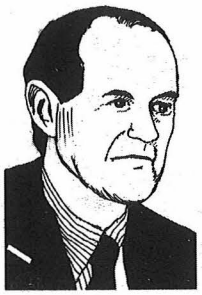
American College of Trial Lawyers · ESTABLISHED 1950 ·

The Bulletin

Number 38, Summer 2001

PANEL REVISITS BUSH V. GORE



David R. Boies

Douglas Cox

The high drama of *Bush v. Gore* was revisited at the Spring Meeting in Boca Raton as lawyers for both sides engaged in the first post mortem panel discussion of the case and its possible ramifications.

The nation held its breath last fall waiting to see who would be its new leader as the case made its way through the Florida courts and finally was argued before the United States Supreme Court. Then on December 12, five weeks after the polls had closed, the court issued a controversial five-to-four decision that resulted in George W. Bush becoming president.

Three months later, March 31, 2001 at the Boca Raton Resort Al Gore's lawyers, David R. Boies (FACTL) and W. Dexter Douglass (FACTL), and Bush's, Douglas Cox and Barry Richard, reflected on their experience. Though they still disagreed on the outcome, the overarching consensus was acceptance of the outcome as the product of an independent judiciary operating under the rule of law.

Past president Michael E. Mone introduced moderator Tim O'Brien, who gave a brief recap of

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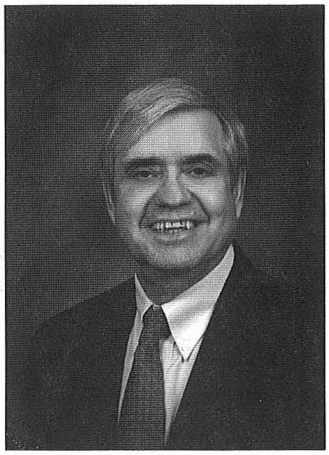

Marion A. Ellis, Editor

With this issue *The Bulletin* takes on a new life.

First, it has a new editor, Marion A. Ellis.

Ellis is a veteran journalist and author from Charlotte, North Carolina. He is the co-author of the College's history, *Sages of Their Craft,* published last October and distributed to each of you. A graduate of the University of Missouri's School of Journalism, Ellis also studied at the University of North Carolina at Chapel Hill. He has written or co-authored nine other books, most of them institutional histories or biographies, including *The Story of NationsBank,* published by UNC Press in 1993 and *Terry Sanford,* published by Duke University Press in 1999.

The winner of numerous journalism prizes, he was a key member of the team from *The Charlotte Observer* that won a Pulitzer prize for public service in 1981.

We believe that Marion's intimate acquaintance with the College, the product of the years of work he put into the College history, will serve us well as we undertake to insure that the quality of

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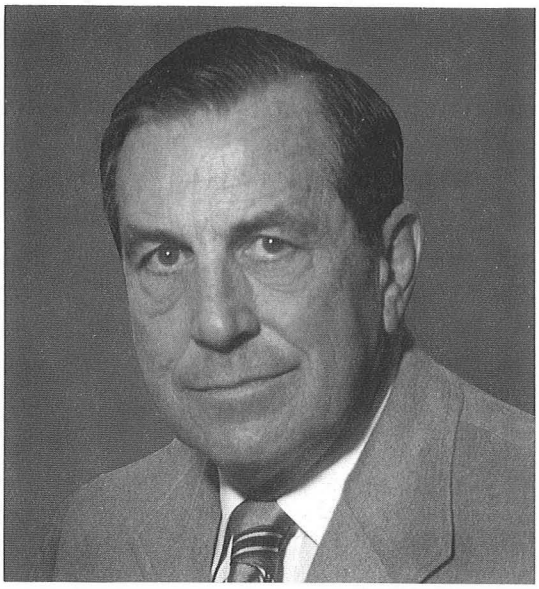
In Memoriam



Robert L. Clare, Jr.

(May 9, 1914 — March 18, 2001)

Past President Leon Silverman delivered the following eulogy for Past President Robert L. Clare, Jr. on May 16, 2001 at the Church of St. Ignatius Loyola in New York City. Past President Ralph Lancaster also participated in the memorial service and a number of Fellows and Honorary Fellows were in attendance.

This is not an occasion for lamentation or mourning. It is a day, albeit tinged with sadness, to celebrate the life of Robert L. Clare, Jr., who passed away on March 18th last.

Bob led a good, satisfying, successful, long and happy life.

Born on May 9th, 1914, he was graduated from the College of the Holy Cross and from the Harvard Law School. He became associated with Shearman & Sterling upon his graduation from Harvard in 1938. He served in the U. S. Army during World War II, rising to the rank of major.

He returned to Shearman & Sterling and became its senior partner in 1977. I will not attempt to discuss his legal career at the firm. That will be undertaken by his friend and the firm's present senior partner, Steven Volk.

Bob was a member of many professional organizations, such as the American Bar Association, the Association of the Bar of the City of New York, the New York State Bar Association, and others.

He was *appointed* by Chief Justice Warren E. Burger to serve on the commission to commemorate the bicentennial of the United States Constitution and served as a director of the National Institute for Trial Advocacy and as president and chairman of the Board of the Practising Law Institute.

It is perhaps worth mentioning that it was under Bob's aegis that the Institute was saved from bankruptcy in the 1970s to become the most significant national provider of continuing legal education to the profession—its money worries have been left far behind.

It is, however, with the American College of Trial Lawyers that Bob found his most satisfying and stimulating institutional home. From the time

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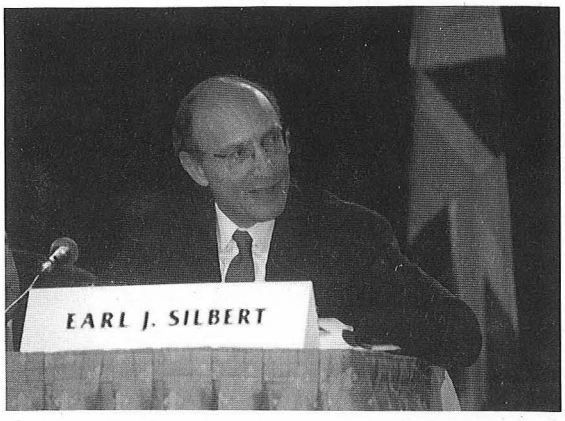
THE PRESIDENT'S REPORT



Earl J. Silbert, President

From time to time and particularly in light of events of the past few months, it is important to reaffirm the firm conviction of the College as trial lawyers in the necessity for an independent judiciary.

It was Justice Cardoza's view that the Bench and Bar are both engaged in "the common task, the great and sacred task — the administration of justice." The American College of Trial Lawyers fully agrees. As advocates in an adversarial process, it is essential that we have impartial justice administered by impartial judges. The Founding Fathers understood that "[t]he complete independence of courts of justice is peculiarly essential in a limited Constitution." Today, there are at least three significant challenges to this indispensable independence of the judiciary: Exorbitantly expensive, partisan and contested judicial elections in several states; inadequate pay; and "unfair" criticism of the judiciary in the form of threats of retaliation and accusation against certain judges and courts by public officials, commentators, and even lawyers as a result of particular judicial decisions.

EXCESSIVELY PARTISAN, EXPENSIVE JUDICIAL ELECTIONS

It is an important right of the citizens of each state to determine the method by which judges are selected. The College does not recommend one particular selection system over another. However, as members of the College and members of the profession, it is our obligation to attempt to insure that no matter what the system, only qualified, impartial judges are selected. Our concern is that recently in a number of states, judicial elections have become vitriolic partisan battle grounds involving significant social and economic issues that may come before the courts. Articles have been written of "the very best judges that money can buy," describing the exorbitant amounts of money being raised to finance judicial campaigns.

The adverse impact on the public's confidence in the administration of justice is clear. Poll after poll consistently show that an overwhelming majority of our citizens believe that a judge's decision will be influenced in favor of the position of the contributors on a specific issue. This is not impartial justice. As Supreme Court Justice Stephen Breyer has stated, "Independence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts. [T]he law and the facts do not include deciding according to campaign contributions." The partisan political battles over whether a particular judicial candidate will support plaintiffs or defendants in civil tort litigation is harmful to the evenhanded administration of justice and the independence of our judiciary.

INADEQUATE PAY

That a first year associate out of law school can command compensation in excess of that paid to the highest judicial officers of our country, the Justices of the United States Supreme Court, is an affront to the judiciary and a severe challenge to its independence. The problem is twofold:

First, associate salaries are simply too high. The reasons for these excessive salaries and the

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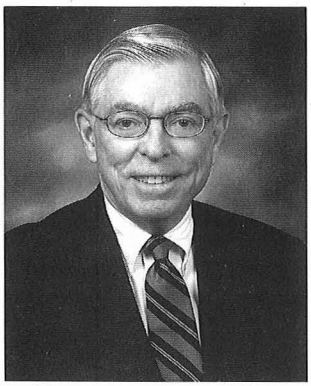
THE COMMUNICATIONS REVOLUTION



Richard E. Wiley

FORMER FCC HEAD EXPLAINS CHANGES:

TELEPHONE, TV, FAX, PC, PALM PILOT, ETC. — HOW THEY WILL FIT TOGETHER IN THE FUTURE.

Remarks by Richard E. Wiley of Wiley, Rein & Fielding, Washington, D.C., to the American College of Trial Lawyers on March 30, 2001. Wiley, a former General Counsel, Commissioner and Chairman of the Federal Communications Commission, 1970-77, practices law in Washington, D.C.

My assignment is to discuss the so-called "Communications Revolution" — one that has brought a host of dynamic new technologies, services and products to the American home and office and, in the process, transformed the manner in which we all live and work. These remarkable marketplace developments, in turn, have required a fundamental reexamination of governmental policies affecting what obviously is an all-important sector of our economy.

My guess is that the communications environment does not occupy the everyday thoughts of many, perhaps most all, in this audience. So let me try and capture what has happened by discussing three interrelated trends that today are sweeping through the communications field, not only in the United States but around the world as well. I refer to the three "Cs" of communications: competition, convergence, and consolidation. And if you fully absorb these three "Cs" — like we all did the 3 "Rs" — you will know all that is needed to depart the litigation rat-race and enter the comfortable, if somewhat kinky, world of regulation!

COMPETITION

In our country, competition has been fostered in almost every sector of the communications industry over the last thirty years — beginning with the video and long distance telephone markets in the 1970s, and continuing with equipment and information services in the 1980s and 90s. Thus, by the middle of the last decade, only two markets remained essentially closed to competitive inroads: the local telephone exchange and the delivery of multi-channel video programming (that is, cable television).

Then, in 1996, Congress — after prolonged effort — enacted the massive Telecommunications Act, the first comprehensive overhaul of our nation's communications laws in over 60 years. The stated objective of this legislation was to further competition generally and, in particular, to introduce it into the two hold-out sectors. Moreover, as competition develops in any particular market, Congress also expressed a desire for lessening the government's regulatory hand.

