American College of Trial Lawyers

THE BULLETIN

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Professionalism and Zealous Advocacy,

Are The Two Incompatible?

by
Elizabeth Pruit

In our legal system, as in Monday night football, winning is everything. At least that is what clients want and those lawyers that most frequently prevail on behalf of their clients are held in the highest regard. It is, therefore, no surprise that lawyers who advocate most zealously — using every tactic in their legal arsenal to win — are most coveted. While lawyers are, in fact, duty-bound to represent their clients zealously, to say that this duty is only performed in a selfless endeavor to fulfill ethical obligations is pure fabrication. Today we see that American lawyers often enthusiastically embrace their duty at the expense of the public trust and the pursuit of justice. To be clear, the behavior we are dealing with is what many lawyers would term "overzealous" or "obstructionist." It is often exhibited in the form of outlandish and abusive courtroom behavior, aggressive and abrasive dealings with opposing counsel, and unnecessarily impeding tactics that merely prolong or es-

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Elizabeth Pruit is a law student at Loyola Law School in Los Angeles. She is the first recipient of the first project of the American College of Trial Lawyers Foundation.

This past year the Foundation launched an essay contest on the subject of "Professionalism and Zealous Advocacy, Are The Two Incompatible?" The Foundation offered awards of $5,000 to the winning essay, $2,500 to the second place contestant, and $2,500 to the legal writing instructor of the winning essayist. The first year of competition found some 45 entries from law schools all accross the country. The second runner-up was Glen Noe from Cumberland Law School in Birmingham, Alabama.

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American College of Trial Lawyers
THE BULLETIN

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calate matters. It is also the type of behavior that demeans the public's perception of lawyers. As a recent ABA public opinion poll notes, almost two-thirds of those interviewed regarded lawyers as "knowledgeable and smart" while nearly forty percent felt that the words "honest and ethical" do not describe lawyers. This naturally prompts the question of whether such zealous advocacy and principles of professionalism are reconcilable.

Professionalism: Dueling Definitions

Zealous advocacy and professionalism are, by the literal confines of their definitions, compatible. The cornerstone of the adversarial system is a lawyer's duty of zealous partisanship on behalf of his or her client. As the ABA's Code of Professional Responsibility defines it, "[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law." Meanwhile, the dictionary meaning of professionalism is simply "appropriate with ... the profession," in this case, lawyering. Zealous advocacy, as exercised by the members of the legal community, is then absorbed into what is generally considered to be "appropriate with" lawyering. In essence, the profession ultimately defines itself; it is unfettered by standards dictated by society. Perhaps the shroud of professionalism itself enables lawyers to engage in often overzealous and otherwise indefensible behavior. Some commentators have referred to this as "role-differentiated behavior" which enables the lawyer to take a systematically amoral and, at worst, occasionally immoral approach to the practice of law. Essentially, the lawyer is transformed into a technician whose legal skills are available only to advance the causes of the client – a hired gun beholden only to one set of interests.

On the other hand, another definition of professionalism lingers underneath the surface. The word has also incorporated connotations of executing professional duties with a certain level of decorum and dignity. Taking this second definition into account, the lawyer's duty of zealous advocacy is constrained by a responsibility, not just to the client, but also to society. Fierce advocacy on the client's behalf no longer solely dictates the boundaries of how a lawyer may perform her duty under this definition. Other considerations must be taken into account, including the preservation of the legal system as a venerable means to dispense justice through the outward manifestations of the roles lawyers play. Under this definition, moral and ethical issues play a greater role in how a lawyer may advocate for his or her client.

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Our society takes a schizophrenic approach to defining standards of professionalism for lawyers. While people are often appalled with their sometimes "sleazy" (although legal) antics, they also want a winner in their corner going into a legal contest. The unresolved conflict between these definitions, therefore, lies in our inability to clearly define the desired role of lawyers in our society. If we simply define lawyers as advocates whose only responsibility is to their clients, then morality and ethics play a considerably minor role while decorum and dignity play no role whatsoever. However, if we broaden the definition of what it means to be a lawyer to include duties beyond the interests of a single client, then this definition begins to have meaning. Again, our definition of professionalism hinges on which model of a lawyer we choose as the standard against which the behavior of others in the profession are measured — is the lawyer purely beholden to the client, or is there an additional component of accountability?

Expanding the Definition of Professionalism by Redefining the Role of the Lawyer

The shortcomings of the narrow definition of a lawyer's role are manifest. If zealous advocacy is, indeed, the singular focus of the lawyer's role, where should we look for the pursuit of the truth and justice? Are we incorrectly assuming that through pure zealous advocacy by two opposing parties the truth shall be exposed? Of course we are, and therein lies the partial source of the public's discontent with the legal system. This strict adherence to such an adversarial philosophy generally leads to the presentation of both ends of the spectrum, whereas the truth may lie somewhere in between. On the other hand, the adversarial system ensures the protection of fundamental rights. It is, for example, necessary that criminal defendants are armed with ample legal latitude in their fight against a government empowered to deprive individuals of personal freedoms. Any redefinition of the role of the lawyer, which in any way constrains the duty of zealous advocacy, must be mindful of the special considerations that the practice of criminal defense presents.

In the course of representing an accused, an attorney may have the obligation to invoke practices and procedures which are themselves morally objectionable, and which the lawyer in other contexts might outright reject. Nonetheless, it appears to be part of the lawyer's duty of zealous advocacy to seek advantage of such rules of law to defend an accused — irrespective of any moral opinions he or she may have about the rule in question. Because the prosecutorial arsenal of the government is so immense, and the punishment by the deprivation of liberty is so grave, there is a natural tendency to take an "anything goes" approach to defining the lawyer's role for the entire profession. Once we leave the particular situation of the criminal defense lawyer, however, it is clear that the "overzealous" and "sharp tactics" of civil attorneys range from inappropriate to indefensible.

It is easy to be improperly discour-

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The President's Report

Edward Brodsky
President

I wish that each of you could share with Cynthia and me the exhilarating experience of spending time with so many of you and your spouses as we travel across this country and Canada to attend College meetings. There is no better group to work with and to have fun with than College members and it is a distinct pleasure for me to count myself as one of you.

