American College of Trial Lawyers

THE BULLETIN

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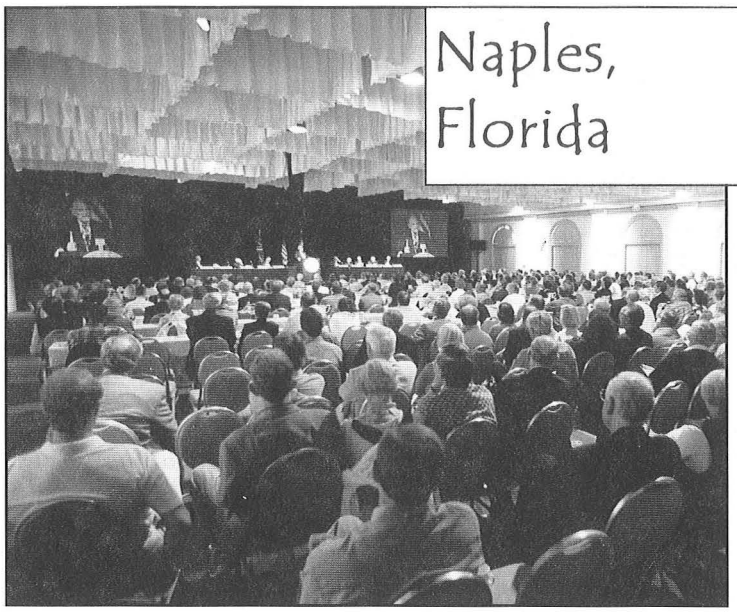
49th Spring Meeting



President E. Osborne Ayscue, Jr. welcomed some 900 Fellows, spouses and guests to the 49th Spring Meeting of the College at the Ritz-Carlton in Naples, Florida. The speakers and the topics of their remarks included:

Judicial Independence, A Canadian Perspective

Barry Gorlick, Q.C., President of the Canadian Bar Association, referenced a study finding that in 1998 there were 396 attacks on judges throughout the world. "Judges are under attack," he said. "They are being challenged by those who disagree with their interpretation of the law and who accuse them of going too far, of interfering with Parliament, the legislators and Congress."

He told of a judge in Canada who was threatened with death and bodily injury, hanged and burned in effigy and who had

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The Obligation of A Lawyer:

Courage and Advocacy

By S. Patrick Dray

Introduction

"tis true that we are in great danger; the greater therefore should our courage be."

William Shakespeare, *Henry V*

"Courageous advocates make courageous judges." (Penny J. White, former Justice of the Tennessee Supreme Court, *Judicature*, Jan-Feb 1997, "An American Without Judicial Independence"). Indeed,

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the courageous advocate empowers the judge to be courageous and do the right thing. In America, judicial independence — a judge's ability to "be free to act upon his own convictions, without apprehension of personal consequences to himself" —is paramount and essential to the proper administration of justice. [*Bradley v. Fisher*, 80 U.S. 335, 347 (1872)]. As a result, it is not surprising why so many legal scholars, practitioners and judges have enumerated courage as a necessary trait for an effective lawyer. The Supreme Court of Wisconsin said it best:

> It is in the interests of the proper administration of justice that counsel shall be courageous and fearless in the discharge of their duties; and, in fact, fearlessness and courage are among the principal elements that lead to professional success. As we cannot have a strong court without courageous and fearless judges, so it is impossible to have a strong bar without courageous and fearless attorneys. Both operate together in a common cause, as parts and parcels of the judicial system, to bring about the best results. [*Langen v. Borkowski,* 206 N.W. 181, 191 (Wis. 1925)].

Thus, courageous advocacy and judicial independence are inseparable.

The Code of Trial Conduct (hereinafter referred to as the "Code") of the American College of Trial Lawyers seeks to inspire advocates to follow the path of courage in order to maintain judicial independence and advance the honor of the profession. The Preamble to the Code sets forth four duties owed by trial lawyers: (1) to their clients, (2) to opposing counsel, (3) to the courts, and (4) to the administration of justice. These four obligations are not simple to execute. In fact, a lawyer's duty becomes harder to carry out and the problem becomes more acute when two obligations seem to be in tension with each other. In these situations, the lawyer will require courage to make the proper decision.

This essay seeks to show that a lawyer requires courage to be an effective advocate. While a lawyer clearly requires courage to defend an unpopular cause or a vilified client, courage is required in other circumstances as well. Three situations have been selected for analysis. In particular, this essay will examine the extent that courage is called for by an advocate to: (1) resist the importunities of an overzealous client, (2) to remain civil in the face of unprofessional conduct by opposing counsel, and (3) to assert a client's rights in the face of an oppressive tribunal. Each situation will be examined separately.

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Editor's Note: *S. Patrick Dray is the winner of the 1998 Essay Contest sponsored by The Foundation of The American College of Trial Lawyers. He is a student at the University of Miami School of Law. There were 50 footnotes in the original essay. For brevity of publication in* The Bulletin, *those footnotes have been deleted. References to quoted text, however, have been included.*

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to function with 24-hour armed guards about him because of a decision he had made in a British Columbia possession of child pornography case.

Mr. Gorlick said, "It was a tough case," involving a defendant with a house filled with child pornography. He said the judge, known as a conservative judge, "wrestled with whether to confirm again – in Canadian terms – that a person's home is his or her castle, or whether to convict. He chose the private rights of the home."

He said, "All hell broke lose in Canada," noting that this was an attack on the independence of the judiciary, "Keeping in mind, of course, that what we were dealing with was a trial, subject to appeal, which is now under appeal, which may well be reversed on appeal."

The "flip side" to judicial independence, he said, is judicial accountability. "And that issue came to a head two weeks ago when Canada's Supreme Court brought down a unanimous decision on sexual assault."

A 44-year-old man had sexually attacked a young woman of 17 when she visited him for a job interview in a trailer. An intermediate appellate judge reversed the defendant's conviction, commenting that the woman was wearing a tee shirt and shorts at the time and not a bonnet and crinoline, according to Mr. Gorlick.

Within a day after the Canadian Supreme Court reversed the intermediate court and reinstated the conviction, this judge wrote a letter to one of Canada's two national newspapers, criticizing one of the Supreme Court Justices who overturned his decision. The appellate judge then spoke with a reporter from the newspaper to provide some further background to the issues in the case. In that interview he said the 17-year-old woman had a six-month old baby, was living with her boyfriend, and "was not lost on her way home from a nunnery."

On the same day, the judge offered an apology to the Supreme Court Justice and said his comments were meant to be, "off the record." By then, however, Mr. Gorlick said, "The news pages were full of the views of lawyers, legal groups, feminist organizations, court watchers and law professors."

He reminded Fellows that, "each day in Canada and the United States literally hundreds, if not thousands of decisions are made by judges that are correct, uncontroversial and therefore not newsworthy."

"The courts stand as the last line of defense against injustice," He said. "Without competence and respect, judges cannot administer justice. It is as simple as that. We need to remind others of the role judges play in our democracy, of a judge's duty to interpret and apply the law to the best of his or her ability. We need to defend judges' independence."

Reflections on the College, Circa 1975

In introducing Past President **Thomas E. Deacy, Jr**, President Ayscue said past presidents "are our institutional memory – they assure that we adhere to the traditions of the College. They are ex-officio members of the Board of Regents – they may move, they may second, they may speak – they cannot vote."

Mr. Deacy said that he became a Regent of the College in 1968 and has attended every meeting of the Board of Regents since that time.

In 1975, while he was President, the College celebrated its Silver Jubilee and Chancellor Emil Gumpert's 80th birthday at the Spring Meeting in Acapulco.

In the early years of the College the Annual Meeting was held at the same time and place of the meetings of the American Bar Association.

However, "It was a stag dinner, and the

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"Without competence and respect, a judge cannot administer justice"

Barry Gorlick, Q.C.
President, Canadian Bar Association

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ladies of the College who came — including the wives of the inductees — were not included in the banquet and had to sit in their hotel rooms." He said the late Sam Gates sent him a letter telling how he had hosted a number of Canadian inductees at the last banquet. "And he was very embarrassed that their wives had come from remote places and had to sit in hotel rooms."

That policy was changed at the next meeting.

At the Acapulco meeting, Past President Lewis Powell delivered a history of the College, mentioning that there were 2,516 Fellows at that time.

The College also created the Emil Gumpert Award for Excellence in Teaching Trial Advocacy that year, with a $5,000 stipend. The award has been given to 38 law schools for excellence in teaching of trial advocacy, and the stipend has grown to $50,000.

"Also at that meeting, we had a program about the overall quality of American advocacy and what could be done about it," Mr. Deacy said. After the 1973 Anglo-American Legal Exchange at Williamsburg he and Past President Robert L. Clare, Jr. had been asked by Chief Justice Warren Burger to talk with him. "He said he was disturbed at the quality of advocacy in the federal courts and wanted to do something dramatic about it. He asked if the College would approve and help out and participate in the program. We told him we thought the College would, and indeed the College did in a big way. The Chief Justice then gave the lecture at Fordham on the quality of advocacy and the need for better preparation."

He explained that many Fellows were prominent in committees across the country that addressed the issue. "We began to encourage the law schools to adopt clinical training courses in advocacy. Not very many of them had it, and they were very offended that lawyers from the Bar and judges should interfere with their own independence in how they taught law. In fact," Mr. Deacy said, "Bob Clare at one time was referred to by the American Association of Law Schools as 'a Clare and present danger.'"

He said, "There have been two fundamental principles which have guided the College to obtaining the respect and prestige in which it is held by the Bar and the judiciary. The first of these is integrity in the selection only of truly qualified lawyers skilled and experienced in the trial of cases possessed of the highest ethical standards who have engaged in trial practice for at least 15 years. And second, the policy of the College which limits its taking positions on issues to those within its stated purposes upon which it can speak with knowledge and expertise in a single voice."

"We began to encourage the law schools to adopt clinical training courses in advocacy"

Thomas E. Deacy, Jr.
ACTL
Past President

Resolution of Issues Left Over From The Holocaust

Professor Burt Neuborne is the John Norton Pomeroy Professor of Law at New York University School of Law. He is also Legal Director of the Brennan Centre of Justice in New York City. He became National Legal Director of the American Civil Liberties Union in 1982.

He has litigated a wide range of landmark cases in the United States Supreme Court and other federal and state courts. According to Immediate Past President Edward Brodsky, who introduced Professor Neuborne, "His cases have influenced the law on such diverse topics as political contributions, commercial and corporate speech, academic freedom, the Vietnam war, CIA mail openings, immigration and federal jurisdiction."

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The mission of the Brennan Centre for Justice is to implement an innovative, non-partisan agenda of scholarship, public education and legal action that promotes equality and human dignity while safeguarding fundamental freedoms.

