ownership of law firms, with the advantage of their outside capital, is already coming in the UK, with whose law firms we compete on a global basis.

The executive summary of this analysis can be accessed at www.legaltransformation.com/studysummary.asp.

The most likely scenario according to the trend-scanning company Strategic Radar, which constantly markets and scans what is going on around the world and quarterly presents what it determines, is E-marketplace, a disaggregated marketplace.

CONCLUSION

No scenario envisions either the end of litigation or the complete deregulation of trial lawyers. For transactional lawyers, there is another story, but there are some recurring themes, including growth, non-lawyer competition and greater impact of information technology. In short, although the current economic disruption is likely to continue into 2010, smart firms are going to manage for short-term survival while planning for their post recovery future, considering these potential legal transformation scenarios or some variation on, or combination of, them.

CONSTITUTIONAL RIGHTS
V.
SPOUSAL OR CHILD ABUSE

THE FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS AND THE INCIDENT AT THE YEARNING FOR ZION RANCH

The story of the encounter between the Texas Rangers and the Texas Child Protective Services Division and the El Dorado, Texas Yearning for Zion Ranch of the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) reads like a mind-bending law school exam question involving both criminal procedure and constitutional law. In that respect, the program that was billed as a discussion on issues of constitutional rights versus spousal or child abuse turned out to be far more.

Gerald Goldstein

Moderated by Regent **Christy D. Jones**, from Jackson, Mississippi, the panel participants were, in order of their presentations:

—**Gerald H. Goldstein**, FACTL, San Antonio, Texas, a nationally known criminal defense lawyer and a past president of the National Association of Criminal Defense Lawyers, who represents the FLDS and Lyle Jeffs, one of its bishops, in the controversy.

—**Don J. DeGabrielle, Jr.**, Houston, Texas, until recently United States Attorney for the Southern District of Texas, whose career includes service in the Federal Bureau of Investigation, the New Orleans District Attorney's office and nineteen years in the criminal and public integrity divisions of the U.S. Attorney's office. He is currently a partner in the law firm of Fulbright & Jaworski.

—**Ronald B. Leighton**, JFACTL, Tacoma, Washington, since 2002 United States District Judge for the Western District of Washington and before that, a twenty-six year trial lawyer, recognized as one of the top ten trial lawyers in Washington.

— **Kathleen McDonald O'Malley**, Cleveland, Ohio, since 1994 United States District Judge for the Northern District of Ohio. After eight years in private practice, Judge O'Malley was chief counsel, chief of staff and first assistant to the Attorney General of Ohio, responsible for the overall function and management of all divisions of the Attorney General's office and counsel of record in the state's more sensitive and complex legal matters.

—**Nancy Gertner**, JFACTL, Boston, Massachusetts, since 1994 United States District Judge for the District of Massachusetts. Judge Gertner has been widely published in the areas of various issues involving constitutional and criminal law and in 2008 was awarded the Thurgood Marshall Award from the American Bar Association Section of Individual Rights and Responsibilities.

THE FACTUAL SCENARIO

Yearning for Zion Ranch is a 1700-acre self-supporting commune with approximately 700 residents, all members of FLDS. It was established in 2004 at a time when it was legal in Texas to be married at age 14. FLDS had broken from the Mormon Church in 1890 over the issue of polygamy. Since that time, it has been distinguished and controversial, not only because of its beliefs, but because of the dress of its women in pioneer-style attire, with elaborate French-braided hair.

The group's leader, Warren Jeffs, is currently serving a Utah prison sentence for arranging "spiritual marriages" between men and underage girls, one of the practices of FLDS. Texas had subsequently raised the legal marriage age to 16, and legislation aimed at defining "marriage" to make "spiritual marriages" unlawful was enacted. The legislative history made clear that these enactments were motivated by the presence of FLDS at El Dorado.

In the spring of 2008, the Department of Family and Protective Services of Texas received a telephoned report alleging physical and sexual abuse of a child on the ranch. The caller identified herself as a 16-year-old mother named Sarah Jessop Barlow, who claimed that she was again pregnant and that she was being abused by one Dale Evans Barlow.

State law in Texas requires the Department to investigate all reports of abuse or neglect allegedly committed by a person responsible for the child's care, custody or welfare. Thus, on April 3, 2008, the Child Protective Services Division (CPSD), proceeding under a civil investigative order, went to the ranch to investigate the report of abuse. It was accompanied by almost 150 Texas Rangers, armed in full combat gear, and an armored personnel carrier. The Rangers were proceeding under a warrant to search the entire ranch, which included over forty homes and a temple, for Dale Evans Barlow. The search warrant was thereafter renewed twice. Eventually CPSD began proceedings to remove children from the premises. Approximately 468 children, some from homes in which there were no "spiritual marriages," were removed from their parents in April.

The series of telephone calls that had triggered the state's actions had proved to be a hoax, perpetrated by someone calling from another state who had no relation to the ranch. Dale Evans Barlow, for whom the search warrant was issued, turned out to be on probation

in Arizona and he was in fact in Arizona.

The controversy sparked nationwide debate, not only about the religious beliefs of the FLDS, but also about the claims of spousal or child abuse and the constitutionality of the actions of the state under the First Amendment of the Constitution of the United States and various provisions of Texas law.

After extended legal proceedings, in which over 500 lawyers, many of them appearing pro bono, participated as guardians ad litem or counsel to guardians ad litem, the children were returned to their parents in early June after the courts found that the Department had not met the burden of proof required for their emergency removal.

THE CRIMINAL PROCEDURE ISSUES

Although the criminal procedure issues were not the intended focus of the panel discussion, Goldstein, representing the defendants' point of view and DeGabrielle the state's, outlined a number of issues raised on these facts. There was, for instance, an issue under *Franks v. Delaware,* in which the United States Supreme Court held that if in seeking a search warrant one intentionally or recklessly misrepresents or omits a truth that is material for probable cause, the warrant is defective. There was a contention that the Texas law enforcement authorities knew that Dale Evans Barlow was in Arizona on probation and that they had in fact found and talked with him by telephone in his probation officer's office.

There was also a contention that if the law enforcement officers had called the area code attached to the call that triggered the whole saga, they would have found that the call was made from Colorado Springs, Colorado and that the number was that of a thirty-three-year-old childless, single, African-American female who had previously been convicted of making a false report of child abuse and who had cases pending against her for similar offenses in seven or eight states.

The broad search warrant directed the Rangers to locate the alleged caller or anyone being held against their will and was not exclusively to arrest Barlow, a fact which raises its own issues. The state also questioned the standing of FLDS to challenge the warrant by raising a constitutional issue, since the ranch is owned by a separate entity. As the CPSD workers interviewed inhabitants of the ranch, they determined and verified what was long suspected in the community, that there were marriages done in violation of Texas law and that there were girls who had been having children with men to whom they had been "spiritually married."