The College is having an extraordinarily fruitful year as we continue to support projects designed to improve the administration of justice. College projects include opposing a recent attempt to encroach upon the attorney-client privilege, limiting discovery in civil cases, pro bono initiatives, a protocol for fair trial in high profile cases, preparing for the year 2000 (the fiftieth anniversary of the College) and dealing with the lack of civility among certain lawyers. I will outline some of the things we are doing.

The pro bono work being organized by our Access to Justice Committee under the leadership of Dan Kolb continues to enlist more states in this extraordinarily worthwhile endeavor. Each state and province which has decided to participate in this project is tailoring its pro bono work to meet its specific needs and to be sure that there is no duplication with other legal services organizations in their areas.

This year we filed an amicus brief in the United States Supreme Court on an issue involving the attorney client privilege. The Court of Appeals for the District of Columbia Circuit held that after death, in deciding whether the privilege applies, there should be a balancing test between the interests of the estate of the deceased and the interests of a prosecutor pursuing a criminal investigation. We took the position that The Court of Appeals decision would have improperly narrowed the privilege by inhibiting clients from freely talking to their lawyers and the Supreme Court agreed, holding that there should not be a balancing test and that no exception to the privilege should be created in favor of the prosecutor upon the death of a client.

We recently approved a syllabus for the teaching of civility to law students. Unfortunately, the relatively few lawyers who engage in uncivil conduct, especially in the course of litigation, damage the reputation of all lawyers, create an unpleasant atmosphere in which to practice law and drive some of our best young people to more civilized endeavors. Thus, our teaching syllabus has been prepared and circulated to our State Chairs with instructions to appoint Fellows to fan out to the local law schools and spend several hours with students teaching them the importance of civility.

In addition, the College Foundation has sponsored the first of what will be an annual essay contest for law students on the subject of "Civility and Zealous Advocacy, Are the Two Incompatible?" The contest was judged by a distinguished panel of jurists consisting of Judges Judith Kaye (New York), Norman E. Vesey (Delaware) and Richard Arnold (8th Circuit Court of Appeals). The winner of the contest this year was Elizabeth Prewitt from Loyola.

Our Judiciary Committee has several matters on its agenda. The salaries of the federal judiciary are extremely low compared with the private bar, considering the demands of the position. Congress passed a one-time cost-of-living increase for federal judges in 1997, which

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is inadequate to meet the goal of appropriate compensation. The College has, thus far, unsuccessfully supported a "delinking" of judicial salaries from that of members of Congress. Delinking would enable Congress to consider raises in salary and cost-of-living increases of the judiciary without having to raise congressional salaries.

The Judiciary Committee also is concerned with the failure by Congress to pass on several long standing vacancies in the judiciary and has been asked to make recommendations to the Board on the activities of a new Commission on Structural Alternatives for the Federal Courts of Appeals. The Commission, which was created in 1997, is charged with studying the structure and alignment of the Federal Court System with particular reference to the Ninth Circuit.

Our report on the Fair Trial of High Profile Cases has recently been concluded and we have already been receiving favorable comment. Ralph Langley, one of our Fellows, wrote that, "[i]t makes a lawyer proud to be a Fellow of the College to read a document like this. It is so carefully worded as to be clear and understandable to the reader — even to a non-lawyer." Judging by that and other responses to date, I believe that the report is going to be widely read and utilized by lawyers, judges and commentators who are involved in high profile cases.

The report covers (i) a rather complete set of proposed guidelines for judges; (ii) a discussion of out of court statements by counsel for the parties; (iii) a discussion of rules of ethics as they apply to these cases; (iv) a discussion of "gag" orders imposed upon attorneys and parties; (v) a discussion of television in the courtroom in high profile cases and (vi) a discussion of proposed standards applicable when attorneys act as commentators.

Our Alternatives for Dispute Resolution Committee has been developing a Code of Conduct for Arbitrators. At this time there is no code of conduct setting standards of behavior for arbitrators and mediators similar to the College Code of Trial Conduct. We are attempting to fill that void.

The Special Problems in the Administration of Justice Committee, chaired by Dick Hite, is examining experiments being conducted across the country on jury reform, including such questions as whether jurors should be permitted to take notes, whether jurors should be permitted to ask questions of witnesses under controlled circumstances, whether there should be mini-summations in the course of long trials and whether the court should charge the jury as the case progresses in long trials.

We have commented to the Conference of State Chief Justices on a proposed report which, for all practical purposes, would support the Department of Justice position that its lawyers are permitted to interview attorneys for defendants in criminal cases without the lawyers knowing that their clients have been interviewed. I had a chilling experience when I was talking to a Fellow at a State meeting who told me that one of his clients had been wired by the Department of Justice and told to secretly have conversations with him — his own lawyer. Thus, while the lawyer thought that he was giving legal advice he learned later that he was simply making a record for the Department of Justice to possibly use against him. This lawyer did not and would not do anything inappropriate, so the taping was a waste of time for the government, but the practice has a dampening effect on what lawyers in criminal cases will say to their own clients.

Our report on The Law of Evidence in Federal Sentencing Proceedings issued this year has been widely circulated. I believe it will have an impact in changing what we perceive to be issues of unfairness in the Federal Sentencing Guidelines.

The ABA Task Force on Civil Trial Practice Standards, which has been led by Greg Joseph, Chairman of the ABA Section of Litigation — who is also Chair of the Downstate New York Committee of the College — has

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President's Report

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adopted recommendations that we have made to the task force. Michael Cooper of New York has been our representative on the ABA task force and has been instrumental in having several of the views of the College incorporated into the ABA Civil Trial Practice Standards.

Our Canada-United States Committee, under the direction of Jack Giles, has prepared a proposed convention between Canada and the United States providing for the reciprocal enforcement of judgments in civil and commercial matters. The report recognizes the substantial daily flow of wealth, skills and people between the United States and Canada, which results in disputes requiring judicial determination. The Canada-United States Committee believes that the reciprocal recognition and enforcement of judgments will facilitate the fair and orderly resolution of such disputes. The report, which also has been approved by the Special Problems in the Administration of Justice Committee, will be considered at the Annual Meeting.

The College recently published a proposed amendment to the Federal Rules of Civil Procedure, which would redefine and provide greater certainty as to the scope of discovery in civil cases in federal courts. The scope of present discovery under Rule 26(b)(1) specifies that discovery may be had as to "the subject matter" involved in the pending action whether it relates to the claim or defense of the party seeking discovery. The proposed amendment would limit discovery to facts about the "claim or defense of the party seeking discovery... ." We believe the amendment would require that discovery more directly link fact and opinion to the claims and defenses in the case and in doing so will reduce discovery costs and delay in civil litigation.