Professor Neuborne described current efforts to resolve civil claims arising from the Holocaust, the major unfinished legal business from World War II. In particular, he explained how plaintiffs are using an "American court structure — and our class action and discovery techniques — as the vehicle for attempting to bring legal closure to issues that have resisted legal closure for more than 50 years."

He emphasized that this effort could bring only legal closure, and not moral closure.

"There is nothing that courts can do, there is nothing that law can do, there is nothing that we can do as human beings that can do anything about the moral outrage of the Holocaust and the behavior of the National Socialists during the Second World War. Courts can't make that right, money can't make that right, there simply is no way to make that right."

In 1953, as the international community met to reschedule the payment of German debt, it became a settled matter of international law that these remaining claims be deferred pending the regaining of economic strength by the German industrial base and by the German nation.

Not until the final settlement of wartime reparations claims between the four Allied Powers and the two Germanys in 1991 could these claims be brought.

These "unfinished businesses" included the role the Swiss banks played in accepting substantial amounts of money from those who relied upon the Swiss banks' tradition of secrecy and "the unfortunate role of the Swiss banks as being the principal source of international exchange for the Nazis from 1943 on." The plundered assets of Belgium and Holland, and gold seized by the Nazi conquerors "was fenced through Swiss banks so the Nazis could purchase the manufactured goods from Sweden needed to continue the war effort," he said.

What liability did the Swiss banks have for these issues?

"I'm happy to tell you — delighted beyond words to tell you — that that issue has been successfully resolved in an American court," Professor Neuborne said. "A settlement has been negotiated between the Swiss banking community, the Swiss government and the lawyers for the plaintiff class for the payment of 1.25 billion dollars into a fund." That fund will be distributed within the next three years in an attempt to move the money as quickly as possible from the fund to the estimated 300,000 victims who are still alive.

"I have read more than once about the greedy lawyers who brought the Swiss bank case," he said. Explaining that he was proud to be a part of managing the litigation and negotiating the final settlement, he said there are 27 American law firms involved. "Twenty-four of us have waived all fees and will take nothing from this case, except the knowledge of a job well done.

"Three lawyers are asking for modest fees for work of an extraordinary nature over a three-year period that produced a 1.25 billion-dollar recovery. My prediction is that the total legal fees will be less than two million dollars, an extraordinary achievement for a Bar that simply came together to do the right thing."

Other issues pending in American courts include the slave and forced laborers who powered the German industrial economy during the war, and the responsibility of the German banks who bought the businesses of the targets of Nazi op-

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"I have read more than once about the greedy lawyers who brought the Swiss bank case"

Professor Burt Neuborne

The President's Report

E. Osborne Ayscue, Jr.
President

Several recent experiences have caused me to focus particularly on one important aspect of the role that the College has assumed, the training of young lawyers. One major agenda of the College has become preserving, not just the skills necessary to be an effective advocate in the adversary system that undergirds our systems of laws, but also to preserve the best of the traditions and traditional values of the profession. To that end, one of the College's major efforts is encouraging the proper professional training of law students and younger lawyers as advocates. Many of us are not aware of the extent of those College programs designed to reach law students and to instill in them a sense of our heritage and introduce them to the College as one of the keepers of those traditions.

On January 28 I sat on the panel of judges in the finals of the National Moot Court Competition in New York and heard arguments from two remarkably talented teams of young law students, both from Texas law schools. At our Spring Meeting in Naples for the first time the College presented an award, given in memory of the late Past President Fulton W. "Bill" Haight by some of his former partners, to the person selected as the best oral advocate among the finalists in this competition.

Four weeks later we attended the finals of the Gale Cup, the Canadian National Moot Court competition, in Toronto. The College presents the Dickson medals, given in honor of the late Chief Justice Brian Dickson, an Honorary Fellow of the College, to the members of the winning team. Chief Justice Dickson had been scheduled to deliver the principal address at the awards dinner. Upon his death in October 1998 the Gale Cup Committee decided to dedicate this year's competition to him.

At the awards banquet I told the law students who had participated in this competition, "Chief Justice Dickson was a valued Honorary Fellow of the American College of Trial Lawyers. . . . [He] was a visionary who came to the bench at the time when your courts began to interpret and apply your Charter of Rights and Freedoms. An observer has compared him to our Chief Justice Earl Warren, who in the 1950's and in 1960's led the re-examination by the United States Supreme Court of some of the most fundamental concepts of our jurisprudence. He has been called a judicial Wayne Gretsky, someone who had the ability to bring out the best in his colleagues. He was a giant, not only in your country, but also in ours. And so, the name inscribed on these medals represents a legacy that I trust its recipients will treasure."

One week later we were back in Ottawa, in two feet of snow, to participate in the Sopinka Cup, the first Canadian National Trial Advocacy Competition, named in honor of the late Justice John Sopinka, who was first a Fellow and then a Judicial Fellow of the College. This competition began as the project of a group of Canadian Fellows, working with some of their counterparts from the United States. A group of Canadian Fellows participated in creating a fund made up of generous donations by legal firms and individuals across Canada, which, together with the College's contribution, will insure the future of this competition.

As I pointed out to the competitors, one of Justice Sopinka's friends commented upon his death: "The most profound effect John Sopinka had was on young lawyers. He taught them about professionalism. He taught them about enjoying law."

Then two weeks later I attended the finals of the National Trial Competition, which we co-sponsor with the Young Lawyers Division of the Texas State Bar. In addition to giving Lewis Powell medals to each of the participants in the finals of this competition, the College gives the George P. Spiegelberg Award to the best oral advocate, chosen from among two teams that reach the finals. I pointed out to the participants in the final round of this competition, "The purpose of these competitions is not merely to test what you had learned before

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you arrived here . . . , but also to allow you who have emerged from your regional competitions to learn from one another. I suspect that you have all learned a lot this week. Those of us who have been judges have seen this happening. Those of us who have observed you this week have learned from *you*. I hope that one additional thing that you will take home with you is the understanding that if you are to rise to the top of your profession, this learning process must continue all the rest of your professional lives."

Each year a committee of the College reviews the trial advocacy programs of each law school nominated for the Emil Gumpert Award. Through a thorough process that includes visiting the campuses of the law schools nominated for the award, we undertake each year to recognize an outstanding trial advocacy teaching program. The award carries a monetary stipend of $50,000.

Last year, the American College of Trial Lawyers Foundation instituted an essay competition, open to law students, on the subject of professionalism. The Foundation gives a monetary award both to the winning essayist and to his or her legal writing instructor.

Many years ago, the College was instrumental in creating the National Institute of Trial Advocacy, which has grown into a well-established vehicle for giving young lawyers intensive hands-on experience to develop their trial skills. Our Committee on the Teaching of Trial and Appellate Advocacy has just created a user-friendly teaching syllabus for use by Fellows in presenting programs on civility. Many of your State and Province Committees have their own programs addressed to law students and young lawyers.

Although most of us are generally aware of these programs of the College, I suspect that most of you, like myself, have never had occasion to focus on their significance in the aggregate.

Unfortunately, these formal programs, however well intended, can reach only a few law students and young lawyers.

In England, from whence we inherited our adversary system, the academic education of a would-be advocate is followed by a period of virtual apprenticeship to a practicing barrister. In this country, in the days before there were law schools, a would-be lawyer read law under a practicing lawyer, carried his briefcase and learned vicariously by watching him and others try cases. Whenever there was a term of court, everything else ground to a halt while lawyers sat in the courthouse and observed the trials of cases in which they were not involved. As his own practice grew, a young lawyer learned by talking through his cases either with those with whom he shared office space or, in many smaller towns, in mid-morning sessions in the local coffee shop. He became a part of a mutually supportive fraternity. The law was a profession with a shared pride in the art of advocacy.

"Each of us has younger lawyers who look to us as role models. I suggest that with that stature goes an obligation to teach, both directly and by example, those traditions and values that are a part of our heritage."

I still have in my office the second-hand law books that older members of the local bar gave my father when he returned to his home town to hang out his shingle ten months after the crash of October 1929. Their flyleaves bear the names of men who were the icons of their profession in that small town.

We need to realize that, except in isolated smaller communities, that nurturing world is gone, perhaps forever. The young lawyer today emerges from law school armed by his or her academic training with every tactical weapon known to man. Perhaps law school has provided some mock trial or other clinical experience. The fortunate ones will have had a summer clerkship with a lawyer or a law firm that may have afforded some opportunity to observe what lawyers do. As law firms have grown larger, the enlightened ones that depend on a succession of competent advocates have created formal mentoring programs or internal trial advocacy programs to train younger lawyers. For those not in such firms, the surplus of lawyers, the resulting intense competition among lawyers and the erosion of collegiality are simply not conducive to the kind of mentoring that was once a tradition in the profession.

Each of us became a Fellow of the College because we had achieved a certain stature in the profession. Each of us has younger lawyers who look to us as role models. I suggest

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that with that stature goes an obligation to teach, both directly and by example, those traditions and values that are a part of our heritage. Only through its formal programs *and* through the individual influence of every one of us can the College fully realize its role as the keeper of those traditions. We owe that to our profession.

Some highlights of the Spring Meeting program:

Past President Tom Deacy, who was President of the College at the halfway point of the fifty-year history we are about to celebrate, reminded us of how much the College has changed over the last twenty-five years. William Webster, former director of the FBI and of the CIA, delivered the Lewis F. Powell, Jr. lecture, reminding us of the breadth of the contributions of Past President and Supreme Court Justice Powell to his native state and his country long before he was appointed to the Supreme Court. Lord Woolf of Barnes, whom we inducted as an Honorary Fellow, spoke of the radical changes underway in the British legal system designed to accommodate that ancient system to the modern world. Former Regent John Martel, trial lawyer turned writer, reminded us of how much contemporary fiction has colored the public perception of our profession, not always for the good. Professor Burt Neuborne gave an inspiring account of the efforts of lawyers who have volunteered their services to write the final chapter in the story of the Holocaust. He told of how these lawyers are seeing that old wrongs are righted to the limited extent that money can accomplish that, and how through litigation they are recovering long-lost bank accounts, insurance policies and works of art. Representative Asa Hutchinson — one of the House of Representatives managers in the presentation to the Senate of the case for impeachment of the President — and Professor Robert F. Drinan, who was a member of the House Judiciary Committee during the Nixon impeachment proceedings, shared their reflections on this chapter in our recent history.

We hope that those who attended took away with them some food for thought.

In the five months since our return from the Annual Meeting in London and Rome, Emily and I have visited with many of you. We have attended meetings of the Mississippi Fellows in Jackson, the Louisiana Fellows in New Orleans, the Quebec Fellows in Montreal, the Virginia Fellows in Richmond, the Eastern Pennsylvania Fellows in Philadelphia, the Northern California Fellows in San Francisco, the North and South Carolina Fellows at Sea Island, the Maryland Fellows in Baltimore, the Hawaiian Fellows in Honolulu and the Alabama Fellows in Birmingham. Though each of these groups has its own personality and its own traditions, we come away from this experience with a deeper appreciation of the common denominator that we see in all these diverse groups: a large measure of collegiality and mutual respect that has become all too rare, even in our own profession.

