

American College of Trial Lawyers

THE BULLETIN

Number 32

Fall 1998

London &

President Edward Brodsky opened the ACTL Annual Meeting in London by saying, "In England we trace so much of our heritage in the common law. We in the College and our English colleagues have a very special bond."

He reminded the audience of some 1,000 lawyers and their spouses that the adversarial system itself, the grand jury system, the Fifth Amendment, the writ of habeas corpus and American copyright law come from the British and that American misrepresentation law owes its origins to old English case law. "American bankruptcy law owes its direct genesis to a British statute promulgated in 1542," he said.

With that as a background, he welcomed the Fellows to the

Rome

Annual Meeting and gave a special welcome to our British colleagues with whom the College has had a long and close relationship.

The following is a list of the Annual Meeting speakers and a summary of their remarks.

The Right Honorable The Lord Woolf is Master of the Rolls, one of the three most important figures in the English judiciary. (The other two are the Lord Chancellor and the Lord Chief Justice.) The office

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ACTL Introduces New Web Page

Elegant, lively harpsichord music, along with a short multimedia presentation, greets those who visit the American College of Trial Lawyers Web Page. Newcomers to the site will be asked to download important software. But the download is completed quickly and one is soon into the Home page, which gives a short, informative paragraph explaining when the College was founded and what fellowship in the College is.

Graphics for the Home page display the

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American College of Trial Lawyers
THE BULLETIN

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(1895-1982)

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Fellows arriving to a drumroll at the Opening Reception at Hampton Court Palace in London were royally welcomed.

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College logo in vibrant blue and gold colors. An area entitled, "About us" offers viewers the following available selections: Founder-Chancellor, History, Leadership, Honorary Fellows, Qualifications for Membership, Publications, Calendar, Awards, Foundation and Moments to Remember.

A new "site map" feature helps those who are unsure how to find what they are looking for. The site map not only lists the items in "About us," but also offers sub-headings of the "About us" selection. For instance, the "Leadership" section lists the President, Board of Regents, Regions of Jurisdiction, Past Presidents, State Committees and Province Committees. There is also a listing of all ACTL awards and one can choose publications sorted by date or by title.

The History page begins with, "The American College of Trial Lawyers, founded in 1950, is widely considered to be the premier professional organization in America. It is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is by invitation, extended only after careful investigation, to those experienced

trial lawyers who have demonstrated exceptional skill as advocates and whose professional careers have been marked by the highest standards of ethical conduct, professionalism and civility."

The page for the American College of Trial Lawyers Foundation explains that the Foundation is a tax-exempt 501 (c)(3) organization and that the goal of the Foundation "is to engage in those activities which will maintain and enhance the justice

**Visit
the ACTL
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at**

<http://www.actl.com>

system through research and fact finding with respect to problems and their ultimate solutions."

The ACTL web site can be reached on the Internet at <http://www.actl.com>.

London Annual Meeting

(Continued from page 1)

of Master of the Rolls dates from at least the Twelfth Century, when he became the archivist who kept the parchment rolls of important notes that were generated by the Chancery. Today the Master of the Rolls serves as the President of the Court of Appeals for the Civil Division. He establishes the schedule and agenda for the civil appellate bench as well as presiding on one of its panels. The Master of the Rolls normally sits with two Lord Justices of Appeal and by custom it is his court that undertakes the most difficult and demanding cases.

Lord Woolf is responsible for a recent study and report on Access to Justice in England which made important recommendations for reform of England's civil justice system.

"We are, today, in this country, going through a remarkable period of constitutional change," Lord Woolf said. "Scotland will have its own Parliament. Wales will have its own Parliament, and we hope that Northern Ireland will have its own Parliament. But we still hope that we will be a united state."

"We will have, for the first time, a Bill of Rights," he said. As a result, Britain will "begin to become a much more rights oriented society."

Lord Woolf compared the common law "as being rather like the ocean: the tide goes out, as it has done with the common law, from this country and spread to one-third of the population of the world the principles of the common law. And now the tide is coming in and we, in our turn, are benefiting from the way that the common law has developed in North America, in Australia, in New Zealand, in India and the other countries of the Commonwealth."

He said that in looking at these other systems he found that they preserved the adversarial tradition of the common law,

but that this was getting out of control, becoming excessive and litigation was becoming too expensive, too complex and too unequal. "Those with deep pockets could become at advantage over those who were less fortunate," he said.

What could be done about those problems?

"We had to bear in mind the means of the party, the nature of the dispute and the importance of providing a result in the great majority of cases very quickly. And so the system from next April will be divided into three categories of litigation."

There will be a small claims system, which will be informal and, "the ordinary litigant doesn't need a lawyer in order to have his dispute resolved."

"Then there are the great bulk of cases which are very difficult to litigate at the moment because the costs tend to exceed the amount involved," Lord Woolf said. These cases would require the assistance of counsel and would run along a defined track for no longer than nine months and would result in disposition at a cost which would be certain. "Within our system, that is a real radical change," he said.

The third method of civil justice would include a multi-party system where the judge would be responsible for case management. "What we are going to have in this country is the ability of a litigant to go to the court without having to start proceedings at all, and ask the court to establish a multi-party situation. Once that framework is in position all that will be required is a single letter from a litigant and he can then be put on the register of the multi-party proceedings."

Lord Woolf explained that this new system for handling multi-party cases will dramatically change an "entrenched right" of being able to select the advocate of one's choice. "For a multi-party situation parties are going to have to be prepared to compromise that right for the benefit of the

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*"We will
have,
for the first
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a Bill of
Rights"*

**The Right
Honorable
The Lord
Woolf**

(Continued from page 3)

whole. And the court is going to have the power to appoint an advocate for the parties if they aren't able to reach agreement as to who is to be the lead advocate for the whole."

He also said the court will recognize the disadvantaged litigant as well as litigants who have yet to be born. The new system will also employ a "Taxing Master," a judge who will monitor costs, and discovery will be closely controlled. Additional powers will be given to judges. One of these "is the ability of the court to say to the defendant manufacturer in a pharmaceutical case — 'Well, you've got the knowledge, the plaintiffs have not got the knowledge. It would be much easier, at least initially, for you to provide the expert evidence.'"

The courts will direct that such a company carry out research within its organization with its own highly skilled experts to produce a report. That employee will owe the primary duty to the court and not to his employer.

Since 1970, **The Honorable Sam C. Pointer, Jr.** has sat as a U.S. District Judge for the Northern District of Alabama in Birmingham. He has been Chief Judge since 1982. He has presided over many complex civil cases, and since 1992 he has been responsible for the coordination of all breast implant cases filed in federal courts in the United States.

In 1990 he received the Samuel Gates Award from the ACTL in recognition of his contributions in improving the litigation process.

Judge Pointer spoke of three items which seem to be of significance in the management of large civil cases — class actions, communications, and the problem of experts and scientific evidence.

"When friends of mine come up and say, 'Sam, are you still involved in that large class action involving breast im-

plants?' I have to resist saying it's not a class action. The thing that I am involved in is not a class action, it's 27,000 individual cases," Judge Pointer said. "So yes, we've stopped the class action. But what have we traded for it? And that is this huge basket of individual cases."

"At one point I think we figured there were almost 25,000 lawyers involved in breast implant cases — people who had communication with me or somebody else." He explained that obviously one could not communicate with everyone.

"What we have done in the breast implant cases is create a website on the Internet for all of the major orders," he said. Upcoming cases around the country, court orders and recent decisions are posted on a two-week basis. He is also experimenting with electronic filing where no paperwork is filed.

As for the Daubert Principle he noted, "The Supreme Court has said that federal trial judges have a gatekeeping responsibility to try and insure that what the jury hears in the way of scientific evidence is not so tainted that it is going to create a false picture of the applicable science."

The Honorable Justice Sandra Day O'Connor, Associate Justice of the U.S. Supreme Court, was born in Arizona and grew up on a ranch with no telephone in a setting where the nearest town was 25 miles away. In 1981 President Reagan appointed her the first woman to sit on the United States Supreme Court.

Justice O'Connor opened her remarks by saying, "I think the College deserves a lot of credit, frankly, in the efforts it has made to improve civility in the legal profession, in the efforts to maintain appropriate standards in federal criminal prosecutions, in the work and interest you have shown in the Sentencing Guidelines problems of our country, and in the support the College has given to the exchanges

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"The thing that I am involved in is not a class action, it's 27,000 individual cases,"

U.S. District Court Judge Sam C. Pointer, Jr.

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we've had through the years with judges and lawyers in other parts of the world."

She gave an overview of American judicial history and the importance of the courts in upholding the rights established by the Bill of Rights. "At the turn of the last century the Court's docket was dominated by property issues," she said. "The Constitutional questions that the Court did decide concerned the division of authority between the states and the federal government, and the allocation of power among the branches of the central government."

As the Twentieth Century progressed, notions of individual liberty came to be "The very heart of judicial decision-making in the United States."