President Ed Brodsky and his wife, Cynthia, attend the Alabama, Georgia and Florida Tri State Regional Meeting at Point Clear, Alabama. Robbie and Regent Warren Lightfoot were also in attendance.

We continue to make a concerted effort and have been successful in improving the quality and regularity of *The Bulletin*. We have employed, on a part-time basis, Gary Hunt, who is doing a superb job in helping us prepare a more interesting publication on a regular quarterly basis. *The Bulletin* is particularly important to Fellows who cannot come to our Spring and Annual Meetings and gives them an opportunity to understand the variety of functions in which the College is involved.

I conclude this report by noting that we are planning a meeting of special importance to celebrate the 50th Anniversary of the College in the Year 2000. We will be reviewing the past and looking ahead to the future. We will emphasize the contributions made by Fellows in maintaining and improving the standards of trial practice, the administration of justice and the ethics of the profession. With respect to the future, we expect to be discussing how the practice of law is different today than it was in 1950 when the College was founded and what lies ahead for trial lawyers in particular.

As you can see, the College has a rich and meaningful menu of projects at different stages of development and none of them could be done without our hard working Committees and Committee Chairs. To them we owe a special word of thanks and I hope to see many of you in London and Rome in the fall. □

ACTL Regional Meetings

Alabama-Georgia-Florida Tri State Regional

Some 42 Fellows attended the Tri State Regional Meeting held at the Marriott Grand Hotel at Point Clear, Alabama in May. Alabama hosted the meeting. Activities included receptions, dinners, golf and tennis.

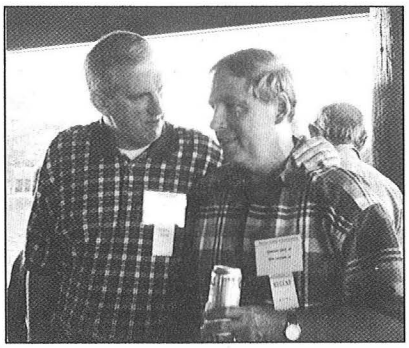
On Friday evening our dinner speaker was Robert L. Steed. Bob Steed is a municipal bond lawyer/humorist who practices law with the King & Spalding firm in Atlanta. He is a real honest-to-goodness humorist and writes from time to time for the *Atlanta Journal* and *Atlanta Constitution.*

In our Fellows program on Saturday morning our speakers were Judge Emmett Cox, United States Circuit Judge for the Eleventh Circuit Court of Appeals and attorney Hal D. Hardin of Nashville, Tennessee. Judge Cox was introduced by Fellow Michael Knight of Mobile, and Hal Hardin was introduced by Fellow William Kimbrough of Mobile.

President Ed Brodsky spoke to the group at our dinner meeting on Saturday evening. His address to the group was most enlightening, informing the Fellows and their spouses of things going on in the College and encouraging our Fellows to make a difference in our profession.

The meeting was very well received and I had a number of very positive comments about the speakers.

Jerry A. McDowell
Alabama Chair

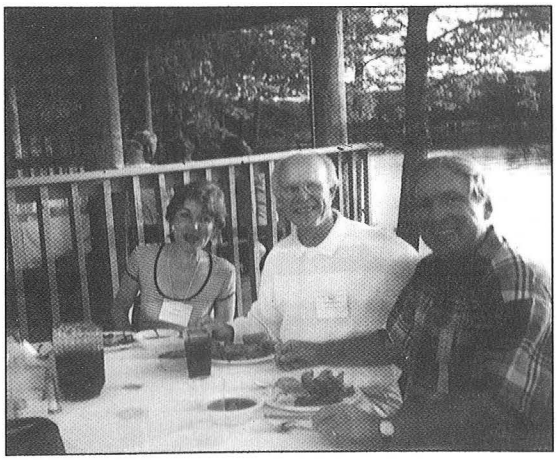


Regent Edward J. Rice, Jr. of New Orleans visits with Fellows from Texas, Mississippi, Louisiana and Arkansas.

Texas, Mississippi, Louisiana and Arkansas Regional Meeting

The Regional Meeting of the Texas, Mississippi, Louisiana and Arkansas Fellows was held in May at Lake Hamilton Resort in Hot Springs. A program began with a fish fry on Friday night. Saturday morning speakers included a talk by former Arkansas Senator David Pryor about the independent counsel process. President Ed Brodsky also spoke concerning the activities of the College.

Robert L. Henry, III
Arkansas State Chair



The challenge then becomes to redefine the role of the lawyer by reconciling the principles of zealous advocacy with responsibilities that extend beyond the client.

Zealous Advocacy

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aged from tinkering with the lawyer's role as a zealous advocate by the special features of the criminal case. Yet, protections already in place insure that criminal defense attorneys will have considerable latitude in representing their clients. For example, ABA Rule 3.1 explicitly creates an exception to the general duty to avoid frivolous claims only for criminal defense attorneys. The rule states that, while the prosecution must prove every element of its case, the defense need not present a good faith argument in support of its client's innocence. Moreover, expanding the definition of professionalism to incorporate duties that extend beyond the client does not impinge upon the type of advocacy exercised by criminal defense attorneys. It is in the civil context that we most often see lawyers relying on tactics of intimidation and harassment in the name of the client. Criminal defense attorneys, on the other hand, simply do not have the requisite leverage to effectively harass and intimidate, and prosecutors are restrained from such activities by special ethical duties imposed upon them when wielding the power of the government.

At bottom, we see that broadening the definition of professionalism is a critical endeavor with marginal downside risks. The challenge then becomes to redefine the role of the lawyer by reconciling the principles of zealous advocacy with responsibilities that extend beyond the client. This process naturally raises a number of pivotal issues. In light of our adversarial system, to whom do lawyers owe their allegiances, what motivates and shapes their behavior, and what role does society play in the equation? Through the process of redefinition, a necessary and long-awaited expansion of the concept of legal professionalism rises to the surface.

