American College of Trial Lawyers

THE BULLETIN

Number 34 Fall 1999

Civility in the Practice of Law

Must We Be "RAMBOS" to be Effective?

By
Robert W. Ritchie

THE PROBLEM

The practice of law has always been subject to abuse by those outside of the profession. This has been true throughout history even though, during significant periods of that history, the disparaged lawyers were taking the lead in the founding of our nation and in fostering every significant social and economic development of that nation.

We have been frequently criticized, vilified and abused by anyone who was on the losing end of any court proceeding and by those whose power or pocketbook was subject to challenge in a judicial proceeding. Some of the criticism of individual lawyers, even groups of lawyers, has been justified, but most of it has not. We have been able to withstand such criticism because of the irrefutable fact that the lawyers of this nation are the

(Continued on page 3)

ACTL Publishes New Monograph

"Report and Proposal on 5K1.1 of the United States Sentencing Guidelines"

The Board of Regents of the College has approved the *Report and Proposal on 5K1.1 of the U.S. Sentencing Guidelines* submitted by the College's Federal Criminal Procedures Committee. Copies of the Report and Proposal have been distributed to Fellows of the College and to members of the Federal Judiciary.

(Continued on page 2)

In This Issue:

1 — Civility in the Practice of Law
1 — ACTL Publishes New Monograph
6 — President's Report
7 — ACTL Fellows Appointed to Bench
8 — Judicial Conference Adopts ACTL Proposal
9 — 1999 ACTL Committee Chairs
1999 State and Province Chairs — 10
University of Montana Receives Emil Gumpert Award — 12
ACTL Calendar of Events — 13
Committee News Reports — 16

American College of Trial Lawyers
THE BULLETIN

American College of Trial Lawyers
8001 Irvine Center Dr., Suite 960
Irvine, California 92618
Telephone: (949) 727-3194
Fax: (949) 727-3894
E-Mail: acotl@earthlink.net

(Continued from page 1)

The monograph has been adopted and published in the long-standing tradition of the College in publishing monographs on topics that the College believes can make a significant contribution to our profession. This monograph seeks to address the unwarranted disparities, unpredictability and unfairness in sentencing that have resulted from the present Section 5K1.1.

Section 5K1.1 of the U.S. Sentencing Guidelines presently permits a court to depart from the guidelines, *upon motion of the government,* when the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense. Similarly, a motion by the government is required to permit a court to impose a sentence below a statutory required minimum sentence under the provisions of 18 U.S.C. Section 3553(e). And only the government can move for a reduction of sentence for substantial assistance under Rule 35 of the Federal Rules of Criminal Procedure.

In the ten years since the promulgation of Section 5K1.1, a broad spectrum of critics – including judges, practitioners, probation officers, legal scholars, and other observers – have voiced their discontent with this procedure. It is generally agreed that the procedure results in widespread inequities in sentencing and fails to promote the law enforcement goals for which Section 5K1.1 was designed.

A focal point of the controversy surrounding 5K1.1 is a government motion requirement. Placing the prosecutor in the role of "gatekeeper" results in a number of problems. Prosecutors are not consistently defining "substantial assistance," which generates unwarranted disparities in sentencing. Also, the motion requirement is an unwise and unnecessary transfer of discretion from the judiciary to the prosecutor, a partisan in sentencing proceedings. And the law enforcement goals of 5K1.1 are undermined by giving the prosecutors the final say as to whether or not a defendant receives a substantial assistance departure.

The present Section 5K1.1 does not define substantial assistance. This is also true of Rule 35(b) of the Federal Rules of Criminal Procedure and 18 U.S.C. 3553(e). The lack of definition results in unfettered discretion within and between U.S. Attorneys' offices which, in turn, results in unwarranted disparities in sentencing.

One of the most egregious consequences of the present law is the disproportionate sentences between relatively more and less culpable defendants, which the report refers to as "the cooperation paradox." Often more culpable defendants receive shorter sentences than less culpable defendants, a problem which Senator Orrin Hatch addressed in a speech to the College two years ago.

The proposed amendment to 5K1.1 attempts to strike the proper balance between prosecutors and sentencing judges in determining whether substantial assistance was provided and whether a departure is appropriate. The proposal eliminates the "gatekeeper" function of the prosecutor and permits the motion for downward departure to be made by either party or by the courts *sua sponte.* The proposal does, however, stress the importance of the prosecutor's evaluation of the defendant's

(Continued on page 8)

Civility

(Continued from page 1)

foundation of a system of justice that is the cornerstone of democracy. We are the advocates of those who find themselves embroiled in disputes and disagreements, the counselors for those whose lives are disrupted or broken, and the advisers of those whose business and personal endeavors must be according to the laws governing such matters.

We can deal with and survive the criticisms of those outside the profession, meeting those criticisms that are false and accepting and using those criticisms that are constructive. What we cannot survive is the deterioration of the professionalism we extent to each other — the decline in the civility between lawyers.

The word "civility" may be misleading. It sounds as if we are talking about nothing more than social graces or supposedly outmoded courtesies such as a gentleman walking on the curbside of a lady or standing when she walks into a room. Without deprecating those old-fashioned customs, I suggest that we are talking about the deterioration of something that can, and in some cases does, endanger the effectiveness with which our profession is practiced and our legal system is operated.