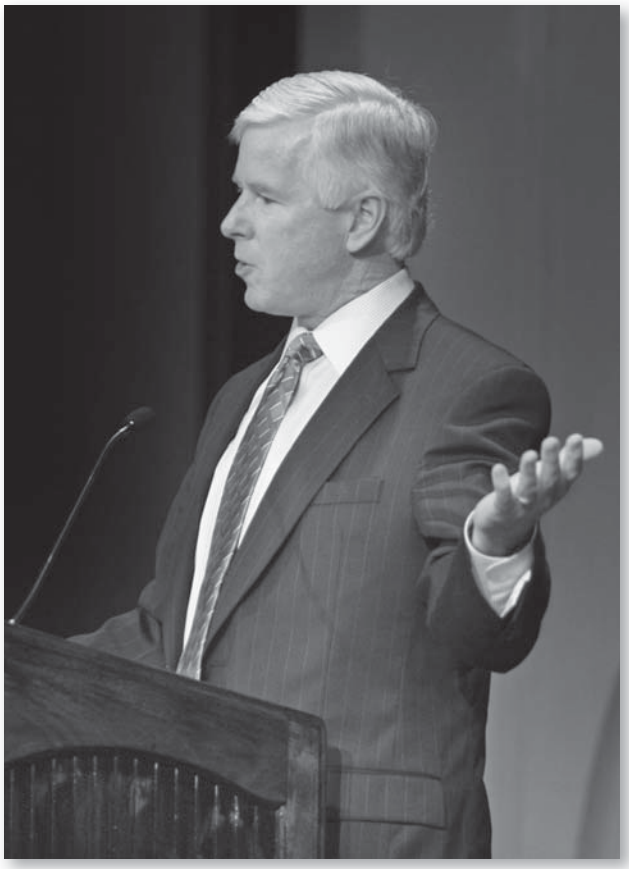
The first of the criminal cases, nine cases of bigamy and four cases of sexual assault on a minor, in which these issues would play out, were set for pretrial hearing in May and for trial to begin in October.

THE ETHICAL ISSUES

Goldstein and DeGabrielle briefly addressed the ethical issues that confronted the lawyers in these cases, both those representing various parties in the CPSD proceedings and the prosecutors, the lawyers representing the state, when confronted with children's issues like those in these cases.

Goldstein pointed out that in these cases the lawyers dealt with clients with disparate points of view, for instance, those of girls who were on the verge of reaching their majority and who disagreed with their appointed counsel's proposed course of action. There were disagreements between guardians ad litem and lawyers appointed to represent them. A frequent dilemma was at what point the lawyer

Christy Jones



Don J. DeGabrielle, Jr.

was to fashion his or her actions based upon what the lawyer thought to be in the child's best interest, as opposed to what the child and her parents might say was in the child's best interest.

On the state's side, these were parallel proceedings. In the civil proceedings the caseworkers, officers of the state, and their attorneys were supposed to represent the best interests of the child. The prosecutors, however, had the duty to represent the best interests of the state, and although they did need to consider the children as victims, their goal was to represent the interests of the state in looking at the criminal ramifications of the conduct of the parents or the husbands.

THE CONSTITUTIONAL ISSUES—ANTI-BIGAMY STATUTES

First, Judge Leighton was asked to address the constitutional validity of the anti-bigamy statute. In doing so, he delved into the relevant history. In its 1856 platform, the Republican Party took up anti-polygamy efforts, describing polygamy and slavery as the twin relics of barbarism. Once they gained control of Congress, they passed a series of laws creating criminal penalties for the practice of polygamy in the territories, limiting the ability of the Mormon Church to own land and reducing the power of Utah's territorial judges and jurors, who were then in the process of thwarting Congress's intent to penalize and eliminate bigamy from the territory.

These laws were upheld by the Supreme Court in *Reynolds v. United States.* The court held that the free exercise clause does not protect religious practices that are deemed socially immoral or an offense against society. The court said that polygamy has always been odious among the northern and western nations of Europe and until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of

African people. That holding, which has had far-reaching applications with respect to religious freedom, has never been overruled.

The *Reynolds* decision paved the way for additional laws that prohibited polygamists from voting or holding public office. Congress ultimately passed a law dissolving the Mormon Church and seizing the property of the church. In 1889, the Supreme Court upheld that law, reasoning that because of the church's status as a public or charitable corporation, the church's property was properly subject to confiscation. Soon thereafter, the leader of the Mormon Church had an epiphany, renouncing polygamy and asking for Utah to be admitted as a state conditioned upon it enacting an eternal prohibition against plural marriages.

Each of the laws enacted by Congress and the Court's decisions upholding them were anchored in the firm conviction that the majority had the right to impose their view of morality upon the conduct of the community at large.

The government's treatment of the Mormon Church prior to 1890, Judge Leighton pointed out, stands in marked contrast to the principles enunciated by our founders. In *Federalist 51*, James Madison opined that "Freedom for all religions is best guaranteed by free competition between religions." Madison advocated that "Freedom of religion can only be accomplished when legislators are required to accord to their own religions the very same treatment given to small, new or unpopular denominations."

Modern-day jurisprudence, he suggested, recognizes that when any type of government activity infringes on religion, it must be secular in purpose, evenhanded in operation, and neutral in primary impact. State laws intending to discriminate against individuals because of their religious practices and beliefs are subject to strict scrutiny, and the state must demonstrate that the laws serve a compelling state interest and are narrowly tailored to advance that compelling interest. "In contrast, if the law is neutral on the subject of religion and is of general applicability, it need not be justified by a compelling government interest, even if the law has an incidental effect of burdening a particular religious practice."

He suggested that the historical underpinnings of the anti-polygamy statutes appear to be so carefully targeted at the Mormon Church that modern-day concerns and factors must be identified, such as abuse and the like, and articulated if these ancient laws are to be upheld.

But in addition to the First Amendment free exercise issue, he noted, anti-polygamy laws are also implicated in the ever-changing world of substantive due process and the right of privacy under the 14th Amendment. *Lawrence v. Texas* invalidated an anti-sodomy statute; and the Court's broad reasoning can be construed to question the state's authority to ban polygamous marriages. Justice Kennedy, writing for the majority, concluded that the case should be resolved by examining petitioner's liberty interest under the due process clause. The Court overturned *Bowers v. Hardwick*, a case that had upheld an anti-sodomy statute seventeen years earlier, criticizing the earlier attempt to define the liberty interest at stake. Instead of merely involving the right to engage in homosexual sodomy, the liberty interest at stake, according to Justice Kennedy was "the most private human conduct, sexual behavior, and in the most private of places, the home."