I have participated in a conference called by the Judicial Conference of the United States concerning the pay of Federal Judges; sat as a judge at the finals of the National Moot Court Competition in New York; attended the Gale Cup Moot Court Finals in Toronto to present the Dickson medals; attended the finals of the Sopinka Cup, the Canadian National Trial Advocacy Competition in Ottawa, and sat as the judge at the finals of the National Trial Competition in San Antonio. On top of conducting the Spring Meeting of the Board of Regents and the Spring Meeting of the Fellows of the College, we have participated in inspections and walk-throughs of upcoming meeting sites in Philadelphia and Maui.

The rewards of this kind of experience more than make up for the long hours on airplanes and the time away from home and office. We look forward to seeing many more of you during the remainder of our tenure. □

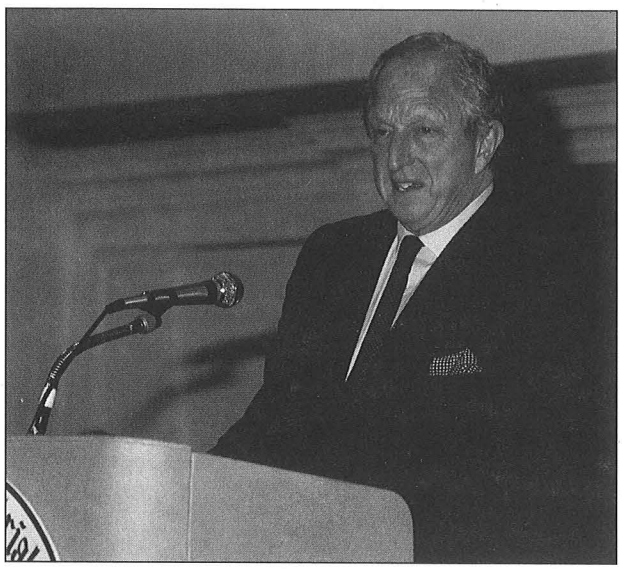
ACTL Fellows Appointed To The Bench

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

J. Edgar Sexton, Q.C. of Toronto, Ontario was recently appointed as judge to the Federal Court of Appeal in Ottawa, Ontario, Canada.

Dennis R. O'Connor of Toronto was appointed to the Ontario Court of Appeal, Ontario, Canada. □

Honorary Fellowship Presented to Lord Woolf, Master of the Rolls



The Right Honorable The Lord Woolf of Barnes

Honorary Fellows of the College are chosen principally from the ranks of the highest courts of the United States, the United Kingdom and Canada. Past President Charles B. Renfrew presented the latest Honorary Fellowship to The Right Honorable The Lord Woolf of Barnes, Master of the Rolls, Royal Courts of Justice, London, England during the Spring Meeting in Naples.

Mr. Renfrew listed a number of responsible positions held by Lord Woolf over the years, including "Treasury Devil," judicial appointments, his service as an English Law Lord, and his current position as Master of the Rolls.

"A listing of these positions does not do justice to Lord Woolf's impact upon the common law," Mr. Renfrew said. "Let me just mention prison reform. In 1990 Lord Woolf carried out the inquiry into prison disturbances following the Strangeway Riots. While the inquiry started as one into the cause of the riots, it concluded with recommendations for sweeping prison reform, which were very well received and highly acclaimed."

Lord Woolf is also the author of a report on civil justice reform in England and Wales called, "Access to Justice." Changes will include expanding small claims court jurisdiction, providing multi-track for different cases of different magnitudes, greater court involvement in managing litigation, simplification of procedures and greater use of alternative dispute resolution mechanisms.

These reforms go into effect April 26 and every judge in England has received training on the impact of the report upon the civil justice system in England and Wales. "It is truly an extraordinary work and one whose final impact will ultimately be felt in the years to come," Past President Renfrew said.

The Master of the Rolls is considered the second most important judicial position in England and Wales, next to the Lord Chief Justice.

Lord Woolf is responsible for the deployment and organization of the work of the 35 Justices of Appeal, as well as presiding judicially over one of its panels. The nation's most difficult cases are often brought before the panel upon which he sits.

"In his time," Mr. Renfrew said, "no man, no person has a greater impact on the common law and its development than Lord Woolf."

Lord Woolf spoke of the "Seeds of reform in England," describing them as, "An avalanche of change."

"How do we bring about change and at the same time retain those aspects of the system which have served us so very well for a great many years, indeed hundreds of years?" he asked.

Among the changes are that solicitors will now be able to "obtain rights of audience in any of the courts. Lay clients will also be able to approach barristers directly. Legal aid in England will change. An Anglicized version of our contingency fee system, called 'conditional fees,' will change the relationship between the client and the lawyer in a fundamental way," he said.

"We will now have a public defending system as well as a public prosecuting system and both systems will be able to use employed lawyers who have only one client to serve, as well as those whom they represent," Lord Woolf said.

"We are going to need to learn from our North American colleagues how to deal with these pressures if we are going to retain our high standards of the past and adopt and take advantage of the wind of change which is blowing through the temple." □

New Fellows Inducted During 49th Spring Meeting Naples, Florida

The College welcomes the following Fellows who were inducted into Fellowship during the 1999 Spring Meeting in Naples, Florida.

ALASKA

John M. Conway
Anchorage

Dave Oesting
Anchorage

ARKANSAS

Toney D. McMillan
Arkadelphia

NORTHERN CALIFORNIA

Peter Dixon
San Francisco

Robert P. Feldman
Palo Alto

Reginald D. Steer
San Francisco

SOUTHERN CALIFORNIA

Robert S. Brewer, Jr.
San Diego

Margaret M. Holm
Santa Ana

Robert P. Mallory
Los Angeles

John Nyhan
Los Angeles

Ronald S. Rosen
Los Angeles

COLORADO

David R. Brougham
Denver

Walter (Woody) W. Garnsey, Jr.
Denver

Michael L. O'Donnell
Denver

David Willis Robbins
Denver

Roger P. Thomasch
Denver

CONNECTICUT

Edward Wood Dunham
New Haven

DELAWARE

Arthur G. Connolly, Jr.
Wilmington

FLORIDA

Ralph Artigliere
Lakeland

James Jay Hogan
Miami

Bruce S. Rogow
Fort Lauderdale

Wm. J. Sheppard
Jacksonville

Harry L. Shorstein
Jacksonville

James Milton Wilson
Pensacola

ILLINOIS

Philip S. Beck
Chicago

Francis R. Petrek, Jr.
Chicago

INDIANA

John C. Duffey
Lafayette

Thomas J. Trauring
Kokomo

KENTUCKY

Michael A. Owsley
Bowling Green

John L. Tate
Louisville

LOUISIANA

John W. Perry, Jr.
Baton Rouge

MARYLAND

Augustus F. Brown
Bel Air

Paul H. Ethridge
Rockville

Robert J. Mathias
Baltimore

Kathleen Howard Meredith
Baltimore

MISSISSIPPI

Wendell H. Trapp, Jr.
Corinth

Tommie G. Williams
Greenwood

MISSOURI

Dan L. Birdsong
Rolla

Kenneth R. Heineman
St. Louis

NEBRASKA

Donald R. Witt
Lincoln

NEVADA

Peggy A. Leen
Las Vegas

NEW HAMPSHIRE

Martha Van Oot Gordon
Manchester

NEW JERSEY

Joseph P. La Sala
Morristown

Martin J. McGreevy
Asbury Park

Charles R. Melli, Jr.
Paramus

UPSTATE NEW YORK

William H. Helferich, III
Rochester

Carter H. Strickland
Syracuse

NORTH CAROLINA

Charles L. Becton
Raleigh

Fred H. Moody, Jr.
Bryson City

OHIO

Mark R. DeVan
Cleveland

OKLAHOMA

E. Terrill Corley
Tulsa

PENNSYLVANIA

William R. Caroselli
Pittsburgh

Alexander H. Lindsay, Jr.
Butler

James D. McDonald, Jr.
Erie

John R. McGinley, Jr.
Pittsburgh

Michael J. Plevyak
Paoli

SOUTH CAROLINA

Carl B. Epps, III
Columbia

TEXAS

Murray Fogler
Houston

Aubrey J. Fouts
Lubbock

Robin P. Hartmann
Dallas

Richard L. Josephson
Houston

David N. Kitner
Dallas

Robert E. Meadows
Houston

Jim M. Perdue
Houston

Rod Phelan
Dallas

John W. Weber, Jr.
San Antonio

H. Ronald Welsh
Houston

UTAH

M. David Eckersley
Salt Lake City

David A. Greenwood
Salt Lake City

VERMONT

John P. Maley
Burlington

VIRGINIA

Rodney G. Leffler
Fairfax

R. Terrence Ney
Fairfax

WASHINGTON

John A. Barlow
Longview

Jan Eric Peterson
Seattle

G. Val Tollefson
Seattle

WEST VIRGINIA

James F. Companion
Wheeling

Jerald E. Jones
Clarksburg

WISCONSIN

Stephen P. Hurley
Madison

Bruce A. Schultz
Madison

WYOMING

Thomas G. Gorman
Cheyenne

Frank D. Neville
Casper

J. Kent Rutledge
Cheyenne

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New Fellows Inducted In Naples

Orientation session for New Fellows at the Naples, Florida Meeting.

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ATLANTIC PROVINCES

David Miller, Q.C.
Halifax

ONTARIO

James R. Caskey, Q.C.
London

Burke Doran, Q.C.
Toronto

John F. Evans, Q.C.
Hamilton

Neil Finkelstein
Toronto

John C. Murray
Toronto

Roger G. Oatley
Barrie

James C. Simmons, Q.C.
Sudbury

Nancy J. Spies
Toronto

Want to send the College a message?

The ACTL e-mail address is:

acotl@earthlink.net

CIVILITY TEACHING

A SYLLABUS AVAILABLE FOR FELLOWS' USE

- Are you looking for material for an Inn of Court program?
- Have you been asked to speak to a group of law students?
- Are you helping design a bridge-the-gap program for new lawyers?

The Committee on the Teaching of Trial and Appellate Advocacy has developed a teaching guide entitled *The Case for Civility in Litigation: Representing Your Client and Preserving You.*

Designed for use by Fellows of the College who need user-friendly material for a program they can give with minimum preparation, the guide begins with a suggested basic outline for introducing young lawyers or law students to the growing problem of incivility in the trial arena. It then poses three vignettes, entitled:

1. *The Client Interview*
2. *Accommodation to Opposing Counsel*, and
3. *Deposition Behavior.*

Designed to be presented through role-playing, each of these vignettes lays out a simple, straightforward fact situation that encourages a dialogue between teacher and students about the "right" way and the "wrong" way to handle the situation illustrated by the vignette. Each vignette is accompanied by suggested questions to stimulate discussion.

