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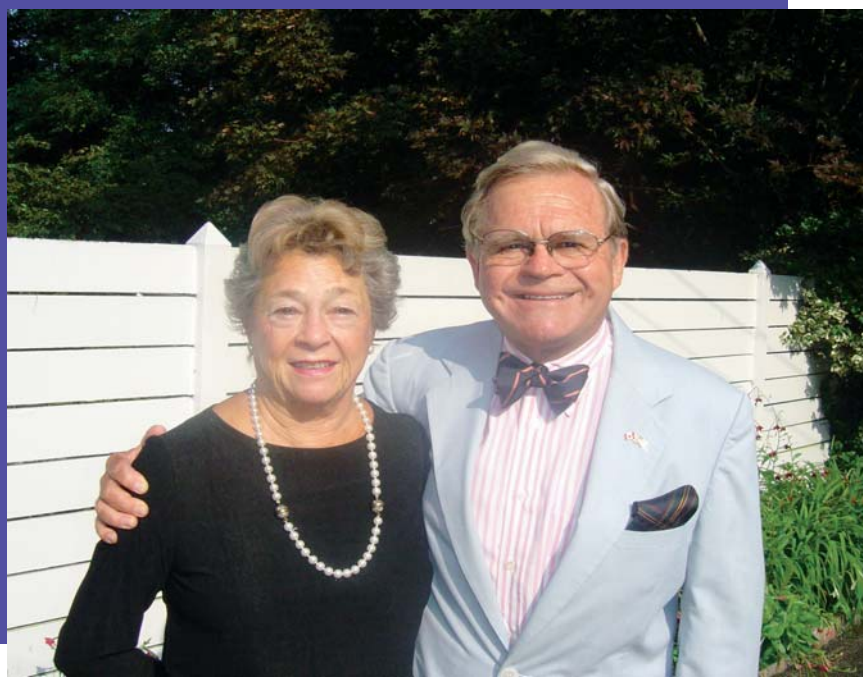
President-Elect Morris: College Must Assert Its Leadership Role



JIMMY AND JANE MORRIS

James W. Morris, III, of Richmond, Virginia, will become President of the College at the Annual Meeting in St. Louis, succeeding David W. Scott of Ottawa, Canada.

President-Elect James W. Morris, III believes the American justice system is under siege on many fronts and that the College must assert its leadership even more vigorously as the preeminent legal organization in the United States and Canada.

"If we are the best, then we should not hide our light under a bushel," said Morris, who emphasized that he will continue to build on President David Scott's efforts. "We should apply our talents toward practical ends that will benefit the justice system and will advance the goals and purposes of the College."

Morris, who was inducted into the College in 1981, comes from a long line of lawyers on both the maternal and paternal

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Jimmy and Jane Morris with granddaughters Janie and Katie

In This Issue

A current calendar of College events is posted on the College Website at www.actl.com, as are a current compendium of the ongoing projects of the College's National Committees.

From The Editorial Board

In this issue, we profile the incoming president, Jimmy Morris, who will be installed at the annual meeting in St. Louis. We also preview the St. Louis meeting.

We have initiated a practice of publishing opinion articles on timely subjects submitted by Fellows for publication. One of the articles from the last issue, Alan C. Kohn's *Playing According to the Rules*, generated a great deal of comment and a number of requests for permission to reprint it.

The other, Pete Vaira's *Videotaping Interrogations of Criminal Suspects*, dealt with a subject that has generated considerable interest among the criminal defense bar. Indeed, another Fellow, Thomas P. Sullivan, recently published an extensive scholarly paper on police experiences with recording custodial interrogations. You will find in this issue an article on the recognition that has come to Sullivan for his work on wrongful convictions.

If you have a subject on which you want to submit an opinion article, please consult with us in advance so that the Board of Editors can consider its suitability for publication.

In light of the ongoing review of the College's website and an increasing numbers of papers being submitted by various committees of the College for publication, President David Scott has separated the *Bulletin* from the Communications Committee and created a Board of Editors for the *Bulletin*.

Coverage of state, province and local activities of Fellows of the College is a continuing challenge. We would like to report every significant substantive activity done in the College's name. You will find in this issue reports of several such activities. If you are in charge of any such activity, be it a meeting of Fellows or a local College project,

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From The Editorial Board

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please make certain that someone sends us information from which we can note it in the *Bulletin*. In particular, we can always use high quality digital photographs taken at such events.