"The changing face of the population, the forever altered role of women and the hopes and expectations of the new generation of racial and ethnic minorities prompted the Civil Rights Movement at mid-century," she said. "Much of that movement centered around litigation before the Supreme Court. The result was a range of rulings that has had a profound impact on our society. In the past 50 years the Supreme Court's decisions on individual rights recognized for the first time many of the freedoms that most Americans today think were our birthright. Among them are the right to speak freely and advocate for change, the separation of church and state, the privileges of political participation."

She mentioned the immense changes brought forth by the Court's one person-one vote decision, shifting the balance of political power from lightly populated rural areas to urban America. She also spoke of the Court's criminal procedure decisions in the 1960s, the importance of *Brown vs. Board of Education*, the Court's increasing protection of the individual and its efforts to extend the benefits of American citizenship to every segment of society.

She summarized the importance of international law and said, "The greatest challenge I see for the next century is for all of us to learn to live together in a world with porous borders. It has to be met with an international legal system that balances our respective needs to maintain internal authority against the obvious gains from closer union with the global community."

Phillip Sycamore is from Blackpool in Northern England, a solicitor who represents plaintiffs in medical malpractice cases. He is the youngest person to serve as President of The Law Society of England and Wales.

"We have recently in England and Wales introduced a form of no-win-no-fee," he said. "It's called the 'conditional fee agreement.'" Originally, it was available only for personal injury, insolvency and European Court cases but is now available in all cases, with the exception of family and criminal cases.

On the subject of the conditional fee agreement, he said, "There has been no history of the solicitor or the barrister having a stake in the outcome of the case." Noting that there are differences between the new British system and the American contingency fee agreement, he said, "The lawyer acts on the basis that if the plaintiff loses there will be no fee, but if the plaintiff succeeds an increased fee may be charged. And the increased fee will be by a percentage increase over and above the lawyer's usual hourly rate. The lawyer will still not be able to charge a fee based upon the percentage of damages awarded. If the plaintiff loses, the plaintiff must still pay the defendant's legal costs, including attorney fees. When the plaintiff loses, although they won't have to pay their own lawyer's fees, they'll still have to pay what you would say is the cost of the case—court fees, expert fees. And this scheme applies equally to defendants as well."

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"The greatest challenge I see for the next century is for all of us to learn to live together in a world with porous borders"

U.S. Supreme Court Justice Sandra Day O'Connor

The President's Report

It is not happenstance that the American College returns regularly to meet in London, as we did this Fall. We share with our British counterparts a legal system, traditions and values rooted in the common law. We also met in Rome, the seat of an empire that once ruled all the known world and, likewise, the source of much of our legal heritage.

From the opening reception at Hampton Court Place in London to the closing banquet at the Palazzo Colonna in Rome, the entire proceedings and the flawless precision with which they unfolded were a tribute to Bob Young and his dedicated staff.

But London and Rome were not simply opportunities to renew old friendships and forge new ones, to visit interesting places and to escape from our everyday lives. Such pilgrimages also give us an opportunity, as Ambassador to the Vatican Corrine "Lindy" Boggs reminded us in Rome, for "contemplation in a world caught up in the instantaneous."

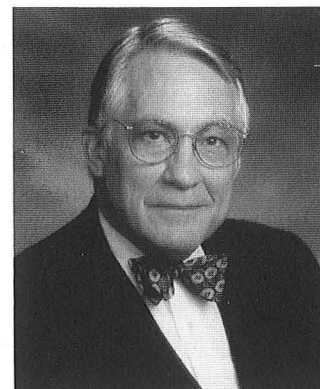
The fifteen speakers from whom we heard collectively reminded us of who we are, of the values that undergird our profession, of our great heritage and of how far in some respects we have strayed from that heritage. From their remarks some common threads emerged:

Our roots — Lord Woolf, the Master of the Rolls, likened the common law with the great adversarial system that is its hallmark, to an ocean that has spread to one-

third of the world. Lord Irvine, the Lord Chancellor of England, reminded us that our adversary system depends on advocates skilled in the art of communication, advocates that Canadian Justice Ian Binnie described as those who, in the words of Shakespeare, "strive mightily, but eat and drink as friends."

The rule of law — United States Supreme Court Associate Justice Anthony Kennedy reminded us that the rule of law on both sides of the Atlantic is based on a constitution, the British Constitution representing an evolving, centuries-old consensus, and the United States Constitution written in one stroke. Wake Forest University President Thomas Hearn labeled the rule of law as modern democratic civilization's singular achievement, and former White House Chief of Staff Leon Panetta pointed out that failure to abide by the rule of law in great part led to the end of the Roman Empire.

Reflections on the New World — Ambassador Philip Lader reminded us that America was founded by people "carrying Gladstone in one hand and the Bible in the other." The tide of the common law that went out from England is returning from the United States and Commonwealth countries, Lord Woolf observed, and the British courts are benefitting from studying the way their systems have developed. Peter Alegi, an American lawyer practicing in Rome, observed that though they have copied our criminal procedures, in the view of many European observers, intellectual and geographic provincial-



E. Osborne Ayscue, Jr.
President

President Edwin Osborne Ayscue, Jr. was born in Monroe, North Carolina. He received his law degree from the University of North Carolina at Chapel Hill where he was Editor-in-Chief of the North Carolina Law Review and a member of the Order of the Coif. He attended Phillips Academy in Andover, Massachusetts, graduating Cum

ism taints American law.

Our Times — United States Supreme Court Associate Justice Sandra Day O'Connor noted that the freedoms most Americans regard as their birthright evolved in this century through brilliant advocates at work in our courts. Ambassador Anthony Quinton reflected that we live in an age in which CNN and the Internet communicate instantaneously what was once transmitted through diplomatic channels. In the last half of the Twentieth Century, President Hearn observed, law has filled the void left by the demise of a moral consensus based on traditional values, becoming the first arbiter of

Laude. He received his A.B. in Political Science from the University of North Carolina at Chapel Hill, where he was a member of Phi Beta Kappa.

Mr. Ayscue has practiced with Smith Helms Mulliss & Moore, L.L.P and its predecessors. in Charlotte, North Carolina for more than 38 years.

In addition to his activities in the American College of Trial Lawyers, he has served as President of the North Carolina Bar Association and of the Mecklenburg County Bar. He served in the House of Delegates of the American Bar Association and is a permanent member of the Fourth Circuit Judicial Conference. He served seven years on the Board of Directors of Legal Services of North Carolina and chaired its first Access To Justice Campaign. A member of the North Carolina Bar Association General Practice

Section Hall of Fame, Mr. Ayscue is listed in Who's Who in America and The Best Lawyers In America (Business litigation; media law). Between undergraduate and law school he served in the Atlantic, Mediterranean and Middle East theaters as Gunnery Officer of the USS Waldron DD-699.

He has served as Senior Warden of Christ Church (Episcopal) in Charlotte.

He and his wife, the former Emily Urquhart, have four married children and six grandchildren. □

within our power to determine that the law will serve, will *minister* to, the need for a system of justice that advances, rather than impedes, the orderly processes by which we live and work.

If each of us left London and Rome with a renewed sense of who we are, a better understanding of our heritage as advocates in a free society and the values that undergird that heritage and with a renewed sense of obligation to pass those values on to the next generation of advocates, the whole endeavor will have lasting value.

For those of you who could not join us in London and Rome, you may from these pages, and on the College's website at <http://www.actl.com>, share some of what we experienced.

Your Board of Regents approved the nominations of 96 of the 125 candidates brought before it, by all odds the highest success rate in recent memory and a genuine tribute to the success of the annual Chairs Workshops and to the superb work being done by your State and Province Committees.

We also participated in the initial planning for an Anglo-American Exchange, to take place in two phases, the first in Edinburgh and London in 1999 and the second in New York and Washington in 2000. Such exchanges, which the College has historically helped to sponsor, have given birth to the establishment of the Inns of Court in the United States, to the spread of mediation as a means of resolving conflict outside the courtroom, and to the use of written

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our lives, instead of the court of last resort, its original role.

Our Problems — United States District Judge Sam Pointer pointed out that our successes in handling complex litigation have themselves created problems and that today it is almost too easy to get into court. Justice Binnie reflected that although the common law still manages to reach the right result, it works injustices along the way. Lord Woolf pointed out that the adversary system is getting out of hand: It is too slow, too expensive, too complicated and too unequal.