THE LOCAL EXCHANGE

Specifically, the Regional Bell Operating Companies ("RBOCs") — that is, Verizon, SBC, BellSouth and Qwest, who together control about 90% of the nation's local telephone exchanges — were given an incentive by Con-

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Oliver Hill Receives Courageous Advocacy Award

Oliver Hill Accepts Award From President Earl Silbert

At the Spring Meeting in Boca Raton, Oliver Hill of Richmond, Virginia, an African American lawyer who was one of the pioneers in the civil rights movement in the South, became the twelfth recipient of the Courageous Advocacy Award. The following is the presentation of the award by Past President R. Harvey Chappell, Jr.

Oliver W. Hill was born in Richmond, Virginia, May 1, 1907. He is a graduate of Howard University, having received the degrees of A. B. from the College of Liberal Arts and J.D. from the School of Law. He was married to the late Beresenia A. Walker, and they have one son, Oliver W. Hill, Jr. He and his wife, Renee, are with us. Please stand and be recognized.

Until his retirement in July, 1998, Mr. Hill was a partner in the law firm of Hill, Tucker and Marsh. He became a member of the Virginia Bar in 1934 and, except for time out in the service of the United States Government, has practiced law in Richmond, Virginia, since 1939. He served in the Armed Forces from June 1943 through November 1945.

Since the mid-thirties, he has worked assiduously in activities having as their objectives the securing of all rights incident to first-class citizenship. He has been particularly interested in civil rights litigation on their behalf.

Some of the landmark cases in which he participated involved such diverse matters as equalization of salaries for public school personnel; the right to serve on grand and petit juries; inclusion in the program of free bus transportation for public school children; equalization of public school facilities; the right of participation in primary elections; the elimination of segregation on common carriers; the use of public places in a nondiscriminatory and unsegregated fashion.

His initial national recognition was in 1948 when he won a seat on the Richmond City Council in a city-wide election, becoming the first Afro-American so elected since Reconstruction Days.

Mr. Hill's career has been highlighted by many citations and awards. At last count there are more than fifty such awards, including:

- 1996 –Richmond City Council concurred in designating their new courthouse the Oliver Hill Courts Building.

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SIXTY-EIGHT FELLOWS INDUCTED AT SPRING 2001 MEETING

ARKANSAS: B. Michael Easley; Forrest City, James (Jim) M. Simpson, Jr., Little Rock **NORTHERN CALIFORNIA:** David W. Condeff, San Francisco; Frank P. Kelly, III, San Francisco; David Ross Lucchese, Walnut Creek; Irv Scott, Sacramento; Stewart M. Tabak, Stockton **SOUTHERN CALIFORNIA:** George E. Fleming, San Diego; Darrell A. Forgey, Los Angeles; Donna D. Melby, Los Angeles **COLORADO:** Scott S. Barker, Denver; Jeff Chase, Denver; Joseph A. Gavaldon, Fort Collins; Robert F. Hill, Denver **DELAWARE:** Jesse A. Finkelstein, Wilmington **FLORIDA:** Fred M. Johnson, Tallahassee; James P. Judkins, Tallahassee; Marty Steinberg, Miami **GEORGIA:** M. T. Simmons, Jr., Decatur **ILLINOIS:** Brian C. Fetzer, Chicago **INDIANA:** David C. Campbell, Indianapolis; James L. Petersen, Indianapolis **IOWA:** Michael W. Ellwanger, Sioux City **MARYLAND:** James E. Gray, Baltimore; Deborah E. Reiser, Bethesda; Marcus Z. Shar, Baltimore; Harry J. Trainor, Jr., Upper Marlboro; James S. Wilson, Rockville; John Anthony Wolf, Baltimore **MISSISSIPPI:** Ronald G. Peresich, Biloxi **MISSOURI:** Gerard T. Carmody, St. Louis; James R. Hobbs, Kansas City; Fred Wilkins, Kansas City **NEW JERSEY:** Edward J. De Pascale, Jersey City; David R. Kott, Newark **OREGON:** Stephen S. Walters **PENNSYLVANIA:** John A. Miller, Beaver **RHODE ISLAND:** Michael G. Sarli, Providence **SOUTH DAKOTA:** Robert C. Riter, Jr., Pierre **TEXAS:** Jerry L. Beane, Dallas; Graham Hill, Houston; Timothy R. McCormick, Dallas; Chuck Meadows, Dallas; Fidel Rodriguez, Jr., San Antonio; C. L. Mike Schmidt, Dallas **UTAH:** Gary Bendinger, Salt Lake City **VERMONT:** Ritchie E. Berger, Burlington; David L. Cleary, Rutland; Robert A. Mello, South Burlington **VIRGINIA:** Jerrold G. Weinberg, Norfolk **WASHINGTON:** Thomas H. Fain, Seattle; John D. Wilson, Jr., Seattle **WEST VIRGINIA:** Susan S. Brewer, Morgantown; Don R. Sensabaugh, Jr., Charleston **WYOMING:** Gerald R. Mason, Pinedale; Tom C. Toner, Sheridan **ATLANTIC PROVINCES:** Kenneth B. McCullogh, Q.C., Saint John **BRITISH COLUMBIA:** John J. L. Hunter, Q.C., Vancouver; Jim Taylor, Q.C., Vancouver **ONTARIO:** Brian J. E. Brock, Q.C., Toronto; Paul J. J. Cavalluzzo, Toronto; Frank Marrocco, Toronto; W. A. Derry Millar, Toronto; Frank J. C. Newbould, Q.C., Toronto; Laurence A. Pattillo, Toronto **QUEBEC:** Guy Du Pont, Montreal; Sylvain Lussier, Montreal; Simon Noel, Q.C./c.r., Hull.

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Susan Slenker Brewer of Steptoe & Johnson, Morgantown, WV, gave the response on behalf of the new inductees and she included an acknowledgment to her father, Norman F. Slenker, FACTL, of Hilton Head Island, SC, who was in the audience.◆

COLLEGE FOUNDATION GROWS

Newly revitalized, the Foundation of the College, under the leadership of Past President, Lively M. Wilson, has begun to expand its activities.

The assets of the Foundation, which was created to provide funds for worthwhile projects that membership dues alone could not support, now total almost $1.1 million. Outstanding pledges add another $180,000. These funds have been accumulated without a formal fund drive.

Projects recently approved by the Foundation's board include:

1. Distribution of the Code of Trial Conduct to every Federal Judge and to the Chief Justices of the various states and the deans of all the accredited law schools. The revised Code was first distributed in its present form almost ten years ago, and many judges have come to the bench in the interim. An accompanying letter will explain the history of the Code and urge its use in the courts.

2. Two successive grants to help establish an International Judicial Academy whose mission is to help train judges, prosecutors and other court personnel from emerging nations.

3. A matching grant to Mercer University Law School to help create a set of teaching materials on ethical and professional considerations in the use of expert witnesses.

4. A matching grant to the University of Pittsburgh Law School to fund monthly addresses to students on a wide range of current issues in the profession, including professional conduct and ethics. These addresses will be a component of that university's recently instituted Civil Litigation Certificate program.

The Foundation has received approximately $50,000 in fees earned by Fellows of the College for *pro bono* representation under the College's Access to Justice initiative to be used to support the expanded activities of that committee. It also administers a number of designated funds, including those that support various College awards.

The Foundation, a 501(c)(3) organization, welcomes contributions. "As the Foundation grows it will be able to support the College in a more meaningful way as it strives to improve the administration of justice and the ethics of our profession" Wilson said. ◆

President of Canadian Bar Outlines Dizzying Changes In the Legal Profession

Daphne E. Dumont, Q.C./c.r.

Transforming the Practice of Law

Remarks by Daphne E. Dumont, Q.C./ c.r., president of the Canadian Bar Association, to the American College of Trial Lawyers, March 31, 2001, Boca Raton, FL.

I'm delighted to be with you today — but then, what Canadian wouldn't be delighted to be in Florida in March? Thank you Earl for the invitation. Your welcome is legendary among Canadian Presidents.

Actually, this venue holds a double benefit: I get to enjoy your beautiful weather, and you don't have to listen to my French!

The Canadian Bar Association values its close relationship with the American College of Trial Lawyers. Your invitation to participate in this Spring Meeting is an honour, and the opportunity to speak to you is a special event in any Canadian President's Agenda.

I want to congratulate your President-elect, Stuart Shanor, and your Executive Director, Robert Young, for this fascinating two-day program. I am very much looking forward to the panel discussion involving members of the legal teams for President Bush and Former Vice President Gore. It's fascinating to come here, to the state where it all happened, and to hear first-hand some of the "behind the scenes" stories of those momentous few weeks. (And I don't just mean the presentations of your distinguished guests — every cab driver I've met so far has a keen interest in the election just past — knows exactly who acted in which case and has a rock-solid opinion on the merits of their legal arguments). The election litigation fascinated Canadians as well — during the period when the court cases proceeded, we managed, in our usual low key way, to call a national election, complete the campaign, count every ballot by hand, declare that the expected winner was indeed the winner, and get through all the media post-mortem . . . in six weeks door-to-door; yet your process riveted our attention throughout.

Canadian lawyers admired the energy and courage of the American lawyers, and we were annoyed when commentators referred ungraciously to the sheer number of lawyers working on the cases. If lawyers can't get involved when such a dramatic test of the rule of law was underway, when can they? As a friend of mine said — "you know, if a president were near death and the two finest teams of cardiac surgeons in the USA had saved him, people wouldn't be saying 'look at all those doctors getting involved in this medical crisis', they would be proud that the nation could produce the expert practitioners needed to bring them through the crisis." So we should be proud of our trial lawyers.

But people continue to misunderstand what trial lawyers do. This is one reason why we must "transform Legal Practice, and find new opportunity in the changing World of Litigation."

I'd like to explore with you three waves of change buffeting our profession, and suggest three

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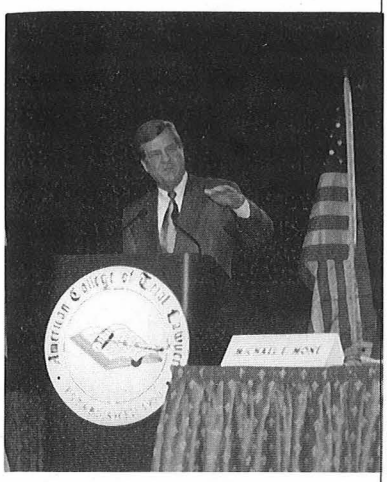
SPRING MEETING WRAP-UP

A discussion among the Bush v. Gore lawyers was only one of the highlights of the Spring meeting for the more than 800 Fellows and spouses who attended.

Senate Majority Leader Trent Lott provided an interesting and informative look at the challenges of managing a Senate that is evenly split between representatives of his Republican Party and the Democrats.



Trent Lott

Ted Borillo, a Fellow from Littleton, Colorado, kept his audience spellbound with a speech which wove the life of Cicero into a dissertation about legal ethics in today's world.