We continue to solicit your ideas for making the *Bulletin* more informative and more useful to the Fellows of the College.◆

Letters To The Editorial Board

Playing According to the Rules , *Spring 2004 Issue*.

I am a fellow from Twin Falls, Idaho. I will be a speaker at the annual "Orientation to Professionalism" at the University of Idaho College of Law, on August 17, 2004, to welcome the incoming first year students. The article entitled "Opinion: Playing According to the Rules" written by Alan C. Kohn, which appears on pages 5 & 6 of the [Spring 2004] *Bulletin* is excellent and contains a message that I believe all new law school entrants should hear and keep firmly in mind as they continue their legal education. I would like to make arrangements to obtain about 100 copies of that article or obtain permission to copy it myself for distribution to the students at that conference.

Please advise how that can be accomplished.

J. Robert Alexander
Twin Falls, Idaho

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Ed: Fellow John T. "Jack" Ballantine of Louisville, Kentucky made a similar request to use this article in a class he teaches at the law school at Louisville University. Consistent with the College's mission to maintain and improve the standards of trial practice, the administration of justice and the ethics of the profession, the editors will be happy to make available for republication any article that appears in the **Bulletin**.

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Dear Alan [Kohn]:

I just read with pride your article in the latest issue of the ACTL *Bulletin*. I think it's important to remind everyone that the suggestions in the "Streetwise" article [which I read with dismay] would seek to legitimize a manner of practice that is foreign to true professionalism and what we are supposed to stand for in the College.

Best Regards,
Phil Garrison
Springfield, Missouri
Phillip R. Garrison is Judge of the Missouri Court of Appeals

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Alan:

Your piece in the current ACTL *Bulletin* is right on the money. It should be required reading for new lawyers at the time of their admission to the bar. . . . Thanks for taking the time and making the effort to write an eloquent rejoinder to such wrong-headed ideas.

Jim Duncan
Concord, New Hampshire
James E. Duncan is a Justice of the Supreme Court of New Hampshire

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Mr. Kohn:

I was much impressed by your article in this quarter's ACTL *Bulletin*. I have heard the same kind of "advice" from others, and agree that it's appalling. I sit on our Supreme Court's Advisory Committee on Professionalism, and have shared your article with the members.

Thanks again for making a point that needs making, especially with the young lawyers.

Frank Carney
Salt Lake City, Utah

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President's Report: The Importance of Local Projects

One of the most interesting and inspiring features of my travels across North America on your behalf is the opportunity to learn of the extraordinary local projects undertaken by the Fellows of the College at the State and Province level. These projects are largely devoted to the education of law students and the continuing education of lawyers, in most cases public interest lawyers. As I noted in my report to you in the January issue of the *Bulletin*, the leadership of the College has determined that if we are to claim, as we do, that we represent the very best of the trial Bar, we must demonstrate our commitment to professional responsibility by sharing our skills and experience with law students, less experienced lawyers and the judiciary. The principal instrument for so doing has been the local project. The objective is that, to the extent possible, each State and Province Committee should have at least one project which is repeated on a regular basis, preferably annually, and which becomes representative of the College as the signature project for the particular State or Province. If the project utilizing the talents of the Fellows is thoroughly and skilfully executed, a byproduct will be, and has been, an elevation of the reputation of the College in those communities in which it is less well known through a more extensive knowledge of its existence and its professional undertakings.

Virtually every State or Province organizes, on an annual basis, a social gathering of Fellows designed to ensure the maintenance of contact and the strengthening of collegiality. However, these events are, in and of themselves, insufficient to meet the dictates of our mandate, specifically the maintenance and improvement of the standards of trial practice, the administration of justice and the ethics of the profession. In the circumstances, a vigorous focus on the nature and scope of local projects is warranted.