United States District Judge Marvin E. Aspen, in an article for the *Valparaiso University Law Review*, *Val. U. Law Review*, 28:513, quoted an exchange between two veteran trial lawyers at a deposition in a multibillion dollar lawsuit. The exchange was reported in the *Chicago Tribune*. Attorney V had just asked Attorney A for a copy of a document he was using to question the witness:

> Mr. V: Please don't throw it at me.
>
> Mr. A: Take it.
>
> Mr. V: Don't throw it at me.
>
> Mr. A: Don't be a child, Mr. V. You look like a slob the way you're dressed, but you don't have to act like a slob. . . . . .
>
> Mr. V: Stop yelling at me. Let's get on with it.
>
> Mr. A: Have you not? You deny I have given you a copy of every document?
>
> Mr. V: You just refused to give it to me.
>
> Mr. A: Do you deny it?
>
> Mr. V: Eventually you threw it at me.
>
> Mr. A: Oh, Mr. V, you're about as childish as you can get. You look like a slob, you act like a slob.
>
> Mr. V: Keep it up.
>
> Mr. A: Your mind belongs in the gutter.

This is an extreme example, but recent

(Continued on page 4)

Robert W. Ritchie is Chair of the Federal Criminal Procedures Committee and a partner in the Knoxville, Tennessee law firm of Ritchie, Fels and Dillard, P.C.

"What we cannot survive is the deterioration of the professionalism we extent to each other — the decline in the civility between lawyers."

Civility

(Continued from page 3)

studies and the increased concern over such matters indicate that the incivility between and among lawyers is growing to an extent that it is interfering with the effective administration of civil and criminal justice. When lawyers are quick to characterize as a misrepresentation or a lie an allegation in a pleading with which he or she has a disagreement, when lawyers attach another's position as motivated by an intentional effort to mislead the court, when lawyers conveniently forget that to which they have orally agreed, when trials become battles by personal attacks between adversaries, and when these things are not isolated occurrences by an identifiable few, we have a problem. When exchanges like this are reported in the *Chicago Tribune*, we have even more of a problem.

I do not believe that it is a problem that has infected the majority of our profession, but even if it has infected an increasing minority of our profession, it is one which we must recognize and with which we must deal effectively.

"If there is an increase in the lack of civility, however, it cannot be attributed to the adversarial nature of our profession."

THE CAUSES

The nature of the adversarial process

The seeds of incivility are present in any adversarial or combative engagement. We are adversaries, after all. Even in compromise one side will often feel that he or she has prevailed or been defeated. We want to win. Often, the pressures are tremendous. There are pressures because of allegiance to our client, and pressures because we know that if we do not win, at least sometimes, we may see our practice evaporate. Emotion becomes involved. The more emotion, the less reason. The adversary becomes the enemy. His or her conduct becomes suspect. He is trying to beat me; he is trying to hurt me. Is it any wonder that we have a problem with civility in our profession?

Yet, as Gee and Garner, in an essay in *The Review of Litigation*, 15:169 (1996) point out, even deadly combatants had their codes of civility:

> Over the centuries, and throughout the world, those humans who have followed the contentious callings — even the deadly ones — have developed their own codes and striven mightily to conform to them, from the chivalry of the Medieval knights and the Code of the Samurai to the duelists on yesterday's Field of Honor, from the fighter pilots in the World Wars down to the Sumo wrestlers, bullfighters and British barristers of today. Why this should be so is hard to tell, but so it has been: not logic but experience, as Holmes said in referring to the life of the law. (citing Oliver Wendell Holmes, *The Common Law* 1 (1881)).

Surely, if those who are about the business of killing each other can adhere to basic principles of civility, we can do no less. All of the emotion and all of the pressure will surely drive us to the lowest common denominator unless we become determined to take a different course.

The increase in the size of the bar

If there is an increase in the lack of civility, however, it cannot be attributed to the adversarial nature of our profession. Those pressures have always been with us. What is different now?

One thing that is different is the increase in the size of the bar. The number of lawyers has increased nationally between 1970 and 1990 from approximately 275,000 to nearly 800,000.

The fact of the matter is, we don't

(Continued on page 5)

(Continued from page 4)

know each other as well as we have in the past. Why has that had an impact?

When we were few, we not only knew each other, but often we knew our adversary's spouse and children. In the late sixties and early seventies, up to a third of the Knoxville, Tennessee bar ate lunch at the same cafeteria almost every day, and most of the offices were within two blocks of each other, in one of five or six office buildings. If you "messed over" a colleague, everyone knew it within 24 hours, and you were looked upon with scorn and disdain. Across the United States many cities and towns had a similar physical proximity and familiarity. That created a sense of collegiality and peer pressure that was a deterrent to incivility.

To be sure, there were problems from time to time. In Knoxville, there were about a half dozen lawyers about whom the word was spread, "to get agreements in writing." But today, with almost three times the number of lawyers at the bar, we have the increased challenge of anonymity. It is far easier to attribute base motives to an adversary you do not know than someone with whom you have dined and shared war stories. It is easier to misunderstand the statement of an adversary when that adversary is little more than a name on a page.

The increase in spirit of competitiveness

Another cause of an increase in incivility is an increase in the spirit of competitiveness. Instead of a noble and learned profession, imbued with the spirit that produced Jefferson, Madison, and Lincoln, there is an increased tendency to view the practice of law as a business, a commercial enterprise, in which the emphasis is on the billable hour and the bottom line. In a day in which even a small firm can have an astounding overhead, there is tremendous pressure to bring in fees — to make money. In this latter aspect, there is a tendency for a client to become a "piece of business," not a person who has come to you for help to solve a problem in his or her life.