Of course, there were more than meetings and speeches in the beautiful Florida setting. Fellows and their guests played tennis and golf and generally enjoyed themselves at Friday night's Forties Swing Dance Party and at dancing and a sing-along following Saturday night's banquet. ◆

BUSH V. GORE

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the case and then introduced the panelists and directed questions to them. First he asked what they had learned from the case.

Boies of Boies & Schiller in Armonk, NY, led off: "On reflection, the thing I will remember about this case and the thing I will take away from this case is how proud I am to be a trial lawyer and how proud I am of the American justice system. The American justice system was challenged in a way that it is rarely challenged, and the lawyers involved on both sides were dedicated to finding a solution."

Courts on every level struggled to find a solution, Boies said, adding that a constitutional crisis did not occur as it could have in some countries.

"From the beginning everybody said: 'This is going to be decided in the courts—it's not going to be decided in the streets—and under the rule of law,' " Boies said.

Responding, Douglas R. Cox of Gibson, Dunn & Crutcher in Washington, D.C., one of the key lawyers assisting Bush's lead litigator, Ted Olson, agreed with Boies about the conduct of lawyers for both sides and the resiliency of the American justice system. "It was a very thrilling experience, but also a very terrifying experience," he said. (Olson had been scheduled on the panel, but preparation for Senate hearings on his nomination to become Solicitor General prevented his attendance).

Barry Richard of Greenberg Traurig in Tallahassee commented on the professionalism and civility of lawyers on both sides. He said, contrary to much of the public's perception of lawyers, the lawyers' behavior in the *Bush v. Gore* case was typical of the behavior of lawyers he faces every day in court.

Agreeing with the three previous speakers, W. Dexter Douglass of the Douglass Law Firm in Tallahassee, local counsel for the Gore team, said he had considered it an honor to be able to represent Gore in such a high profile case. He also lauded Boies as "the best lawyer I've been associated with in 46 years I've been practicing law."

The *Bush v. Gore* case was a hurry-up one for him, Douglass explained. Retained just nine hours before arguing the first case in circuit court, Douglass remarked with self-deprecating humor, "I was as well prepared as I usually am." As the audience roared with laughter, more followed as Douglass quoted the comment of an unnamed

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WORK IN PROGRESS

QUEBEC FELLOWS ON ETHICS PANEL

Quebec Province Chair Richard Shadley and Fellows Lynn Kassie and William Hesler were part of a panel on ethics at McGill University's Faculty of Law on March 21. The panel was chaired by the Honorable Mr. Justice Michel Proulx of the Quebec Court of Appeal, who is also author of an upcoming book on ethical problems in criminal law. The fifth panel member was Lori Weitzman, a senior Crown prosecutor in Montreal.

More than a hundred McGill law students took time off from preparation for spring exams to hear the panel members discuss how they would approach a wide variety of difficult ethical dilemmas drawn from actual experiences in criminal, corporate-commercial and family law.

The students also received copies of the Canadian Code of Trial Conduct, a bilingual publication of the College. The success of the event has prompted the McGill Law Faculty to suggest that the Quebec Fellows participate in a similar panel next year.

POLL ON JURY TRIAL INNOVATIONS

Last year, the Committee on Special Problems in the Administration of Justice polled 4,951 U.S. Fellows seeking their opinion on the possible efficiency of ten of the most common jury trial innovations. A total of 1,358 Fellows complied, for a 27 percent response rate.

Of the ten innovations, "juror note taking" was the only one cited by the majority of Fellows (54 percent) as a way to improve the administration of justice.

Another survey in which responses will be gathered only from lawyers with actual experience in trial with the innovations is being contemplated. The Committee is also seeking input from Fellows with specific experiences with any jury innovation.

Kevin J. Dunne, Chair; James W. Morris III, Regent Liaison.

SCIENCE AND TECHNOLOGY IN THE COURTS

The Science and Technology in the Courts Committee is gathering information from courts in their geographical areas about the use of computer generated graphics and other forms of technology during jury trials.

William B. Dawson, Chair.

INTERNATIONAL LITIGATION ISSUES

The International Committee is focusing on three different areas: 1. International litigation issues that arise out of the use of the Internet; 2. Jurisdiction, procedures and processes of the International Criminal Court and predecessor tribunals, including the War Crimes Tribunals, from the perspective of the trial lawyer; and 3. Working with the Canada-U.S. Committee on a joint project with the Canadian Bar Association and the American Bar Association to implement a treaty for the reciprocal enforcement of judgments between Canada and the United States.

Mark H. Alcott, Chair.

UNPUBLISHED OPINIONS STUDY

The Federal Rules of Evidence Committee is preparing a report on the use of unpublished opinions rendered by the U.S. Courts of Appeals.

Alan J. Davis, Chair.

TEACHING TRIAL ADVOCACY EFFORTS UNDERWAY

The Committee on the Teaching Trial and Appellate Advocacy Committee is considering four distinct projects: 1. Developing a trial advocacy curriculum for public interest and government lawyers; 2. Creating a teaching program for trial lawyers utilizing the technology available in "courtrooms of the future"; 3. Encouraging law schools to utilize ACTL Fellows to teach trial advocacy to law students; and 4. Developing a curriculum for teaching trial advocacy in law firms.

Terry O. Tottenham, Chair. ◆

BUSH V. GORE

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friend: "For a man in the twilight of a mediocre career you were brilliant."

O'Brien, who covered the Supreme Court for years for ABC News and is now a law professor at Nova University Law School in Kensington, MD, then asked the panelists, "Some people think that this decision may have been politically motivated. Do you think it was based on law or based on politics?"

Boies replied, "I think it is difficult, as I read the equal protection cases that the Supreme Court relied on and as I read the prior equal protection opinions of the five justices in the majority, to reconcile the majority decision in *Bush v. Gore* with those prior precedents. I think we need a longer time perspective to really understand what was going on with this decision. I think inevitably there is a suspicion, a belief that when you have the five generally regarded as most conservative justices on one side and when you have four generally regarded as liberal on the other side that there is some political division there. On the other hand it is impossible to tell from the outside what really goes on in those deliberations."

He continued, "Everybody believes that courts are political and that supreme courts, both state and federal, are inherently political in the sense that they must deal with some of the most sensitive questions that our country is faced with. Church and state, civil rights, abortion rights—these kinds of issues are inherently political issues. What was troubling to some of us was that the court, the United States Supreme Court, had always stayed away from electoral political issues, and it was the impression of the court stepping in and perhaps stepping in precipitously into an election battle to, in effect, determine who was going to win that battle. That I think was troubling. Obviously I thought that the minority on the United states Supreme Court , the majority on the Florida Supreme Court, was right. My opponents had an equally opposite view."

Boies added that he thought lawyers on both sides were genuinely struggling to come up with what they thought was right as the case was being adjudicated.

Cox responded next to O'Brien's question: "Part of the perception problem comes because the people in the media are repeating a canard, which is the majority in the second case was five to four. In fact, if you look at the opinions, counting concurrences, it's really seven to two because both Justice Souter and Justice Breyer agreed with our argument that the procedures going on in Florida violated the equal protection clause and as the *per curiam* says, the only disagreement among the seven was as to the remedy."

W. Dexter Douglass

After some questioning from O'Brien and response from Cox, Boies jumped in with: "Could I just comment on that? First of all there was a *per curiam* opinion but four of the justices did not join in it. Second, Justice Souter, who was, according to Doug, one of the people who believed in the seven to two majority, begins his dissenting opinion by saying this court should never have taken this case. It was a mistake to take it and it's a mistake to decide it the way it has decided. I think you can say many things about the relative merits of the majority and minority opinions, but I think it is very hard to say that it was a seven to two split on that court."

Douglass, who celebrated his 71st birthday during the *Bush v. Gore* deliberations, then chimed in: "In our view the case was decided when they stopped the vote count. That five-to-four vote was the critical vote. On the other hand I think all of us missed the point that two of the dissenters in that particular case were Republican appointees and there were only two Democratic appointees on this court. We make a mistake when we say there are five judges on the court that are Republicans and four Democrats therefore the vote is going to be five-four. Anybody that's practiced law knows that is the

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(Continued from page 11)

worst thing you can think—how a court's going to rule, based on anything."

He continued, "Nobody notices in the press that the court is independent, and our sole duty as lawyers, which we forget I think, is to maintain an independent judiciary. So it never does the courts any good or us any good when lawyers, whether they're speaking in a political setting or otherwise, to trash the court as making a political decision because every decision in the world is political, in every church, in every law. The judiciary is bound to be independent and if it's not, our whole system of law and our rule of law falls."

O'Brien then asked whether the court is perceived as deciding on the basic of personal politics shouldn't it be criticized?

Douglass replied that the court had been perceived that way in the past but that it hadn't worked that way in history.

"Look, we don't like to lose," he offered. "I think those five guys were just dead wrong, but, by golly, when they rule that's the rule of law." He said he followed the advice an old senior law partner had given him years ago: when a judge ruled against him he should keep his protests private.

Barry Richard

Boies said, "I think there's a distinction between disagreeing with a case, with the legal reasoning of the case and attacking the court or the justices of the court. I think that every one of the courts that we were in front of was composed of justices that were really committed to the law, in most cases [had] dedicated their lives to public service and certainly the latter part of their lives to public service. . . . That doesn't mean we think they did the right thing but what it does mean is we accept that it is their job to decide cases; it's our job to argue cases."

He continued, "Whether it is applied narrowly or broadly, whether we agree or disagree with the decision, if we believe in the rule of law and we believe that the rule of law is really the safeguard of the durability of our democracy, once that decision is made we accept that decision and we don't engage in a kind of personal *ad hominem* attacks on the justices that some people have, although very few people have in this particular election."

> ***"I think if the United States Supreme Court had declined to take this case it would have been an act of judicial cowardice that would have been criticized for generations."***
>
> **Barry Richard**

After some repartee between O'Brien and the panelists, Barry Richard then said, "I want to dispute the suggestion that has been made with some frequency that the United States Supreme Court has not historically involved itself in state election cases. That is just not true. The United States Supreme Court has taken up major state election cases when there was a fundamental federal constitutional issue implicated, and I can't imagine a case of greater significance when it comes to a fundamental constructional right to vote than this one. I think if the United States Supreme Court had declined to take this case, it would have been an act of judicial cowardice that would have been criticized for generations."

He continued, "I think it was perfectly appropriate for the United States Supreme Court to address this issue. I share everybody's agreement here that none of the justices on either of these courts was acting politically, if by politically we mean that they acted with the design to elect either of these candidates. I don't think any of us believe that."

(Richard said he is writing an article for the *ABA Journal* defending the impartiality of the United States Supreme Court and the Florida Supreme Court).

He noted that governors and presidents appoint judges whose views are most similar to

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theirs and that the system would never eliminate five to four decisions because the American system has been unable to devise a better one.