These materials, which have been endorsed by the Board of Regents for your use, are available through your State or Province Chair or directly from the College office.

ACTL Calendar of Events

1999

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

May 14
Southern California Fellows Annual Black Tie Dinner
The California Club
Los Angeles, CA

May 21-23
DE, PA, NJ Regional Meeting
Hotel du Pont
Wilmington, DE

June 3
Georgia Fellows Black Tie Dinner
Piedmont Driving Club
Atlanta, GA

June 4-6
Minnesota Fellows Weekend
Maddens Resort
Brainerd, MN

June 7
Supreme Court Historical Society Dinner
Supreme Court
Washington, DC

June 11-12
Northeast Regional Meeting
Killington, VT

June 18-19
Arizona Fellows Meeting
The Phoenician Hotel
Scottsdale, AZ

June 25
Florida Fellows Annual Black Tie Dinner
Boca Raton Resort & Club
Boca Raton, FL

August 1-4
Northwest Regional Meeting
Coeur d'Alene Resort
Coeur d'Alene, ID

August 6-8
Iowa Fellows Annual Meeting
On the Mississippi River
McGregor, IA

August 22-25
Canadian Bar Association Meeting
Edmonton Convention Center
Edmonton, Alberta

September 23
Missouri Fellows Annual Banquet
Mission Hills Country club
Kansas City, MO

September 24
Colorado and Wyoming Fellows Dinner
University Club
Denver, CO

October 1
Indiana Fellows Meeting
Checkerberry Inn
Middlebury, IN

October 1
Nebraska Fellows Annual Golf Outing and Dinner
Lincoln Country Club
Lincoln, NE

October 16-17
Kansas Fellows Annual Meeting
Ritz-Carlton
Kansas City, MO

October 24-28
Board of Regents Meeting
Union League
Philadelphia, PA

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

November 5
Maryland Fellows Meeting
Williamsburg Inn
Williamsburg, VA

November 5-7
MD, DC, VA Regional Meeting
Williamsburg Inn
Williamsburg, VA

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

December 3
Mississippi Fellows Annual Meeting
TBD

2000

January 22
Emil Gumpert Award Committee Meeting
Windsor Court
New Orleans, LA

February 3
Final Rounds National Moot Court Competition

February 17-20
Tri State Meeting
The Cloister
Sea Island, GA

March 12-16
Board of Regents Meeting
The Halekulani
Honolulu, Hawaii

ACTL Calender

(Continued from page 13)

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

April 27-30
Northern California Regional
The Inn at Spanish Bay
Pebble Beach, CA

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

August 20-23
Canadian Bar Association Meeting
Convention Center
Halifax, NS

October 22-25
Board of Regents Meeting
J W Marriott
Washington, DC

October 26-29
ACTL Annual Meeting
J W Marriott
Washington, DC

2001

March 25-28
Board of Regents Meeting
Boca Raton Resort & Club
Boca Raton, FL

March 29-April 2
ACTL Spring Meeting
Boca Raton Resort & Club
Boca Raton, FL

May 17-20
Tenth Circuit Regional Meeting
Ritz-Carlton
Kansas City, MO

October 14-17
Board of Regents
The Ritz-Carlton
New Orleans

Courage And Advocacy

(Continued from page 2)

Furthermore, each example will be explored by noting the appropriate rule or duty and showing how that duty is in tension with another obligation. Ultimately, the essay concludes that a lawyer's obligation is to make decisions that further society and enhance the system of justice. Courage is required to make these difficult decisions because their impact affects the future of the profession.

Part One

Courage and Resisting the Importunities of an Overzealous Client

"The client never wants to be told he can't do what he wants to do; he wants to be told how to do it, and it is the lawyer's business to tell him how." Robert T. Swaine, *The Cravath Firm and Its Predecessors* (1946).

Interestingly, the Preamble to the Code indicates that a lawyer's first duty is to the client. Similarly, section 2 of the Preamble to the ABA Model Rules of Professional Conduct (hereinafter referred to as the "Rules") imposes upon a lawyer the duty to "zealously assert the client's position" — as the first obligation. In addition, Article One of the Rules addresses the Client-Lawyer Relationship first. Indeed, the first four rules: 1.1 (Competence), 1.2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication) all enhance and further support the lawyer's obligation to represent their clients' interests.

Nevertheless, this duty is in addition to and sometimes in tension with an advocate's duty to the court. It is clear that an attorney has a duty to the court. In fact, the Preamble to the Code lists this as the third duty. Moreover, Code sections 16, (Relations with the Judiciary), 17 (Courtroom Decorum), and 18(e) (Trial Conduct) govern specific conduct designed to uphold an attorney's quasi-judicial status as an officer of the court. Similarly, The Rules specify that only meritorious claims and contentions can be made to the court (Rule 3.1), and a lawyer must be candid with the tribunal (Rule 3.3).

Courage is required to effectuate both of these duties effectively and maintain the dignity of the profession. In a situation where an overzealous client demands a lawyer to take actions that are repugnant or imprudent to the lawyer's view, the lawyer is required to analyze competing obligations and courageously follow the proper path to enhance the system of justice. This path is not always clear; nor is it easy to follow. A lawyer may be inclined to help his client. After all, it is the client that provides the lawyer with income and directly affects the lawyer's livelihood.

However, the impact of pleasing the client today may, in fact, destroy the lawyer's livelihood in the future. Take the recent example of criminal defense attorney Joel Rosenthal. For eight years Rosenthal was a federal prosecutor who specialized in white-collar crime. He also spent 13 years as a respected defense lawyer in Miami, Florida. Yet, he admitted to making an "error in judgment" by accepting cash from a Columbian drug baron — the Cali Cartel — and writing checks to a Texas lawyer to have him represent a local drug trafficker. This conduct amounted to a money-laundering scheme because

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the source of the funds — the Columbian drug baron — was concealed from the lawyer in Texas. As a result, Rosenthal is no longer practicing law. Rosenthal should have declined his client's overzealous importunities. There is no doubt, in the short run, that Rosenthal's livelihood would have been at risk by the loss of such a lucrative client. But in the long run, Rosenthal's livelihood was taken away because of an error in judgment.

The courageous advocate operates with the understanding that with every action there is a reaction. The ability and willingness to face the "reaction" produces advocates that can balance the challenge posed by the duty to the client and the obligation to the court. In short, there is no duty to break the law. The Code and the Rules do not suggest that a lawyer can break the law to achieve the client's aim. The key words in the Code are: "all appropriate legal means **within the law.** Likewise, the Rules permit a lawyer to decline to represent a client or withdraw from representation." [*Malutea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546 (11th Cir. 1993)]. Thus, a lawyer's duty to the client is limited. Lawyers owe a greater obligation to society to ensure that our system of justice functions smoothly, and we cannot do that if we do not put the interests of the courts first.

Part Two

Courage and Remaining Civil in the Face of Unprofessional Conduct by Other Counsel

"Never ascribe to an opponent's motives meaner than your own. Courage is the thing. All goes if courage goes."
J.M. Barrie, *Courage*, Rectorial Address, St. Andrews, May 3, 1922.

The second duty enumerated in the Preamble to the Code is the duty owed to opposing counsel. The language is clear: "a lawyer owes the duty of courtesy, candor in the pursuit of the truth, cooperation in all respects not inconsistent with the client's interests and scrupulous observance of all mutual understandings." In addition, section 13 of the Code directly governs relations with opposing counsel, stating "[t]he lawyer, and not the client, has the sole discretion to determine the accommodations to be granted [to] opposing counsel...." This is to avoid the problem whereby a client may try to dictate to his attorney unscrupulous tactics to thwart opposing counsel. Even this clear language, however, seems insufficient to some to avoid the tension between the obligation to opposing counsel and the duty to the client.

This tension arises most often during pre-trial discovery — in the absence of a judge's presence. A keen observer noted:

> lawyers can be perfectly congenial over drinks and then absolutely rude and vicious ... Nowhere is this Jekyll-Hyde transformation so apparent as at a deposition, where the presence of neither a stern judge nor a scrutinizing jury assures lawyers will stay within the bounds of civility (Larry Johnson, "The 10 Deadly Deposition Sins.")

Indeed, discovery abuses have contributed greatly to ethical violations by attorneys — especially during depositions. For example, incivility during depositions have included: directing a witness not to answer legitimate questions; being rude, uncivil, and vulgar; and obstructing the ability of a questioner to elicit testimony to assist the court. When faced with such conduct by opposing counsel, a lawyer may seem justified to respond in kind. However, this approach is wrong. *Ethicon Endo-Surgery v. U.S. Surgical Corp.*, 160 F.R.D. 98, 100 (S.D. Ohio 1995) (not proper for counsel to respond in kind); *Castillo v. St. Paul Fire & Marine Ins. Co.*, 828 F.Supp. 594, 600 (C.D. Ill. 1992) (same). A lawyer responding in kind lacks courage and his conduct results in the same rule and ethical violations committed by opposing counsel. Moreover, this type of outrageous conduct may lead to discouraging talented people from entering the profession, and encouraging those within to leave. More importantly, the public will be disappointed and question the justice system. Justice Sandra Day O'Connor observed, "Stress and frustration drive down productivity ... [m]any of the best people get driven away from the field. The Profession and the system lose esteem in the public's eyes."

Consider the unprofessional conduct of attorney Joseph Jamil. He represented a director of Paramount Communications Inc. during a deposition held in Texas for a Delaware corporation. As a result of his outrageous behavior during a deposition, the Delaware Supreme Court was compelled to add a four page addendum to its opinion to condemn his conduct. It should be noted the court raised this matter *sua sponte* — none of the litigants brought Jamil's conduct to the court's attention. Jamil's reputation was clearly damaged. In-

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deed, it may be true that Jamil gained an advantage during the litigation, however, the cost was high. Mr. Jamil's incivility will not be forgotten by the court — it will linger — to his peril in the long term.

Here, courage is required to avoid escalating the conflict and avoid engaging in similar unprofessional conduct. The popular maxim "discretion is the better part of valor" aptly applies and should govern. Some commentators have suggested that in these situations building the record is the best possible thing to do. To be courageous in the face of unprofessional conduct by opposing counsel is to stay calm and focused. In the short term, it will seem that opposing counsel will be gaining an advantage. But a courageous advocate has the ability to see the larger picture and refrain from lashing back at his opponent. In the long term, the advocate exercising courage will prevail.

Part Three

Courage and Asserting a Client's Right in the Face of an Oppressive Tribunal

"[T]he court was equally hostile in its remarks to both attorneys, and hence, the jury was not given the impression that the court had a bias in favor of one side or another" [*People v. Lee*, 109 A.D. 2d 804, 805,486 N.Y.S. 2d 318, 319 (1985)].