With the number of lawyers increasing faster than the population and faster than the growth of the economy, there is a substantial increase in the competition for the available clientele. This level of competition, which has resulted in chapters of yellow page ads and letters to people who are injured or arrested, results in crass commercialism, not the spirit of a learned profession. Has this produced an edge to our relationships and contributed to the deterioration in civility? Probably so.

The Age of Rambo and Clint Eastwood — No one wants to appear weak

The kinds of tactics which have epitomized the increase in incivility have been called "hardball", "scorched earth" and "Rambo" tactics. Clients often speak of wanting the "meanest," most aggressive lawyer they can find. They have seen the Rambo movies. They have seen *Magnum Force*, starring Clint Eastwood. The heros of these movies have always come out on top. They not only win their battles, they have the respect of all around them. Don't we want to be like that--strong, brave, disregarding all the rules to get the job done? Civility has little chance in that arena.

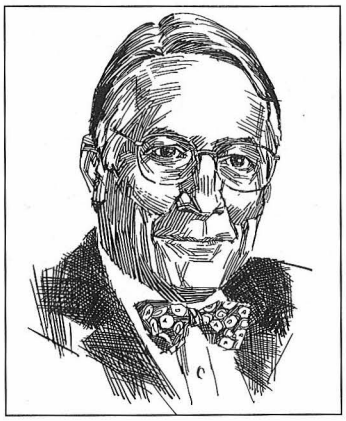
Is civil or courteous behavior a sign of weakness? Ronald J. Bilson and Robert Mnookin, in a article entitled "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation," published in *Columbia Law Review*, 94 *Colum. L. Rev.* 509 (1994) said:

> Those lawyers who believe that 'scorched earth' tactics are key to success in matrimonial litigation justify their 'win at any cost' behavior on the basis of zealous advocacy on

(Continued on page 14)

"When we were few, we not only knew each other, but often we knew our adversary's spouse and children."

The President's Report



E. Osborne Ayscue, Jr.
President

As my presidential year has flown by, I have become more and more conscious both of our diversity and of the common thread that runs through every gathering of Fellows. Some groups meet in lumberjack shirts in the North woods, others in black tie in exclusive private clubs. We have seen in every group of Fellows we have visited, however they dressed and wherever they gathered, a bond of mutual respect and camaraderie that transcends their differences. The collegiality that Emil Gumpert insisted must be a hallmark of the College is very much alive.

Since my last letter, we have visited the 10th Circuit Regional in Santa Fe, where Regent Stuart Shanor and Ellen did everything but wash the dishes, the 6th Circuit Regional in Cincinnati and the 3rd Circuit in Wilmington, Delaware. We dined in black tie with the Georgia Fellows at the legendary Piedmont Driving Club in Atlanta one night and in polo shirts with the Minnesota Fellows on Gull Lake the next. We cruised the upper Mississippi at Prairie de Chien, Wisconsin with the Iowa Fellows. I am leaving to dine with the Nebraska Fellows in Lincoln tomorrow night, and next weekend I will fly to Alaska to attend the first ever dinner of the Alaska Fellows in Anchorage.

Along the way, several of your past presidents, Executive Director Bob Young, one Regent and I attended the memorial service for Associate Justice and Past President Lewis F. Powell, Jr. in Washington. I attended a meeting at the White House at which President Clinton called on the leaders of our profession to renew the fight for equal justice for all our citizens.

In August we were guests at the annual meeting of the Canadian Bar Association, at which Honorary Fellow and Chief Justice Antonio Lamer announced his intention to retire in January 2000. Ten days ago we returned from participating in an Anglo-American Legal Exchange in Edinburgh and London, an event the College cosponsored.

I spoke in my first letter about the common bond we share with our British counterparts. As we have traveled about this year, our close relationship with our Canadian counterparts, something many of us tend to take for granted, has also become even more apparent to us. The first Canadian Fellow was inducted when the College was two years old. Though the Canadian bar is much smaller than that of the United States, we have well over two hundred Canadian Fellows. I have served with two Canadian Regents, Yves Fortier and David Scott.

Six members of the Canadian Supreme Court are Honorary Fellows, as was Chief Justice Brian Dickson, who died last year. Two were Fellows before they went on the bench and are now Judicial Fellows, as was the late Justice John Sopinka. We are inducting Justice Frank Iacobucci as an Honorary Fellow in Philadelphia next month.

The College helped to create the Canadian National Trial Advocacy Competition, which is named in memory of Justice Sopinka. We give the Dickson Medal to the winners of the Canadian National Moot.

Next year's roster, the Blue Book, will contain (in both French and English) the new Canadian Code of Trial Conduct, authored by our Canada-United States Committee and endorsed by Chief Justice Lamer. That committee has also drafted a proposed protocol for cross-border enforcement of judgments. We have sponsored periodic legal exchanges with Canada. And next Spring the guest on the beach at Maui attired in a kilt will be Ed Meehan, the new President of the Canadian Bar.

A legal system that springs from the same roots as ours, a culture shaped by the French influence in the East and the frontier spirit in the West and a group of notoriously

(Continued on page 7)

(Continued from page 6)

convivial Fellows immensely enrich the College.

As the College has grown in stature it has been looked to more and more to provide leadership in our profession. We have nevertheless chosen to exert our influence principally when we see a need that we are uniquely positioned to address. We have not, however, hesitated to speak when the situation demanded it. We spoke out strongly in favor of caution and further study when a proposal to amend the Model Rules of Professional Conduct to allow lawyers to participate in multidisciplinary firms surfaced on the agenda of the ABA House of Delegates in June. After a spirited debate, in which a number of Fellows participated, that proposal was rejected. The subject is not likely to go away, and we are creating a special committee to explore its merits.