O'Brien then said the court was rarely seen as political itself, but many people believe the justices' minds were already made up before the argument even occurred.

Boies feigned shocked surprise that politics would be involved, and then said, "Particularly in the decision to stop counting the votes you can argue a lot of arguments one way or the other. On Saturday, December 9 to stop the vote count [caused] irreparable injury to people of the United States [not] to find out how the State of Florida would have counted the votes if permitted to do so. That decision probably had a lot to do with the perception that there were political implications involved."

Richard said, "I think it (the stop the vote count ruling) was wrong but the final decision was right." And then he continued that he thought the lawyers for both sides were not interested in getting people's votes counted, but were concerned with getting their candidates elected.

O'Brien then asked the panelists if they thought the Supreme Court's reputation had been damaged by criticism following the five-to-four vote.

Boies immediately replied, "I don't think the Supreme Court has suffered long-term damage. If you believe as I do that this was a wrong decision, the Supreme Court can easily survive a wrong decision from time to time. If you believe as Barry (Richard) and other people do, that it was the right decision, obviously the Supreme Court ought to be strengthened by it. But whether or not you believe it was the wrong decision or the right decision, I think it will be an unusual decision. I don't think you will see the Supreme Court often stepping into these kinds of issues. As long as it doesn't, I don't think any one decision will greatly impair the position or the respect for the court."

Douglass pointed out that he thought the Court had survived many attacks worse than the controversy surrounding the *Bush v. Gore* decision, including the 1954 ruling in *Brown v. Board of Education*, which prompted "Impeach Earl Warren" billboards in some Southern states. ◆

Bylaw Change Expands Board of Regents

At its Spring Meeting, the Board of Regents amended the bylaws of the College to provide that the election of a Regent to the office of Secretary or Treasurer creates a vacancy in his or her region.

Heretofore, election as President-Elect created such a vacancy, but the Secretary and Treasurer of the College continued to serve the regions from which they were elected.

As the College has grown, the demands on members of the Executive Committee, who run the College between Board meetings, have increased immensely. The duties of the Secretary and Treasurer have likewise increased.

It had also become increasingly apparent that having one person serve as Regent for more than four years was an impediment to the development of new leadership.

This bylaw amendment, which became effective immediately, increased by two the size of the Board of Regents.

As a result, this year's Regent's Nominating Committee, chaired by Regent James P. Schaller, will make nominations for six new Regents at the 2001 annual meeting. ◆

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gress to open up their monopoly markets. Once the RBOCs do so, by meeting a stringent statutory test designed to facilitate local competition in a given state, they will be permitted to enter the long distance telephone field (populated primarily by AT&T, their former parent, WorldCom, and Sprint — the so-called Interexchange Carriers or "IXCs"). By the way, you can see that acronyms are a way of life in the communications world — and, rest assured, there will be more to come in this presentation.

In the five years since the 1996 Act was passed, the statutory test for RBOC entry into long distance has been attained in only four states (principally, New York and Texas). But, over the next 18-24 months, I predict that we will see many more states added to the list. The contemplated end-result is to provide an integrated local/long distance (or exchange/interexchange) telephone service — something that generally has not been available to you and me since 1984 when AT&T, then the world's largest company, was broken up by the government and the RBOCs were born.

This goal has been facilitated to some extent by the rise of so-called Competitive Local Exchange Carriers (or "CLECs") — yet another acronym. Since the 1996 legislation, CLECs have captured substantial local telephone service from the Incumbent Local Exchange Carriers ("ILECs"), principally the RBOCs. However, most of the CLEC gains have been with business customers in urban markets. The local residential marketplace has proved especially difficult for competitors to penetrate — contrary to what the Act expected — primarily because ILEC local rates (which traditionally have been subsidized by long distance service to ensure affordable telephony to all Americans) are priced at, or sometimes even below, cost. Such a pricing scheme obviously makes it difficult for any new entrant to take market share away from an incumbent. Additionally, some CLECs allege that the RBOCs have been recalcitrant about opening their networks to rivals.

While all of these local exchange machinations have been developing, AT&T also has been attempting to enter this same market from its preeminent position in the long distance industry — again, in order to provide integrated telephone offerings in competition with the RBOCs. AT&T's strategy has been to employ cable's broadband facilities, spending an eye-popping $100 billion to acquire a number of major multiple system operations. Given more time and a better overall economy, this approach might have worked. However, the company's recent announcement of a second (albeit voluntary) divestiture — splitting itself into three separate entities — reflects the plan's failure to some degree. Incidentally, AT&T is now leading an effort to "structurally separate" the RBOCs' network and customer operations as well — a proposal that, for the Operating Companies, certainly would not be voluntary.

AT&T's recent problems are only partially its fault. In truth, the company probably underestimated the technical complexity and expense of converting one-way cable into a two-way communications network and also of upgrading its back-office systems to permit transparent customer service across its cable and telephony facilities. At the same time, however, external forces also may have negated AT&T's plans — specifically, the recent shift in emphasis among the investor community from growth to value, accompanied by a ruthless Wall Street preoccupation with near-term earnings.

Indeed, AT&T's troubles are but one example of the malaise currently gripping the traditional "Big 3" interexchange carriers. WorldCom and Sprint have been similarly punished in the marketplace, victims of rapidly declining margins in their core businesses, the prospect of large market share losses when the RBOCs begin providing long distance services, and — perhaps most surprisingly — a glut of capacity. The "Field of Dreams" approach to deploying high capacity networks has run into the harsh reality that the demand for bandwidth is not insatiable after all.

The result of all these marketplace changes may be that the major local and long distance car-

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riers — that is, the RBOCs and IXCs — will pair off in the near future, something that I want to discuss in a few minutes in the context of telecom industry consolidation. Should all this happen, it would reflect a return to a more efficient industry structure — an "all-distance" marketplace, which eliminates the artificial division between exchange and interexchange services created by the break-up of AT&T.

The ultimate public policy objective, of course, is a marketplace in which a number of carriers (not just AT&T as it was pre-1984) compete to provide integrated services to the American people. Studies demonstrate that the consuming public generally prefers so-called "one-stop shopping" — that is, the ability to receive all of its telephony service (local and long distance), and also Internet access and even video in the future, from a single provider.

VIDEO

The cable television market is similar in some ways to the local exchange — that is, competition has developed differently (and more slowly) than Congress envisioned in the 1996 legislation. In our country, unlike Japan and Western Europe, cable has established a huge head start over potential multi-channel video rivals, passing 98% of all television households and being subscribed to by about 70%.

The Telecommunications Act assumed that the telephone industry would be a competitive force in the video marketplace. But, with both the RBOCs and AT&T focused on "one-stop" telephone service, it just hasn't happened.

Instead, competition to cable has come from the direct broadcast satellite ("DBS") industry which now serves some 15 million subscribers nationwide. DBS, obviously still a niche service compared to cable, should be helped immeasurably by a law passed last year which allows satellites to carry valuable local broadcast signals (which, to date, has been a major market barrier). While the venerable over-the-air broadcasting industry is the only one channel/free service in an increasingly multi-channel/pay universe, the fact is that about two-thirds of the overall television viewing audience is still watching broadcast programming (even though it may be doing so increasingly over cable, DBS, and soon personal computers).

Incidentally, over-the-air television someday may receive a boost from its entry into digital television (or "DTV"). In 1996, after ten years of research and development, the FCC established a new digital broadcast standard for our country (one adaptable to cable, DBS and PCs as well), gave all television operators a second channel in which to provide DTV service, mandated an aggressive implementation schedule (and over 170 stations are now transmitting digital signals), and established 2006 as the year in which conventional television service (as we have known it) would be phased out.

Why haven't you heard more about this revolutionary new service? Well, unfortunately, the transition to digital has been slower and more contentious than anyone expected — first generation DTV sets did not always perform optimally, key issues such as cable interoperability and copyright protection were left unresolved and, most importantly, scant digital programs have been transmitted that would motivate the public to purchase expensive new equipment. For all of these reasons, the 2006 deadline to end current TV service is almost certain to be extended (perhaps to 2010 or beyond).

However, the digital scene hopefully will change for the better in the next few years. Without doubt, both government and industry have committed the nation to a digital television future, and there really is no turning back. In the process, all of us will be introduced to a number of exciting new digital services, including interactive data (marrying the power of the computer with TV) and high definition television (or "HDTV") — with a resolution six times that of conventional TV. Already, CBS has broadcast the Super Bowl, the Masters and U.S. Tennis tournaments, and NCAA "Final Four" basketball games in brilliant wide-screen HDTV — and a multitude of movies

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and other programming in this dramatic format is on the near-term horizon, bringing Americans what might be called "the theater of the home". The Cable, DBS and computer industries also will be involved competitively in the digital transition (overall, the first retooling of our video system since it was introduced in the early 1950s).

CONVERGENCE

If you are still with me, I would like to turn now to the second "C": convergence — which can be defined as the delivery of essentially the same communications services over different technologies by previously distinct industry segments. After years of unfulfilled expectations, convergence is finally beginning to happen across a number of different industries.

Perhaps the best example of this trend is the delivery of high-speed Internet access which today is being offered over cable, telephone, satellite, terrestrial wireless devices, and even broadcast spectrum. In particular, cable modems are now serving some four million customers with broadband Internet services, and this number is expected to grow rapidly over the next few years.

Not to be outdone, telephone carriers are introducing a family of digital subscriber line (or "DSL") services which allow the current telephone copper wire plant to be used for high-speed Internet access. In providing such offerings, telecos are required to unbundle their lines and make them available to competitors. They also are subject to a number of other FCC legacy regulations, none of which apply to cable-based broadband offerings. This disparity has led to calls for a so-called "open access" policy — that is, a requirement on all providers, including cable, to open their facilities to competitors.

Similarly, the burgeoning wireless industry is looking to transform itself from simply a purveyor of voice services over cellular telephones into a broadband medium for the delivery of video, high-quality audio, and data. That, at least, is the promise of so-called "Third Generation" ("3G") wireless. The biggest obstacle to 3G's development, incidentally, is not the threat of open access requirements or other regulatory restrictions. Instead, it is the scarcity of suitable radio frequencies. Spectrum — like beachfront property — is a finite natural resource on which there are infinite demands today.

The FCC is considering three distinct blocks of radio frequencies for 3G services — but each would require the partial relocation of important incumbents: television broadcasters, some high-profile educational and religious institutions and, most notably, the Department of Defense. And if such relocations were not a sufficient challenge, prospective 3G providers also will be asked to spend billions of dollars in auctions for FCC licenses, to overcome daunting technical questions, and to gamble that consumers really want to be able to watch movies on their cell phones.

I don't want to paint too gloomy a picture here because the wireless industry boasts some of the most innovative companies and savvy marketers in the business. Thus, broadband wireless undoubtedly will become a reality someday, and many of its offerings may well become as indispensable to consumers as cellular service is today. But my guess is that all this will take longer to realize than many have hoped.