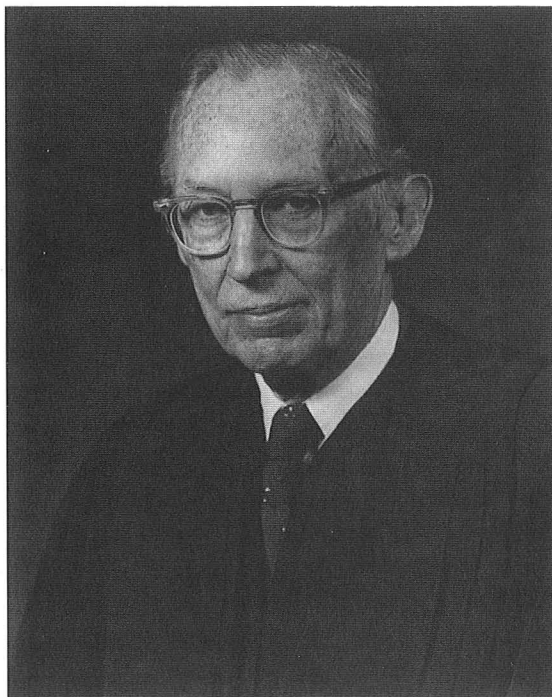
Our Needs — Lord Woolf: A

litigation system that provides procedure proportionate to the matter at issue. Justice O'Connor: Adjustment to the transition from a rural to an urban society and to the need to accommodate the conflicting interests of different groups in society. Leon Panetta: Political heroes in a democracy where things now get done more through crisis than through leadership.

And finally, our challenge — President Hearn: Professions must serve society, and not themselves, if both are to flourish. Organizations like ours must be advocates for a legal system that is the servant of the nation and its people. It is

In Memoriam

LEWIS FRANKLIN POWELL, JR.



1907-1998

Lewis Franklin Powell, Jr., the 20th President of the American College of Trial Lawyers and the 99th Justice to sit on the United States Supreme Court, died on August 25, 1998, at his home in Richmond, Virginia. He was ninety years of age.

After receiving his undergraduate and law degrees from Washington and Lee and a master's degree from Harvard, he commenced his practice of law in Richmond with Christian, Barton & Parker in 1932 and continued his practice in Richmond for many years with Hunton

& Williams until his appointment to the Supreme Court.

He served four years in the United States Army Air Forces and the Military Intelligence Service (War Department) during World War II in North Africa and Europe, as a combat and staff intelligence officer, rising from the rank of lieutenant to full colonel. During part of his tour of duty he worked on the Ultra Project at Bletchley Park, near London, decoding German military messages sent by the Enigma encryption machine. He was decorated for his service, having received the

Bronze Star, the Legion of Merit, and the French Croix de Guerre with Palms (France).

After the war he resumed his law practice and his active participation in the affairs of his city and his state. In 1947 he headed the special commission that prepared the charter introducing the city manager form of government to Richmond.

He also was chairman of the Richmond School Board during the emotional period following the 1954 Supreme Court school desegregation ruling in *Brown v. Board*

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of Education. He opposed "massive resistance" and his thoughtful and evenhanded approach contributed to keeping the schools open. He later served as chairman of the Virginia State Board of Education and was a member of the Virginia Commission on Constitutional Revision.

Long active in the American Bar Association and its programs, he served as President of the Association in 1964-1965.

Although he had served his nation in various capacities, including the National Commission on Law Enforcement and Administration of Justice (1965-1967) and the Blue Ribbon Defense Panel to study the Department of Defense (1969-1970), he was reluctant to be considered for appointment to the Supreme Court. He ultimately was nominated by President Richard M. Nixon, then confirmed by the United States Senate and was sworn in as an Associate Justice of the Supreme Court on January 7, 1972.

In 1973, in recognition of his appointment to the Supreme Court and his service to the profession as well as his contributions to the College, the College struck a medallion in his honor which is presented each year in both The National Moot Court Competition and The National Trial Competition.

After fifteen distinguished years of service on the Supreme Court he retired in 1987, and the College honored him on the occasion of his retirement at the College's annual meeting in San Francisco. His interest in the College never faltered.

Lewis Powell was a man of moderation, suspicious of extreme views, and committed to the balancing of all interests. His Supreme

Court opinions reflect this philosophy. He was a gentle man, whose eminence in the law was based on scholarship and reason.

On August 31st, at his funeral in Grace Covenant Presbyterian Church, Richmond, all sitting members of the United States Supreme Court attended as well as retired Justice Byron R. White. Eulogies by his son Lewis, III, and by the Chief Justice and Associate Justice O'Connor were touching and

telling. The Chief Justice observed: "His remarkable influence resulted from a combination of ability, fair-mindedness and personal grace." And Justice O'Connor described him as "a model of human kindness ... there will never be a better man." These observations well describe our departed Fellow and friend. □

President's Report

(Continued from page 7)

pre-argument briefs in the appellate courts of the United Kingdom. We have much to learn from one another.

We inducted as Honorary Fellows Lord Irvine of Lairg, the Lord Chancellor of England and the Queen's second subject (second only to the Archbishop of Canterbury), and Sydney Kentridge, a native of South Africa, an English barrister, a former member of the Supreme Constitutional Court of South Africa, and, in the words of Lord Woolf, "a jewel of the British Bar."

Some of us had the privilege of dining with Lord Thomas Bingham, the Chief Justice of England, himself an Honorary Fellow of the College, who in the midst of our meeting handed down the ruling that the courts of England had no power to extradite General Pinochet, a head of state. Thus, our visit was punctuated by a striking illustration of the supremacy of the rule of law over

popular clamor. The subsequent appeal to a panel of the House of Lords, some of whom are also Honorary Fellows, raising the question whether in a new transnational world order the applicable rule of law itself has changed, serves only to reinforce the supremacy of law.

Mindful that the last words on the epitaph of any institution that perishes are, "But we always did it that way," we intend during the course of the year to take a hard look at the way we are organized and the way we do things. We are also taking preliminary steps towards a planning effort to ensure that we can maintain our relevance as we enter the Twenty-First Century.

My door, my mailbox and my computer terminal are always open. My e-mail address is "ozzie_ayscue@shmm.com." I will be happy to hear from any of you, and Emily and I look forward to seeing many of you on our travels this year. □

New Fellows Inducted During 1998 Annual Meeting In London

The College welcomes the following Fellows who were inducted into Fellowship during the 1998 Annual Meeting in London.

ALABAMA

David H. Marsh
Birmingham

Jere F. White, Jr.
Birmingham

NORTHERN CALIFORNIA

Mary B. Cranston
San Francisco

DISTRICT OF COLUMBIA

John D. Aldock
Washington

Charles Lee Eisen
Washington

A. J. Kramer
Washington

George M. Sirilla
Washington

GEORGIA

Judson Graves
Atlanta

IDAHO

Jack S. Gjording
Boise

Howard I. Manweiler
Boise

ILLINOIS

Jeffrey D. Colman
Chicago

Joseph J. Duffy
Chicago

Frederick P. Erickson
Decatur

Peter C. Fieweger
Rock Island

R. Michael Henderson
Peoria

Matthew Piers
Chicago

John Martin Stalmack
Chicago

Andrea L. Zopp
Chicago

INDIANA

David O. Tittle
Indianapolis

IOWA

Michael J. Coyle
Dubuque

Kirke C. Quinn
Boone

KANSAS

Victor A. Bergman
Overland Park

KENTUCKY

Randall S. May
Hazard

David R. Monohan
Louisville

LOUISIANA

Samuel W. Caverlee
Shreveport

C. Edgar Cloutier
New Orleans

Richard R. Kennedy
Lafayette

George H. Robinson, Jr.
Lafayette

MARYLAND

Ward B. Coe, III
Baltimore

MASSACHUSETTS

Clyde D. Bergstresser
Boston

Paul F. Leavis
Boston

William F. Lee
Boston

Richard M. Zielinski
Boston

MISSISSIPPI

W. Wayne Drinkwater, Jr.
Jackson

Joe H. Montgomery
Poplarville

MISSOURI

Ron Mitchell
Joplin

John Wooddell
Springfield

NEBRASKA

Terry C. Dougherty
Lincoln

NEVADA

Paul Hejmanowski
Las Vegas

Larry R. Hicks
Reno

**DOWNSTATE
NEW YORK**

Daniel J. Beller
New York

John A. Diaz
New York

UPSTATE NEW YORK

David Edward Brown
Rochester

Joseph V. McCarthy
Buffalo

NORTH CAROLINA

Martin L. Brackett, Jr.
Charlotte

George Daly
Charlotte

OHIO

Paul G. Crist
Cleveland

Thomas W. Hill
Columbus

Gerald R. Kowalski
Toledo

Alan T. Radnor
Columbus

OKLAHOMA

Steven E. Clark
Oklahoma City

A. Thomas Elder, Jr.
Oklahoma City

Larry Ottaway
Oklahoma City

OREGON

Larry A. Brisbee
Hillsboro

Paul R. Duden
Portland

Paul T. Fortino
Portland

PENNSYLVANIA

Elizabeth K. Ainslie
Philadelphia

Carmen P. Belefonte
Media

Roger J. Ecker
Washington

Frederick N. Egler, Jr.
Pittsburgh

John W. Frazier, IV
Philadelphia

Alexander Kerr
Philadelphia

W. Thomas McGough, Jr.
Pittsburgh

Gregory P. Miller
Philadelphia

William Pietragallo II
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Philadelphia

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*(Continued from page 11)***PUERTO RICO**

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Past President John Elam gives the Induction Charge to new Fellows in London.