We also spoke out against a proposal to amend Model Rule 4.2 to allow government agents to communicate directly with represented parties, something that the College has actively opposed as a matter of policy for a number of years. That proposal was withdrawn.

We have recently published a thoughtful and scholarly monograph proposing to amend Section 5K1.1 of the Federal Sentencing Guidelines to cure what many see as an inequity in the present system for implementing downward adjustments in criminal sentences. This report and recommendation is the product of several years of labor by your Federal Criminal Procedure Committee. Each of you has received a copy, and one has been sent to every member of the Federal judiciary. It is deserving of your study, whether or not you practice criminal law.

Two weeks ago the Judicial Conference of the United States approved a proposal to amend Rule 26 of the Federal Rules of Civil Procedure to narrow the scope of permissible discovery to the claims and defenses asserted in the action, rather than the broader "subject matter" scope provided in the original rules. The proposed amendment now goes to the Supreme Court and then to the Congress. This proposal, which emanated from your Federal Civil Procedure Committee, represents the first change in the scope of discovery under the Federal Rules since they were adopted in 1938.

In these and numerous other ways various committees of the College are using your collective stature to improve the system of justice under which we operate. It is a hallmark of the College's growth that an organization founded principally to identify and bring together outstanding trial lawyers to enjoy one another's company has grown into the leadership role it has assumed in our profession. It is a hallmark of its maturity that two years hence an organization once regarded as an elitist enclave will, over a period of five years, have been led successively by a former prosecutor turned law school dean from Oklahoma, a Brooklyn-born lawyer from a large New York firm, a Southerner who practices twenty-five miles from the small town where he was born, an Irish plaintiff's personal injury lawyer from Boston and a New Englander who went to Washington to get a few years' trial experience, prosecuted the Watergate break-in and never got back home.

A year from now we will celebrate the 50th anniversary of the founding of the College with a four-day meeting in Washington. We will publish a history of those 50 years, in reality a history of the legal profession, and not just of the College. We expect it to be an extraordinary event. Please mark it on your calendars. □

ACTL Fellows Appointed To The Bench

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

William Alsup of San Francisco, California has been appointed to the U.S. District Court for the Northern District of California.

Donald W. Bostwick of Wichita, Kansas was recently appointed Magistrate Judge.

James R. Epstein of Chicago, Illinois was recently appointed Judge of the Circuit Court of Cook County, Illinois.

Kathryn E. Neilson of Vancouver, British Columbia has been appointed to the Supreme Court of British Columbia.

Neil C. Wittmann of Calgary, Alberta was recently appointed to the Court of Appeal of Alberta. □

Judicial Conference Adopts College Discovery Proposal

On September 15, the 27 members of the Judicial Conference of the United States, chaired by Chief Justice Rehnquist, approved the recommendations of the Standing Committee and the Advisory Committee of the Judicial Conference to amend the scope of discovery under the Federal Rules of Civil Procedure. This action would change Rule 26 (b) (1) scope of discovery from that "relevant to the subject matter involved in the pending action" to that "relevant to the claim or defense" of the party seeking discovery. A party may still attempt to seek "subject matter" scope if necessary, upon motion and a showing of good cause to the district court.

The Judicial Conference vote marks the first time the Conference has voted to amend the scope of discovery since the Federal Rules were promulgated in 1938. The amendment had its origins with the ACTL's Committee on Federal Civil Procedure in early 1996 when it was proposed to the Advisory Committee of the Judicial Conference.

Regents of the College adopted the committee proposal in 1998 and sent a report to the Advisory Committee on the underlying rationale of amending the scope of discovery.

After three years of discovery conferences, symposiums and public hearings, the Advisory Committee adopted the College's basic proposal in April 1999 and sent it – along with a package of other recommended discovery amendments – to the Judicial Conference's Standing Committee. This was approved and forwarded to the Judicial Conference in June.

The College proposal was the subject of intense debate and opposition. While it received the support of the Litigation Section of the American Bar Association, it was ultimately opposed by the Department of Justice, ATLA, the NAACP, and several other professional organizations.

The action of the Judicial Conference will now be laid before the United States Supreme Court in November 1999 for its consideration and approval. Under the Rules Enabling Act, the Supreme Court has until May 1, 2000 to review, promulgate and transmit the rule amendments to Congress. Unless Congress passes positive legislation amending or rejecting the promulgated rules within seven months, the amended rules will take affect as part of the Federal Rules of Civil Procedure by operation of law on December 1, 2000. □

5K1.1 Monograph

(Continued from page 2)

assistance to the judge's decision to depart. Furthermore, the proposed amendment defines substantial assistance for the first time.

The criticism that substantial assistance departures typically benefit defendants who are relatively more culpable than those whose role is minimal is addressed in the proposal. The proposal permits a court to aggregate the assistance of several defendants involved in the same or a related offense in determining whether any one defendant's assistance is substantial.

The proposed Section 5K1.1 provides additional guidance to the courts in determining the magnitude of a departure based upon a defendant's assistance. By detailing such factors, the unwarranted disparities in the magnitude of the substantial assistance departure should be reduced significantly.

Finally, the proposed amendment eliminates the government motion requirement in 18 U.S.C. Section 3553(e) and Rule 35 of the Federal Rules of Criminal Procedure. This will provide uniform application of the different substantial assistance provisions and address the existing criticism that prosecutors are using the government motion requirement in the mandatory minimum context for improper reasons.