Justice Kennedy criticized the *Bowers* court's reliance on history and morality to justify

Virginia's anti-sodomy law. He said that in the past half century, laws and traditions have actually shown an increasing acceptance of giving individuals the right to choose how to conduct their private and sexual lives and that Justice White's statement in *Bowers* that "condemnation of homosexual practices is firmly rooted in Judeo-Christian moral and ethical standards" is far too sweeping.

Justice Scalia, dissenting, viewed the majority's holding broadly. "Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is immoral and unacceptable constitutes a rational basis for regulation." In Scalia's view, numerous governmental statutes will be called into question, post *Lawrence*. State laws against bigamy, same-sex marriage, adult incest, prostitution, adultery, fornication, bestiality and obscenity are, he argued, likewise sustainable only in light of *Bowers* validation of laws based on moral choices. According to Justice Scalia, "Every single one of these laws is called into question by today's decision."

So where, Judge Leighton asked, are we on the subject of polygamy? First, the right to enter into a polygamous union may be encompassed in the right of privacy. Second, concepts of morality may no longer be tenable justifications under the rational basis standard of review. The *Reynolds* decision, never overruled, was based entirely upon moral and historical rationales. If one looks at marriage as an increasingly private arrangement, the bases for anti-polygamy statutes are, he suggested, very weak. If, on the other hand, one focuses on the public aspect of marriage, there may in his view be some vitality for some statutes when considering issues of sexual abuse, subjugation of women and potential harm to children.

Hon. Ronald. B. Leighton

In the end, Leighton concluded, "In a case of this magnitude, I would not venture a guess as to where the law is going to develop. All I know is I would . . . make the decision as best I could, and then get ready for the reversal."

CONSTITUTIONAL ISSUES—LEGISLATION AIMED AT "SPIRITUAL MARRIAGES"

Judge O'Malley was then asked to assume that the theoretical defendant and his wives now live on a commune with other practitioners of his faith. One of their practices is the spiritual marriage of young girls of almost any age, ranging from as young as eight to twenty, to older men. The state legislature enacts a law raising the age at which children may marry without or with parental consent from fourteen to sixteen. The legislative history of the statute confirms that the existence of the commune and its prac-

tices precipitated the revision of the statute. "Is," she was asked, "the statute constitutional and what analysis do you employ?"

Responding, Judge O'Malley stated that "whatever one thinks about *Lawrence* or whether one agrees with Justice Scalia that because of *Lawrence* the sky is falling, clearly this hypothetical takes me outside of *Lawrence*. *Lawrence* itself differentiated the facts there from a circumstance where children are involved, where consent could arguably be given only under duress or could be imposed by duress, where there is any public conduct -- I think arguably a marriage could be considered public conduct-- and specifically said it does not address the question of whether the government should be forced to endorse any kind of relationship. So this hypothetical puts *Lawrence* off to the side . . . ."

This, she suggested, brings us back to the more traditional free exercise principles. "*Reynolds* was the starting point, and ironically, it was a case about polygamy. . . . *Reynolds*, read very broadly, says you can't legislate beliefs, but you can legislate actions. . . . You can legislate . . . and you can limit the actions, and that shouldn't interfere with the free exercise clause, but the Supreme Court has changed the law quite a bit since *Reynolds*, though it took it about 100 years to start doing something about it. . . . The development of the law here has been less than linear."

After *Reynolds*, which was a very general statement of the "actions versus opinions" principle, the Supreme Court next visited the issue in 1963 in *Sherbert v. Verner*. In that case, the Court said that it was a violation of the free exercise clause to legislate or to prevent someone from participating in unemployment benefits after they had been fired for refusing to work on Saturday, their Sabbath. The Court said that there was not a sufficient compelling state interest in working on Saturday to justify that intrusion on the free exercise clause. That was the first time that the words "compelling interest" had appeared in the free exercise analysis.

Then in *Wisconsin v. Yoder* the Supreme Court in 1972 said that the Amish could not be required to send their children to school after the eighth grade, again relying heavily on the compelling state interest standard. The Court, without really explaining how it got there from *Reynolds*, said that in order to do this analysis, you look at whether the challenged law impinges on a sincerely held religious belief or practice. If so, you look to whether there is a compelling state interest to justify that impingement.

Then in 1990 in *Employment Division v. Smith*, Justice Scalia held that there need be no compelling state interest to justify stepping on religious practices so long as the law is "neutral and of general application." In other words, if the law was intended to apply to everybody and was not solely passed to prohibit a religious practice, Justice Scalia concluded that you do not even have to apply a balancing test. The fact that it may have an incidental interference with religious practices was not meaningful, according to Scalia.

In *Smith*, a drug rehab counselor was fired for using peyote in a religious ceremony and applied for unemployment benefits. The Supreme Court held that it was permissible to deny him unemployment benefits, because the Controlled Substances Act was a broadly applicable neutral statute that could be applied and that an incidental interference with religious practices did not affect the ability to apply the act.

But the next time the Supreme Court addressed the free exercise clause was in *Church of Lukumi*, where the City of Hialeah had been so frightened by the Santeria religion wanting to open a church within its boundaries that it passed an ordinance that outlawed the ritual sacrifice of animals, a practice of the Santeria religion. The problem was that it was pretty clear that the city was targeting the religion, a contention borne out by the legislative history.

Justice Kennedy, writing the opinion, acknowledged *Smith*, but said that this enactment could not pass the neutrality test for two reasons, first because it was clear that the statute had only one goal and only one effect, to outlaw this religious practice, and second, because the goal was so clearly stated to be a religious one, to stop this religious practice. In a long dissent, Justice Souter, said that the mere reference to *Smith* was a problem, because *Smith* should not be good law and that we should go back to saying that compelling interest is always the test.

Ultimately in *Lukumi*, the Court said that the ordinance was not neutral, and so could not claim the benefit of *Smith*, and that there was no sufficiently compelling interest to protect animals in that narrow way to justify the legislation at issue.

Hon. Kathleen McDonald O'Malley

The hypothetical posed on its face applies to everyone. It is generally applicable and it would clearly be neutral and would clearly apply across the board, regardless of whether it was a religious practice to marry between fourteen and sixteen or whether you just wanted to marry between those ages.

If, therefore, the statute's effect was the only issue, the statute would be neutral. But because in *Church of Lukumi*, Justice Kennedy said we should also at least look at the purposes behind the statute, something Justice Scalia disagrees with, and the hypothetical recited a legislative history that said its clear purpose was to protect against this polygamist activity, the law might fail the *Smith* test and bring into play the compelling state interest analysis.