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Terrence J. O'Sullivan
Toronto

ACTL Fellows Appointed To The Bench

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

R. Brooke Jackson of Golden, Colorado was recently appointed to Division 6 of the Jefferson County District Court, Golden, Colorado.

Robert B. King of Charleston, West Virginia was recently confirmed as a Judge of the United States Court of Appeals for the Fourth Circuit.

Hon. Mr. Justice Colin L. Campbell was recently appointed to the Ontario Court of Justice (General Division), Canada. □

Want to send the College a message? The new ACTL e-mail address is:

acotl@earthlink.net

Honorary Fellowships Bestowed To South African Advocate and The Lord Chancellor of England

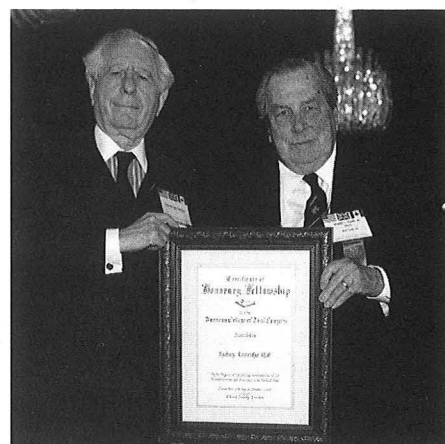
Sydney Kentridge, Q.C. was born and educated in South Africa, was graduated with First Class Honors from Oxford, returned to South Africa and became famous for his fight against apartheid and his fight for equal justice. In 1995 and 1996 he served as a Provisional Justice of the Supreme Constitutional Court of South Africa.

As he received an Honorary Fellowship to the American College of Trial Lawyers in London, he talked about the rule of law and the role of the advocate. He noted that the rule of law is often hard to define. "Where I practiced at the Bar for some 35 years in the apartheid era the government then exercised the power to detain political opponents indefinitely without trial. They moved black communities hundreds of miles without judicial process or compensation. Yet in every one of those oppressive measures the South African government could point to an Act of Parliament authorizing it. Consequently, they maintained they observed the rule of law and were greatly indignant when anyone suggested that they didn't. Now that is not what I have in mind when I speak of the rule of law."

An Honorary Fellowship in the American College of Trial Lawyers was presented in Rome to **The Right Honorable The Lord Irvine of Lairg, The Lord Chancellor of**

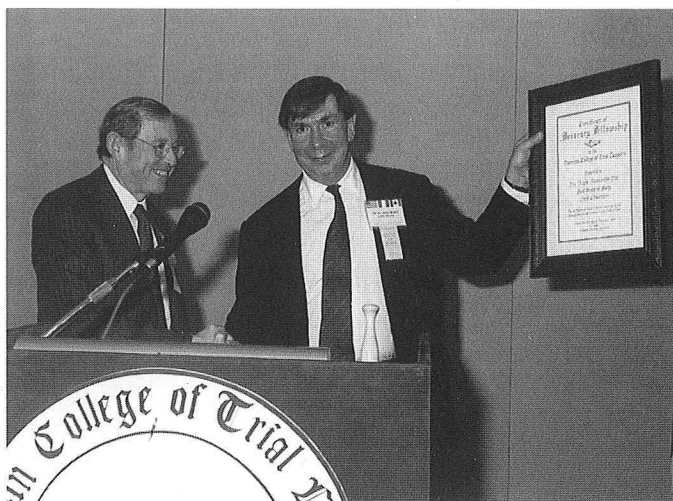
England, by Sydney Kentridge, who had himself received the honor in London.

The Lord Chancellor is the Queen's second subject after the Archbishop of Canterbury. Mr. Kentridge explained the functions of Lord Irvine's position by saying one can throw away all notions of the separation of powers. "The Lord Chancellor is a judge, a member of the legislature and a member of the cabinet. The highest court of law in England is the House of Lords in its judicial capacity, consisting of a number of the Law Lords — the top judges in the country — and the Lord Chancellor may sit in that court as a judge whenever he wishes. When



Past President Robert L. Clare, Jr. presents plaque of Honorary Fellowship to Sydney Kentridge.

he sits he presides. The Lord Chancellor presides over the House of Lords and he introduces important government legislation in the House of Lords. As a cabinet member he presides over a great government department with many responsibilities. He is responsible for all legal aid in England, responsible for the administration of the courts and he and he alone appoints most of the English judges." It is, "A very powerful office indeed." □



President Edward Brodsky congratulates The Right Honorable The Lord Irvine of Lairg on his induction as an Honorary Fellow in Rome.

Immediate Past President's Report

The College has had an extraordinary year carrying out its mandate to develop and support projects to maintain and improve the standards of trial practice, the administration of justice and the ethics of the profession. We are exhilarated by a sense of strong accomplishment in our many initiatives and our sense that the College is performing at its peak. That means that our committees are working hard and we are grateful that our heritage of fellowship among us remains undiminished. There is no better group to work with or have fun with than Fellows of the College and it is a distinct pleasure for me to count myself as one of you.

The projects engaging us this year are rich in substance, covering a wide spectrum. Many of them are ongoing and will run into next year and years to come. We are attempting to continue to implement the goals of our Long Range Planning Committee, one of which is to have the College more involved in substantive projects designed to improve the administration of justice. We are doing this through our national and state committees, which are more active than ever.

Thus, for example, we have been engaged in a pro bono initiative which is catching on nationwide — we have opposed a recent attempt to encroach upon the attorney client privilege — we have written a report on fair trial in high profile cases, and a report on limiting dis-

covery in civil cases — we are attempting to deal with the lack of civility among lawyers and have prepared a teaching syllabus on that subject. We are in the process of completing a report on a recommendation for a convention for the reciprocal enforcement of judgments between the United States and Canada and a report criticizing an aspect of the Federal Sentencing Guidelines. We also are completing a syllabus for the teaching of our Code of Trial Conduct. We are hard at work preparing for the Year 2000, the fiftieth anniversary of the College, when we will have a grand celebration in Washington, D.C. and our history of the College will be completed by that time. I will highlight here the work of several of our committees and conclude this report with a more complete summary of the work of those and other committees.

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. This is a relatively new project for us but we now have fifteen states doing pro bono work under the auspices of our State Committees and the list continues to grow. 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.



Edward Brodsky
Immediate Past President

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. 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 completed 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

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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 (Eighth Circuit Court of Appeals). The winner of the contest this year was Elizabeth Prewitt from Loyola. I commend this essay to each of you as one of the better writings on this subject.

The College Foundation has become more active and, as more funds are raised, will become a significant organization for projects designated to improve the administration of justice. Lively Wilson, a Past President of the College, heads the Foundation and is leading the charge in persuading Fellows to make charitable gifts to the Foundation each year. The more money that is raised, the better equipped the Foundation will be to engage in the projects which need attention.

Our Judiciary Committee has several matters on its agenda. The salaries of federal judges are extremely low compared with the private bar, considering the demands

and responsibility of the judges. Congress passed a one-time cost-of-living increase for federal judges in 1997, which 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 also has been asked to make recommendations to the Board of Regents 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 received favorable comments. 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 comments, 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 mediators. At this time there is no such code setting standards of behavior for mediators similar to our College Code of Trial Conduct. We are attempting to fill that void.

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 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 Evi-

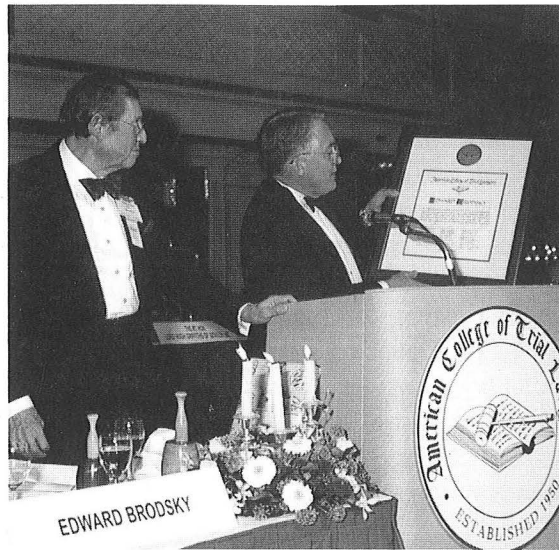
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dence in Federal Sentencing Proceedings, issued this year, has been widely circulated. I believe it will have an impact in changing what we perceive to be issues of unfairness in the Federal Sentencing Guidelines. The problem is that at present, under the Sentencing Guidelines, there are no evidentiary standards for judges to follow at sentencing hearings and, in addition, a defendant may be acquitted on one count of an indictment, convicted on another and receive an enhanced sentence for the crime for which he or she was acquitted. We believe that should be changed and have said so in our report.