John P. Cooney of New York, New York chaired the 5K1.1 Subcommittee and members of the entire Federal Criminal Procedures Committee, in numerous meetings, contributed to the final report.

At the time the Board of Regents adopted the Report and Proposal, the committee was informed that several members of the Board, including past presidents Griffin B. Bell and Robert B. Fiske, Jr., expressed interest in presenting the proposal to the Department of Justice and the U. S. Sentencing Commission in an effort to move the proposal forward. It is the hope of the committee that such efforts may transform the Report and Proposal into positive change within our system of justice. □

Robert W. Ritchie, Chair
Federal Criminal Procedures Committee

1999-2000 Committee Chairs

Access to Justice and Legal Services
Daniel F. Kolb
New York, NY
(212) 450-4394

Adjunct State
Spencer J. Brown
Kansas City, MO
(816) 421-4000

Admission to Fellowship
Paul S. Meyer
Costa Mesa, CA
(714) 754-6500

Alternatives for Dispute Resolution
Shaun S. Sullivan
New Haven, CT
(203) 498-4315

Attorney-Client Relationships
David H. Marion
Philadelphia, PA
(215) 772-7541

Award for Courageous Advocacy
Philip J. Kessler
Detroit, MI
(313) 225-7018

Canada-United States
Earl A. Cherniak, Q.C.
Toronto, ON
(416) 601-2350

Committee on Honary Fellowship
Robert L. Clare, Jr.
Annandale, NJ
(908) 236-2224

Communications Committee
Sharon M. Woods
Detroit, MI
(313) 965-9725

Complex Litigation
Ralph W. Brenner
Philadelphia, PA
(215) 772-7231

Emil Gumpert Award
Raymond L. Brown
Pascagoula, MS
(228) 762-0035

Federal Civil Procedure
Robert S. Campbell, Jr.
Salt Lake City, UT
(801) 521-9600

Federal Criminal Procedure
John P. Cooney, Jr.
New York, NY
(212) 450-4558

Federal Rules of Evidence
Alan J. Davis
Philadelphia, PA
(215) 864-8230

Finance and Compensation
Earl J. Silbert
Washington, DC
(202) 861-6250

History Committee
John C. Elam
Columbus, OH
(614) 464-6271

International Committee
Mark H. Alcott
New York, NY
(212) 373-3179

Investment Committee
Warren B. Lightfoot
Brimingham, AL
(205) 581-0711

Judiciary Committee
Edward W. Madeira, Jr.
Philadelphia, PA
(215) 981-4353

Legal Ethics
John H. McElhaney
Dallas, TX
(214) 740-8458

Lewis F. Powel, Jr. Lectures
R. Harvey Chappell, Jr.
Richmond, VA
(804) 697-4137

National College of District Attorneys
Mark W. Buyck, Jr.
Florence, SC
(843) 662-3258

National Moot Court Competition
Mary Jo White
New York, NY
(212) 637-2573

National Trial Competition
Michael A. Williams
Denver, CO
(303) 572-6710

Professionalism Committee
George C. Chapman
Dallas, TX
(214) 969-1139

Samuel E. Gates Litigation Committee
Sylvia H. Walbolt
Tampa, FL
(813) 223-7000

Science and Technology in the Courts
Michael D. Knight
Mobile, AL
(334) 432-5300

Special Problems/ Administration of Justice
Edward W. Mullins, Jr.
Columbia, SC
(803) 733-9401