Under the *Lukumi* analysis, the question then is whether or not you have a compelling state interest. In this case, Judge O'Malley concluded, because of the interest in protecting children between the ages of fourteen and sixteen from marriage, even with parental consent, especially given the fact that it is at least arguable that children at that age could not knowingly consent, and since there is some evidence that they are being coerced into consenting, the legislation would likely pass the compelling state interest test.

CONSTITUTIONAL ISSUES-ALLEGED CHILD SEXUAL ABUSE

The moderator then added to the hypothetical the existence of a commune in which couples are living together in polygamous marriages involving underage girls, some as young as eight or ten, who are spiritually married to older men. The girls are substantially younger than the legal age for marriage, have sex and give birth to children. A complaint of child sexual abuse of a minor is filed with the appropriate authority. The question posed is how the free exercise of religion clause restricts, if at all, prosecution involving allegations of child sexual abuse premised upon religious beliefs.

Hon. Nancy Gertner

Judge Gertner responded that focusing on children changes the paradigm completely. The circumstances under which we intervene for children are very different from the circumstances in which we may constitutionally intervene with adults. There is on the one hand that notion of children having special protections, and on the other hand allowing families to make decisions with respect to upbringing of children on their own. This collision has its most clear focus in the criminal law, but the analysis tends to slide back and forth between criminal cases and civil cases, child protection cases.

It is, for instance, rare that we prosecute Christian Scientists who refuse transfusions for their children or refuse medical treatment. We regard that what they do with respect to their children as less culpable within the meaning of the criminal law. Civil intervention to protect the child is treated differently. What the state may criminalize and what the state may put its imprimatur on are obviously two separate things. Courts are reluctant where there was essentially a good faith basis, where the parents truly believe in spiritual healing as the basis for dealing with their children, to sustain criminal prosecution. On the other hand, there is a body of law involving Christian Scientists that addresses transfusions and the circumstances under which the court can order a transfusion. If the court can intervene before there is a death, the law is actually quite permissive, notwithstanding Christian Science being harmed.

In the hypothetical, the state has not put its imprimatur on marriage of young children. There is a profound question of coercion, one of the reasons why the age of consent is fixed by law. We do not believe that children at a certain age can freely consent to marriage, so that under the circumstances outlined, as long as we are talking about a civil proceeding, civil intervention by child protective services, Judge Gertner suggested that this would be permissible, so long as it

is directed at particular individuals. The church's teachings become evidence in the individual cases, but the focus has to be on the individual case.

In summary, Judge Gertner observed that all of these cases obviously have a different resonance when children are involved. Notwithstanding the case law that goes on at great length on the right of parents to raise their children, where a child is endangered, by, for instance, sexual abuse, a criminal offense, the child's interest should prevail.

There was an obvious collective sigh of relief from the judges that they did not have to decide these issues in an actual case. It is not unreasonable to assume that the audience was likewise relieved not to have faced these issues on a bar examination.

bon mot

[During the introduction of Judge Nancy Gertner, a fire alarm sounds.]

President **John J. (Jack) Dalton**: Ladies and gentlemen, if you would just give us a moment to find out. We had this happen last night in the wing where we were staying, so perhaps it's a conversion to the new hotel owners, but be ready.

Moderator **Christy Jones**: I think it's due to you.

[Long pause.]

Dalton: The good news is this is not an emergency and they will be shutting off the alarm shortly. It's a good thing, because I was going to turn this emergency over to Joan (Lukey, the president-elect who planned the program).

Jones: We're not going to mention Judge Gertner again for a while.

[Alarm off.]

Jones: Honorable --

[Alarm sounds again.]

Jones: Honorable --

[Alarm sounds again.]

Jones: We may not mention any judges again.

* * * * * * * * * * *

A couple of weeks ago I sentenced a middle-aged man who had previously robbed seventeen banks and . . . he was back before me. He said, "I'm sorry, Judge. I've been in prison most of my life, and when I got out I went to the mall and I looked at the people and I looked at what they were wearing and I looked at how they were acting and I freaked out. I robbed another bank so I could go back to jail." I told him I knew exactly how he felt. I have the same reaction when I go to the mall. And it is a pity that we as a society needed to rely on a career criminal as our moral compass.

Judge Ronald B. Leighton

bon mot

IN MEMORIAM

In this issue we note the passing of thirty-five Fellows ranging in age from fifty-six to ninety-seven, fourteen of them eighty or older, including the earliest living Fellow, the last of the College's 1951 inductees. For the first time, however, the deaths of Fellows in their fifties, sixties and seventies, nineteen in number, many of them known to be from cancer, exceeded the deaths of their elders. The ages of two are unknown. Nine are known to us to have been veterans of World War II, six of the Korean Conflict, one of the Vietnam era and two who served in peacetime. They include two Fellows who won Silver Stars for heroism in battle in World War II, one who was a veteran of six invasions in the South Pacific as the skipper of an LST and one who was in charge of twelve rocket-launching boats in the first wave at Omaha Red Beach on D-Day and who later shot down one of the last Kamikazes in the South Pacific. They include two Honorary Fellows, both Law Lords, one of whom had remarkably ascended to the bench without a college degree and the other of whom had also served as a Judge on the European Court of Justice. They also include one Fellow who had won all but one of his fifty cases as a prosecutor and later successfully defended an Attorney General of the United States, one who prosecuted the case that led to modern-day free agency in the National Football League, one who was associate chief counsel to the presidential commission that investigated the accident at Three Mile Island and one private practitioner in whose honor the judges in his district had named a courtroom. They represented a wide variety of interests outside the law. One was a legendary conservationist, one delighted in riding his Harley-Davidson and racing his Corvette, one played the violin in his local philharmonic orchestra, two were wine collectors, one became a licensed helicopter pilot at age seventy-seven and one earned a college degree in mathematics at age eighty-six. One, the youngest, too ill to attend a national meeting, had been inducted by then College president Mikel Stout in a special ceremony a few months before his death of cancer of the brain.

We continue to struggle to collect information about older Fellows, particularly those who in retirement move to another place, lose touch with their old law firms and about whose deaths we then learn too late to locate published obituaries on the Internet or otherwise. Undoubtedly some of those have stories as compelling as the ones we recount here. We continue to need your help in this respect. We owe that to one another.

As we were going to press, we were notified of the passing of Past President(1994-95) **Lively M. Wilson**, Louisville, Kentucky. A memorial tribute to Lively will appear in the next issue.