Our Federal Criminal Procedures Committee has written a report critical of the current Sentencing Guidelines and making suggestions for improvement. The report criticizes the method that a defendant may be permitted a downward departure in sentencing for his or her substantial assistance to the government. Under the guidelines, the court may not — without a government motion — consider a downward departure in sentencing. Thus, as distinguished from prior law, the court has no discretion to reduce the sentencing dictated by the guidelines unless the prosecutor takes the position that a defendant has substantially assisted in the investigation. The committee believes that taking that discretion away from the court is wrong.

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 matters. The report recog-



E. Osborne Ayscue, Jr., President-Elect, presents plaque to Edward Brodsky.

nizes 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.

In Canada, we also are making progress in securing the establishment of a Canadian National Moot Court Trial Competition for law students, similar to our very successful trial competition in the United States. We also are drafting a Canadian Code of Trial Conduct modeled after our widely used code in the United States.

The College recently published a proposed amendment to the Federal Rules of Civil Procedure, which would redefine and provide greater certainty in interpreting the scope of discovery in civil cases in federal

courts. At present, under Rule 26(b)(1), discovery may be conducted of "the subject matter" of the action whether or not 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.

One of the most rewarding aspects of my term as President has been to have the honor of acting as a judge in the finals of the moot court program in New York and the national trial competition in Texas. The quality of the arguments of the law school students who participate in these programs is excellent and it is particularly rewarding to know that the College is contributing to the trial and appellate training of these young people. Fortunately, we are also getting very close to having a national trial competition in

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Canada.

The Eastern and Western workshops held in September were a time for reflection, teaching and developing new ideas. By that standard the workshops were extremely successful. At the workshops we meet with the chairs of Standing Committees and the chairs of our State and Province Committees. We make sure they are following our strict standards for admission and I can report that they have done that. In addition, the workshops are a time for all of us to talk about how the College can be improved and what new ideas for projects we should develop. There is always room for improvement and ideas developed at the Eastern and Western Workshops continue to be implemented.

I am pleased to report that we maintain the highest standards for admitting people to the College. Our reports on candidates are as thorough as they ever have been and the quality of our new Fellows is as high as ever.

At our Spring Meeting we admitted to Honorary Fellowship the Honorable Peter de C. Cory, Associate Justice, Supreme Court of Canada. At our meeting in London we admitted to Honorary Fellowship Sydney Kentridge, Q.C., formerly a member of the first Supreme Constitutional Court of South Africa and in Rome we will admit the Rt. Honorable The Lord Irvine of Lairg, Lord High Chancellor of Great Britain.

We continue to make a concerted effort and have been successful in improving the quality and regularity of the College *Bulletin*. We have employed, on a part-time

basis, Gary Hunt who is doing a superb job in helping us prepare an interesting publication on a regular quarterly basis. *The Bulletin* is particularly important to Fellows who cannot attend 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 continuing their efforts to implement the mandates of the College. 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. The Committee for the Year 2000, Chaired by Past President Frank Jones, reports that Chief Justice Rehnquist has approved our proposal that the highlight of the Annual Meeting in the Year 2000 will be a dinner in honor of the Supreme Court of the United States.

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.

The President of the College does not work alone and I want to express my deep gratitude for the invaluable assistance that I have had in this exciting year. First, to Bob Young, our Executive Director, who is as indispensable to the function-

ing of the College as any one person can be. He works tirelessly in the daunting task of arranging our meetings. He does that brilliantly and, working with him this year, I know something about the enormous difficulties of that job. If Bob had nothing else to do, except plan and be responsible for the success of the Spring Meeting, the Annual Meeting, and the Eastern and Western Workshops, it would be a full-time job for most other people. But Bob does much more than that. He is involved in a morass of projects and is responsible for and works tirelessly on the day-to-day functions of the College. In addition, Bob has assembled a fine staff to assist him and each and every one of them deserves our highest praise.

On a personal note, I want to thank my wife Cynthia for being at my side this year. Both of us have enjoyed every minute of it but along with the job came a lot of hard work for Cynthia. She traveled with me across the country and to Canada, attended the dinners and the professional programs, spoke to the groups when she was invited to speak and was an extraordinarily fine partner in this wonderful endeavor.

Finally, I am grateful to my secretary, Mary Burke, who has a unique talent for keeping things in order and making it all tick.

I am turning over the reins of the Presidency to Ozzie Ayscue whose imagination, energy and intelligence will, I am confident, take the College to new levels.

Respectfully Submitted,

Edward Brodsky,
President, 1997-1998

London Annual Meeting

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There is a maximum 100 percent "uplift," as he called it. One of the drawbacks of this system, Mr. Sycamore said, is that in some instances it may be that the amount of fees in a small case might exceed the amount of damages.

He also mentioned proposed changes by the government that would deny access to jury trials in some minor dishonesty offenses. There are no jury trials in Magistrate Court and the new changes would require that certain "minor dishonesty offenses" would be sent automatically to the Magistrate Court.

Professional legal societies have joined together to oppose these proposals which would sacrifice a fundamental human right in the interests of "justice on the cheap," he said. "If you are the person accused, a just result is more important than what is convenient for the system. And there is no doubt in my view that a jury trial is a superior process to a trial in the Magistrate's Court."

Honorable Ian C. Binnie, Q.C., Justice of the Supreme Court of Canada, is a Judicial Fellow of the College. As an advocate he worked for eleven years trying to overturn the conviction of a man who was convicted of murder. Eventually, through DNA exclusion, he was able to establish conclusively that the man who had been convicted of murder simply could not have been the murderer. Justice Binnie's client was exonerated, released from prison and given compensation of over one and a quarter

million dollars.

Mr. Justice Binnie said, "If the profession is to address the notion of incivility it has to recognize that there is a considerable element of incivility inherent in the adversarial system. Really what becomes a difficulty is when incivility gets in the way of the administration of justice. When two lawyers can't get along, and because they can't get along, they generate extra motions, unnecessary depositions, fruitless encounters of one kind or another and drive up the costs of the litigation and add to the delay."

He also talked about a hearing in the Supreme Court of Canada that lasted for four days, dealing with the question of whether or not Quebec could succeed from Canada. Something of this nature would never occur in the United States since there were no litigants and there was no actual case brought before the Court. But the Court had been asked to have a hearing on the question.

He said that the feeling of the French people of Quebec was that, "having freely entered into a federation they could as easily freely withdraw." The presentation before the Court and among the parties was highly emotional. The Court held that there was no unilateral right to succession, but it did so in the context of 78 pages of reasoning.

"The point that I want to make," Justice Binnie said, "is that the reaction to this decision was, on both sides — both the Premier of Quebec and the Prime Minister of Canada — that somebody had laid out a framework. There was some stability injected into the debate in that people now understood where the issues lay and, that the Court had not usurped the political process but

had delineated the constitutional framework in which that decision would be taken by the political representatives and the people directly."

The Honorable Anthony M. Kennedy, Associate Justice of the Supreme Court of the United States, noted a few practical requirements for framing an enduring constitution.

"The first is that a constitution should be short," he said. "This is not original with me, it was written by James Madison. He knew that for constitutions to endure they have to teach. And he knew that to teach they have to inspire. And he knew that if they have to inspire they have to be something short."

"Constitutions should not over-promise," he said. Many modern constitutions contain a Bill of Rights, but then they go further and contain so-called social rights. "They provide as a constitutional guarantee that there will be adequate housing, adequate food, adequate shelter, that you can receive an education as far as your abilities can take you. These are laudable principles. They are perhaps the first principles of any decent society, but they are not judicially enforceable. And if you put these in your constitution you risk devaluing the currency of your constitution."

He also said that there must be some institutions, some standing. "There must be some consensus that the law lives in the consciousness of the whole people. Law is not automatically inherited. It is taught," Justice Kennedy said. "And the lawyers and the judges must teach it to the next generation

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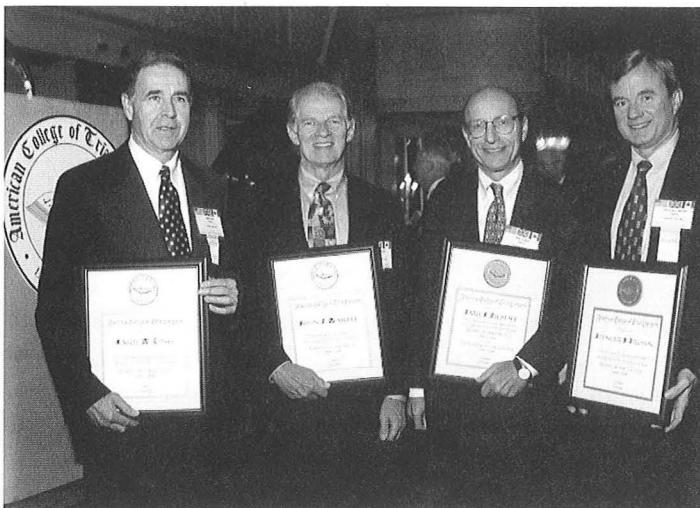
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who will soon be the sole trustees of the bar's tradition. And it must be taught not just to lawyers but to the whole people because that's where the constitution really lives."