The Lawyer as a Warrior

We want to win. Competition is the most natural outgrowth of our American ideals of individuality and freedom. Taken to its logical extent, our brand of free-market competition for legal services may border on Social Darwinism — let the fittest (and most aggressive) lawyers win. While the public pays lip service to the idea that how one plays the game makes a difference, lawyers are not fooled. Clients often judge lawyers favorably based on their abrasive and missionary zeal to win at all costs. It is also clear that clients are frequently well-advised to select representation based upon how far a lawyer will take the role as an advocate. It is a simple and familiar fable of the economics of supply and demand. Whether lawyers have created a public appetite for, or clients have prompted, such lawyers' overzealous behavior is a matter of debate. Regardless, on a most practical level, lawyers who conduct business with pure intentions and restrained behavior will often find themselves quickly out-gunned by dubious and highly aggressive tactics of the opposing counsel. Judges, often striving to "split the baby," are frequently

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influenced by the tendency toward exaggeration by one side or the other, sometimes reapportioning outcomes which are at odds with how the facts and the law would otherwise dictate.

Lawyers also frequently embrace zealous behavior for their own selfish reasons. It satisfies our need to perform and be charismatic, to cultivate macho war stories that can be used to convince others, and ourselves, that our profession more closely resembles a John Wayne western than a chapter out of Dicken's *Bleak House*. There is also a significant financial stake attached to how lawyers advocate. In civil matters, attorneys on both sides have incentives to escalate the unpleasantness. A plaintiff's attorney may find it advantageous to harangue a defendant to compel a higher settlement while defense attorneys certainly have their own obvious incentives to prolong litigation through their own obstructionist tactics.

Lawyers also have defensive motives for overly aggressive behavior. Malpractice liability sometimes compels lawyers to be more combative and ruthless than they would naturally be inclined. This is because many typical malpractice claims are based upon the assertion that the lawyer did not fight hard enough. Many such complaints, for example, arise from a lawyer's failure to add in a legal theory or damage claim that might ultimately have been successful. Such liability can also take the form of discovery malpractice which generally consists of a failure to depose an opponent or zealously uncover documents.

The incentives to advocate overzealously are persuasive. Nonetheless, public dissatisfaction with the behavior remains. Commentators and lawyers have decried the rise in adverbial abuse and recrimination which, more frequently than not, permeates the litigation process from the filing of motion papers to the presentation of oral arguments. In order to mitigate the problem, we must incorporate other considerations and begin to prescribe some limitations on the lawyer's role as a zealous advocate. We must never forget that unlike in business and sports, the law is a profession with obligations that extend not only to the client, but to the public as well. In essence, the lawyer has two mistresses, and he cannot serve both by overzealously representing his client's interests.

The Lawyer as a Healer of Human Conflict

Lawyers were once viewed, not only as warriors, but also as "healers of human conflict." Their role as professionals was not simply to advocate for a particular client, but also to search for the truth in the process. Ideally, such conflicts would then be resolved on their merits, often without the need to resort to litigation. This earlier school of thought represents a sharp departure from the contemporary role of the lawyer as a gladiator-for-hire. In his 1982 Report on the State of the Judiciary, Chief Justice Warren Burger observed the decline in this perception of the lawyer's role, specifically noting that the legal profession was failing in its purpose to serve as "healers of human conflicts." Justice Burger re-

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In civil matters, attorneys on both sides have incentives to escalate the unpleasantness.

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marked on the transformation, noting that, instead, "[a] common thread pervades all courtroom contests: lawyers are natural competitors and once litigation begins they strive mightily to win using every tactic available."

Not much has changed since Justice Burger made his observations. A 1993 poll commissioned by the ABA reveals a negative public perception of lawyers rooted in dissatisfaction with how aggressively lawyers practice their trade. The public apparently agrees with Justice Burger that lawyers are no longer "healers of human conflicts" — only 26% of respondents regarded an attorney as a "settler of disputes."

Perhaps adequate rules do currently exist, but are not properly enforced.

This earlier perception of the role of the legal profession as one deputized to search for truth and enforce public norms has clearly fallen into disfavor. As Walter Olson in *The Litigation Explosion* describes the trend away from this model: "writings on legal ethics began to stress the lawyer's obligation to push clients' rights to the edge of the envelope through full, ardent, fiery, red-in-tooth-and-claw advocacy as if the besetting sin of the modern American litigator were an excessive scrupulousness." While a complete reversion back to this restrained and less partisan role of the lawyer as a "healer of human conflicts" is arguably unrealistic and ill-advised, perhaps middle-ground between the two extremes exists. In civil matters, a partial revival of this earlier ideal, if somehow achievable, could go a long way toward restoring society's faith in the legal profession and the justice system.

Finding Middle Ground & Enforcing the Ideal

A balancing force needs to be injected into the process. This can be achieved by incorporating (and enforcing) responsibilities to the legal system within the profession's ideal of a lawyer's role. Perhaps this ideal role is best defined as a hybrid between the warrior and the conflict-healer — mediating between the ideals of zealous advocacy and a certain measure of decorum. It could be argued that, in the long run, it would be advisable for a lawyer to maintain a certain level of civility in dealing with opponents on behalf of clients. Such behavior would certainly be appreciated by both judge and jury, and arguably render the lawyer a more persuasive advocate. This argument has, however, been soundly defeated in the minds of many, as is evidenced by the all-too-often reported courtroom antics. In fact, a multilateral disarmament is unrealistic without extensive external motivation by way of new, or adequately enforced, rules of conduct. In order to preserve the status quo, it is often argued that it would be impossible to regulate these complex interpersonal exchanges to complete satisfaction without forcing our legal system to grind to a halt. Furthermore, new ethical rules could be taken advantage of, potentially resulting in an increase in petty obstructionist tactics. This is probably one reason why nothing has been done to curb the spiteful, petty and dubious conduct that is practiced by so many.

Perhaps adequate rules do currently exist, but are not properly enforced.

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Lawyers do, of course, have explicit duties (as defined by the ABA) other than that requiring zealous advocacy. To name a few, we have a duty to expedite litigation, a duty of candor toward tribunals, a duty of fairness to opposing party and counsel, and a duty to avoid frivolous claims. It is widely acknowledged that in these areas, however, there are myriad violations and a pitiful lack of enforcement. This then fundamentally calls into question the bar association's conviction to its duty as a self-regulatory body. The perceived lack of regulatory teeth has led to a system of lawlessness where unethical behavior divides the winners from the losers.