John Thompson Allred (88), a Fellow Emeritus, retired from Kilpatrick Stockton LLP, Charlotte, North Carolina, died March 4, 2009 after a brief illness at age 79. After graduation from the University of North Carolina, he served for five years in Japan and in the continental United States as an officer in the U.S. Navy during the Korean Conflict. Returning to the UNC School of Law, he graduated with honors, served as associate editor of his law review and was elected to the Order of the Coif. He had practiced for twenty-seven years in the Charlotte firm, Moore & Van Allen, followed by eighteen years as a partner in Kilpatrick Stockton. A thirteen-year member of the North Carolina Board of Law Examiners, he had served as its chair. A gregarious man of many interests and talents with a host of friends and a flair for living, he had served as president of the Charlotte Tennis Association and was a Grande Officier Honoraire of the Confrerie des Chevaliers du Tastevin, having held a number of offices in that international organization of wine aficionados. He is survived by his wife and a son.

Walter G. Arnold, Sr. (56), a Fellow Emeritus, retired to Ponte Vedra Beach, Florida, died March 2, 2009 at age 97. A graduate of the University of Florida and a magna cum laude graduate of its School of Law, where he was valedictorian of his class, he had entered private practice before becoming an assistant county solicitor in Jacksonville, Florida. Shortly after the bombing of Pearl Harbor, he entered the US Naval Reserve. After serving in naval intelligence in the Miami area, he requested a combat assignment and became first the executive officer and later the commanding officer of an LST (Landing Ship, Tank). He participated in the invasions of Lingayen Gulf, Bataan, Corregidor, Mindanao, Zamboango and Borneo. Upon his discharge, he returned briefly to the county solicitor's office before entering private practice. For the major part of his career he was a partner in the Jacksonville firm Arnold, Stratford and Booth. In addition to a long career in both civil and criminal trial practice, he had served on the boards of directors of several banks and for 57 years served as chairman of a scholarship fund that assisted many young men in obtaining a college education. His survivors include three sons.

Matthew P. Boylan (84), Lowenstein Sandler, PC, Roseland, New Jersey, died March 1, 2009. Born in 1932, he was a graduate of the College of the Holy Cross and of Harvard Law School. A criminal trial lawyer, he had served as an Assistant US Attorney and on various occasions had been appointed Special Deputy Attorney General on the recommendation of the New Jersey State Bar Association, as a Special Deputy Attorney General on the recommendation of the Chief Justice of New Jersey to prosecute the then Secretary of State and as a Special Investigator by the Judicial Council of the Third

Federal Circuit. He had served as Director of the New Jersey State Division of Criminal Justice and had served on the New Jersey Trial Attorney Certification Board. He had received the Distinguished Trial Attorney award from the Trial Attorneys of New Jersey. He had served on the College's New Jersey State, Federal Criminal Procedure and Emil Gumpert Award Committees. His survivors include his wife, two daughters and two sons.

The Rt. Hon. Lord Nigel Cyprian Bridge, Lord Bridge of Harwich (84), an Honorary Fellow, London, England, died November 20, 2007 at age 90. Having quit Marlborough College at age 17, he had spent time in Europe, becoming fluent in both French and German, before returning to England to work as a journalist and to write a novel that was never published. Foreseeing World War II, he tried to volunteer for flying service but was rejected as color blind. Later conscripted, he served a year in the ranks before receiving a commission in the King's Royal Rifle Corps. He served in Italy, northwest Europe and Germany. Having been detailed by his adjutant to defend a young soldier accused of desertion, he absorbed the applicable military law manual, perceived that the soldier had a complete defense and procured an acquittal, after which he was much in demand as a defending officer, albeit one with no formal training. Discharged from military service as a Captain in 1946, he pursued his newly-discovered talent and was called to the Bar by Inner Temple in 1947, taking first place in that year's examinations. In 1946 he became Junior Counsel to the Treasury in Common Law, a position known as "Treasury Devil" which provided a direct path to the High Court Bench. He joined the Queen's Bench Division in 1968 and the Court of Appeal in 1975 and in 1980 was elevated to the House of Lords, becoming the only Law Lord without a university degree. During his career, he was called on to conduct several high-profile investigations and to render public reports. After reaching mandatory retirement age, he enrolled in the Open University at age 78, reputedly in part to show that he had retained his cognitive abilities, and at age 86 graduated with a degree in mathematics. A widower, his survivors include two daughters and a son.

Robert Clair (Bob) Burleson, Jr. (78), Naman, Howell, Smith & Lee, Temple, Texas, died April 20, 2009 at age 71. A graduate of Baylor and of its School of Law, where he had later served as an adjunct professor, he was a frequent contributor to legal publications and had been president of his local Bar. In marking his death, his local newspaper observed that he had made his living in courtrooms, "but he made his mark in life by working to conserve Texas' natural beauty and rare archaeological sites." First inspired by Rachel Carson's books, he had served on the Texas Parks and Wildlife Commission, was a founder of the Texas Explorers Club, which led the effort to create the

Guadalupe Mountains National Park, chaired the Southwest Regional Advisory Committee of the National Park Service, as president of the Texas Archaeological Society drafted and helped pass the Texas Antiquities Code, led in the creation of the Texas Organization for Endangered Species, was a former executive director of the American Whitewater Affiliation and editor of its magazine and was a leader in establishing the Natural Resources Division of Texas Parks and Wildlife. He had facilitated the acquisition by a conservancy of an archaeological site that had been inhabited for over 14,000 years, which has yielded the earliest engraved stones yet found in North America, dating to about 11,200 years ago. He and his wife had restored their 500-acre farm into a natural tall-grass prairie on which many original Blackland Prairie plants and flowers had reappeared. In addition to his legal writing, he had written a canoeing and hiking guide to the Rio Grande River Canyons and was co-author of *Backcountry Mexico*, growing out of his work among the natives in rural Mexico near Big Bend National Park. His survivors include his wife and two daughters.

Robert H. Burns (81), a Fellow Emeritus from Chesterfield, Missouri, died April 20, 2006. He had last practiced with Burns & Marshall in Clayton, Missouri, retiring in 1996.

Robert Paul Chaloupka (86), Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, LLO, Scottsbluff, Nebraska, died February 19, 2009, at age 65 after a three and one-half year battle with cancer. His father, a PT boat skipper, had died in World War II, less than a year after he had been born. When several years later his mother remarried, his step-father adopted him. A graduate of the University of Nebraska and of its School of Law, upon graduation he entered the US Army Military Police, where he taught for two years during the Vietnam War era and was discharged as a Captain. He had been president of his local bar, was a past president of the Nebraska Association of Trial Lawyers, a past board member of the Association of Trial Lawyers of America and had served in numerous local civic organizations. Among his hobbies were riding his Harley-Davidson, racing his Corvette and skiing. His survivors include his wife, two daughters and a son.