He quoted James Madison, who wrote a letter some years after the enactment of the United States Constitution, stating that those at the Constitutional Convention were mere draftsmen of a plan and that not so much attention should be placed upon what the Founding Fathers thought. "And in speaking about the Constitutional Convention he said this — 'Whatever veneration ought to be accorded to that great body, its sense of the meaning of the Constitution ought not to be regarded as oracular in expounding it. As the Constitution came from the Convention it was the mere draft of a plan, a dead letter until life and validity were breathed into it by the spirit and the voice of the American people.'"

"Constitutions must speak with a voice," Justice Kennedy said. "And after our people know and understand, and demonstrate their consensus for a constitution and their commitment to its principles, then you as lawyers must speak with their voice. And this is the mission to which your distinguished College is committed."

Before entering government service, **Philip Lader**, U.S. Ambassador to the Court of St. James, had been a businessman and college president. He served in President Clinton's cabinet as the administrator of the U.S. Small Business Administration, White House Deputy Chief of Staff and Assistant to the President. He has also been deputy



Former Regents were recognized and presented plaques in London. (Left to Right) Hon. Garr M. King, John Martel, Earl Silbert and Spencer Brown.

director of the Office of Management and Budget.

He talked about an 1,100 mile walk he took across Britain when he became U.S. Ambassador. He said he learned that, "Britain today is not the pastoral England of American's dreams."

"From my walk what I've really learned is that the kinship between our countries today is no longer derived from principally language or from family. It's America's and Britain's common commercial interests which tie us together. Our prosperity, our cultures, our security are intertwined as never before.

"Forty percent of all of the American investment in all the European nations is in this country. The American investment here is greater than the aggregate American investment in all of continental Asia. Today one million Americans will go to work, or at least on Monday morning, for British owned firms. And you'd be surprised at some of the names — Brooks Brothers, Burger King, Pillsbury, Seven-Up, Dr. Pepper, Princess Cruise Lines. If you think

in terms of the trans-Atlantic routes, the busiest air route in the United States is London and New York."

Ambassador Lader said, "Today there are more practicing Muslims in Britain than there are practicing Methodists. You look at my home state (South Carolina), about one-third African American. You look at California, which in not too many years a majority will be Hispanic or non-white. And I raise the question, whatever this special relationship between Britain and America was and is, will that relationship hold when a smaller percentage of our population actually have family ties elsewhere? When they're asked about their heritage, and they say — 'Britain, that's not my heritage.'"

"As our societies become more multicultural, as our economies become increasingly global, will Anglo-American ties be sufficient for future generation needs? I ask this question respectfully as the first Ambassador to the Court of St. James born after the Second World War." □

Eastern and Western Chairs Workshops Train ACTL Leaders

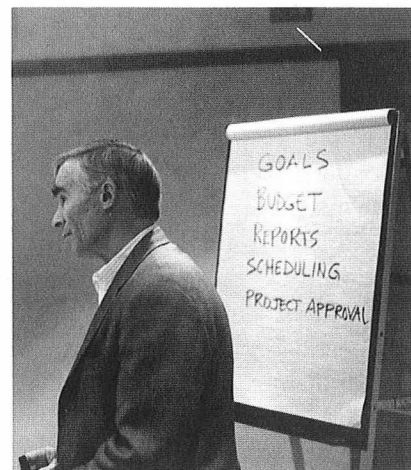
Chairs of ACTL Committees met with other ACTL officers in the fall to learn more about the College, their mission and their leadership role and to get to know one another better. The Eastern Chairs Workshop met at The Greenbrier, White Sulphur Springs, West Virginia and The Western Chairs Workshop was held at The Inn at Spanish Bay, Pebble Beach, California.

E. Osborne Ayscue, Jr., President-Elect at the time of the meetings, led the workshops. "We hope that when you leave here you will take with you a renewed appreciation of the College, a sense of why it exists and the role into which

it has grown, an understanding of your role in the College and a more personal relationship with your fellow leaders of the College," he said in the opening remarks.

Mr. Ayscue explained that "Emil Gumpert's idea was to identify and invite into fellowship the best trial lawyers, not to be a bar association, not to have an agenda, but simply to enjoy one another's fellowship. What has evolved over the ensuing forty-seven years from this germ of an idea in one man's mind is probably the most respected legal organization in this hemisphere, at least."

After elaborating on how the College has operated and how activity has increased in recent years, he



Regent Warren Lightfoot leads a discussion at the Western Workshop.

then said, "That is what we are. Let us talk about what we are not. First and foremost, as Bob Clare frequently reminds us, we are not a bar association. We do not take up every cause that comes along. We do not engage in joint projects with other legal organizations. They sometimes do not understand that. We paddle our own boat and we carefully select those matters where we have a unique contribution to make and when the weight of our authority will have an impact. We do not sponsor continuing legal education programs, except for seeking credit for the programs at our Spring Meeting. We do not toot our own horn or polish our own image. The people who matter know who we are." □



Reflections On The College As An Institution

by
Past President Lively Wilson

Past President Lively Wilson was asked to talk about the College and what it meant to him during the Western Chairs Workshop at Pebble Beach in the fall. These are his remarks.

Contrary to what my grandchildren may think, I was not present at the founding of the Republic, nor was I on the famous train ride with Chancellor Gumpert in 1950 when the idea of the College had its beginning. You have heard the story of the College's beginning often enough that I need not repeat it here. I did not know Cody Fowler or Bert Jenner or the Chancellor or any of those early leaders of the College and whose stories are the stuff of legends, stories which characterize the early years. These comments, if they are to come from my own experience, are of the latter day kind. And, if they are reflective of the College as an institution, they will be reflective of our success in continuing and building on Chancellor Gumpert's dream.

My introduction to the College came in the summer of 1969 in Dallas, Texas. It was the annual meeting, which we had then in conjunction with the ABA, and it was as hot as only Dallas can be in July.

Because I had not registered for the ABA, I was encamped in some motel on the outskirts of all the activities. While I remember vaguely the induction ceremony, I have to confess it did not have the kind of impact that Chancellor Gumpert probably thought it should. I think the first meeting I attended was a spring meeting in Acapulco. I remember having dinner with one of the Fellows who was to become president of the College. It wasn't long before the collegiality of the fellows at that meeting and others that followed simply became all encompassing. That collegiality is the key to our success as an organization.

Collegiality comes naturally to good trial lawyers. There are very few shy retiring types among us. And the opportunity which meetings of the College afford us to be together are stimulating and enjoyable. We come together as diverse, yet like minded and like principled professionals from whom we can learn and whose company we enjoy. Not all of the learning opportunities which these meetings afford are related to the law. Tine Graham, wife of former Regent Jerry Graham, and Faye Hanger, the wife of former President Chuck Hanger, can teach you to paint; Andy Coats can teach you to play golf; and Bob

Clare can teach you to cook (but don't ask him about grits or red eye gravy) or to play gin rummy. But I would caution you, however, and this comes from personal but bitter experience — both golf and gin rummy lessons can be very, very expensive.

The term trial lawyers as used by the popular press has become almost a term of opprobrium, and we get a lot of criticism today that incivility and the lack of professionalism mark our activities. This is perhaps more pronounced because in the days of Atticus Finch and Ephraim Tutt civility was the hallmark of trial lawyers. If Tocqueville was correct that lawyers are the only aristocracy in America, then it is up to us to justify that appellation. Membership in the College and meetings like this and others like it give us the sustenance we need not only to renew our own commitment to a civil practice, but to be exemplars to the rest of the bar as well.

If Chancellor Gumpert's motivation was to provide an opportunity for outstanding trial lawyers to come together and enjoy each other's fellowship, I would suggest to you that he has succeeded in spades, and that we have been true to that vision.

The other thing that is reflective

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of the College is the work that we do. If I were an original intent constructionist of the Constitution, I am not sure how the activities of the College today would fit in with the original idea of fellowship for fellowship's sake. Originally, the Fellows met once a year for dinner, then twice a year during the 50s and early 60s. These were stag affairs. There were no women Fellows and the wives, as the Kingfish on the old Amos & Andy Show would say, were "included out."

This was at a time before class actions, before mass torts, before enterprise liability and all of the other theories that soon became a part of our legal system. There was not even a manual for complex litigation. But as the system responded to these new initiatives and created new challenges, you could not expect the leaders of our profession to sit on their hands. And so, gradually, the College at the national level began to engage in projects that would address these challenges and hopefully improve the administration of justice, enhance the ethics of our profession, and improve the quality of trial advocacy. You know many of these activities — but let me just mention a few.