Bar associations are not alone in the responsibility to curb overzealous behavior; attorneys are themselves obliged to regulate their profession. Lawyers must then exercise a reasonable level of introspection, tapping on their own moral judgement. Adherence to the spirit of the rules of conduct requires a steadfast moral compass to stave off the tendency we have as lawyers to ferret out exceptions and loopholes to regulatory schemes. Unfortunately, the moral conviction is lacking; otherwise the current system would be working soundly. We are left with the proverbial "fox guarding the hen-house."

In a recent attempt to fill the relative regulatory void left by state bar associations, some city attorneys have themselves taken on the task of prosecuting overzealous and unprofessional behavior of attorneys. For example, in May of 1997, a Los Angeles attorney was charged with violating California Penal Code Section 415 which makes it a misdemeanor to "use offensive words in a public place inherently likely to provoke an immediately violent reaction." The attorney is accused of eyeballing a deputy district attorney following a hearing and telling him, "you are an ass." If convicted, the attorney could be sentenced up to 90 days in county jail and/or fined up to $400. Although this may seem a meager fine in the context of the erosion of public faith in the legal system, it should instead be viewed as a small step forward.

Ultimately, lawyers have always been trained to win, and without fundamentally changing their view of themselves as gladiators (and our desire to cast them in that role) it remains questionable how much impact regulations can have. The incentives for overzealous behavior must be removed through a redefinition of the role of the profession, and a corresponding change in the public expectation. The self-regulatory scope of a lawyer's role needs to be underscored in all legal institutions: the courts, law schools, and bar associations. As a last resort, bar associations need to increase funding for the prosecution of objectionable attorney conduct. The goal should be that the prized lawyer is not one who can simply win at all costs, but rather, the one who upholds both the profession and the justice system in the process of zealously advocating on behalf of his or her client. □

Unfortunately, the moral conviction is lacking; otherwise the current system would be working soundly.

ACTL Calendar of Events

1998

August 14-16
Iowa Fellows
Summer Meeting
Village East
Okoboji, IA

August 22-26
Canadian Bar Association
Annual Conference
St. John's, Newfoundland

August 28
Central Ohio Fellows Dinner
Rocky Fork Country Club

September 10-13
Eastern Chairs Workshop
The Greenbrier
White Sulphur Springs, WV

September 17-18
Wisconsin Fellows Fall Meeting
Lake Lawn Resort
Delavan, WI

September 18
Illinois Fellows Annual Dinner
Westmoreland Country Club
Wilmette, IL

September 19
Maryland Fellows Boat Cruise
Annapolis City Dock
Annapolis, MD

September 24-27
Western Chairs Workshop
The Inn at Spanish Bay
Pebble Beach, CA

October 2
Indiana Fellows
Annual Meeting
Woodstock Club
Indianapolis, IN

October 10-11
Kansas Fellows Meeting
Ritz-Carlton
Kansas City, MO

October 12
Nebraska Fellows Golf Outing
Happy Hollow Country Club
Omaha, NE

October 24-28
Board of Regents Meeting
London, England

October 29—November 1
Annual Meeting
London, England

November 2-5
Rome Conference
Rome, Italy

November 19-21
Oregon Fellows Meeting
TBD

December 4
Washington State
Fellows Dinner
Sorrento Hotel
Seattle, WA

December 4
Mississippi Fellows Dinner
TBD

December 4-7
Executive Committee Meeting
Windsor Court Hotel
New Orleans, LA

December 5
Louisiana Fellows Dinner
TBD

1999

January 29
Northern California Fellows
Annual Dinner (Tentative)
St. Francis Yacht Club
San Francisco, CA

February 5-6
Virginia Fellows Annual Meeting
The Commonwealth Club
Richmond, VA

February 25-28
South Carolina Fellows
Annual Meeting
The Cloister
Sea Island, GA

February 27
North Carolina/South Carolina
Joint Meeting
The Cloister
Sea Island, GA

March 7-11
Board of Regents Meeting
The Ritz-Carlton
Naples, FL

March 11-14
ACTL Spring Meeting
The Ritz-Carlton
Naples, Florida

April 22-25
TX, AR, MS, LA
Regional Meeting
TBD
San Antonio, TX

May 6-8
Tenth Circuit Regional Meeting
El Dorado Hotel
Santa Fe, NM

August 1-5
Northwest Regional Meeting
Coeur d'Alene Resort
Coeur d'Alene, ID

October 24-28
Board of Regents Meeting
Philadelphia Marriott
Philadelphia, PA

October 28-31
ACTL Annual Meeting
Philadelphia Marriott
Philadelphia, PA

November 11-14
Western Chairs Workshop
Surf and Sand Hotel
Laguna Beach, CA

November 18-21
Eastern Chairs Workshop
The Ritz-Carlton
San Juan, Puerto Rico

2000

March 12-16
Board of Regents Meeting
The Ritz-Carlton
Kapalua, Maui, Hawaii

March 16-19
ACTL Spring Meeting
The Ritz-Carlton
Kapalua, Maui, Hawaii

July 23-26
Northwest Regional Meeting
Chateau Whistler Resort
Whistler, British Columbia
Canada

October 22-26
Board of Regents Meeting
J W Marriott
Washington, DC

October 25-29
ACTL Annual Meeting
J W Marriott
Washington, DC

2002

March 10-13
Board of Regents Meeting
La Quinta Resort and Club
La Quinta, CA

March 14-17
ACTL Spring Meeting
La Quinta Resort and Club
La Quinta, CA

2004

July 18-20
Northwest Regional Meeting
Salishan Lodge
Gleneden Beach, OR

Committee News Reports

Adjunct State Committee

Our committee has under consideration two individuals who have been recommended for nomination into the College. One from Georgia is in his first year of eligibility and our committee concurs with the Georgia State Committee to go slowly when considering such newly eligible candidates. Accordingly, we have asked the Georgia Committee to keep that individual under consideration and to advise us of that committee's eventual consideration of the individual in the future. We will play a support role for investigation outside of Georgia.

We have had another individual referred to our committee who lives in Arizona and tries cases throughout the country. The Arizona State Committee was not familiar with the individual and thus our committee is actively investigating the individual by contacting lawyers and judges in the states where he has tried cases. Our committee will then make a recommendation on his nomination. This exact situation fits the purpose of this committee.

We would be pleased to hear from any college members who know of similar situations.