Teaching Trial & Appellate Advocacy
Hon. Nancy Gertner
Boston, MA
(617) 748-4844

1999-2000
State and Province Chairs

ALABAMA
W. Stancil Starnes
Birmingham
(205) 868-6000

ALASKA
Robert B. Baker
Anchorage
(907) 277-3232

ARIZONA
Ted A. Schmidt
Tucson
(520) 790-5600

ARKANSAS
Floyd M. Thomas, Jr.
El Dorado
(870) 862-3478

COLORADO
John A. Purvis
Boulder
(303) 422-3366

CONNECTICUT
James R. Fogarty
Greenwich
(203) 661-1000

DELAWARE
A. Gilchrist Sparks, III
Wilmington
(302) 575-7276

DISTRICT OF COLUMBIA
William E. McDaniels
Washington DC
(202) 434-5055

DOWNSTATE ILLINOIS
Thomas W. Alvey, Jr.
Belleville
(618) 236-3406

DOWNSTATE NEW YORK
Robert G. Morvillo
New York
(212) 856-9600

FLORIDA
Alan G. Greer
Miami
(305) 373-4010

GEORGIA
William Usher Norwood, III
Atlanta
(404) 523-7706

HAWAII
James Kawashima
Honolulu
(808) 544-8300

IDAHO
Merlyn W. Clark
Boise
(208) 344-6000

INDIANA
John D. Ulmer
Goshen
(219) 533-1171

IOWA
John M. Bickel
Cedar Rapids
(319) 365-9461

KANSAS
James L. Eisenbrandt
Overland Park
(913) 338-7700

KENTUCKY
John M. Famularo
Lexington
(606) 226-2300

LOUISIANA
John C. Combe, Jr.
New Orleans
(504) 582-8144

MAINE
Peter J. DeTroy, III
Portland
(207) 774-7000

MARYLAND
Albert D. Brault
Rockville
(301) 424-1060

MASSACHUSETTS
Martin S. Cosgrove
Quincy
(617) 479-7770

MICHIGAN
Carl H. von Ende
Detroit
(313) 496-7618

MINNESOTA
George W. Flynn
Minneapolis
(612) 333-9500

MISSISSIPPI
Robert C. Galloway
Gulfport
(228) 864-1170

MISSOURI
Richard F. Adams
Kansas City
(816) 410-4600

MONTANA
James H. Goetz
Boseman
(406) 587-0618

NEBRASKA
Jeffrey H. Jacobsen
Kearney
(308) 234-5579

NEVADA
Julien G. Sourwine
Reno
(702) 828-0200

NEW HAMPSHIRE
Bruce W. Felmly
Manchester
(603) 625-6464

NEW JERSEY
Francis X. Dee
Newark
(973) 565-2018

NEW MEXICO
John B. Pound
Sante Fe
(505) 982-8405

NORTH CAROLINA
J. Donald Cowan, Jr.
Greensboro
(336) 378-5329

NORTH DAKOTA
Orlin W. Backes
Minot
(701) 852-2544

NORTHERN CALIFORNIA
John L. Cooper
San Francisco
(415) 954-4400

OHIO
George Gore
Cleveland
(216) 696-2959

OKLAHOMA
George F. Short
Oklahoma City
(405) 232-1211

OREGON
Carl Burnham, Jr.
Ontario
(541) 889-5368

PENNSYLVANIA
Dennis R. Suplee
Philadelphia
(215) 751-2068

PUERTO RICO
Francisco G. Bruno
San Juan
(787) 250-5608

RHODE ISLAND
Joseph V. Cavanagh, Jr.
Providence
(401) 831-8900

SOUTH CAROLINA
William U. Gunn
Spartanburg
(864) 585-4273

SOUTH DAKOTA
Robert (Bob) D. Hofer
Pierre
(605) 224-5825

SOUTHERN CALIFORNIA
Charles H. Dick, Jr.
San Diego
(619) 235-7790

TENNESSEE
Thomas S. Scott, Jr.
Knoxville
(423) 546-7000

TEXAS
David J. Beck
Houston
(713) 951-3700

UPSTATE ILLINOIS
Ann C. Tighe
Chicago
(312) 263-0345

UPSTATE NEW YORK
Thomas C. Burke
Rochester
(716) 454-6480

UTAH
Gordon L. Roberts
Salt Lake City
(801) 532-1234

VERMONT
John J. Zawistoski
Rutland
(802) 786-1015

VIRGINIA
Gregory N. Stillman
Norfolk
(757) 640-5314

WASHINGTON
James M. Danielson
Wenatchee
(509) 662-3685

WEST VIRGINIA
Fred Adkins
Huntington
(304) 529-6181

WISCONSIN
Thomas L. Shriner, Jr.
Milwaukee
(414) 297-5601

WYOMING
Raymond B. Hunkins
Wheatland
(307) 322-2882

Province Committee Chairs

ALBERTA
Phyllis A. L. Smith
Edmonton
(403) 426-5220

ATLANTIC PROVINCES
Joel E. Pink, Q.C.
Halifax
(902) 492-0550

BRITISH COLUMBIA
D. Barry Kirkham, Q.C.
Vancouver
(604) 688-0401

MANITOBA/ SASKATCHEWAN
Hymie Weinstein, Q.C.
Winnipeg
(204) 942-0501

ONTARIO
Rino Anthony Stradiotto, Q.C.
Toronto
(416) 367-6268

QUEBEC
William Hesler, Q.C.
Montreal
(514) 847-4510

University of Montana School of Law Receives Emil Gumpert Award

The University of Montana School of Law received the 1999 Emil Gumpert Award in September, presented by the ACTL for the school's outstanding record of excellence in teaching trial advocacy.

Payton Smith, ACTL Regent, presented a plaque and a check for $50,000 to Dean E. Edwin Eck during a ceremony on the law school campus in Missoula, Montana. The prestigious award was established in 1975 and is given annually to a law school that has achieved a level of excellence in the teaching of trial advocacy noteworthy of national recognition.

The University of Montana Law School's Trial Advocacy Program is, in the words of Thomas Groark, Jr., chair of the Emil Gumpert Committee, "a remarkable, well-rounded program. It was easily the most impressive that we have seen in years. Although it is a small school in a small state, its Trial Advocacy Program is on a par with, or better than, many larger, more prestigious schools. This is not something that happened by accident."

In 1979, former Dean Jack Mudd, who came to the deanship from private practice as a trial lawyer, embarked on a planning project to design the appropriate law school curriculum for the next 25 years. He did this with assistance from the Fund for Improvement of Post Secondary Education and advisors from the bench and bar of the states of Montana and Idaho. Paramount among the project's findings was the extreme importance of trial advocacy and its component skills in developing well-trained lawyers.

A driving principle states that each of its graduates, "shall be able to represent clients in the resolution of judicial disputes involving disputed legal rights and obligations." Each student is required to take 26 credit hours (out of a total 90 required for graduation) in trial-related courses, such as pretrial advocacy, ethics, trial advocacy, professional responsibility, civil procedure, evidence and appellate advocacy. The school also offers 14 elective credits in moot court, advanced trial advocacy, client counseling, and negotiation.

By the early 1990s, the law school had a team of seven tenured professors, all of whom were former trial lawyers. Adjunct trial lawyer teachers supplemented this team. Many are Fellows of the College. The school also has facilities that include modern courtrooms.