A lawyer's obligation to the court, as expressed in the Code, includes "respect, diligence, candor and punctuality.... Seventeen other directives are contained in the Code that amplifies that broad statement. Similarly, the Rules also impose upon the lawyer a duty to the court. For example, Rules 3.3 (Candor Towards the Tribunal) and Rules 3.5 (Impartiality & Decorum of the Tribunal) embody similar objectives sought by the Code. The advocate, however, must be able to execute that duty, while simultaneously carrying out the duty to the client. Herein lies the tension. A lawyer may be perceived to violate his duty to the court by continuing to advocate a position for his client. Moreover, an advocate who fails in his duty to the court may feel the immediate effects of a judge's contempt power and lose their liberty. Only a courageous advocate can succeed in navigating through this dilemma.

Indeed, advocates must exercise a great deal of courage to continue to assert a client's right in the face of an oppressive tribunal. Failure to do so may prejudice the client. However, by encouraging the judge to revisit his or her rulings to avoid further error, the lawyer may further antagonize the tribunal. At the very least, the court may stop making discretionary rulings in favor of counsel who has antagonized him or her. To resolve the problem, the courageous advocate must combine zeal with sound judgment and diplomacy.

For example, in *Hill v. Boatright,* attorney Ronald Nemirow was held in contempt for responding to the court's question and providing a contrary point of view by saying "Sir, it does not." At the next recess, outside the presence of the jury, the judge berated Nemirow. The judge stated:

> I've never observed any attorney stand up in front of a jury and address a judge as 'Sir' and say 'You are wrong.' That kind of conduct is prejudicial to the administration of justice. [890 P.2d 180 (Colo. App. 1994)].

The judge fined Nemirow $500 and told him to never appear as counsel in his courtroom and to withdraw from pending cases before him. The record disclosed no prior warning or misbehavior by Nemirow. The court of appeal held that the lower court abused its discretion and Nemirow's words — "Sir, it does not" — fell "short of violating applicable standards...." (Id.). Nemirow exercised the requisite amount of skill, courage and diplomacy in asserting his client's position. He also avoided a prolonged and heated colloquy with the judge. For those reasons, he was vindicated on appeal.

Advocates lacking courage would most likely allow a judge to have his way and let the matter "slide." That course, however, would betray the lawyer's duty to the client because on appeal the client is only entitled to "plain error" review. Therefore, to prevail the courageous lawyer must be candid and advise the judge of their view of the law in a way that avoids personal animosity and helps the judge make the proper ruling. In this way, the advocate fulfills both his obligations to the client and to the court.

Conclusion

"Be strong and of good courage; be not afraid... "
Bible, Old Testament, Joshua, 9

The competing professional obligations imposed upon a lawyer demand that an advocate act with courage. To be sure, the public expects no less. In tense situations, a lawyer who is quick to react and

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First National Trial Advocacy Competition in Canada

University of Toronto Claims the First Sopinka Cup

The first annual National Trial Advocacy Competition to be held in Canada took place in Ottawa in March 1999.

Eight teams from the Universities of British Columbia, Saskatchewan, Manitoba, Toronto, Ottawa, McGill, New Brunswick and Moncton competed for the Sopinka Cup. The trials took place at the Ontario Courts of Justice Building in Ottawa.

The Competition was sponsored by the College and by the Friends of the Late John Sopinka, a Judicial Fellow of the College in whose memory the Sopinka Cup was awarded.

The sessions were presided over by the Senior Regional Justice of the Ontario Court (General Division), the Hon. James B. Chadwick, and by the Associate Chief Justice of the Federal Court of Canada, the Hon. John D. Richard. Both are Judicial Fellows of the College.

Of particular note was a bilingual proceeding in which counsel questioned witnesses and argued in French and English in a contest between the University of Moncton (a Francophone law school in New Brunswick) and the University of British Columbia. Instantaneous translation was provided.

The University of Toronto won the overall Competition and the Sopinka Cup with a team made up of David Armstrong and Katherine Hilton. The individual award winners were the Best Opening, Shandra Bresoline of the University of Manitoba; Best Closing, Manie McDonald of the University of Manitoba; Best Examination-in-Chief, Cassandra Doulis, University of British Columbia; Best Cross-Examination, Katherine Hilton, University of Toronto. Prizes were awarded by Justice Iacobucci.

ACTL President Ozzie Ayscue and his wife Emily were present and he addressed the awards dinner, which was attended by five of Justice Sopinka's former colleagues on the Supreme Court of Canada.

Judges for the two-day event included Mr. Justice Chadwick, Mr. Justice Richard, Mr. Justice Ronald Pugsley of the Nova Scotia Court of Appeal, Mr. Justice Marshall Rothstein of the Federal Court of Appeal and Mr. Justice William McEwan of the Federal Court (Trial Division). Also, ACTL Fellows Eleanore Cronk, Brian Finley, both of Toronto, George MacIntosh, Vancouver, and David Cupps, Columbus, Ohio, a former Chair of the College's National Trial Competition Committee.

The Organizing Committee was made up of a number of lawyers from Ottawa and Toronto and included College Fellows John Evans and Bob Armstong. Madame Louise Labrosse of the Canadian Bar Association, Ontario, provided administrative support.

President Ayscue said of Justice Sopinka, "He was the son of immigrants, an outstanding trial lawyer, a professional athlete who gave up that career for the law."

According to Mr. Ayscue, one of his friends said, upon his death, "The most profound effect John Sopinka had was on young lawyers. He taught them about professionalism. He taught them about enjoying the law."

Justice Sopinka's widow, Marie Sopinka, attended, as did his daughter, Melanie, a member of the Ontario Bar who delivered a eulogy to her father. □

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stops thinking will surely fail to uphold his professional responsibilities. The examples above illustrate advocates that have won and failed the test of courage. Those that have succeeded respected their dual obligations and acted with a view to uphold the system of justice. Ultimately, courageous advocates enable judges to make appropriate rulings and preserve the dignity of the profession. □

Canadian Students Win Brian Dickson Medals

The Brian Dickson Medal is awarded by the American College of Trial Lawyers during the Gale Cup moot court competition in Canada. The ACTL medal honors former Chief Justice Brian Dickson. The three recipients of the Brian Dickson medals this year were David Lederman from Western Ontario Law School, Violet Allard from British Columbia and Alejandro Varela from McGill University.

The winner of the Gale Cup Competition was McGill University. □

Temple University Law School Wins 1998 National Trial Competition

Temple University Law School students Kevin M. Toth and Bryan P. Fortay were recognized in Naples as the winning team in the 1998 National Trial Competition.

The American College of Trial Lawyers and the Young Lawyers of Texas cosponsor the National Trial Competition, which attracts over 200 teams and involves more than 1,200 law school students annually.

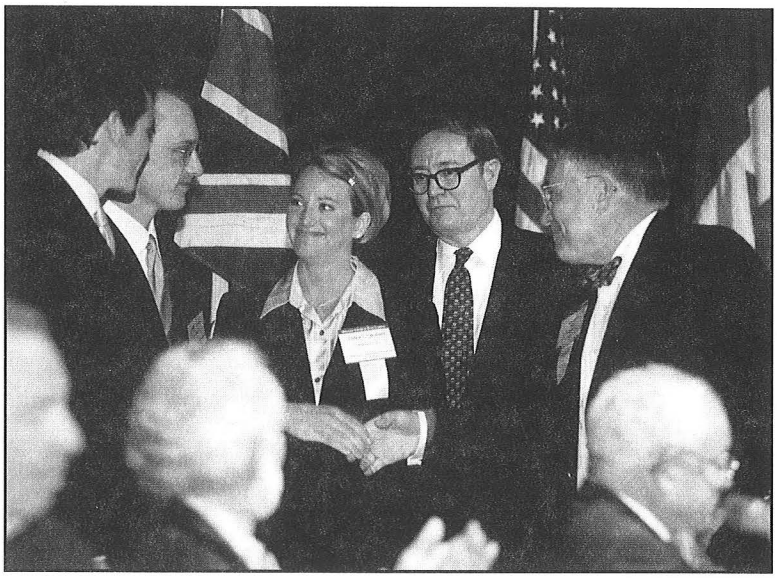
Frank N. Gundlach, Region Liaison to the National Trial Competition Committee, in presenting the award, said, "It is the premier law school competition in the nation and the largest of its kind. Each year the College assists with the funding and provides judges for the competition, and provides jurors for the final trial."

Then President Edward Brodsky served as the presiding judge of the final round of the competition.

Each finalist in the competition received the Lewis F. Powell Medalion, which is struck in honor of the former Associate Justice of the United States Supreme Court and past president of the College.

Each year the College also presents the Kraft W. Eidman Award, which consists of a $5,000 award and a revolving trophy to the winning law school. The award is funded by the Houston firm of Fulbright & Jaworski.

Mr. Toth accepted the George A. Spielberg plaque as Best Oral Advocate for the competition. The Spielberg Award is funded by a grant from the New York City law firm of Fried, Frank, Harris, Shriver & Jacobson. □



President Ozzie Asycue congratulates the South Texas College of Law team of Brent Cordell, Kevin Cain and Twila Grooms — winner of the 1998 National Moot Court Competition as David Cupps looks on.

South Texas Law School Wins 1998 National Moot Court Competition

Kevin G. Cain, Brent M. Cordell and Twila L. Grooms were in Naples to accept the College's honors for winning the 1998 National Moot Court Competition for the South Texas Law School in Houston, Texas.

The annual award is sponsored by the College in cooperation with the Young Lawyers Committee of the Bar Association of the City of New York.

Some 165 teams from throughout the country participated in 14 regional competitions. The two top teams from each region were then called to New York to participate in the National Finals.

Ms. Grooms received the newly created Fulton Haight Award, presented to the best advocate by Lively M. Wilson and Dodie Haight, on behalf of the American College of Trial Lawyers Foundation.

In accepting the award, Ms. Grooms said, "The life lesson for us in this competition was that victory, whether it be in real life or whether it be in moot court, comes from working together as a team towards a common goal." □

Samuel E. Gates Litigation Award Presented to The Honorable Dorothy W. Nelson

President Ozzie Ayscue and Past President Ralph I. Lancaster present the Samuel E. Gates Litigation Award to Honorable Dorothy W. Nelson.

Samuel E. Gates was President-Elect in 1979 when death claimed him on his way to a College meeting. In recognition of his trial abilities and his standing at the Bar, his law firm, Debevoise & Plimpton, created the Samuel E. Gates Litigation Award. The award recognizes a lawyer who has made a substantial contribution to the improvement of the litigation process.

The Honorable Dorothy Wright Nelson, Senior Circuit Judge for the U.S. Court of Appeals for the Ninth Circuit, Pasadena, California received the award in Naples, Florida.