Frank N. Gundlach, Chair

Alternatives for Dispute Resolution Committee

As a follow up to our March 20, 1998, meeting in Palm Desert, the committee has had two conference calls to review draft text for the Mediation Standards project. Draft text for all topics are due no later than August 1, 1998. Another conference call will be scheduled in August to review draft text and discuss the annotation phase of the project.

Shaun Sullivan, Chair

Attorney-Client Relations Committee

I am pleased to report that the case pending before the Supreme Court of the United States of America involving the issue of whether attorney-client privilege survives the client's death has been argued to the court and an opinion has been issued. The thrust of the case was a claim by independent counsel that information received by attorney Vincent W. Foster, Jr. while Deputy White House Counsel from a client was no longer privileged after his death. The District Court agreed and denied enforcement of subpoenas seeking this information.

The Court noted that "in reversing, the Court of Appeals recognized that most courts assumed that privilege survives death, but noted that such references usually occur in the context of the well-recognized testamentary exception to the privilege allowing disclosure for disputes among the client's heirs. The court declared that the risk of posthumous revelation, when confined to the criminal context, would have little to no chilling effect on client communication, but that the costs of protecting communications after death were high. Concluding that the privilege is not absolute in such circumstances, and that instead, a balancing test should apply, the court held that there is a posthumous exception to the privilege for communications whose relative importance to particular criminal litigation is substantial."

In a split decision, the Supreme Court reversed the Court of Appeals in an opinion issued June 25, 1998. In part, the court holding stated:

It has been generally, if not

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universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this. While the arguments against the survival of the privilege are by no means frivolous, they are based in large part on speculation — thoughtful speculation, but speculation nonetheless — as to whether posthumous termination of the privilege would diminish a client's willingness to confide in an attorney. In an area where empirical information would be useful, it is scant and inconclusive.

The Court held that "interpreted in the light of reason and experience that body of law requires that the attorney-client privilege prevent disclosure of the notes at issue in this case. The Judgment of the Court of Appeals is reversed."

Your committee will continue with all diligence to address this and related problems as they arise. I wish to specifically thank all of the members of the committee and Regent Earl Silbert who have been knowledgeable, diligent and helpful in pursuing the committee's purposes and goals.

Carman E. Kipp, Chair

Canada-United States Committee

The most significant development since the report of the committee in the last edition of *The Bulletin* is that committee member Bob Armstrong has reported great progress in securing the establishment of a Canadian national trial competition under the auspices of the College. Indeed, breakthrough might be a better description, given that Bob's work affords the strongest ground for confidence the competition will be up and running in the spring of 1999.

The deans of the law schools competing in the Ontario and Western regional competitions have agreed to conduct these competitions in February. As a result, there will be time for the national competition to take place before the end of the academic year. In addition, there is a prospect that a regional competition will be established in Atlantic Canada so that it can participate as well in the national competition in the year 2000.

The only disappointment is that the Quebec deans still have concerns preventing them from joining in. We are hoping their minds can be changed, and Bob has enlisted the support of Quebec Fellows in that endeavor.

The other projects the committee has underway consist of the establishment of a Canadian Code of Trial conduct, and a recommended form of Convention for the reciprocal enforcement of judgments between Canada and the United States.

The work of preparing a Canadian Code of Trial Conduct has been completed under the leadership of committee member Earl Cherniak. It is the information of the committee that the Code has been submitted to the Regents of the College, and it is hoped that they will be able to deal with it at the next meeting of the College in London.

At the meetings of the College in the fall of 1997, the form of a Convention for the reciprocal enforcement of judgments had been agreed upon and, with the unanimous approval of the committee, the draft had been forwarded to the Regents. Following this, the President of the College had referred the draft to the College's Committee on Special Problems in the Administration of Justice, which has now approved the recommendation of the Canada-U.S. Committee. It is the hope of the committee that the Regents will be able to address this question as well at the next meeting of the College.

At the London meeting, the committee hopes to address itself to the feasibility of a new project, namely *pro hac vice* admission on both sides of the border.

Jack Giles, Chair

Complex Litigation

The committee continues to receive reports from its members on the "Mass Tort" projects assigned at the meeting in Palm

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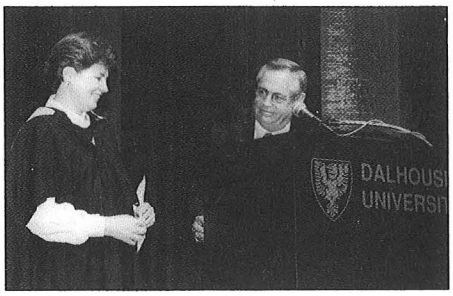
Desert. These reports will be the subject of discussions at the committee meeting to be held in London this fall. It is hoped that the committee will be able to make some constructive suggestions in the handling of cases in this complex practice area.

Ralph W. Brenner, Chair

Emil Gumpert Award Committee



Fellow Louis Fryman (right) presents the Emil Gumpert Award to Dean Dawn Russell at the Dalhousie Law School in Ontario during the Convocation ceremony in May. The award comes with a $50,000 cash prize.

Thomas J. Groark, Jr., Chair

Federal Criminal Procedures

The Federal Criminal Procedures Committee met for a work session in Washington, D. C., on June 5-6, 1998, and reviewed the work of John P. Cooney's Subcommittee on FRCrP 5K1.1. After substantial discussion, the report of that subcommittee was adopted, subject to suggested revisions. Those revisions were completed, circulated, and further discussed in a conference call on June 24, 1998. At the conclusion of the conference call, the committee adopted the report and will present it to the Board of Regents for its consideration.

The report addresses the substantial problems of the approach and implementation of Section 5K1.1 due to the unwarranted disparities, unpredictability, and unfairness in sentencing resulting from the "gatekeeper" role of the prosecutor. The suggested modification of 5K1.1 provides structure and guidance for downward departures for substantial assistance, while providing for a motion for such departure by either party or the court.

The Federal Criminal Procedures Committee will continue its work on sentencing issues during the coming year, with emphasis on relevant conduct and mandatory minimum sentences, and suggestions from the Fellows of the College in any of these areas will be welcomed.

Robert W. Ritchie, Chair

Federal Rules of Evidence

The Federal Rules of Evidence Committee held a well-attended and productive breakfast meeting during the Spring Meeting of the College in Palm Desert. The principal topic of discussion was the proposed revision of certain Federal Rules of Evidence that will be the subject of public comment later in the year.