Applications for the Emil Gumpert Award are submitted from law schools in the United States and Canada. Programs at schools are reviewed by ACTL and a site evaluation team may visit the school, inspect facilities, meet faculty and observe class sessions and actual trial practice work. Other recipients include Harvard, Yale, UCLA, Northwestern, New York University, Dalhousie Law School in Canada and Stetson University College of Law in St. Petersburg, Florida. □

E. Edwin Eck, left, Dean of the University of Montana law school, receives the ACTL Emil Gumpert Award for outstanding excellence in teaching trial advocacy . Presented by Regent Payton Smith, the award includes a plaque and a check to the school for $50,000.

ACTL Calendar of Events

1999

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 Dinner
Stanton Hall
Natchez, MS

December 10
Washington Fellows Annual Dinner
Sorento Hotel
Seattle, WA

2000

January 21-23
Emil Gumpet Award Committee
Meeting
Windsor Court
New Orleans, LA

February 3
Final Rounds National Moot Court
Competition
The Association of the Bar of the
City of New York
New York, NY

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

February 24-27
South Carolina Fellows Annual
Meeting
The Cloister
Sea Island, GA

February 25-26
Gale Cup Moot Competition
The Great Hall at Osgoode Hall
Toronto, ON

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

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

March 30-April 1
National Trial Competition
TBD
Dallas, TX

April 13-15
AR, LA, MS & TX Regional Meeting
Fairmont Hotel
New Orleans, LA

April 27-30
Southwest Regional Meeting
The Inn at Spanish Bay
Pebble Beach, CA

July 23-25
Northwest Regional Meeting
Chateau Whistler Resort
Whistler, British Columbia,
Canada

August 11-13
Iowa Fellows Meeting
TBD

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

September 17-23
Anglo-American Exchange
New York, NY and Washington, DC

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

Civility

(Continued from page 5)

the client's behalf. In some cases this approach intimidates or wears down the opponent, resulting in victory for the offensively aggressive (and aggressively offensive) lawyer. More often, however, such tactics simply cause delay and divisiveness, increase expense, and waste judicial resources. Enlightened lawyers hold the view that courteous behavior is not a sign of weakness, but is consistent with forceful and effective advocacy. The spirit of cooperation and civility does not simply foster collegiality of the Bar, although that is a welcome side effect, but also promotes justice and efficiency in our legal system.

There is a great difference between being aggressive and forceful and being mean and obnoxious. Perhaps one of the causes of the decline in civility is that we have confused the concepts and, in doing so, have not only undermined the collegiality of the bar, we have greatly damaged our effectiveness as advocates.

Advanced technology

Some feel that the atmosphere conducive to a decline in civility has been created, in part, by the advances in technology during the last twenty years. Computers, overnight mail, and facsimile machines have helped create a far more hectic pace to the practice of law. When someone mailed a letter that you would receive three days later, he or she did not expect to receive a response the same day. Now a fax is often sent with the expectation that a reply will be forthcoming within the next few minutes or at least during the same day.

You have a conversation with someone and within an hour you may receive a letter that purports to memorialize that conversation. If you do not respond immediately, you fear that your adversary will take the ensuing half an hour of silence as agreement, when, in fact, the contents of the letter are not exactly as you recalled the conversation. In the meantime, you are working on something totally unrelated which has to "get out" that afternoon. Now you feel you have to stop what you are doing to respond. Meanwhile, three more calls or faxes come in. The pace, the stress, and the pressure are often unremitting.

Under these conditions, it is little wonder that we get edgy and civility takes a back seat. In fact it is just that type of pace, stress, and pressure that have driven many lawyers from our profession.

SOLUTIONS

If in fact the legal profession has a problem with an increase in incivility, as it appears we do, what can we do about it? We can look to ourselves, to the courts, and to the educational programs of the bar.

Looking inward

The first thing we must do is to decide for ourselves that conducting our relations with fellow lawyers and the courts in a civil manner is not just the "nice thing to do," but is sufficiently important to warrant our dedicated effort. Writing in the *St. Thomas Law Review*, Vol. 8, page 113 (1995), in an article entitled "Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism," Mark Neal Ironstone, said:

> Generally speaking, civility is important because it frames common expectations about trust and respect in seeking resolutions through dialogue. Without such mutual confidence, there cannot be an effective meeting of the minds as a way to resolve social disputes and problems. Instead, individuals wind up talking past each other or sinking to the lowest common denominator to strike a short term advantage or to achieve a cheap gain. Virtues of any sort require much more in terms of human dependability and self discipline. They represent a concern for doing what is right regardless of the circumstances.

Despite the abuse which lawyers have endured throughout history, and the increased abuse we have endured during recent years, we have a good reason to be proud of our profession. We should resolve that this profession which has given so much will not be destroyed from within. We will not "eat our own." We will be strong and forceful advocates, but in a manner which does not destroy our professionalism, our collegiality, and our effectiveness.

Recently, I had an illustrative experience with an adversary that began on a sour note. A response to a routine motion suggested, without foundation, that I was intentionally misleading the court. I was very upset when I received the response. I had barely met this attorney and my first impulse was to reply in kind, harshly and in the strongest terms. Instead, I responded in terms suggesting that perhaps there had been a

(Continued on page 15)

(Continued from page 14)

misunderstanding, proceeded to deal with the issues factually, and gently suggested that making such allegations of misconduct without foundation was detrimental to the process. A short time later my adversary called me and suggested that we have lunch. He said something to the effect that this was going to be a tough trial and perhaps it would be good to have a friendly visit before we got into the thick of it. We did so, and established a rapport that carried us through an otherwise highly contentious and hard-fought trial without rancor or further personal problems.