This quick tour of the converging frontiers of telephony, cable and wireless reveals one overarching reality: the Internet is fast becoming the universal medium of communications — one that soon will be widely capable of transmitting telephone calls and also radio and television programs (or, to put it in the new Net language, audio and video "streaming").

As such, the Internet beckons to transform not only the communications industry but every other aspect of our commerce and society as well. In just a few short years, the number of Americans connected online — in both their businesses and homes — has grown exponentially. And the truth is that we are only at the inception of this new and infinitely diverse medium. Incidentally, the stumbling block to the Internet's maturity as a fully-

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developed mass medium is similar to the 3G syndrome that I just detailed — namely, a lack of adequate spectrum (or bandwidth) to permit high-speed, high-capacity services.

The Internet's future growth — and its central importance to our lives — poses a dilemma for government policy-makers. The accepted wisdom, which happens to be true, is that the dramatic evolution of the Web from a government research network to the driving force of the "new economy" was facilitated by a conscious decision not to regulate — indeed, this "hands off the Internet" philosophy has assumed nearly canonical stature in Washington. Yet convergence as a general matter, and the Internet in particular, challenges policy-makers to confront an outmoded regulatory regime based in large part on the identity of the service provider.

Let me explain. Traditionally, the FCC has regulated broadcasters under a public interest model, telephone companies as common carriers, cable and DBS somewhere in between, and computers not at all. Today and increasingly in the future, as all of these entities begin to provide fungible services — many of them using the Internet as a platform — such asymmetric regulation will be not only irrational but a dangerous barrier to investment as well. The government then will have an option of regulating all competing industries "up" or deregulating them "down" to the lowest common denominator necessary to protect competition and the public interest. To me, that choice should be clear.

CONSOLIDATION

This brings me to the third primary "C" trend: consolidation. Since the passage of the 1996 Act, we have witnessed a veritable feeding frenzy of communications mergers and acquisitions. Let's look at this scene sector by sector:

1. In the local telephone field, where once there were seven RBOCs, there now are four — only one of which retains its circa-1984 name: BellSouth (which also has not been involved in any major transactions to date).
   - In a series of horizontal mergers, SBC has merged with two other RBOCs: PacTel and Ameritech (and also non-RBOC Southern New England Telephone);
   - Similarly, Bell Atlantic (a fourth RBOC) acquired a fifth one (Nynex) and, then, merged with GTE (the leading non-RBOC local exchange carrier) to form Verizon.
   - And Qwest, an upstart long distance carrier, merged with the seventh RBOC, U.S. West, in a vertical merger.

2. Looking to the long distance field, I have already mentioned AT&T's extensive cable acquisitions.
   - Additionally, MCI and WorldCom merged — and, then, tried to add Sprint (which would have combined the #2, 3, and 4 largest interexchange carriers), only to be stopped by the Department of Justice.

3. The Sprint merger would have given WorldCom a major wireless presence that it lacks in order to compete with several other global wireless companies or consortia — e.g., Vodaphone and AT&T/British Telecommunications — which have engaged in their own conglomerations.

4. On the mass media side of communications, the 1996 Act greatly increased the number of radio and television stations that any single entity is permitted to own — setting off an immediate wave of mergers and acquisitions. Back in the dark ages of the 1970s, when I served at the FCC, no one could hold more than six TVs, six AM and six FM radio stations. By contrast, one owner today — Clear Channel Communications out of Texas — has about 1,000 stations.

5. On the network television front, CBS has been acquired by Viacom, ABC by Disney, NBC has a major joint venture with Paxson Broadcasting and its so-called "family network", and Fox is considering the acquisition of leading DBS provider, Direct-TV.

6. And, of course, the most stupendous combination of them all was approved early this year: AOL/TW, combining the "old" media with the

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new Internet-oriented economy (a sign of possible events to come).

As a lawyer involved in a large number of these mergers, the first thing that strikes you about them is the enormous market consolidation involved. But, in truth, greater size may not be the only (or even the predominant) factor involved. Instead, these conglomerations may best be considered as a natural outgrowth of the first two trends we have discussed: competition and convergence. Specifically, virtually all of the existing combinations (especially on the telecom side of the aisle) have reflected a desire by the parties to offer a complete complement of services within a single corporate family (again, "one-stop shopping").

Another motivating force behind the merger mania is the recognition that communications increasingly is a national (even global) marketplace. Thus, any company hoping to compete in this environment must achieve "critical mass" — that is, geographical as well as service ubiquity in order to take full advantage of economies of scale.

In particular, this factor explains why the Regional Bell Operating Companies felt compelled to engage in a number of horizontal mergers in order to compete against the nationwide offerings of AT&T and other interexchange providers. Incidentally, once the RBOCs attain greater entry into the U.S. long distance telephone field, look for a spike in the number of international combinations between U.S. and foreign carriers — globalization being a probable fourth major communications trend to come.

And, closer to home, don't be surprised — as I earlier suggested — if ILECs and major long distance carriers join forces in the next year or so. While AT&T, WorldCom, and Sprint are in a difficult situation today, they have assets and expertise that would be invaluable to the RBOCs. Far from being "unthinkable" — as former FCC Chairman Hundt once termed the prospect of an SBC/AT&T merger — I think such a local/long distance combination should be eminently achievable from a regulatory standpoint.

CONCLUSION

And now let me express the two happiest words in the English language: "In Conclusion", the three (or perhaps four) interrelated communications trends that I have outlined today undoubtedly are here to stay. And the result of their interaction, in my opinion, will be a more dynamic telecommunications marketplace, with universal deployment of advanced services to our and the world's population.

I hope that the information that I have delivered this morning has made everything "perfectly clear" — as we used to say in the Nixon Administration. And armed with all this information, you too can be a new (if somewhat dangerous) competitive entrant into the communications law practice.

Good luck and thanks for listening. ◆

2001 MOOT COURT WINNERS HONORED

Drake University Law School Moot Court team members Jeffrey Link, William D. Schultz and Theodore C. Simms, II, were honored at the 2001 Spring meeting in Boca Raton as winners of the 2001 National Moot Court competition in New York City.

Link, as winner of the Best Oral Advocate, gave the response for the team from the Des Moines, Iowa, school.

The College co-sponsors the annual competition in cooperation with the Young Lawyers Committee of the Association of the Bar of the City of New York. Each year, as many as 250 teams of law students compete. ◆

College Issues Report On Twelve-member Civil Jury

"The civil jury of twelve persons has an ancient lineage. By some accounts, it dates back more than one thousand years," begins a recently issued College Report on the Importance of the Twelve-Member Civil Jury in the Federal Courts.

The College has long held to the view that the traditional twelve-person jury better serves the needs and objectives and better reflects the values of a rational democratic system of justice.

A recent move to return the federal courts to a twelve-member civil jury failed. The College decided, nevertheless, to contribute this carefully documented monograph to the literature on the subject.

The 35-page report summarizes the history of the civil jury system, discusses the recent downsizing of civil juries in federal courts and recommends reinstating the twelve-person civil jury.

The report was produced by the Committee on Federal Civil Procedure chaired by Robert S. Campbell, Jr. of Salt Lake City. Other members were: David J. Beck of Houston, John T. Dolan of Newark, Francis H. Box of Boston, Charles A. Harvey, Jr. of Portland, ME., Robert C. Heim of Philadelphia, Fredric H. Kauffman of Lincoln, Nebraska, Edwin L. Klett of Pittsburgh, Edward P. Leibensperger of Boston, William A McCormack of Boston, Barbara W. Mather of Philadelphia, James F. Moseley of Jacksonville, FL, Anthony Murray of Los Angeles, Roland L. Roegge of Grand Rapids, MI, David Thomas Ryan of Hartford, James P. Schaller of Washington, DC, Evan Schwab of Seattle, Robert D. Stanton of Prairie Village, KS, and John W. Vardaman of Washington, DC. Stuart D. Shanor of Roswell, NM was Regent liaison to the committee.

Fellows are encouraged to broaden the distribution of this report. Copies are available from the College office. ◆

Proposed Ethics Rules Revisions

Two representatives of the ABA Ethics 2000 Commission presented a look at highlights of the proposed changes in the Model Rules of Professional Conduct on Friday, March 30 at the Spring meeting in Boca Raton.

Lawrence J. Fox ,FACTL, of Drinker Biddle & Reath in Philadelphia and Professor Susan R. Martyn of the University of Toledo College of Law gave a brief overview of the proposed revisions and described the process for their adoption.

Their presentation highlighted several proposed changes, including some involving the attorney-client privilege, that would directly affect trial lawyers.

The ABA House of Delegates is scheduled to take up the subject at its August meeting in Chicago.

"One of our concerns and one of the reasons for the timing of this commission's work is the growing disparity in state ethics codes," Martyn said. "Although the Model Rules were passed by the ABA in 1981, even today there is a growing disparity in the content and in the format of those codes."

The commission has considered vast changes in the use of technology and the practice of law such as multi-disciplinary changes and multi-jurisdiction changes, Martyn and Cox emphasized.

The College has a long history of defending the principle of attorney-client confidentiality. The Legal Ethics Committee, under the leadership of John McElhaney of Dallas, Texas, is drafting a report on proposed changes in the Code as they relate to that subject. This report will assist the College in taking a position on the proposed changes. ◆

OLIVER HILL

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- 1997 – Bronze busts in places of honor in his home city of Richmond.
- 1999 – Presidential Medal of Freedom.
- 2000 – American Bar Association Medal.
- 2000 – National Bar Association Associate for Justice Award.

He has received eight honorary doctoral degrees.

Please permit me now to read from the citation of the Award for Courageous Advocacy being presented today to Oliver W. Hill:

In 1954, the Supreme Court unanimously announced its landmark decision in Brown v. Board of Education, which declared that segregated education was a denial of equal protection under the law. Intimately involved in this crucial victory in America's evolution toward equal treatment for all citizens, you, Oliver W. Hill, Sr., knew this decision marked only one more step in the long march against segregation, 'Jim Crow' and institutional racism. As an African-American trial lawyer engaged in civil rights litigation and criminal defense in Virginia, you knew this all too well because, despite constant intimidation, menace and overt threats to you, your wife and your child, you spent your entire career seeking basic rights denied to African-Americans.

Second in your law school class to none other than the late Justice Thurgood Marshall, your dear friend and comrade, you created a civil rights legal practice that was second to none. Beginning your career more than twenty years prior to the decision in Brown, you challenged social injustice and championed the rights of African-American criminal defendants across Virginia – undaunted by the racist mentality that pervaded all levels of society, often including the very legal system in which you tried cases.

With your partner, Samuel W. Tucker, FACTL, you regularly accepted difficult, racially charged cases in the face of adverse public reaction. You carried a heavy caseload, becoming one of the central attorneys in the civil rights movement. You were not deterred by the bitter opposition of the majority of the population, by the government establishment, by the popular press and even the courts, nor by threats of violence to you and your family. With the support of your wife of 59 years – your beloved "Bernie" – you survived this oppression with steely determination, yet somehow without personal hatred.