The Report of the College on "The Law of Evidence in Federal Sentencing Proceedings," issued in 1997, has been printed in *Federal Rules Decisions* and may he found at 177 F.R.D. 513 (1998).

Our Committee will hold another meeting in London in connection with the Fall Meeting of the College.

Fletcher L. Yarbrough, Chair

Legal Ethics Committee

The subcommittee that is developing a Teaching Syllabus for the Trial Code is continuing its work. The subcommittee, chaired by John Gianoulakis and consisting of Joe Parker, Tom Shriner and our past chairman, Charlie Hileman, anticipates it will be able to mail a draft of the syllabus to the committee at large for review on July 15 or shortly thereafter.

Murray E. Abowitz, Chair

Mexico Committee

The Mexico Committee is pursuing contacts with a small group of highly recommended Mexican lawyers as outlined in our previous report. We will report to the Board and membership on the results.

Phillip A. Robbins, Chair

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National College of District Attorneys

The Board of Regents met on Saturday, June 6, 1998, at the new National Advocacy Center on the campus of the University of South Carolina in Columbia. The U. S. Department of Justice operates the Center. The National District Attorneys Association has entered into an agreement with the Department of Justice to provide training for state and local prosecutors at the Center. The NCDA has, in turn, agreed to provide that training at the Center.

Up until the time of the meeting, the NCDA had presented four courses at the Center which were attended by approximately 180 prosecutors and which, with one exception, related to trial advocacy.

The 29th Annual Career Prosecutor Course was presented at the University of Houston from June 14 through June 26, 1998. Of the 206 prosecutors in attendance from across the country, 37 received scholarship assistance from the American College of Trial Lawyers.

Thirteen Faculty Assistants conducted the trial advocacy workshops during the course. Faculty Assistants are graduates of the Career Prosecutor Course who are selected to return based upon recommendations of their Faculty Assistants from the prior year. This year those serving were John Brewer, Houston, TX; John Karnezis, Chicago, IL; Ann Poindexter, Chesapeake, VA; Richmond Riggs, Flint, MI; Larry B. Ladd, Lubbock, TX; Christie A. Bachmeyer, Golden, CO; Charles A. Carpenter, Nashville, TN; David C. Brown, Minneapolis, MN; Rex S. Gordon, Baltimore, MD; Charles E. Rooks, Atlanta, GA; Kristen Bender, Rockville, MD; Michael J. Nolan, Chicago, IL; and David L. Crowley, Fall River, MA.

The Honorable William L. Murphy, District Attorney in Staten Island, New York, and president of the National District Attorneys Association, delivered the annual John Price Lecture at the course.

John L. Hill Jr., Chair

National Trial Competition Committee

The final rounds of the National Trial Competition will be held in San Antonio, Texas on March 18, 19 and 20, 1999. This year's trial problem will be a criminal case, and in keeping with tradition, it is anticipated that ACTL's President will serve as the presiding judge in the final round of the Competition on March 20, 1999.

James J. Virtel, Chair

Teaching of Trial and Appellate Advocacy

The committee continues to move forward with the publication and distribution of a syllabus entitled "The Case for Civility in Litigation: Representing Your Client and Preserving 'You.' " The syllabus is to be used by Fellows throughout the United States and Canada in teaching law students and young lawyers about professionalism and appropriate behavior in the practice of law. The plans are for the materials to be distributed through the State and Province Chairs before the beginning of the fall 1998 law school term.

The next meeting of the Committee, hopefully, will be in October 1998 in London, England.

J. Robert Elster, Chair □

ACTL Fellows Appointed To The Bench

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

Hon. Garr M. King of Portland, Oregon was recently appointed United States District Court Judge.

Hon. Edward F. Shea of Pasco, Washington was recently appointed United States District Court Judge. □

State and Province Committee Reports

ARIZONA

The Arizona Fellows held their annual state meeting in Phoenix on June 26, 1998. The weekend began with a western style dinner for members and guests. On Saturday morning we held a business meeting of the Arizona Members. We heard a report from Regent Tony Murray concerning the College's activities, discussed the proposed activities of our Access to Justice Committee at the local level, and the plans for this year's Jenckes Moot Court Competition between the law schools at the University of Arizona and Arizona State University. A lively discussion of proposed candidates ensued and we anticipate submitting a number of proposals for qualified candidates. The final event was attendance at the Arizona-Seattle baseball game at the Diamondbacks' magnificent new stadium. The score of the game will not be discussed.

Philip A. Robbins, Chair

CONNECTICUT

The Connecticut State Committee met in March and May. Dan Kolb, Chair of the Downstate New York Pro Bono Committee, was kind enough to attend the May meeting. Dan described how the New York program was set up and the success it has had to date. Dan also reported on the status of efforts of other state committees to set up similar *pro bono* projects. The issue of the establishment of a Pro Bono Committee in Connecticut is an agenda item for the July meeting.

Shaun S. Sullivan, Chair

FLORIDA

The Florida Fellows held their Annual Black Tie Banquet at the Buena Vista Palace at Walt Disney World Village in Orlando on June 19th, with more than 90 Fellows and guests in attendance. Special guests included President Ed Brodsky and his wife, Cynthia, and former independent counsel Lawrence E. Walsh. Four of the Fellows in attendance were celebrating their 50th anniversary as Florida lawyers, including: Chesterfield Smith, Mark Hulsey, Wilfred C. Varn and Davisson Dunlap.

The recently formed Florida Fellows Access to Justice Committee, chaired by Fellow Robert Feagin, received a positive response to a written questionnaire it circulated to Fellows throughout the state, reflecting a wide-spread interest in participation in the program.

Murray M. Wadsworth, Chair

INDIANA

The Indiana ACTL Fellows will meet October 2, 1998, at the Woodstock Country Club in Indianapolis for a reception and annual dinner. ACTL Fellow Larry A. Mackey will speak about his experience as counsel for the prosecution in both Oklahoma City bombing trials. The afternoon will include golf and tennis. The Indiana State Committee will meet on October 2, 1998.

Sherrill Wm. Colvin, Chair

KANSAS

Each year the Kansas Fellows recognize the outstanding advocate from each Kansas Law School with a cash award of $250 and recognition on a plaque maintained by the law school. This year's winners are Milt Theologou from the University of Kansas School of Law and Kevin Stamper from Washburn University School of Law.