The College started the Emil Gumpert Award, a monetary award now \$50,000, for the law school with the best trial advocacy program. We were one of the initial supporters of the National Institute of Trial Advocacy, NITA Program. The College presently provides financial support to the National College of District Attorneys. We sponsor a National Trial Competition and the National Moot Court Competition. Because of the stature of

the College, the Federal Civil Rules Committee meets with the Civil Rules Advisory Committee of the Judicial Conference on changes in the federal rules. And now similar committees have been established

*"You have the talent
and the resources to
make a difference in
the way justice is
administered in this
country.
Do something more
about it."*

and serve a similar purpose with the advisory committee on the criminal rules and the advisory committee on evidence.

The College, within the past 10 or 15 years, has begun to publish position papers on significant issues that impact the administration of justice. A monograph on ADR was published several years ago and it still is an important resource on that subject. More recently, a monograph on the *Daubert* decision has found wide acceptance by the profession and the courts. The College's Code of Trial Conduct was revised and updated. It has had tremendous circulation and acceptance by the profession and the courts and has become a standard for conduct in many state and federal courts.

Early in this decade, political

figures, jurists, academics — when they spoke to the College — sounded one theme, "You have the talent and the resources to make a difference in the way justice is administered in this country. Do something more about it." In response to that challenge, the College, at a planned retreat in 1993, began to search for other ways to improve our justice system and our ethics. The Foundation was set up to provide funding. A new initiative to increase pro bono activities at the state level was begun, and we continue to study issues that seem to bedevil our system. How can we handle mass torts in an efficient and effective way? What is the impact — not just on the defendant — but on the system and society of sentencing guidelines and the creeping federalization of crimes? These then and other activities are the things I think about when I think about the College.

I am not sure I quote her accurately, but Judge Rya Zobel, the Director of the Federal Judicial Center, when she spoke to the College several years ago, summed up the College very succinctly. She said, "When I think of the American College of Trial Lawyers, I think of a group of outstanding lawyers doing excellent work and having a good time at expensive resorts." We have built on Chancellor Gumpert's dream, and we shall continue to do so. □

& Rome

President Ed Brodsky opened the Rome Conference by reminding the attendees that Italy is a civil law country where all laws are codified, as distinguished from the United States where we rely in large part upon precedent. He told the audience that one of the first codifications of Roman Law was in 437 B.C. and was posted in public places for all to read. That codification said in part, "Any person who destroys by burning any building or heap of corn deposited beside a house shall be bound, scourged and put to death by burning at the stake. If any person has sung or composed against another person a song which is slanderous or insulting he shall be clubbed to death. If theft has been done by night, if the owner killed the thief, the thief shall be held lawfully killed. And slaves caught in the act of escaping should be flogged and thrown from a rock." Mr. Brodsky said that the Italians and we have come a long way since that time.

Program speakers and a portion of their comments are listed below.

Honorable Corinne C. Boggs is the U.S. Ambassador to the Holy See. A former member of Congress, in 1976 she became the first woman to chair the Democratic National Convention.

Ambassador Boggs said, "The

Vatican assignment is considered in many countries the height of diplomatic careers. Among my 160-plus ambassadorial colleagues are some of the most seasoned officials in the world. In turn, we meet with superbly experienced, brilliant officials in the Vatican hierarchy on issues of common concern. I also work with some of the most competent American Foreign Service Officers available worldwide."

"As history has proven quite soundly," she said, "when the United States works together with the Holy See we've been quite effective in promoting peace in troubled regions, increasing freedom and democracy and protecting — and especially promoting — human rights."

Issues her office has dealt with include the Pontiff's visit to Cuba, efforts to clarify the historical record concerning the Holocaust and obtaining as full an accounting as possible of assets looted from victims of the Holocaust. The plight of refugees in volatile areas of the world is important to her mission, as are Vatican scientific interests, including the Vatican telescope project at Los Alamos. Trafficking in women and children are a great concern, she said, and "The United States and the Vatican take this issue very seriously."

She also noted that women are becoming more prominent in Vatican affairs.

"In the coming year we are looking forward to busy Millenium Jubilee celebrations in Rome with over 25 million pilgrims and visitors expected."

Ambassador Boggs said, "The Millenium offers a time for reflection.... Reflection is of the utmost

importance in a world ever more caught up in the instantaneous."

She mentioned the Pope's earnest desires for helping all of the peoples of the world and his hopes to trace the steps of Abraham and to have a meeting atop Mount Sinai with the leaders of the other monotheistic faiths. "You know, that is truly a Summit Meeting," she added.

Leon Panetta spent 16 years in the House of Representatives, then became director of the Office of Management and Budget under President Clinton before moving on to become White House Chief of Staff.

He reminded the audience that failing to abide by the rule of law contributed largely to the fall of the Roman Empire. He said, "It is extremely important that we focus on where this nation must go as we enter a new millenium."

Those challenges include a world economic crisis, volatile areas of the planet and the menace of international terrorism. "And the challenges at home are great as well," he said. "The national debt, the information age, providing quality education, caring for our parents and our elderly, our infrastructure."

All these challenges demand leadership. He defined leaders as "People who are willing to sit down, to roll up their sleeves, to find solutions, to compromise if necessary — the very glue that holds our government together — to do it with integrity and with respect for one another. That's the essence of leadership in a democracy."

He referenced a long list of well known American public figures on

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the scene when he began government service, all of them now departed, then asked the question — "Where are the heroes in American politics?"

"And it's not to say that there aren't good people. There are good people in Washington today that want to do the right thing. Why is it so tough for people to assert themselves for the challenges that are out there?"

He expressed concerns for our democracy in the information age. "The information age allows information to rapidly cross the country and the world so quickly that it often happens without analysis, without balance, and it can destroy in a matter of seconds."

Mr. Panetta said, "The new sword of politics is the 30 second hit piece," and warned that it is becoming much more attractive to use that weapon than to sit down and work out solutions.

He told of his first visit to the "Situation Room" at the White House and his surprise at finding two men in military uniforms watching CNN News. Then he said he was awakened once in the middle of the night by a Secret Service Agent who reported that an airplane had flown into the White House. After a few quick questions he determined that it was not a DC 10, but a light plane, and that the Secret Service Agent didn't think it had caused any serious damage. "And I said, but is it full of dynamite — are their explosives, is it a diversion for a threat on the life of the President? And there was this pause and he says, 'According to CNN News.'"

"I said, would you mind going out and checking just to make

sure."

He notes that since we are so dependent on this rapid flow of information, there is the temptation in politics to use information — "rumors, leaks, innuendoes to destroy." He said, "Today polls are no longer used to give you guidance of what the pulse of the people is about. Polls are used to set policy."

"Instead of using leadership, you take a poll and decide then which way you go according to the poll."

"So the politics of personal destruction have become almost a way of doing business in Washington," he said.

Mr. Panetta said, "My greatest hope lies in the great common sense of the American people. That's what I find the most encouraging thing of all because despite all of the opinion makers and all of the news and all of the sound bites I think there's a great common sense and a sense of proportion and balance in the American people. They understand what's most important to their families and to this country. They are the citizen soldiers. You are the citizen soldiers."

Peter C. Alegi is an American who practices law in Rome. He explained some of the differences between the Italian and the American approach to justice.

He spoke of the interest in Italy in American law, using the example of television shows — "Perry Mason," "Matlock," "L.A. Law," "JAG," and "Law and Order."

What do Italians like about U.S. justice? "They like the directness of an adversarial trial. They like lawyers in swift action," he said.

Mr. Alegi said, "It is not an overstatement to say that the 'Perry

Mason' program led to a fundamental change in Italian criminal law." He noted that Italy had an inquisitory justice system. "Information was gathered by an inquisitory prosecutor for presentation to a court." He said that under that system there was no real trial. The judge was not so much an impartial arbitrator but was an inquisitor. Prosecution and defense advanced questions wholly through the judge, if he agreed to receive them. The judge was a career bureaucrat usually hired by the state right out of law school.

The quality of law under that system was perceived as unfair and oppressive. "Along came Perry Mason," he said. "He presented an alternative legal world which the Italian people liked — not the lawyers or the judges." Impressed by the Perry Mason programs, he said, "Italian citizens demanded changes." In 1980 there was a mandate to produce an Anglo-American system.

"Perry Mason should translate into a series of things for us. It should translate into lawyers playing thoughtful, responsible roles in the justice process — investigating the facts, protecting their clients, seeking the truth, narrowing the gap between the accused and the trier of fact by direct questioning of the witnesses," he said.

Some of the matters Italians criticize about U.S. justice include capital punishment and "What is perceived to be political interference in the judicial system."

Capital punishment was abolished in 1944 in Italy because it was associated with a totalitarian government, he said. "People here believe that the state cannot be trusted

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to take life."

He also said, "Italians are quite convinced that the U.S. justice system is subject to political interference." The major problem is the basic misunderstanding in the way judges and prosecutors are selected. "The widespread election of state judges and prosecutors in the U.S. is equated with political influence before and after the election. It is assumed that the career of a judge is promotion, and reelection will depend upon performance which is acceptable to persons having influence."