In spite of dangers to you and your family, you zealously advanced the rights of Americans relegated to only second-class citizenship.

Your efforts were not confined to the courtroom. On more than one occasion, you personally shepherded a truck filled with African-American children to all white schools and helped force national recognition that "separate but equal" was in fact unequal, unjust and, indeed, untenable.

You took your battle to the political system – literally shaking your fist at the all-white Virginia legislature in an appearance before that body to dissuade them from closing the public schools in their effort to avoid integration.

Even when you bravely served this country during World War II, you challenged racial inequality in the Armed Forces. Efforts such as yours led to the historic decision of President Harry S. Truman to end segregation in the military.

Each obstacle you faced in your quest for equality under law served to galvanize your resolve to overcome. You succeeded despite the fact that for much of your career you and your family were subjected to the same indignities and deprivations that you challenged in court on behalf of your clients.

Your life is inspiring, exemplary and heroic, not only because you braved personal danger and unremitting public and private opposition, but because you did so with dignity and grace and because you overcame.

Your unwavering pursuit of equality helped to spark the strong, vibrant civil rights movement that continues today, but this award, and all that it represents, could not be given without recognition that the goals of that movement are not yet fully realized.

Your illustrious career is an inspiration to those who cherish our constitutional rights and freedoms and to all trial lawyers challenged by difficult, unpopular and dangerous cases.

Hence, we are here today to honor you with one of the most important awards of the College, the Award for Courageous Advocacy. This Award is given by trial

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OLIVER HILL

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lawyers who both understand and appreciate the intense personal commitment, sacrifice and courage necessary to sustain the quality of advocacy you have demonstrated. You are only the 12th person to be recognized for this award.

You have exemplified the qualities of COURAGE and COMMITMENT in a lifetime of advocacy for equal justice, as a trial lawyer and a humanitarian. By your example, you have inspired and *elevated us all.*

WHEREFORE, on this 31st day of March, 2001, in the City of Boca Raton, Florida, the Regents and Fellows of the American College of Trial Lawyers proudly confer upon you, Oliver W. Hill, FACTL, the AWARD FOR COURAGEOUS ADVOCACY.

We salute you, Oliver!

(Fellow Hill gave a brief response acknowledging his friendship with George Allen of Richmond, winner of the first Courageous Advocacy Award in 1965.) ◆

COLLEGE REPORT PROPOSES CHANGES IN SENTENCING GUIDELINES

After extensive investigation by the Committee on Federal Criminal Procedure, the College has issued a new report on Proposed Modifications to the Relevant Conduct Provisions of the U.S. Sentencing Guidelines. The 38-page monograph summarizes the background of the guidelines and recommends several changes.

The second of a proposed series of reports on the Sentencing Guidelines, this report analyzes and critiques present provisions that authorize, indeed require, a federal judge to increase the sentence of a convicted defendant based on conduct for which defendant was never charged or for which he may have been charged and acquitted.

The first report, which also addressed a provision of the Sentencing Guidelines widely regarded as a detriment to the fair administration of justice, has received wide approval from both bench and bar. That report proposed a change in the present provision that only the prosecution may request a downward departure in a prescribed sentence for a defendant who has provided substantial assistance to the government in investigating and prosecuting criminal conduct.

John P. Cooney, Jr. of New York City is chair of the College's Committee on Federal Criminal Procedure, which produced the report. Other members were: Elizabeth K. Ainslie of Philadelphia, Hon. Charles R. Breyer of San Francisco, Gordon Willis Campbell of Salt Lake City, J. W. Carney, Jr. of Boston, Locke T. Clifford of Greensboro, NC, Ty Cobb of Denver, Thomas W. Cranmer of Bloomfield Hills, MI, David F. DuMouchel of Detroit, Thomas E. Dwyer, Jr. of Boston, James L. Eisenbrandt of Overland Park, KS, Lee D. Foreman of Denver, Hon. Nancy Gertner of Boston, Jordan Green of Phoenix, Pauline F. Hardin of New Orleans, Joseph A. Hayden, Jr., of Teaneck, NJ, Thomas E. Holliday of Los Angeles, William F. Manifesto of Pittsburgh, Veryl L. Riddle of St. Louis, Robert W. Ritchie of Knoxville, Patrick M. Ryan of Oklahoma City, Terry Philip Segal of Boston, Hon. George Z. Singal of Bangor, ME, Robert W. Tarun of Chicago, Peter F. Vaira of Philadelphia and Theodore V. Wells, Jr. of New York City. Louis W. Fryman of Philadelphia is Regent liaison.

This report has been sent to every member of the federal judiciary. Copies are available from the College headquarters. ◆

PRESIDENT OF CANADIAN BAR

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responses through which we can turn what seem like negative developments into positive and profitable benefits.

What are these waves of change? Do they really amount to a tide? I think a rising tide analogy is quite apt. I'm from Prince Edward Island, off the east coast of Canada, so I know tides. We have the highest tides in the world in the Bay of Fundy. One of the things that always amazes me is that every year, some tourists get caught as the tide comes in. Didn't they notice it getting higher? Didn't they feel the water against their ankle, their knee, their thigh?

The fact is, the water rises so slowly that you *don't* really notice it. Or if you *do* feel it, you're sure you can ignore it for now, certain there'll be time to reach shore when you want to. Today, many litigators are ignoring the rising tides and three waves have already washed over our feet to warn us:

The first wave is the steady decline in the monopoly we've enjoyed in the practice of law. Once, lawyers were the guardians at the gate of legal knowledge. But today there *is* no gate. People can go over us and around us to get the legal information they need.

The new reality is that much of what we deliver *can* and *will* be delivered by non-lawyers.

Look at what's happened to stockbrokers. Just a few years ago, the only way to trade stocks was to use a full-service stock broker. Today, people execute their own trades online, for a fraction of the cost. And much of the research and basic information that was once only available from brokerage houses is now available online, for a fee or free.

So too, much of the core library of law-related information is now readily available free on the Internet or at moderate cost through legal research databases. And you don't need to be a lawyer to access it or use it.

And, I'm afraid, some people believe it's a small and easy step from information retrieval to self-representation. Right here in Florida, for example, 80% of all family law cases now involve at least one party without formal representation. Well — that's only family law — not commercial litigation, you might say. I practice some family law and I can assure you that family law is the canary in the mine, a good advance warning of threatening danger. As the government and the public now treat family law, they may later treat general civil litigation. They may reduce access to courts, *forcibly* divert cases to other settlement avenues, and encourage unrepresented litigants to take part. No one benefits from *pro se* litigation. Not the judge, not the opposing party, and definitely not the litigant. But people are convinced they can leave us out.

Our challenge is not to bemoan this trend, but to ensure that we provide real, added value when helping clients. This requires working backwards from what the client needs: asking ourselves how we can deliver our services in the way most beneficial to them. It requires us to publicly highlight those aspects of our work we take for granted, — the value of experience, courage, and creativity to the client with a legal problem.

Clients should be shown the difference between the quiet courage and nerve of a persistent, skilled litigator (which takes years of training to develop) and the plain recklessness and gall which a party to litigation may think she already has.

(Not that great litigators don't demonstrate breathtaking gall on occasion - they sometimes develop it early. My favorite 20th century litigator is F.E. Smith - Lord Birkenhead — who is famous for jousting with eminent judges, usually successfully. He showed his form early; at university he was given a lengthy oral exam on various legal issues, at the end of which the examining panel of law professors suggested that he should read a bit more real property law — to which this nineteen year old student replied; "I have come here — sirs — to be *examined*, not to receive *unsolicited advice*. . . .").

The second wave that's upon us is competition — not just from other lawyers but from other professions.

Just look at the field of accounting. Three of

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the ten largest law firms in the world are now associated with the Big Five accounting firms. Andersen Consulting is now one of the largest "law firms" in Europe, with more than seventeen hundred lawyers — and that's *not* counting their tax lawyers.

And for those who think that only transactional law practice is threatened (real estate, wills, corporate services) consider the explosive rise in alternative dispute resolution — a matter of considerable interest to trial lawyers. The Big Five accounting firms have all devoted substantial resources to cultivating high-value dispute resolution services, and are profiting from selling these services.

In Canada, Alternative Dispute Resolution is being offered by governments and private businesses as a solution to overcrowded dockets, high-cost litigation, and trial delay, and consumers are eagerly responding. I can only imagine the story is similar here.

The third wave, is the whole technological revolution. Just as the industrial revolution changed the face of the blue-collar world, the knowledge revolution is bringing massive changes to the professional community. Jack Welch, CEO of General Electric and one of the true corporate visionaries, has ranked the Internet as numbers 1, 2, 3 and 4 on his list of priorities — which only has four items on it.

I've already mentioned the information the Internet can put into the hands of potential clients (and wait until all that convergence and consolidation we heard about yesterday from Richard Wiley takes place!). But that's just the beginning. Technology is changing how we practice law — not just how our clients access information:

Court documents can be filed electronically,

The latest case law is on West or Lexis-Nexis, or court Websites, and:

Colleagues and clients increasingly insist we communicate by e-mail.

We've already seen the beginnings of video conferencing. But as bandwidth expands, so too will new possibilities — for electronic interviews, for video depositions, or even full-blown trials. If anyone here has seen Courtroom 21, the dynamic, fully wired courtroom experiment at William & Mary Law School, you know that the future of litigation will be increasingly electronic.

Technology also has a nasty habit of speeding things up. Impatient clients, accustomed to instant access to almost everything, have little tolerance for delays in the delivery of legal services, or for the wheels of justice grinding at their present ponderous pace.

Mercedes Benz, which used to produce three new models every ten years, now produces ten new models every three years. Could we in the legal profession adapt to that rate of change?

The fact is, most of us could not. Ours is a profession that in many ways looks backwards rather than forwards, that employs the same techniques and philosophies that our predecessors did, decades and even centuries before us. (As we heard from Cicero yesterday, he was unsettled by arguing a major case in Caesar's living room. Imagine having to argue a case from a small studio to judges on video monitors.) Other professions embrace change and we must not be like the tourist who ignores the rising tides or we could find ourselves very far from shore indeed.

So, what's to be done? Should we just give in to new competition, the frantic pace of change, pack our bags and leave litigation to someone else? Society needs lawyers, whether it wants to admit it or not. Our *knowledge*, *creativity* and *courage* are indispensable in an increasingly complicated world.

But at the same time, we can't simply ignore the tide. What we can do is recognize that every challenge is actually an opportunity; every threat can be turned into a benefit. I would like to suggest briefly how each of these trends, which seem ominous and negative, can be turned into something beneficial.

First of all, the first wave — the unrepresented client. Instead of worrying about the effect of *pro se* litigants on our business and our courts, we should ask ourselves: Why has this person chosen not to use a lawyer? What are the root causes behind that kind of decision?

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PRESIDENT OF CANADIAN BAR

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Is the person afraid that he can't afford a lawsuit? Maybe we could explain contingency fees to him. Does she think that she can do as good a job as any lawyer? Maybe we need to explain the true breadth of what we do and the benefits we bring.