Even with a large bar, we do not have to remain strangers. Perhaps a lunch just to get to know one's adversary on a basis separate from the litigation is one way to approach the problem.

Looking to the Courts

If lawyers are the first line of civility defense, the judges are the second line and a very important one. It is no secret that some lawyers will go as far and take as much advantage as they can. If the judge presiding over a proceeding in which such a lawyer is participating takes control early and forcefully, much of that type of tactic would be avoided.

I had occasion to see Judge D. Kelly Thomas of Maryville, Tennessee, a small town in East Tennessee, effectively illustrate that principle a couple of years ago. A prosecutor in his court made a remark which was personal in nature, casting aspersions on his adversary. Judge Thomas immediately stopped the proceedings and admonished the prosecutor, saying that he was not going to tolerate that kind of conduct in his courtroom. The prosecutor was an honorable attorney who probably had been just caught up in the emotion of the moment, but he did not take that approach again, at least not that day.

The judge sets the tone of the courtroom. If the judge is short tempered and uncivil, he or she invites incivility. If the judge is firm in refusing to tolerate personal attacks and incivility by either side, an atmosphere conducive to a more orderly and civil trial will be created.

Looking to the Bar

Lastly, the American College of Trial Lawyers, together with the American Bar Association, and our state and our local bar associations, can do their part. We can focus on the issue, discuss it, and encourage the treatment of each other as we want to be treated. We can study suggested guidelines such as the "Proposed Standards for Professional Conduct Within the Seventh Federal Judicial Circuit." Most of what we find there should come automatically to an attorney who cares about our profession and our system of justice, but it certainly does not hurt anything to read them and use them as guides. Perhaps then we can return to the day described by D.A. Frank writing for the *Texas Bar Journal* in 1939, when he said:

> One of the finest characteristics of the legal profession is its good sportsmanship. To the casual observer . . . lawyers in fighting each other would seem to be perennial enemies. Yet, when a case is completed and especially when court has adjourned, these same lawyers may be found visiting in offices and homes of their opponents, as friends . . . No profession is so imbued with the chivalry of combat as the law. It thrives upon combat, contests, and fights. It does not engender hatreds, jealousies, and envy. It does produce respect, appraisement of ability, and warm friendship. 2 *Tex. B.J.* 357, 357 (1939).

Despite the problems that have become manifest, I strongly believe that the great majority of lawyers want that type of relationship between and among the members of the bar. We have not strayed so far from that ideal that a little focus and a little additional effort on our part will reverse the trend against it. □

Committee News Reports

Complex Litigation

During the Naples meeting, the committee discussed several potential projects in the area of mass torts and concluded that the committee should undertake, with the assistance of a reporter, the preparation of a Manual for Mass Torts. This manual might be similar to the Federal Courts' Manual for Complex Litigation. The committee believes that the experience of its members in mass tort litigation will enable it to speak with a voice of experience about how mass torts cases can be tried efficiently but fairly. The committee will seek assistance from the Foundation to finance a reporter. A discussion draft describing such a project has been distributed to the committee.

Ralph W. Brenner, Chair

Emil Gumpert Award Committee

Members of the committee have written letters to more than 15 law schools advising them of the Emil Gumpert Award and the application process.

Thomas J. Groark, Jr., Chair

Federal Criminal Procedures Committee

The Board of Regents adopted the Federal Criminal Procedures Committee's Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines at the Naples meeting on April 12, 1999. It is anticipated that the report will be printed and distributed to the federal judiciary, U. S. Sentencing Commission, selected members of the Congress, and other interested persons before the end of August, 1999. The Report and Proposal represents a substantial part of the work of the committee, including the 5K1.1 subcommittee, chaired by John P. Cooney.

In July the Federal Criminal Procedures Committee held a work session in St. Louis. The meeting focused on the work of the subcommittee on relevant conduct, chaired by Thomas E. Dwyer, Jr. The committee also initiated two additional subcommittees, one for the study of grand jury procedures, chaired by Veryl L. Riddle, and one for the study of a rule for the disclosure of exculpatory evidence, chaired by Robert W. Tarun.

The committee will meet at the annual meeting in Philadelphia and continue its work in each of these areas. Any suggestions from the Fellows of the College as to these or other issues will be welcomed.

Robert W. Ritchie, Chair

Federal Judiciary Committee

Since the committee's March meeting, the Chair and President Ayscue have been working with the Judicial Conference, the Federal Judges Association, the ABA and other entities to further efforts to obtain increased compensation for federal judges. There are several on-going initiatives towards this end and there is cautious optimism that there can be some affirmative action by year-end.

The committee has also been concerned about the extent of judicial vacancies, as well as the lack of dispatch, both regarding the submission of nominations to the Senate as well as the scheduling of hearings on the nominations. As of July 1, 1999, there were 25 vacancies in the Courts of Appeal with 16 nominees pending and 43 vacancies in the United States District Courts with 24 nominations pending.

The Committee has also monitored the concerns expressed by the Judiciary over the proposed funding levels for FY2000 which, if not adjusted, will result in a shortfall of $211 million for court staff throughout the country.

Edward W. Madeira, Jr., Chair

Lewis F. Powell, Jr. Lectures

With the assistance of College staff, the texts of the three Powell lectures presented so far are being assembled. Once five lectures have been delivered, it is planned that the texts will be prepared in appropriate book form for distribution to the Fellows. Also, speakers for the next two lectures have been tentatively selected.

R. Harvey Chappell, Jr., Chair

Want to send the College a message?

The ACTL e-mail address is:

acotl@earthlink.net