Judge Nelson graduated from the University of Southern California law school, was its first woman law professor and became USC's dean of law in 1969. She was appointed by President Jimmy Carter to the Ninth Circuit Court of Appeals in 1979.

Presidents Nixon, Ford, Carter and Reagan appointed her to national commissions. She has received six honorary degrees and awards that include the Los Angeles Times Woman of the Year Award. "But it is her role as the driving force for the creation for the Western Justice Center Foundation and the implementation of its goals which truly distinguishes Judge Nelson for this award," said Past President Ralph I. Lancaster, who presented the award. "This is a place where creative minds can invent, test, evaluate and replicate new approaches to the resolution of important issues," he said.

In accepting the award, Judge Nelson said, "For some kinds of cases our trial system simply doesn't work."

Congress has recently passed two acts, "that will greatly affect the lives of trial lawyers in this country," she said. The Alternative Dispute Resolution Act of 1998 requires every U.S. District Court to adopt a local rule requiring all litigants in a civil case to consider the use of an ADR process.

The Environmental Policy and Conflict Resolution Act establishes the United States Institution for Conflict Resolution and promotes alternative forms of dispute resolution in environmental cases.

She noted that Congressional acts in the 1970's and 80's providing for arbitration, mediation and early neutral evaluation in summary jury trials were "violently opposed" by the trial Bar in her circuit. "But in the past few years it has been the trial lawyers who have been the greatest support of the alternative dispute resolution program," she said.

She said the Justice Department requires every civil litigator in the department to receive mediation training. And last May President Clinton asked the Attorney General to chair an inter-agency group to promote dispute resolution programs throughout the Executive Branch of the federal government.

"Clients want to remain in control of their disputes," she said, "but you can't control the outcome of a matter once it is presented to a court for resolution. Moreover, when a jury or a court decides who wins or loses, that ruling may not resolve the underlying problems that cause the suit to be filed in the first place. Thus this movement is growing — not out of benevolent altruism of the participants — but rather out of the recognition that in many circumstances there are better ways to resolve disputes. So whether we like it or not, ADR is here."

She said that ACTL founder Chancellor Emil Gumpert, "was one of my great mentors when I was a young lawyer and a young law professor. In fact, I required every single class of mine in a seminar in law reform, which I taught, to spend one hour with Judge Gumpert to talk about the future of the law. He would always emphasize that it was not the substantive law that was so important. It was the process that would bring about a just resolution of the conflict that was the most important." □

49th Spring Meeting

(Continued from page 5)

pression "at ridiculously low prices." The insurance companies who collected premiums which would have paid dowry funds to meet the traditional practices of Polish, Ukrainian and Jewish life of that period offer another problem, as well as the recovery of lost artwork that was plundered systematically throughout Europe, according to Professor Neuborne.

Little-Known Adventures of Justice Lewis F. Powell As An Intelligence Officer in World War II

The second in the Lewis F. Powell, Jr. Lecture series was presented by **William H. Webster**, former Director of the Federal Bureau of Investigation and former Director of the Central Intelligence Agency.

Judge Webster was a Naval lieutenant during World War II and was called back into service for the Korean War. He has also served as the U.S. Attorney in St. Louis, where he also practiced law for a decade before being appointed as a U.S. District Judge. Later he was appointed as a judge on the Eighth Circuit Court of Appeals.

He was introduced by Past President Griffin Bell, who said that once the appointment of Judge Webster as Director of the FBI was made, "President Carter thought it was the finest appointment he made during the time he was President."

The Reagan Administration retained Judge Webster as FBI Director and when President Bush was elected he made him head of the Central Intelligence Agency.

Judge Webster noted that Justice Lewis F. Powell was a Past President of the College and of the American Bar Association.

He spoke of a less well-known aspect of Justice Powell's career — his role in intelligence gathering during World War II. He said he had known Justice Powell for a decade before he visited the Air Force Museum at Wright Patterson Field in Dayton, Ohio and learned of Justice Powell's involvement in intelligence gathering during the war.

Lewis Powell was 34 when he volunteered for the war effort and in April 1942 he was assigned to the 319th Bombardment Group of the United States Army Air Forces. In August he was sent to Europe and by October he was in North Africa, where he gained combat experience as an interrogator of returning flight crews.

Justice Powell served in the Northwest African Air Forces headquarters staff in Algiers, was selected as special courier to carry top secret assessments to General Dwight Eisenhower's field headquarters, and served in Sicily. His responsibility was to follow the capabilities of the German Air Force. He was recognized as one of the authorities on the German Air Forces in the United States services.

After being returned to the United States for six months to teach trainees, Powell was then assigned to Military Intelligence Service, War Department, under the direct authority of the Secretary of War.

"They were looking for exceptionally bright officers," Judge Webster said. Lewis Powell was one of 28 selected. He was sent back to England to serve under his old commander in North Africa and Sicily – Major General Carl Spaatz — commander of the U.S. Strategic Air Forces as the Ultra Secret representative.

Ultra was one of the best-kept secrets of World War II. The German military machine had made improvements on the Glowlife Ciphering and Deciphering Machine, available in Berlin as early as the 1920s. The Poles had reconstructed its version of the military model and shared their knowledge of the German Enigma cipher machines with the British and French just prior to the German invasion of Poland.

Ultra was a device to defy decryption of what the German's thought was decryption proof. Because the Germans were using the Enigma to encode and decode the most sensitive and vital information, it was extremely important to the Allies that knowledge of their newfound ability to decode Enigma be confined.

Considerable effort went into providing rational explanations for Allied actions based upon Ultra information. According to Judge Webster, "One of the most acceptable covers, ironically, was that it was put out that this information was leaked by Italian sources, which the Germans were always willing to believe."

"Into this highly clandestine world on February 28, 1944 marched Lewis Powell Jr., uniquely qualified by intelligence, experience, integrity and context to serve as an Ultra Secret representative. He received three weeks of training and was sent in April to Algiers, where he delivered sealed documents to explain his mission," Judge Webster said.

After inspections of our operations in Italy, interviews with British personnel and meetings and briefings with American intelligence officers,

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he made a number of recommendations to General Spaatz, who gave him more and more responsibility. He sent him to the strategic air forces at SHAPE, Eisenhower's Supreme Headquarters for the Allied Expeditionary Forces.

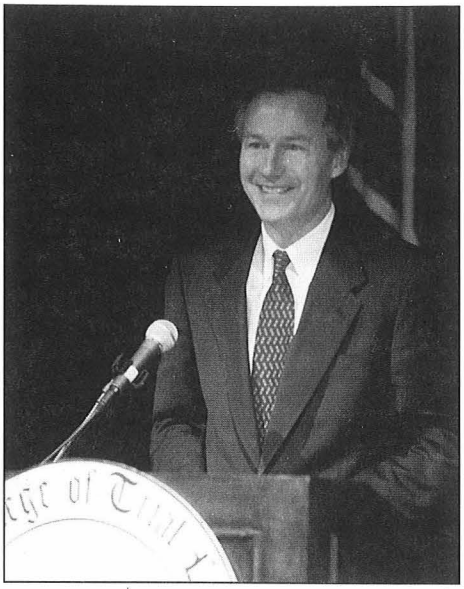
"Powell became very active in the selection of bombing targets. He was a staunch advocate of precision, rather than blanket bombing," Judge Webster said.

By the war's end, Lewis Powell had been promoted to full colonel. "In 18 months abroad he had performed his work with competence and with a quiet pride that never wavered in the years ahead," Judge Webster said. He ended his wartime service in February 1946 and was awarded the Legion of Merit and the Bronze Star.

A House Manager's Perspective

Congressman Asa Hutchinson is a member of the House Judiciary Committee and was a House Manager in the Impeachment Trial of President Clinton. In 1982 he was appointed by President Reagan to be the U.S. Attorney for the Western District of Arkansas, where he served until 1985. Appointed at the age of 31, he was the youngest United States Attorney in the country. He then practiced law in Fort Smith for 10 years and was elected to the House of Representatives in 1996.

Past President Leon Silverman introduced him by saying, "When he was appointed as U.S. Attorney, he soon showed his mettle as a courageous public servant. Wearing a flack jacket, he negotiated a peaceful conclusion to what had become a tense three-day standoff between a heavily armed paramilitary group and some 200 law enforcement officers." Some 60 members of the neo-Nazi group called the CSA — The Covenant, The Sword and The Arm of the Lord — surrendered, and Hutchinson received a FBI citation for his successful efforts.



Congressman Asa Hutchinson

After successfully prosecuting the leaders of the group, Mr. Hutchinson, a judge and an investigator were marked for death and received government protection.

He has since served as Chairman of the Arkansas Republican Party, and when his brother, Tim Hutchinson, resigned his Congressional seat in 1996 to seek a Senate seat, Asa Hutchinson ran to fill the vacancy and was elected. He was reelected with no major party opposition in 1998.

Congressman Hutchinson spoke of his disappointment that the House Judiciary Committee could not establish bipartisan procedures as the Senate did. "They developed a bipartisan process in the Senate that gave what they were doing more credibility. Again, ultimately, it came down to more of a party line vote, but they had that bipartisan procedure that gave the public some confidence."

Stating he did not ask for the job of House Manager, Congressman Hutchinson talked about what he called the "culture shock" the procedures in the Senate produced. "I'm a trial lawyer and I was thinking in terms of a trial, that we would go over to the Senate, that we would have witnesses, that we would go through the normal procedure. All of a sudden we had six days of opening statements. Then we had a question and answer time. And I'm just not used to that — where the jurors submit questions and we answer those. That's an interesting procedure.

"And then, after that, the House Managers have an opportunity to make a motion to call witnesses," he said. "Well, you know, that's a little different. And so, we made the motion to call witnesses, and it was simply to depose witnesses, to take their deposition. And it was a heavy burden that we had and finally we

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got the opportunity to depose three witnesses. And then when we deposed those three witnesses, they said, 'Now you can have the opportunity to make the case to call these witnesses live.'

"We made that case and, of course, the response was, 'Well, we don't need to call them because we've already heard them. We had their deposition — we saw the video. And so we're going to let you play excerpts from the depositions.' And so we went through that process. Even though they were able to obtain a bipartisan procedure, which I applaud, it was at the sacrifice to normal procedure that we would customarily see in the courtroom."

He also said, "Nothing beats a trial. Witnesses make the case, not lawyers. I'm sure you know that. But you make a simple contrast. An average of nine million people in America watched the Senate trial while the House managers were presenting the case in contrast to almost 70 million people watching Monica Lewinski on Barbara Walters. Now what would have happened – it might not have made any difference – but what would have happened if 70 million people had watched the testimony, under oath, of a key witness in the case before the United States Senate? You contrast the impact of a nine million audience versus a 70 million – and I guarantee you that's what scared the United States Senate.