In noting that Italian law does not provide for a civil jury and has a very limited criminal jury, he said, "The Italian public is convinced that this is a wild card — the jury system — which produces very odd results and which interferes with the abstract, pure application of law."

Anthony C.E. Quainton spent 38 years as a career diplomat and is the former Director General of the United States Foreign Service.

He outlined three great problems in today's diplomacy — tradition, technology and terrorism. He spoke of the Foreign Service and how it has changed since its formation in 1924. "The Embassy in Italy has over 30 U.S. agencies present. In London there are over 40 U.S. agencies," He said, "And only one of those agencies is the Department of State."

When he joined the Foreign Service in 1959, "The diplomacy of America was driven by one and only one goal, which was to counter the Soviet Union. Countering the Soviet Union had many facets and

many aspects." It was about competition in ideology and political and economic institutions, he said.

The agenda has changed in that we no longer have a single enemy, he said. "It's vastly more complicated."

He explained the complexity of today's world where other agencies need help in advancing their missions. "Diplomats make it possible for others to succeed," he said.

"When we were doing all the heavy lifting we were the ones who got the credit for the success. When something went well between the United States and Italy the diplomats puffed out their chests and said, 'Yes, we made it happen.' But today the relationships are so complicated and the success will be distributed so widely that no one entering the Foreign Service today can say, 'Yes, we got that drug program going' or 'We got that criminal investigation completed.' Those will be things for others to do. And yet without that framework of understanding we will not succeed in carrying out all the many, many things that the American people expect our foreign affairs to achieve."

He spoke of the role of the Internet and instant communications in sharing information, obtaining information and interacting. "I regret to say that in Washington in general and in the State Department in particular we do not have that luxury. A lucky officer has three terminals on his desk. One for classified information, sensitive information; one for unclassified, sensitive information; and one for unclassified but insensitive information."

"None of these systems talk to each other," Mr. Quainton said.

"None of them talk to the outside world. None of them talk to other agencies of government. So the State Department is not on line with the National Security Counsel or with the Justice Department, or the Defense Department, the CIA — nor is the White House on line with any of the above."

This situation stems from a "culture of secrecy" developed during the Cold War to keep "information out of the hands of bad guys."

Of course, he said, we still want to keep some things out of the hands of bad guys, "but the radical change in the last decade is a change from secrecy to openness in the way we do business. You cannot do business today without being able to share information."

It means doing business differently, he said. "We still, in the State Department, rely on the telegram as the basic medium of communication. We still send messages solemnly from Washington to Rome so someone here in the Embassy can make a phone call, or get in a car and go across town and hand in a piece of paper to the Italian Foreign Ministry and say, 'This is what the United States Government hopes the Italian government will do.'"

The Honorable Thomas Foglietta is the United States Ambassador to Italy. He has been in public service for more than 40 years and was a nine-term member of the House of Representatives, from Philadelphia.

"This is a time of significant change in Italy and indeed throughout Europe," he said, "both when

(Continued on page 28)

1999**January 22**

Northeast Regional Dinner
Four Seasons Hotel
Boston

January 29

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

February 2

Quebec Fellows Meeting
Mount Royal Club
Montreal, Canada

February 5-6

Virginia Fellows Annual Meeting
The Commonwealth Club
Richmond, VA

February 19-20

Arkansas Fellows Meeting
James At the Mill Restaurant
Fayetteville, AR

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

March 18-20

National Trial Competition Final
Rounds
St. Anthony Hotel
San Antonio, TX

April 22-25

TX, AR, MS, LA
Regional Meeting
TBD
San Antonio, TX

April 29-May 2

CT, DNY, VT Regional Meeting
Elbow Beach Hotel
Burmuda

May 6-8

Tenth Circuit Regional Meeting
La Fonda Hotel
Santa Fe, NM

May 13-15

OH, KY, TN and MI Regional
Meeting
Netherlands Omni Plaza
Cincinnati, OH

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**February 17-20**

Tri State Meeting
The Cloister
Sea Island, GA

ACTL Calendar of Events**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

2001**October 14-18**

Board of Regents Meeting
The Ritz Carlton
New Orleans, LA

October 18-21

ACTL Annual Meeting
The Ritz-Carlton
New Orleans, LA

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

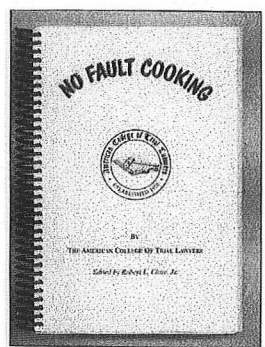
NO FAULT COOKING

A former President was upset when the editor said the red-eyed gravy was made with black coffee. Despite the fact that the editor sent the President recipes from 10 cookbooks where black coffee was used, he persisted on the strength of a Kentucky railroad cookbook which used only water. I maintained that a railroad which made lousy coffee would think twice about spoiling ham gravy with railroad coffee. I thought this was a big joke until I got a hate letter saying how dare a damn-Yankee presume to tell a southern Gentleman how to make a southern dish. I then realized how strongly feelings could run over food.

Robert L. Clare, Jr.
Editor's Preface

Edited by ACTL Past President Bob Clare and illustrated by Tine Graham, the wife of former Regent Jerome J. Graham, Jr., *No Fault Cooking* is unlike all other cookbooks ever published.

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Great Britain, including three members of the Supreme Court of the United States," the editor writes in the Forward.

He also writes in the Preface that his personal prejudices show throughout the book. Indeed, they do. They give the book wit, character, and practical advice. Of course, once you buy the cookbook, you won't have to take the practical advice in the privacy of your own kitchen.

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Rome

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you speak of economics and when you speak of politics."

He noted that Europe has adopted a common currency—the Euro.

He spoke of the new government of Italy and how the headlines around the world described Italy's new leader as a former Communist. "But we know that headlines do not tell the whole story sometimes." He said that the new head of state has led his party away from Communism. "He is a man with progressive ideas that is consistent with other leaders of the West. He is a practical and bright political leader, and he believes in the kind of market economy that will make Italy grow and prosper as a full partner in a unifying Europe." Mr. Foglietta said that he has great confidence in the new government and looks forward to working with it.

There are many foundations which keep the relationship between Italy and the United States strong, he said. "Italian immigration to the United States, which began in earnest over a hundred years ago has created powerful emotional ties on both sides of the Atlantic," Ambassador Foglietta said. "As I travel around Italy almost every family I meet will have some relative in the United States."

This year Italy celebrated the fiftieth anniversary of the Marshall Plan. He told how Americans stand in awe of Italian art, opera, and fashion, and how Italians admire and appreciate American movies, American music and American jeans.

Dr. Thomas K. Hearn, Jr., a former philosophy professor, has served as President of Wake Forest University in Winston-Salem, North Carolina for 15 years.

"Everything that we associate with the Twentieth Century, the modern era, belongs to the last half of our century," he said. He said in his boyhood world in a small town in North Alabama, "Change was regarded as a source of peril."

Where he grew up, those small town values were one of the most important elements of society. The transcendent norms were "Laws of the family, of God, and of the state. A well-lived life consisted within conforming one's behavior to these established norms. To be happy, or successful, or to live well in any respect, was a matter of obedience to requirements that were not a matter of our own choosing or making. The fundamental authorities were the church, the family and the government. The proper attitude was reverence and worship, and the only possible response was obedience. Moral certainties were clear, and they were above all certain."

The Twentieth Century, he said, meaning that era since 1945, "has undone the moral universe of my childhood."

In the 1950s schoolteachers identified chewing gum and talking as the primary problems of student behavior, he said. "No one locked their doors in my childhood town. I cannot remember that we even owned a key to our home. The lessons of that small community to the young were clear and consistent and there was no television to offer alternative life styles in sexy packages. The movies of that era, especially the Westerns, were morality plays."

Dr. Hearn said, "My grandmother thought that 'Gone With the Wind' was unfit for children because the word 'damn' was actually spoken."

He said, "Law fulfills much of the void created by the disappearance of our Twentieth Century moral consensus." And he added, "Law did not cause the rise in the divorce rate or exploding rates of crime. In the unprecedented expansion of the scope of law, the legal system is responding to changes in the social order. The expansion of law is not a conspiracy of lawyers."

In the Nineteenth Century of his youth "Commerce was conducted as part of a set of relationships that were not commercial. My mother still lives in our family home but the economic order of the town of my youth has vanished entirely." Locally owned and operated businesses have been replaced by Walmart, Eckerd, Food Fair and True Value, he said. "In the Twentieth Century relationships between and among these local merchants and businesses were personal and communal. A handshake or a phone call were sufficient to seal an agreement, but not in the Twentieth Century."

In the Nineteenth Century the law was "Literally an arbiter in the court of last resort, but as the law now must regulate the conditions of daily life where legal protections must serve in friendship's place, the law is the first arbiter of resort since the relationship upon which all else depends are legally defined. We do not like these arrangements," Dr. Hearn said. "It was easier before. You are not responsible but you do the work and you get the blame." □