George H. Corey (60), a Fellow Emeritus, retired from Corey, Byler, Rew, Lorenzen & Hojem, LLP, Pendleton, Oregon, a lawyer and a rancher, died April 23, 2009 at age 93. A graduate of the University of Oregon and of its School of Law, he had served as a Captain in World War II. He had served as district attorney of his county, president of the local Chamber of Commerce, chaired his local school district and had been the Grand Marshall of the local Westward Ho! Parade. He had also chaired the local United Way and had been a member of the Board of Governors of the Oregon State Bar Association, as well as a member of the Oregon Water Resources Commission and the

State Board of Higher Education. His survivors include his wife, two sons and a daughter.

Austin R. Deaton, Jr. (84), Deaton, Davison & Kessinger, PC, Ada, Oklahoma, died March 11, 2009 at age 83. A graduate of East Central Oklahoma State University and of the University of Oregon School of Law, he had practiced for 57 years. He had served as a member and as chair of the Oklahoma Judicial Nominating Committee and was the recipient of the Oklahoma State Bar's John E. Shipp Ethics Award. A widower, his survivors include a daughter and a son.

Hon. William Prospere DeMoulin (86), a Judicial Fellow from Lakewood, Colorado, who had retired in 1999, died February 17, 2009 at age 75 of Non-Hodgkin's Lymphoma after a period of declining health. After serving in the U.S. Army in the Panama Canal Zone in the Korean Conflict era, he had graduated from the University of Colorado and from its School of Law. After twenty-nine years in private practice, he had served as a state District Court Judge for ten years, the last two as Chief Judge, and then as a Senior judge for five more years. A past president of the Denver Bar Association, the Colorado Defense Lawyers Association and the Colorado Bar Association, he had also served on the national House of Delegates of the American Board of Trial Advocates. Widely known for his support of volunteer legal services, drug rehabilitation programs and in particular for his support of women in the profession, he had been honored by ABOTA in 1998 as Trial Judge of the Year and had received the Golden Gavel Award of the Colorado Court Reporters' Association and the William Lee Knous Award, the University of Colorado Law School's highest award. His survivors include his wife and four sons.

M. Allyn Dingel, Jr. (89), Boise, Idaho, died April 23, 2009 at age 72 of lung cancer. A graduate of the University of Idaho and of New York University Law School, where he was a Pomeroy Scholar and Associate Editor of the Law Review, he was in private practice for almost three years before joining the staff of the Idaho Attorney General, where he became Chief Criminal Deputy Attorney General. Facing mandatory retirement from his firm after nearly forty years of private practice at age 70, he continued practicing as of counsel to another firm until his death. A founding member of the Idaho Law Foundation, of which he had been vice-president, he had served as Idaho's lawyer representative to the Ninth Circuit Conference of the United States Courts, served in the American Bar Association House of Delegates and had chaired the Idaho State Code Commission. He had been president of the Idaho Association of Defense Counsel. For twenty-five years he was Chancellor of the Episcopal Diocese of Idaho, and he served on the executive committee of Idaho Partners Against Domestic Violence. He was a member emeritus of the Advisory Board of Idaho University School of Law. A

baritone, he also sang at weddings and played the violin in the local Philharmonic Orchestra. In 2004 the Idaho State Bar named him its Distinguished Lawyer of the Year. The Idaho Legislature commended him with a concurrent resolution honoring his years of service to the legislature and the courts and his charitable and philanthropic endeavors. The state court judges in his district honored him by naming a courtroom for him. His survivors include his wife and two sons.

Robert A. Downing (87), a retired partner in Sidley & Austin, LLP, Chicago, Illinois, died in May 2009 at age 80. A graduate of the University of Wisconsin, where he played football, and of its School of Law, he was a naval officer during the Korean Conflict. He had long been active in Episcopal Charities. His survivors include his wife, three sons and a stepson.

Davis W. (Bill) Duke, Jr. (90), Tripp Scott, PA, Tallahassee, Florida, died September 18, 2008 at age 76. A graduate of Duke University and of its School of Law, he has served in the Air Force Office of Special Investigations. He practiced most of his life in Fort Lauderdale. Involved in politics for much of his life, he had been chair of the Broward County Republican Party. His survivors include his wife, two sons and a daughter.

William Henry File, Jr. (68), File Payne Scherer & File, PLLC, Beckley, West Virginia, died March 13, 2009 at age 94. A graduate of Lynchburg College and of the University of Virginia Law School, he was a member of the law review and of the Raven Society. He practiced law in the same firm in Beckley for over sixty-five years, interrupted only by service in World War II, at various times with his father, his uncle, his three sons and a son-in-law. A naval officer in the amphibious force and winner of a Legion of Merit and a Silver Star, he participated in the invasion of Sicily as a boat officer operating from an attack transport. He was boat officer in charge of twelve rocket-launching boats in the first wave at Omaha Red Beach on the D-Day. He later assumed command of a rocket-launching amphibious craft which he commissioned in Boston, took through the Panama Canal and into combat in the Pacific, including shooting down an attacking Kamikaze plane in the late stages of the war in the Pacific. A former city attorney, he had served in the West Virginia House of Delegates, including one term as majority leader. He had also served on the boards of several banks and had been West Virginia State Chair of the College in the early seventies. A widower, his survivors include a daughter and three sons.

Peter Fleming Jr. (88), Curtis Mallet-Prevost, Colt & Mosle LLP, New York, New York, died January 14, 2009 at age 79 of complications from lung surgery. A graduate of Princeton University and of Yale Law School, he had served in the United States Navy between

undergraduate and law schools during the Korean Conflict. After three years at Davis Polk & Wardwell, Fleming became an Assistant United States Attorney in the Southern District of New York under Robert M. Morgenthau. During his nine years as a prosecutor, he won 49 of 50 cases. Leaving to join Curtis Mallet-Provost, his clients had included Attorney General John Mitchell, whom he successfully defended against a charge of obstruction of justice and perjury in connection with the investigation of fugitive financier Robert L. Vesco. He represented John J. Rigas, chief executive of Adelphia Communications, against a charge of conspiracy, bank fraud and securities fraud involving $2.3 billion. He successfully defended boxing promoter Don King against charges of defrauding Lloyds of London. In 1991 the United States Senate had named him special counsel to investigate the disclosure of sexual harassment allegations made by Anita Hill against Clarence Thomas during his confirmation hearings. A widower, his survivors include four sons and a daughter.