"And so, ultimately, we did not have any witnesses," Congressman Hutchinson said, "so that left the burden on House Managers trying to persuade a juror of a case without the benefit of the compelling testimony of live witnesses who have been personally impacted by the drama in their own life. And I think that obviously makes a difference in your presentation of a case and it made a difference in the presentation of the case in the Senate."

With Reality Like This, Do We Really Need Fiction?

John S. Martel is a former Regent of the College who practices law in San Francisco. He is also a novelist. Bantam Books published his first novel, *Partners*, in 1985. Pocketbooks published *Conflicts of Interest* in 1993 and *The Alternate* is being published by Dutton in April of this year.

Past President Gene W. Lafitte introduced Mr. Martel as a lawyer, a teacher, a writer and also an athlete. "He lettered in basketball, football and track at Modesto Junior College in California, then played basketball at the University of Oregon," Mr. Lafitte said. The Korean War interrupted track season and Mr. Martel served as an Air Force pilot from 1951 to 1955. "In 1991 he began competing in the Masters Competition of the World Veterans Federation, a competition that occurs by age groups."

In 1997 he won the National Championship in the 100-meter hurdles for his age class, defeating two Masters athletes whom he had never beaten in six years of competition. Mr. Lafitte said, "It is reported that his time was 16.69 seconds and he was probably the best in the world for 100 meters in 1997."

Mr. Martel read a piece from his novel, *Conflicts of Interest* where, "My protagonist has seen that the jury has bought into his opponent's argument and he's desperately trying to marshal his thoughts and control his raging emotions as the judge and the jury impatiently wait for his closing argument. Now this is a young lawyer and certainly not a model for any one of us, but perhaps his thoughts will resonate in your distant past:

> He listened to the familiar courtroom sounds: the clerk's muffled whisper into her telephone, a juror's self-conscious cough, the velvet key taps of the court reporter's machine catching up on exhibit numbers and a wheezing noise like a bicycle wheel in need of oil. His own breathing. At least he was breathing again, although it felt something like closer to hyperventilation.
>
> His mouth was dry as asphalt. He wanted to lick his lips but resisted to the impulse. Knowing that the jury was watching him now, he twisted like an insect on his adversary's pin. All twelve of them now watching him for the slightest indication of uncertainty, of fear.
>
> He began to resent those jurors with their smothering eyes all over him, staring at his pock-scarred cheeks, expecting too much of him. He pictured himself rising to his feet, but instead of delivering his closing argument, simply wishing his client the best of luck and then walking out of the courtroom into the warmth of the then morning sun."

Mr. Martel noted that his character didn't walk out of the courtroom, and that he won the case.

Mr. Martel said he remembered

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Jimmy Stewart and George C. Scott in *Anatomy of A Murder* and Gregory Peck in *To Kill A Mockingbird* and how those examples of entertainment convinced him as a law student that he was in the right line of work.

But he also rattled off a list of movies that distorted the trial process and portrayed "gross ethical violations by lawyers as commonplace, indeed, necessary in achieving justice." In the 1963 movie *Jagged Edge*, "Glenn Close strutted about the courtroom in a sprayed-on skirt. . ." and "made an ex parte visit to the judge at night."

In the 1987 movie, *Suspect* where the victim is found floating in the Potomac River, "Defense lawyer Cher — apparently short of associate support — uses one of her own trial jurors to assist in the investigation and the legal research to win a defense verdict. In *Class Action* a father and daughter team up to win a huge class action verdict and with the proceeds of the fees set up a firm called Ward and Ward. Nothing wrong with that except for the fact that the daughter was also the defendant corporation's lawyer – a fact which seemed to bother no one in this Hollywood model of family values.

"Then there was *Guilty As Sin* (1993), in which the defense counsel decides in the middle of the trial that her client is guilty. So she sneaks into his apartment, plants incriminatory evidence and then leaves an anonymous message for the police."

"Perhaps the most damaging of all was *The Verdict* because it was so damn wonderful to watch," Mr. Martel said. "And you walked out of the theater feeling thoroughly entertained and even fulfilled because, after all, the good guys won.

"But if we quiz lay jurors the next day as to lessons learned about lawyers and the justice system, I submit they gain the following impressions: One, that trial lawyers will do anything to win, including breaking into the U.S. Mail, which is a federal felony.

"Two, that when sober enough to catch a cab they will go to a funeral parlor and hand out business cards. Breach of ethics.

"Three, that big firm lawyers like James Mason can send unsympathetic medical witnesses out of reach of the opposition by simply treating them to an exotic foreign vacation.

"Four, that good looking female employees with a big firm can conceal their affiliation and take their adversary to bed to engage in physical discovery.

"Five, that lawyers don't have to convey settlement offers to their clients.

"And six, that big firms can buy off corrupt judges."

He said, "As lawyers we may lament and find laughable James Mason's objection or his failure to seek a directed verdict or the misuse of the hearsay rule exceptions, or the best evidence rule, because it ended okay in *The Verdict.*

"But it isn't okay, and here's why. The justice system is the foundation of democracy and when faith in the machinery of justice fades, anarchy waits in the growing shadows. Public faith in the justice system therefore necessarily depends on the system's perceived capacity to discern truth."

Moving from the world of fiction to the real world, he quoted an article from *The San Francisco Chronicle*: "Citizens are blowing off invitations to jury duty at a rate as high as ninety percent in some cities such as New York and Los Angeles. The reason is simple, say keen observers of the legal scene. It's the O.J. effect or fallout from the Trial of the Century. Since O.J., so the theory goes, people have lost so much respect for the jury system that they think jury duty is a waste of time. Verdicts come out wrong and trials are too complex. Better to ignore the summons."

He also said, "I submit that when we combine the surreal features of these real life dramas with the recognition that distortion-filled novels, movies and television have become the primary teacher of the public as to how our system works and how we lawyers function – I say we've got a problem. Now, I can hear my fellow writers saying, 'Hey, lighten up, Martel. You've got some bad guy lawyers in your own books and it's entertainment, for gosh sakes. It's okay.' Well, I hope I've shown that it's not okay."

Reviewing Impeachment As The Founding Father's Saw It

Robert F. Drinan, S.J. is a Roman Catholic priest, a member of the Jesuit Order and a lawyer who has served as Dean of Boston College School of Law and is now a law professor at Georgetown University. He also served as a member of the U.S. Congress for five terms representing the Fourth Massachusetts District.

Past President Gael Mahony introduced Father Drinan by saying, "When I asked him how he finds the time and energy to do all the things he does, he said, 'The answer is one word – celibacy.'"

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Father Drinan has written extensively on the field of human rights and has served on human rights missions to Chile, The Philippines, El Salvador, Guatemala, Nicaragua, Argentina, and Vietnam.

Father Drinan began his remarks by saying, "If there is one thing that's overwhelmingly clear in our Constitution it is the historic fact that the framers intended the impeachment remedy to be the last, last extreme way to save the Republic from a dire consequence.

"Benjamin Franklin put it well. He said that a President should be removed only, only if this is necessary to prevent his assassination or to prevent an uprising."

He said that to the 54 Framers the phrase, "high crimes and misdemeanors" means an offense against the state – a political offense, something that is subversive of the Commonwealth. It does not include any offenses of a personal nature that would not cause any direct harm to the government.

"The entire clause about impeachment should be parsed together. Impeachment is possible for 'treason, bribery or other high crimes and misdemeanors.' And the high crimes consequently must be in the same range as treason or bribery," he said.

Father Drinan reminded the audience that the attempted removal of Andrew Johnson in 1868 involved a direct violation of a statute enacted by the Congress, "which President Johnson directly violated simply by removing one of his Cabinet members." And the consensus of historians is that the attempted removal of President Andrew Johnson was a mistake of profound dimensions that many historians say weakened the Presidency for several decades, according to Father Drinan.

"Incidentally," Father Drinan said, "the frequent reference by the Managers for Impeachment in the Senate to the impeachment of judges was totally irrelevant. The standard in the Constitution for the removal of life appointed, life-tenured judges is good behavior. But the standard for the removal of a President is much higher than that – it's treason or bribery or other high crimes or misdemeanors."

According to Father Drinan, 23 federal judges have been removed in American history.

In speaking of the offenses charged against Mr. Nixon, he said they "were offenses against the government. They were designed to commit and then cover up actions that were intended to perpetuate the party in power and to cripple the political opponents."

He pointed out, however, that the Judiciary Committee turned down conduct that was clearly a felony, backdating his taxes. "He would have been prosecuted for it, but the House Judiciary Committee said overwhelmingly – three to one – that is not an impeachable offense even though it is indictable."

With references to the current House Judiciary Committee, he said they, "kept saying that this is like a grand jury and we only find something that's indictable and then send it on to the Senate. And with all due respect, that is a misconstruction of history. The House is not that. It is not a criminal process. It is a political process. And when the Framers concluded, way back in Philadelphia, that something must be included in the Constitution about impeachment, they didn't give it to the judges. It was not a criminal matter. They gave it to the body that is popularly elected and it makes it very clear that they can remove him only for these high crimes or misdemeanors."

Father Drinan said it is extremely difficult to have an objective reading on what has happened to the impeachment process during the last few months. He said, "James Madison feared that the use of the impeachment process could result in a government where the President sits at the pleasure of the Senate. And all of the dragons and demons that have been opened up suggest to me that we have much to fear if this example is followed. Consequently, lawyers — and indeed the entire legal profession — should become students of the impeachment process so that it will not again be misused for partisan purposes." □

Committee News Reports

Access to Justice Committee

Individual state Access to Justice Committees are now established in 20 states.

The committee is currently studying ways to coordinate training programs for public service lawyers in different regions. Efforts are also underway to coordinate the ABA Death Penalty Project with the College Access to Justice Program. In addition, we are discussing ways to participate in developing a web network to be established by the Pro Bono Institute. This project would create a source of efficient communication on significant Pro Bono matters.

Daniel F. Kolb, Chair

Admission to Fellowship

The committee is collecting statistics and other information reflecting nationwide trends in the frequency of trials. The study will provide a report that may enable Regents to assess whether current standards for admission to Fellowship continue to be appropriate.

Audrey Strauss, Chair

Alternatives for Dispute Resolution Committee

The committee has met twice by conference call, once in London and once in Kansas City to finalize the paper on the ACTL Mediation Project.

Shaun S. Sullivan, Chair

Canada-U.S. Committee

The first Canadian National Trial Competition – The Sopinka Cup – was held in Ottawa in March. The committee has also presented the Board of Regents with a draft Canadian Code of Trial Conduct. [*Editor's note: This draft was approved by the Board of Regents.*]

Earl A. Cherniak, Q.C., Chair

Federal Civil Procedure Committee

A two and one-half hour telephone conference regarding the proposed recommendations of the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure 26-37 led to two reports to the Advisory Committee.