Lynn and Jackie Johnson graciously hosted a reception at

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their home in Mission Hills, Kansas during the Bar Convention in June.

Wayne T. Stratton, Chair

KENTUCKY

The ACTL Kentucky Chapter will hold its First Annual Summer Retreat June 10-12, 1999 at Barren River Lake State Resort Park, Lucas (Barren County) Kentucky 42156. Reservations for lodging must be made directly to the park on a first to call basis (800) 325-0057 or (502) 646-2151. Please contact Whayne C. Priest, Jr. of Bowling Green, Kentucky (502) 781-6500 with any questions or suggestions regarding the retreat.

Whayne C. Priest Jr., Chair

MARYLAND

This year the Maryland Chapter has appointed liaisons with our two law schools, the University of Maryland and the University of Baltimore. The chapter will become a more active participant in law school programs and special trial practice-related projects. Our Access to Justice and Legal services Committee are in full swing and have already taken on one *pro bono* matter. The Committee is in the process of making its existence known in the right quarters of the Maryland Bar and particularly the Maryland *pro bono* community. American College Fellows will be advising and assisting on appropriate projects in the coming months.

Several months ago the Maryland State Committee appointed its first formal social chairman, Jim Miller of Rockville. He has arranged a boat cruise on the Severn River, near Annapolis, on September 19. There will be cocktails, dinner and music, not to mention a very scenic trip on one of the Chesapeake Bay's prettiest tributaries.

Eight new members from Maryland were proposed for fellowship in March of 1998.

Andrew Jay Graham, Chair

MISSISSIPPI

Mississippi Fellow James 0. Dukes recently won the election for the Presidency of the Mississippi Bar. Jimmy will serve the Bar as President-Elect for a period of one year, and will be installed as President at the Mississippi Bar Convention in the summer of 1999. Jimmy is the latest in a long line of Fellows of the College who have served as President of the Mississippi Bar.

Fellow Landman Teller Jr. is completing a year as President of the Mississippi Bar Foundation, Inc. Landy will step down at the meeting of the Mississippi Bar to be held July 15-18, 1998, to be succeeded in the Presidency of the Foundation by Fellow Bob Galloway, who is currently President-Elect.

Also, Mississippi Fellow Nick Harkins was recently elected to the position of Second Vice President of DRI at its meeting in Acapulco, Mexico. We understand that election puts Nick on the track to serve as President of DRI in the year 2001.

The Mississippi Fellows congratulate all of our brethren mentioned above for succeeding to these positions of leadership, and we thank them for this service to Bar groups.

The annual breakfast meeting of the Mississippi Fellows is scheduled to be held in conjunction with the Mississippi Bar Convention meeting at Sandestin, Florida in July.

John B. Clark, Chair

NEBRASKA

The Nebraska Chapter of ACTL will meet on Friday, October 2, 1998, at 12:30 p.m., at Happy Hollow Country Club in Omaha, Nebraska, for a golf outing. That will be followed by 6:30 p.m. cocktails and 7:30 p.m. dinner at the Country Club. This is an annual social event that usually attracts the majority of the Follows from Nebraska.

We would certainly be honored if our Regent, Spencer Brown, or either President Ed Brodsky or President-Elect Osborne Ayscue — or any other Fellow for that matter — would like to join us.

William Jay Riley, Chair

NEW MEXICO

The New Mexico Fellows met in Farmington, New Mexoco in May and enjoyed a fly-fishing/ golf weekend. The meeting was a bit unusual in that all State Fellows had a choice of sporting activities.

The New Mexico Chapter is already hard at work in preparing for the Tenth Circuit Meeting to be held in Santa Fe in May, 1999. Regent Stu Shanor (also now National secretary) is spearheading arrangements for what will be a very special meeting in a popular location. All Fellows should mark their calendars now for May 13, 14, 15, 1999.

Richard L. Gerding, Chair

TEXAS

The Texas chapter of the American College of Trial Lawyers held its annual luncheon on June 12, 1998, at the State Bar of Texas Annual Meeting in Corpus Christi, Texas. The annual luncheon, chaired by Darrell Barger of Corpus Christi, Texas, was also attended by Regent Edward J. Rice Jr. of New Orleans, along with the American College's new President-Elect, Michael Mone, who addressed the group and shared with the Fellows some of the major activities of the College.

James L. Branton, Chair

BRITISH COLUMBIA

The British Columbia chapter held its "first annual" dinner on April 23. Most of the B.C. Fellows and Judicial Fellows attended. We were honored to have President-Elect Ozzie Ayscue and Regent Mike King attend. The Honorable Lloyd McKenzie, a retired judge and Judicial Fellow, delighted the audience with a review of College affairs in British Columbia, dating back to its origin in 1965.

The B.C. fellows enthusiastically supported the idea of making this an annual affair.

D. Barry Kirkham, Q.C., Chair □

Coming Soon

No Fault Cooking

A Collection of Recipes from Fellows Benefitting The Foundation

The American College of Trial Lawyers is in the process of publishing a cookbook entitled, *No Fault Cooking*.

The cookbook is a collection of recipes from all 50 states and all Canadian provinces. Consisting of 264 pages of recipes, the cookbook has 15 chapters and a 30-page index.

Included are recipes from three U.S. Supreme Court Justices, three Canadian Supreme Court Justices and three members of the House of Lords in England.

"Covering letters show a sincere desire to help and a love for the College," said Fellow Robert L. Clare, Jr., who has gathered the recipes for the College. "One of the cover letters said, 'I am sharing this recipe for the first time.' Another proclaimed, 'For 33 years I have guarded this recipe and refused requests to divulge it, but I have decided to release it to you."

Mr. Clare said,"One of the most moving stated, 'This is the only time we have shared the recipe outside the family. We feel in this instance, however, that Dad would approve our sharing the recipe because he was an early member of the College.' "

Mr. Clare is a past president of the College (1973-74).

All proceeds from the sale of the cookbook will be given to the Foundation of the American College of Trial Lawyers. The cookbook will be sold for $35 per copy. It is anticipated the books will become available in September.

Tine Graham, the spouse of New Jersey Fellow and former Regent Jerome J. Graham, Jr., designed the chapter dividers with her creative art. □