Much of the *pro se* population is, in my opinion, simply a vast latent market. So many missed client opportunities parade through our courts each day. By reaching out to these people, by offering public legal education and by marketing our services to them, we can help them and our profession.

The Second Wave — other professionals practicing law. Some lawyers characterize this as a turf war, a threat, competitors trying to "eat our lunch." Well, that's one way to look at it. But another way is to see non-lawyer professionals as colleagues seeing a market and offering services similar to, but not replacements for, our own. In many cases, these services complement what we offer. They open new markets for us — in short, creating innovative new opportunities for the legal profession.

Multi-disciplinary teams are common in the professional world, as large clients employ lawyers, accountants, management consultants and others on large projects. As the multi-disciplinary practice debate evolves, more such teams will emerge. Lawyers can be key parts of such teams, using our skills to lead and define the services the teams offer. But the profession itself must define the terms on which we will join these teams — and protect our core values of privilege, confidentiality, and protection from conflicts. Less formal alliances are also possible.

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"Competitors" may actually be colleagues or partners whose benefits to our own practice have not been recognized yet. Turning a challenge from non-lawyers into an opportunity for new business is the second way in which lawyers can respond to a new development creatively and positively.

The third wave — and third opportunity, lies in technology. Who can ignore this driving force for change? The hype over e-business has been replaced by the realization that no matter how you deliver it : business is business — and it still involves people and legal transactions. That means a growing need for lawyers.

Technology is expensive to buy, troublesome to maintain and irritating to upgrade. And sometimes it seems our clients think e-mail was only invented so that they can ask us 10 times a day how their file is coming along. But technology, besides introducing cost-efficiencies into our day-to-day practice, holds another, hidden benefit. It offers us opportunity.

Litigation has historically been the result of contention born of opposing views. In days past, what I call the analog age, the development of conflicts took much longer than it does today. In the digital age the pace is frenetic. The exchange of data and information can result in disputes arising much more quickly. The new economy produces new areas for dispute — and dispute resolution — regularly now. The result is exponentially higher demands on you and me and on the existing justice system — and for more lawyers. The Canadian president visits every Canadian law school every year, and times are good there . . . . Except that the best job offers are coming from New York — even in the civil law schools in Québec! Most of the best graduates at the French-only "Université de Montréal" are off to the U.S.A. — and the Law School there is adding courses in *American* civil law to its curriculum.

Surveys in Canada say clients criticize our civil justice system in terms of costs, delays, and transparency. We're engaged in formal case management now so settlement is encouraged, but if it's impossible litigation is fast-tracked with the aid of computers. The technology gives us the opportunity to harness the best of digital world for our work as litigators, and ultimately for our cli-

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ents. And with the increasing demands for litigation, some legal consultants are predicting increases in legal fees, reflecting the increasing value of skilled litigators to clients and society.

Technology also offers us a way to bring client service to a higher level than ever before.

I don't mean simply e-mailing clients or setting up a Website. I mean things like:

Setting up a secure intranet for your clients on your Website, so that clients can check the progress of their files any time of the day or night, find out who's working on what and how much the file is costing them.

Developing a knowledge management database, a constantly-evolving online library of information, precedents, experience and insight derived from your firm's hard work over the years.

Creating an e-mail newsletter geared towards your clients' interests: updating important court decisions that affect their industry, and explaining new legislation that could impact on their cases and business.

New technology doesn't just provide a cost-effective way of doing what we've always been doing. It offers us a chance, an opportunity to reinvent ourselves, to completely rethink what we do as lawyers and do what we've never done before.

Each of the three challenges,

- the decline in our monopoly,
- the increase in competition, and
- the advent of the technology revolution

presents excellent opportunities for the legal profession.

However, it is clear we must make one important step before we can take full advantage of the opportunities. Each one of us — must face the change in our profession and not just adapt to it, but profit from it by approaching it positively, understanding the new market realities and reaping the benefits of technology.

The tides of our profession are turning, and the shore is slipping away. The Canadian Bar Association believes that this is the greatest challenge we have met for many years. But tides will not flood over us if we remember what all islanders know — just float on the rising tide, swim with it, not against it — never fight it — and it will bring us safely to shore.

Thank you. ◆

Poll Form Revision Reflects Changes In Trial Practice

Fellows recently polled about candidates from their state or province saw a new and revised Confidential Poll form. Refined to give the Board of Regents a clearer picture of candidates, the form reflects changes in trial practice and a growing bar population that have made identifying qualified candidates increasingly difficult.

The major change was the addition of two questions:

1) Have you been to trial with and/or observed the nominee in trial, as opposed to discovery, motions, etc.?
YES [ ] NO [ ]

2) Have you had any other advocacy or litigation experience (appeals, hearings, arbitration, motions, discovery, etc.) with the nominee?
YES [ ] NO [ ]

The explanation accompanying the poll form has also been clarified to emphasize the importance of the definitions that accompany the eight

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In Memoriam

(Continued from page 3)

he was inducted as a Fellow in 1961 through his presidency in 1973 and 1974 and his continuing service on the Board of Regents until his death, his heart belonged to the College.

Many of you may be unaware of the high standards to be met by those who are admitted to the American College of Trial Lawyers, but I will not recount them here. I assure you, however, that the process is long, detailed and thorough.

To become an officer and eventually President of the College, one must demonstrate excellent judgment, high moral rectitude, and a passion for the interests of the College and be of a stature that would enhance the College's position as the premier institution of trial lawyers in the country. Bob as Regent, President and Past President added luster to the College during the many years of his association.

Bob succeeded Whitney Seymour as the College's liaison to the British judiciary and bar. An Anglo-American Legal Exchange had been organized under the leadership of Chief Justice Burger and senior British jurists, most particularly Lord Diplock, a member of the Law Lords. These exchanges take place every four or five years and meet in the United Kingdom and the United States, spending a week in each venue. Bob became a member of the Exchange in 1973 and was reappointed to the next three Exchanges. He declined reappointment to the Exchange held in 1999 and 2000. He felt that others should have an opportunity to participate.

"Bob as Regent, President and Past President added luster to the College during the many years of his association."

Leon Silverman

I think it right to acknowledge the presence of Justice Stephen Breyer and Sir Sydney Kentridge and Lady Kentridge. Justice Breyer and Sir Sydney served with Bob on an Anglo American Exchange. Sir Sydney brings the respectful greetings of Bob's many English friends who intend to hold their own service for him in London in the near future.

In 1992, Bob was elected an Honorary Bencher of the Inner Temple, one of the English Inns of Court, a rare and prestigious distinction which he greatly prized.

Bob was a chef and a connoisseur. At his death, he owned almost four thousand cook books—a collection described as "massive and world class in scope and content." Bob authored a cook book entitled "Never Trust a Skinny Cook." I would caution those of you who value the state of your arteries to carefully choose only those recipes (if you can find them) which will not require angioplasty after you have dined. Bob also prepared a cook book called "No Fault Cooking" illustrated by Tine Graham, which contained recipes from members of the College and its honorary members, including members of the Supreme Court, British Law Lords and other senior members of the British judiciary.

Nor should I fail to point out that Bob was an avid and dedicated gin rummy player. I thought he was a *great* gin player having contributed substantially to the Clare coffers, as have at one time or another Barney Sears, Bert Jenner, Jimmy Morris, and Alston Jennings, among others.

I indulged the assumption as to Bob's prowess at the card table until I accidentally met his brother, David, one day on a cruise ship. After explaining to David that I knew Bob from the College and played gin with him on occasion, David said rather contemptuously—"Bob is a terrible gin player. I can beat him any day." When invited later that day to join a game in which David was playing, I respectfully but firmly declined.

Let me for a moment mention some of the qualities that Bob evidenced during his long and successful career. Bob was not a man of neutral disposition. He was a man of strong convictions resolutely held and rarely changed.

Bob was a man without guile. He was contemptuous of the self aggrandizing. Often at College meetings, he would challenge a nominee whose sole claim to membership was that he was

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"popular." He could not abide the "bar politician." His constant question was "How many cases has he tried; how complex were the issues; how was he viewed by his adversaries and judges?" Never, "How big were his verdicts? How many bar association committees does he belong to? What offices did he hold?" Any question as to the ethics of the candidate was investigated with care and discussed at length. Any questions remaining—not fully put to rest—ended the discussion for Bob. The candidate was rejected.

It was quite clear that Bob had become the conscience of the College, succeeding the legendary Emil Gumpert, its founder and only chancellor.

Bob was fiercely loyal to his friends. He had unwavering faith that those who enjoyed that friendship were incapable of ignoble action. He was rarely wrong. Once given, Bob's friendship lasted a lifetime.

I said at the outset of these remarks that Bob led a long and happy life. Yet Bob's life had not only its joys and satisfactions but also its fair share of sorrow.

Bob married Ruth Eyerkuss in 1942. They had six children together. Ruth died in 1972.

On the Anglo American Exchange in 1973, Bob met Margaret Cross—the Peggy we know and love. They were married in 1974 and spent their honeymoon at the College meeting in Boca Raton. For the next twenty-seven years, Bob was the living example of a man *twice* blessed.

Peggy has been the mainstay of Bob's life. I do not say that *only* because she cared for him in the last days of his life as tenderly and compassionately as a mother with a favorite child. I mean that during the many *healthy* years of their life together, she gave Bob a happiness which was best described by Bob himself in a note found after his death but written some seven years ago—a note that Peggy shared with me at Bob's funeral and which I have edited slightly.

"From Peggy I have learned by her example that love is friendship with affection; companionship with understanding; it is given without end; it is forgiving and forgetting; it is sharing all joys and sorrows; it is being able to laugh and relax; it makes no demands and it is not envious; it is just and merciful; it is caring beyond all thought of self; it is loyal and everlasting and it is constant and thoughtful."

How poignant a testament to their life together.

Bob was above all a religious man. His faith was complete and enduring. Bob's obituary recited that he was survived by six children, twenty grandchildren and eight great-grandchildren. But Bob lost three grandchildren—a blow, please God, that none of us should ever have to suffer. He accepted this loss as he had the loss of Ruth, indeed as he accepted the sure and certain knowledge of his own impending death with grace, calmness and resignation, sure in the knowledge that although God's plan was unknowable, it could not fail to come out well in the end.

"[Bob] was to each of us something different: husband, brother, father, grandfather, great-grandfather, uncle, colleague, partner, lawyer, companion and, above all, friend."
Leon Silverman

Bob's many virtues cannot be easily encapsulated. He was to each of us something different: husband, brother, father, grandfather, great-grandfather, uncle, colleague, partner, lawyer, companion and, above all, friend.

We will each of us sorrow privately and mourn his passing according to our personal loss. Bob was a great and good man. We wish him peace. ◆

American College of Trial Lawyers
ESTABLISHED 1950

FROM THE EDITORIAL BOARD

(Continued from page 2)

The Bulletin meets the high standards that should be the hallmark of everything the College does.