The first report, a letter from the President of the College and the Committee Chair, supports the Advisory Committee's proposal to amend F.R.Civ.P. 26(b)(1) changing the scope of civil discovery from "subject matter" to "claims and defenses."

The College recommendation on scope of discovery under 26(b)(1) incorporated by reference a spiral-bound report submitted to the Advisory Committee in behalf of the College and committee in August and November 1998. The August 1998 College report was adopted by the Advisory committee and has become the basis of its proposal amending 26(b)(1).

A second committee report was submitted to the Advisory Committee containing recommendations on all of the other proposed amendments to the civil discovery rules 26, 30, 32, 34, and 37. This 10-page report summarized rules that this committee has had under study and analysis for the last four years.

The Committee Chair testified before the Civil Rules Advisory Committee in January in San Francisco representing the committee regarding the proposed discovery rule amendments. The committee's discovery rules work will continue throughout 1999 as the rules make their way through the process of the Rules Enabling Act on the way to the Judicial Conference of the United States and the United States Supreme Court.

The subcommittee on 12-person juries has also been very active the last several months in drafting a proposed report for full committee review to be ultimately submitted to the Regents. The study and report could pave the way for a proposed amendment to F.R.Civ.P. 48, entitling parties, once again, to a 12-person jury in federal civil litigation, or possibly to a federal statute on 12-person juries.

Robert B. Campbell, Jr., Chair

Federal Criminal Procedures Committee

The Federal Criminal Procedures Committee submitted its Report and Proposal on Section 5K1.1 of the U. S. Sentencing Guidelines to the Board of Regents at the Annual Meeting in London. The report and proposal suggested modification of 5K1.1 to provide structure and guidance for downward departures for substantial assistance, while provid-

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ing for a motion for such departure by either party or the court. The Board of Regents requested that the committee submit the report and proposal to the Department of Justice for its suggestions or comments.

Committee member Patrick M. Ryan then submitted the report and proposal to the Department of Justice for its analysis and comment. James K. Robinson, Assistant Attorney General for the Criminal Division, responded with a thorough analysis of the Department's concerns. The 5K1.1 subcommittee, chaired by John P. Cooney, gave careful consideration to Mr. Robinson's comments and suggested certain modifications to the original report and proposal.

In January the committee discussed the comments of the Department of Justice, considered the subcommittee's response and suggestions, and approved the submission of the revised Report and Proposal on 5K1.1 to the Board of Regents at its scheduled Spring Meeting. [*Editor's note: This report was adopted by the Board of Regents.*]

Suggestions concerning issues which should be addressed by the committee from Fellows of the College will be welcomed.

Robert W. Ritchie, Chair

Federal Judiciary

Judicial Compensation

At President Ayscue's invitation, I accompanied him to a meeting in Washington, D.C. in January of the Judicial Branch Committee of the Judicial Conference. The meeting was convened to begin formulating a strategy for obtaining increases in compensation for the Federal Judiciary. The relative decline of judicial salaries was one of the main points in the Chief Justice's 1998 year-end report. Practical problems in obtaining relief for the judiciary were discussed and future sessions will be held. The College will be invited to participate in these sessions.

Judicial Vacancies

In his year-end report, the Chief Justice noted progress in the confirmation of judicial nominees. However, the committee is still concerned about this serious problem.

Committee On Structural Alternatives For Federal Court of Appeals

The committee is studying the recommendations and recent report of this commission, chaired by retired Justice Byron R. White. It has generated much controversy with the bar as well as the federal judiciary.

Judicial Independene

The recent flurry of reports and seminars on judicial independence uniformly comment on the lack of public understanding of the work of the courts. They also underline the need for public education about the role and significance of both the state and federal judicial systems. There will be a joint meeting with the State Judiciary Committee at the College's Spring Meeting in Naples to review various programs and ideas that have been advanced to accomplish this goal.

Edward W. Madeira, Jr., Chair

Federal Rules of Evidence

The committee met in London and completed our discussions of committee positions on proposed amendments for comments to the Advisory Committee on the Federal Rules of Evidence. Those comments were completed and submitted to the Advisory Committee in January 1999.

Fletcher L. Yarbrough, Chair

Samuel E. Gates Litigation Award Committee

I have gathered historical materials relating to the criteria/guidelines and the qualifications of prior recipients of the award. The committee will discuss these matters at the Spring Meeting in hopes we can refine the criteria for approval of the Board of Regents.

Sylvia H. Walbolt, Chair

Emil Gumpert Committee

The Emil Gumpert Committee convened in New Orleans in January with 18 of the 20 members present. Applications of the University of Alabama, Brooklyn Law School, University of Montana, Wake Forest University and University of Washington were reviewed, and the committee recommended that the University of Montana be awarded the Emil Gumpert Award for 1999. The committee also discussed possible nominees for making a presentation on the future of trial advocacy at the Annual Meeting in the year 2000. The committee also discussed improving our selection process and methods of encouraging applications.

Thomas J. Groark, Jr., Chair

International Committee

The committee is investigating possible projects and the Chair

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serves as the College liaison to the ABA working group for International Criminal Court.

Thomas D. Allen, Chair

Legal Ethics Committee

At the London meeting, the committee voted to request advice from the Board of Regents on whether this committee should study the ethics issue of political contributions to judicial candidates by practicing attorneys. The committee decided not to undertake any study of the related but broader issue of appointment/election of judicial candidates. We understand that this issue has already received attention from the State Judicial Committee of the College.

The committee is now studying the issue of an evidentiary privilege for accountants akin to the attorney-client privilege.

John H. McElhaney, Chair

Lewis F. Powell, Jr. Lectures

The committee invited William H. Webster, former Director of the Federal Bureau of Investigation and the Central Intelligence Agency, to give the Lewis F. Powell, Jr. Lecture during the Naples, Florida meeting.

R. Harvey Chappell, Jr., Chair

Mexico Committee

As previously planned, letters have been sent to selected Mexican attorneys and several favorable replies have been received indicating an interest in pursuing informal contacts. The committee chair will be in Mexico City on other business in early June and will meet with some of the respondents.

Phillip A. Robbins, Chair

National College of District Attorneys

At the November 1998 meeting of the National College of District Attorneys, the board authorized the Dean of the College to negotiate an agreement with the University of South Carolina and its School of Law that would enable NCDA to move to Columbia. This move would allow the organization to have all of its components located on the same campus and to coordinate its activities at the National Advocacy Center more efficiently.

John A. Hill, Jr., Chair

Professionalism Committee

Members of the Professionalism Committee are serving as judges for the 1998-1999 essay contest sponsored by the American College of Trial Lawyers Foundation. This year's topic, "Courage and Advocacy: The Obligation of a Lawyer" has attracted many well written and interesting papers.

Other members are working on our project dealing with the contributions of lawyers to the founding and development of the United States. The initial phase of the project will cover the period of the Declaration of Independence, the Constitution, and the Bill of Rights.

Eugene A. Cook, Chair

Publications Committee

Three projects are being studied concerning publication of *The Bulletin*. First, consideration of establishing an Editorial Board to review/edit proposed articles. Second, addressing a question raised concerning whether we should help defray costs of publishing *The Bulletin* by accepting advertising. Serious consideration must be given to the appropriateness of soliciting and endorsing vendors in an official College publication. Third, should we conduct some type of survey to determine what percentage of Fellows read *The Bulletin*?

Given the rapidly expanding information network, should the committee seek permission to expand its scope of work to include other types of communications of the College? This might include such College functions as the website, developing a College media relations policy, developing welcome packets for new Fellows and exploring methods of maintaining the College roster.

The committee also needs to look at preparing a policy for document security, preservation and access for College historical and operating documents.

Sharon M. Woods, Chair

State Judiciary Committee

The committee met during the London Meeting and decided to explore the issue of judicial elections and the related issue of attorney contributions to judicial campaigns. The committee believed it might be helpful to draft proposed guidelines for lawyer contributions and appropriate candidate conduct. The committee has not reached any final conclusion on developing a possible statement by the College supporting the abandonment of judicial elections and the institution of merit selection models for state judiciaries. It is believed it

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Professional Program at the Spring Meeting

Fair Trial of High Profile Cases

"Fair Trial of High Profile Cases" was explored during the professional program at the Spring Meeting. ACTL President-Elect Michael E. Mone moderated a panel of lawyers who had experience with the issue.

Panelists included ACTL Fellow Judy Clarke, Executive Director of the Federal Defenders of Eastern Washington and Idaho. She sees a challenge to the legal profession where the public views some jury case determinations as, "The right verdict" or "The wrong verdict."

Martha Coakley is the District Attorney for Middlesex County, East Cambridge, Massachusetts. She said she has a duty as a public official to respond to media requests for information. "We are held to a very high standard and in some ways it makes me a better DA and public official." she also said, "In the long run I think that makes us do our job better as prosecutors."

George Freeman is the Assistant General Counsel for The New York Times Company. He said at a similar panel at the ABA meetings in Toronto last summer he came away with a strong feeling that in civil cases, "the days of 'no comment' are over. My guess is that ten years from now that change will continue into the criminal arena, for better or worse."

Larry Mackey, a Fellow of the College and a panelist, compared the continuous media coverage of the Simpson case, which took one year, to the non-media event of the Oklahoma Bombing cases, "which had far more witnesses and far more victims, but only took six months."

Judge William G. Young is Chief Judge of the U.S. District court in Boston. "I think one of the big drivers here is going to be the Internet," he said. He speculated that people who want them will someday get transcripts of trials on the Internet. "And then shortly thereafter we will begin to get videos of trials on the Internet, for those who want. And the media will do what they have always done, which is the selection." □

Committee Reports

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might be difficult for the College to effectively change the philosophies of various states that have a longstanding political affinity for judicial elections. However, at the least, the committee felt the College might positively influence the role of lawyers and candidates in judicial election campaigns. I have gathered related information for the committee with the thought of drafting a statement, code or guidelines for the committee to consider for presentation to appropriat College officials.

The committee is committed to improving the judicial election processes, especially from the "appearance" of justice perspective. As suggested by President Ayscue, the committee will coordinate with the Ethics Committee as it works on this issue.

The committee will meet jointly with the College's Federal Judicial Committee during the Spring Meeting to identify issues both committees may be able to work together on. Issues the committees will discuss will include judicial selection processes, defense of judicial independence, coordination of the College with judicial conferences, preservation or enhancement of judicial resources and attracting qualified persons to serve in the judiciary.

George E. Feldmiller, Chair

Teaching/ Trial & Appellate Advocacy

The committee publicized the professionalism and civility syllabus prepared by the committee and published by the College in August 1998. Demand has been steady and reports of its use have been complimentary. The committee will meet in Naples to continue circulation efforts and to explore potential new projects on other subjects.

J. Robert Elster, Chair □

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