Stephen H. Foster (93), Holland & Hart LLP, Billings, Montana, died April 9, 2009 at age 70. The son of a sheep rancher and a teacher, he was a graduate of Montana State and, with honors, of the University of Montana School of Law. After clerking on the Ninth Circuit Court of Appeals, he had variously practiced with a law firm in Billings, as chief counsel for the Anaconda Company in Butte, for Atlantic Richfield (ARCO) in Butte and Denver and last with Holland & Hart. Serving on the latter's management committee, he had opened its Billings office in 1980. He had retired in 2005. In his later life he had returned to the piano and became an accomplished pianist. He had served on the board of the local symphony and was instrumental in founding a local theater company. His survivors include his second wife and two children.

James E. Garvey (75), a Fellow Emeritus from Eau Claire, Wisconsin, retired from Garvey, Anderson, Johnson, Gabler and Geraci, SC, died February 12, 2009 at age 79. A magna cum laude graduate of Loras College, where he played basketball and tennis, and the University of Minnesota Law School, where he was a member of the law review, he had been the College's Wisconsin state chair in the eighties. A past president of his local Bar, and a past treasurer of the State Bar of Wisconsin, he had served in a number of other bar positions, including the Federal Judicial Nomination Commission and the Governor's Advisory Council on Judicial Selection and had served in a number of civic and religious organizations. His survivors include his wife, five daughters and two sons.

Edward M. Glennon (74), Lindquist & Vennum, PLLP, Minneapolis, Minnesota, died April 24, 2009 at age 85. A graduate of the University of Minnesota and of its School of

Law, he had begun his career as a trial lawyer for the Soo Railroad. He was best known for prosecuting the case that brought modern-day free agency to the National Football League. He was also reputed to have taken to trial the first case under the Americans With Disabilities Act. He had been president of the National Association of Railroad Trial Counsel. His survivors include his wife, two daughters and a step-daughter.

John Allen Grambling (72), El Paso, Texas, died February 24, 2009 at age 88. A graduate of the University of Texas and of its School of Law, he practiced in El Paso for over fifty years. He had served in the United States Navy during World War II. A past President of his local Bar, active in a number of civic and charitable organizations, he was a charter member of the Texas Bar Foundation. His survivors include his wife and three sons.

Paul Hayden Grimstad (89), Nash, Spindler, Grimstad & McCracken, LLP, Manitowoc, Wisconsin, died March 26, 2009 at age 64. A graduate of the University of Wisconsin and of its School of Law, he was a charter member and a past president of the Wisconsin chapter of the American Board of Trial Advocates. He had lectured and written widely on medical malpractice issues for both lawyers and medical and dental providers. He had served as president of the Northeastern Wisconsin Golf Association and as a director of the Western Golf Association. His survivors include his wife and one son.

Charles A. Harvey, Jr. (93), Harvey & Frank, Portland, Maine, died February 18, 2009 at age 59 after a brief illness, of pancreatic cancer. A graduate of Assumption College, where he was president of the Student Government Association, and of the University of Maine Law School, where he was editor of the law review, he had practiced with Verill Dana for twenty years before forming his own law firm. In 1979, he was appointed associate chief counsel to the President's Commission on the Accident at Three Mile Island. He had chaired the Maine Supreme Court Special Committee on Cameras in the Courtroom, the Governor's Select Committee on Judicial Appointments and the Grievance Committee of the Maine Overseers of the Bar. In the College he had chaired both the Maine State Committee and the Legal Ethics and Professionalism Committee. At the time of his death he was a consultant to the Maine Supreme Court's Advisory Committee on the Rules of Civil Procedure and chaired the U. S. District Court's Local Rules Advisory Committee. In the month he died, he had been selected by the justices and judges of Maine to receive the McKusick Award, created by the Maine judiciary to honor a person who has contributed substantially to the administration of justice and the delivery of judicial services. At his death he was also an advisory trustee of the Portland Symphony Orchestra and he had previously

served as a trustee of a number of community arts and educational institutions. His survivors include his wife, a daughter and a son.

Hon. Keith Howard (75), a Fellow Emeritus from Omaha, Nebraska, died July 29, 2008 at age 86 of congestive heart failure. A graduate of the University of Nebraska and of its School of Law, he had practiced for thirty-two years before becoming a District Judge in Douglas County, where he had served for twelve years before retiring in 1991.

Marcelino J. (Bubba) Huerta, **III** (08), Tampa, Florida, died March 19, 2009 at age 56 of complications from cancer of the brain. The son of Spanish immigrants whose father was the football coach at the University of Tampa, he was a graduate of the University of Florida, which he attended on a baseball scholarship, and of the South Texas College of Law. After four years as a state court prosecutor, he practiced criminal defense for the rest of his career. Asked to respond for the inductees when he was first invited to join the College, he had declined because he was undergoing chemotherapy. Several months later, as his condition worsened, then College President Mikel Stout traveled to Tampa and, accompanied by the Florida State Committee and the Tampa Fellows, conducted his induction into the College in the presence of his family. His survivors include his wife and a daughter.

Raoul D. Magana (51), a Fellow Emeritus from Pacific Palisades, California, died January 16, 2007 at age 95 of heart failure. He was the earliest living inductee of the College and the last surviving member of the group inducted in 1951, the year after the College's founding. His family had moved to California during the Mexican Revolution when he was four years old. He was a graduate of the University of California at Berkeley and of its Boalt Hall Law School. An infantry private in World War II, he practiced until he took inactive status at age 90. He had been President and Dean of the International Academy of Trial Lawyers and had been California Trial Lawyer of the Year in 1963. He had written widely on courtroom medicine. And had been an editor of the journal Trauma. His survivors include his wife, two sons and two daughters.

E. Snow Martin (70), Martin & Martin, PA, a Fellow Emeritus from Lakeland, Florida, died in September 2007 at age 98. A graduate of Cumberland School of Law, his father, two uncles and five of his six siblings were lawyers. He had practiced in Bartow, Florida and had served two terms in the Florida State Legislature in the thirties, where he helped to write the Florida Citrus Code. His survivors include his wife of 75 years.

Archibald Thomas Reeves, Jr. (88), Reeves & Stewart, Selma, Alabama, died May 3, 2009 at age 76 of complications following cancer.

A graduate of Davidson College and the University of Alabama Law School, where he was a member of the law review, he practiced with his father and later with his son. Active in his church and various civic and community organizations, his survivors include his wife and three sons.

Harrison L. Richardson (75), Richardson, Whitman, Large & Badger, Portland, Maine, died February 26, 2009 at age 79 of a stroke. An all-conference tackle at the University of Maine, he was a graduate of Hastings College of Law. Growing up on a chicken farm, he never lost his love for farming. He began his practice in Chicago before returning home to Maine. He had served in both houses of the Maine legislature and had been majority leader of the state House of Representatives and narrowly lost his party's nominating primary for governor. An early proponent of strict environmental laws, he been a member of the Maine League of Conservation Voters and was an emeritus member of the Maine Audubon Society. He had chaired the trustees of the University of Maine system and was a current trustee of the Maine Maritime Academy. He has served as the chair of the College's Maine State Committee in the early eighties. A widower, his survivors include two sons, a daughter, a step-son and a step-daughter.