We know that for many of you *The Bulletin* is your principal link to the College outside your own state or province.

The College's national meetings, Spring and Fall, are rich with thought-provoking programs. We try to give those who attend something to take home with them. Extending the benefit of those programs to Fellows who cannot go to these meetings is a constant challenge.

We are searching for better ways to do that.

This issue contains verbatim the presentations of two of the speakers at the recent Spring meeting in Boca Raton. One, a presentation by Richard E. Wiley of Wiley, Rein & Fielding, the former Chairman of the Federal Communications Commission, deals with the Communications Revolution. Your telephone, your television, your fax machine, your personal computer, your radio and your handheld device have become a part of your everyday life. Most of us are bewildered by the array in the market of players who are fast tying all of these means of communication together, sometimes competing, sometimes cooperating.

"Extending the benefit of those [thought-provoking] programs to Fellows who cannot go to these meetings is a constant challenge."

We hope that this paper will provide you with a framework to help make the Communications Revolution more understandable. For some of you, this article will simply inform your everyday life. Others of you will inevitably soon find yourselves delving into this area as lawyers.

The second paper, taken from a presentation by Daphne E. Dumont, Q.C.,/c.r., President of the Canadian Bar Association, is a perceptive and stimulating observation on the state of the profession and the challenges it faces.

Your Communications Committee is also aware that we need to do a better job of keeping you informed about how the College is using your collective stature and your dues money to make a difference in the legal profession.

The two College reports highlighted in this issue, one recommending changes in the Federal Sentencing Guidelines and the other urging a return to twelve-member civil juries, are the product of intensive effort by two College committees.

"Your Communications Committee is also aware that we need to do a better job of keeping you informed about how the College is using your collective stature and your dues money to make a difference in the legal profession."

Over the years the College has carefully selected issues on which it has a unique perspective and on which it can make a significant contribution to the existing literature. These reports, carefully edited, are reviewed by the Past Presidents and the Board of Regents and their publication is authorized by the Regents. Bound in blue covers with gold lettering, these works have become recognizable to both bench and bar.

This issue of *The Bulletin* focuses principally on the Spring meeting of the College. The next issue, scheduled for late Summer or early Fall, will focus more closely on ongoing activities of the College, on the way the College operates and on the problems facing it and the profession generally.

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We welcome your thoughts, suggestions and criticisms as we work to make your *Bulletin* what we all want it to be.

Ozzie Ayscue, Chair
Communications Committee
email: Ozzie_Ayscue@SHMM.com ◆

THE PRESIDENT'S REPORT

(Continued from page 4)

fallout from them is a subject beyond the scope of this column. Second and more important, judicial salaries are too low. This is within the scope of this column because it does affect adversely the independence and quality of our judiciary. Judicial pay must be adequate to persuade and enable "learned" men and women to quit the lucrative pursuit of "private practice for the bench." Adequate pay is vital, as the Supreme Court has recently noted, "to secure an independence of mind and spirit necessary if judges are 'to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty.'" When judicial compensation of the federal judiciary falls to less than a third of what these judges reasonably could expect to earn in private practice, that disparity has become unacceptable.

This is, of course, not to suggest that judges, or any other public official for that matter, should become rich from serving in a public position. But we do want the most learned lawyers to be attracted to the bench and, while serving, have adequate (not excessive) compensation to support themselves and their families.

UNFAIR CRITICISM

"Judges cannot permit their decisions to be influenced by politics or ties of personal and group loyalties. To do so is to put the independence of the courts at risk."

No public officials, including members of the judiciary, are above criticism. Judges cannot permit their decisions to be influenced by politics or ties of personal and group loyalties. To do so is to put the independence of the courts at risk. Judges must also decide "according to law." Not to do so is to weaken support for independence and invite popular distrust and legislative intrusion.

But to secure and promote judicial independence, it is vital that representatives of the separate branches of government show respect and restraint in their inter-branch relationships. Threats of retaliation against a judge or the judiciary for a particular decision, such as threat of impeachment, or withholding adequate personnel and economic resources from the judicial branch, or threatening to strip the court's jurisdiction is adverse to the public interest and specifically to judicial independence.

The long recognized indispensable element of judicial independence is the ability of judges to perform their responsibilities "without fear or favor." Judicial independence is a means to the end of justice for all. Independence makes a system of impartial justice possible by enabling judges to protect and enforce the rights of private citizens and by allowing judges, without fear of reprisal, to render decisions that maintain the equality of the separate branches of government. It is important to recognize that judicial independence is not for the personal benefit of the judges but for the protection of the people.

"The long recognized indispensable element of judicial independence is the ability of judges to perform their responsibilities 'without fear or favor.'"

The American College of Trial Lawyers is dedicated "to maintaining and improving . . . the administration of justice." The Code of Trial Conduct promulgated by the College calls upon its Fellows to become involved in the method, selection, and retention of judges and to "defend and cause to be defended judges who are subjected to unwarranted and slanderous attacks, for public confidence in our judicial system is undermined by such statements concerning the character of conduct of judges. It is the obligation of lawyers who are also officers of the court to correct misstatements and false impressions, especially where the judge is restrained from defending himself of herself." It is our responsibility, "without fear or favor", to continue to fulfill this obligation. ◆

POLL FORM REVISION

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possible substantive responses that have traditionally constituted the poll. Those responses and their definitions are:

A) Very favorable — you *know* the candidate and strongly support nomination.
B) Favorable — you *know* the candidate and approve nomination.
C) Very favorable, by reputation — based on reputation you strongly support nomination.
D) Favorable, by reputation — based on reputation you approve nomination.
E) Unfavorable — you *know* the candidate and do not consider him or her qualified.
F) Unfavorable, by reputation — you know the candidate's reputation and, based on that, do not consider him or her qualified.
G) Insufficient knowledge to vote.
H) Do not know of candidate.
(Emphasis added.)

The instructions that accompany the Confidential Poll also encourage written explanatory comments, particularly for unfavorable votes.

Fellowship in the College is intended for those who are "skilled and experienced in the trial of cases." As the size of the lawyer population has grown and as fewer and fewer trials take place, the task of distinguishing stand-up, first-chair trial lawyers from those whose practice consists principally of searching documents, taking depositions and arguing motions or of handling a high volume of cases that never go to trial has become more difficult.

Investigation by the Regent of the credentials of a candidate with many "Very Favorable" votes and no unfavorable ones, sometimes discloses that, although the candidate is highly regarded by everyone who knows him, not a single one of the Fellows who voted for his candidacy has ever actually tried a case with him. Further investigation may disclose that the candidate has a high-volume practice, settling all his cases and rarely, if ever, going to trial.

These revisions, drafted by a committee headed by Regent James W. Morris, III, working with the Executive Committee of the College, were designed to address this problem.

The addition of questions 1 and 2 will enable the Regents to determine whether the personal knowledge on which a Fellow's answers to questions A, B and E are based relates to trial or other litigation-related activity or whether the response is based on other sources of knowledge, e.g., law school, bar work or social acquaintance.

When considering a nominee, the Board of Regents has before it the nominee's poll results, collated on a spread sheet showing the total votes he or she received in each category. The spread sheet also contains each written comment made about the candidate, along with the rating that accompanied the comment, indicating whether the comment is based on trial or other litigation-related experience with the candidate.

The Regents do not know who gave a particular rating or made the accompanying comment. Only the investigating Regent (the Regent for the candidate's state or province unless the candidate is a partner, associate or relative of that Regent) has that information, and his obligation to protect the confidentiality of each voting Fellow is scrupulously honored.

The poll is designed to help the Regents select only those trial lawyers the College can hold out as outstanding among their peers. The opinions it expects to have reflected in the Fellows' poll responses concern the candidate's trial skills, judgment, ethical and moral standards, character and collegiality.

The Board finds comments about the *quality* of a candidate's trial practice, as opposed to volume of cases handled, to be particularly helpful. Comments that distinguish the zealous, tough, no-nonsense advocate from the one who crosses the line and is unreasonably and unnecessarily contentious or unnecessarily unpleasant to deal with are helpful in resolving close cases where this is an issue.

The success of the process of selecting new Fellows depends heavily on the precision and candor with which Fellows respond to the confidential poll and on their willingness to take the time to make relevant, fact-based comments to support their votes. The new poll form was designed to encourage such responses. ◆

CALENDAR

NOTE: Calendar changes frequently and dates should be checked with ACTL office before scheduling events.

2001

August 3-4
Iowa Fellows Weekend
Village East
Okoboji, IA

September 6
Georgia Fellows Black-Tie Dinner
Piedmont Driving Club
Atlanta, GA

September 7-9
Upstate NY, Ontario, Quebec
Regional Meeting
Chateau Laurier Hotel
Ottawa, ON

September 13
Missouri Fellows Annual Dinner
Location TBD
Springfield, MO

September 14
Nebraska Fellows Annual Golf
Outing and Dinner
Lincoln Country Club
Lincoln, NE

September 21-22
Wisconsin Fellows Annual Meeting
Osthoff Resort
Elkhart Lake, WI

September 22
Michigan Fellows Annual
Black-Tie Dinner
Ritz-Carlton
Dearborn, MI

September 28
Indiana State Committee
Fall Meeting
Briar Ridge Country Club
Shererville, IN

September 28 – 30
ND & SD Fellows Joint Meeting
Holiday Inn Plaza
Rapid City, SD

October 6-7
Kansas Fellows Meeting
Fairmont Hotel
Kansas City, MO

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

October 18-21
Annual Meeting
The Ritz-Carlton
New Orleans, LA

November 1-4
Western Chairs Workshop
The St. Regis Monarch Beach Hotel
Monarch Beach, CA

November 9-11
Maryland & DC Fellows
Joint Meeting
Tidewater Inn
Easton, MD

November 15-18
Eastern Chairs Workshop
The Ritz-Carlton
Key Biscayne, FL

November 29
Washington State Fellows
Annual Christmas Dinner
Broadmoor Golf Club
Seattle, WA

November 30
Oregon Fellows Dinner
Heathman Hotel
Portland, OR

2002

February 14-17
Tri-State Meeting
(Georgia, Florida, Alabama)
Cloister
Sea Island, GA

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

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

May 16-19
Board Retreat
Ritz-Carlton Reynolds Plantation
Atlanta, GA

October 13-16
Board of Regents Meeting
The Waldorf-Astoria
New York, NY

October 17-20
Annual Meeting
The Waldorf-Astoria
New York, NY

College National Offices Relocated

The College's national headquarters have been moved to new office space in Irvine, California. The new offices are located within blocks of the Orange County (John Wayne) Airport, a facility served by a number of major airlines.

The College offices had been relocated over a decade ago from Los Angeles to a then new office building in what was an almost rural setting in suburban Irvine.

"The new office space is more user-friendly for the staff, saves the College thousands of dollars each month and is close to the Orange County Airport," said Robert A. Young, Executive Director.

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