James Evans Simpson (88), Adams & Reese, LLP, Birmingham, Alabama, died March 10, 2009 at age 78 of complications following surgery. A graduate of Princeton and of the University of Virginia Law School, he had served as an officer in the U.S. Army field artillery in Germany. A lifetime student of history, he had visited battlefields in three continents and could converse in five languages. He had been a member of the Democratic State Committee and a delegate to the 1960 Democratic Convention. He was a trustee and docent of Birmingham Museum of Art and vice-chair of the Alabama Department of Archives. Active in a number of local philanthropic organizations, he was on the Advisory Board of the University of Alabama-Birmingham English Department and the College of Arts and Sciences at Samford University. His survivors include two sons and a brother, Henry, who is also a Fellow of the College.

Paul Edward Sinnitt (70), Sinnitt & Sinnitt, Inc., P.S., a Fellow Emeritus from Tacoma, Washington, died November 11, 2001 at age 81. An Eagle Scout and a naval officer who had commanded a tugboat in the South Pacific in World War II, he received his law degree from Gonzaga University after the war. Beginning his career as a prosecutor, he had served as Chief Deputy Attorney General in the Washington Highway Department, participating in the acquisition of rights of way for the state's modern highway system. Entering private practice in Tacoma, he was regarded as the

leading authority in Washington on eminent domain, a subject on which he had written and lectured extensively. His survivors included his wife, three daughters and a son.

The Rt. Hon. Lord Gordon Slynn, Lord Slynn of Hadley (92), an Honorary Fellow, London, England, died April 7, 2009 at age 79. A graduate of Goldsmith's College and Trinity College, Cambridge, where he took an MA and an LLM and became president of the university law society, he was called to the Bar by Gray's Inn in 1956, becoming a Bencher in 1970 and Treasurer in 1988. In 1967 he had been appointed junior counsel to the Ministry of Labour and in 1968 was appointed "Treasury Devil," appearing for the government in the Divisional Court before the Lord Chief Justice. There he had participated in a number of landmark cases. Taking silk in 1974, he became the first-ever leading Treasury Counsel. Appointed Judge of the High Court, Queens Bench Division, in 1976, he was almost immediately chosen to sit on the Court of Criminal Appeal. After three years as president of the Employment Appeal Tribunal he became Britain's Advocate-General at the European Court of Justice, after which he served for four years as a judge on that court until, in 1992, he was made a life peer, elevated to the House of Lords, from which he retired in 2002. Widely known for his interest in international law and the supremacy of international tribunals, in 2001 he had been made president of the Court of Appeal of the Solomon Islands. He had received honorary degrees from numerous institutions and had been decorated by Luxembourg, Poland, Malta, Hungary and the Solomon Islands. Made a Knight of the Order of St. John in1998, he was appointed Knight Grand Cross of the Order of the British Empire (GBE) in 2009. His survivors include his French-born wife, whom he had met when she was a nurse in a hospital where he had been treated following an automobile accident.

John Edward Sparks (80), a Fellow Emeritus from Berkeley, California, retired from Brobeck, Phleger and Harrison, died February 25, 2009 at age 78 after a long battle with cancer. A graduate of Indiana University, he had served as an officer in the Army Quartermaster Corps in Korea before getting his law degree from Boalt Hall at the University of California at Berkeley. A law review editor who finished sixth in his class, he studied at the London School of Economics before entering private practice. He had served as an adjunct professor at the University of San Francisco Law School, as president of the Legal Aid Society and as president of the Boalt Hall Alumni Association. He was a recipient of the UC Berkeley Wheeler Oak Meritorious Award. Following his retirement in 1996, he had continued to volunteer his legal services. His survivors include his wife, two sons and a daughter.

Raymond Rex Stefani, Sr. (83), Gray, Stefani & Mitvalsky, PLC, Cedar Rapids, Iowa, died March 9, 2008 at age 78. His education at the University of Iowa interrupted by service in the Korean Conflict, he completed his undergraduate and legal education at Drake University. He had served on the Advisory Committee of the Eighth Circuit Court of Appeals, as president of his local bar and as president of the Iowa Defense Counsel Association, of which he had been made a lifetime member. His survivors include his wife and four sons, all of them lawyers, one of whom is also a College Fellow.

John J. Tigue, Jr. (97), Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, PC, New York, New York, died May 3, 2009 at age 70 of cancer. A graduate of St. Peter's College and New York University Law School, he had been licensed as a Certified Public Accountant the year before he completed law school. After three years with a large law firm, he became an Assistant United States Attorney. After practicing for twenty years in a firm that bore his name, he joined Morvillo, Abramowitz in 1994. An expert in tax matters, he was a frequent author on the subjects of criminal tax matters and white collar crime. He had lectured at Harvard Law School and had been an adjunct professor at Fordham and at NYU Graduate Law School. His survivors include his wife and four sons.

Hamilton D. Upchurch, Sr. (69), Upchurch, Bailey & Upchurch, PA, St. Augustine, Florida, died in January 2008 at age 82. Volunteering for the Army Air Corps immediately after finishing high school and trained as a pilot, the war ended before he saw combat. He remained a lifelong pilot and had been licensed as a helicopter pilot in his seventy-seventh year. A graduate of the University of Florida and of its School of Law, he had begun his career as a state court prosecutor and had served as mayor of St. Augustine and for ten years served in the Florida House of Representatives, including eight years as chair of the House Judiciary Committee. He had been president of his local Bar and had served on the Florida State Bar Board of Governors. Active in many civic organizations, he had helped to found the predecessor of his local United Way and had been president of the Historical Society of St. Augustine, the oldest city in the United States. He had also been a founding director of two local banks. His survivors include his wife and a son.

James Owen White, Jr. (76), a Fellow Emeritus from San Marino, California, died October 17, 2008 at age 88. A graduate of Stanford University and of its School of Law, he had practiced in Los Angeles as a founder of Cummins & White. A forward observer in military campaigns in Italy, France and Northern Africa in World War II, he had been awarded a Silver Star and a Purple Heart. He had served as president of both the American Trial Lawyers Association and the American Board of Trial Advocates. His survivors include his wife and two sons.

THE BULLETIN
of the
AMERICAN COLLEGE OF TRIAL LAWYERS
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Irvine, California 92612

STATEMENT OF PURPOSE

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

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

HON. EMIL GUMPERT, CHANCELLOR-FOUNDER, ACTL