DAVID W. SCOTT

As the Fellows of the College are aware, materials are available from the National Office to assist States and Provinces in designing and implementing projects appropriate for their locale. Since my original report on this subject, a set of problems in Ethics have been approved by the Board of Regents and has now been published. These materials are available for the use of Fellows in conducting seminars with law students or less experienced members of the Bar. The materials are excellent. They consist of a number of problems printed in a form which enables the user to separate the problem from the proposed solution so that the student can consider the problems uncontaminated by premature resort to the solutions. The materials lend themselves typically to a two-hour seminar requiring minimal preparation which might be conducted jointly by a panel made up of Fellows and Judicial Fellows. Similar materials have been used in Canada with great success. It is anticipated that at the Annual Meeting, the Board of Regents will be invited to consider a third package of materials, namely an elaborate manual in problem format for use in the teaching of provisions of the Code of Trial Conduct.

Accordingly, the message from your leadership is that at the local level, States and

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PRESIDENT'S REPORT

(Continued from page 5)

Provinces should be exploring the development of their own project or projects by which they can showcase the extraordinary skill and experience of Fellows of the College. To this end, I thought it might be useful to outline in this report several such projects which are in place, and others which are in the planning stages to whet the appetite of Fellows and encourage all of us that these initiatives have real value. What follows are some illustrations which are taken at random and are a reflection, by example only, of what many States and Provinces are doing. I would urge you to consult the College website for a much more comprehensive view of what is underway in your area. Hopefully by this time next year, the website will disclose an even more extensive menu of activities.

Jim Bausch, for example, the State Chair of Nebraska, details a number of initiatives in his State, specifically a trial competition between teams from the Creighton School of Law and the University of Nebraska Law School by way of preparation for the regional and national trial competitions sponsored by the College. Nebraska Fellows function as judges in these competitions and, in addition, present a plaque each year to the winning school. Rutledge Young advises that each year in South Carolina the Fellows of the College teach a continuing legal education class at the University of South Carolina Law School devoted to civility and ethics in the trial practice. Jane Vogelwede, the State Chair in North Dakota, reports that the Fellows in her region have for several years conducted a cooperative project on professionalism at the University of North Dakota School of Law. The project is entitled "Trial Tactics and the Principled Professional" and it integrates civility and professionalism issues with the nuts and bolts of trial practice. Each year a team of Fellows co-teach trial advocacy students along with law school faculty.

Rob Goodin advises that in Northern California, the State Committee conducts a statewide trial advocacy training program for public interest lawyers. This effort is in collaboration with the Public Interest Clearinghouse whose mission is to provide support of all kinds to the community of public interest lawyers in California. As reported by the State Chair, Charles Faruki, in Ohio the Fellows, in conjunction with the Ohio State Bar Association, conduct an annual seminar on the subject of ethics and professionalism. In Wisconsin, Wayne Babler's Committee has presented the College's program for public interest lawyers at Marquette University Law School in Milwaukee to about 64 public interest lawyers from all over Wisconsin, notably without charge. The faculty consists of Wisconsin Fellows and members of the judiciary and the law school faculty.

In Iowa, the State Committee under the leadership of Jim Hayes contributes to the planning of, and offers the services of, Iowa Fellows as faculty for a three day trial training seminar for young lawyers at the University of Iowa College of Law. In the Province of Quebec in Canada, the Province Committee is committed to an ongoing project of ethics and professionalism. A panel of Fellows has been formed which attends university law schools in the Province to provide a wide range of exposure to the challenges facing trial lawyers.

In the District of Columbia, as in several other States, Jack Bray's Committee provides Fellows to act as judges and evaluators for the regionals of the National Trial Competition which is held in Texas each year. Judge Philip Garrison, the Chair of the National Trial Competition of the College, has laboured assiduously to persuade State Committees to

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REFLECTIONS OF A PAST PRESIDENT

(PAST PRESIDENT WARREN LIGHTFOOT AND HIS WIFE ROBBIE MADE A REMARKABLE 45 TRIPS FOR THE COLLEGE DURING HIS YEAR AS PRESIDENT. HERE ARE EXCERPTS FROM HIS REPORT.)

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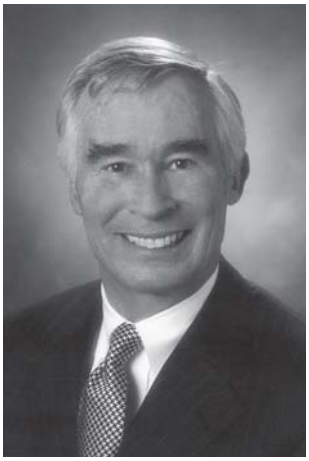
Over and over I was able to see that our Fellows, dedicated and determined as they are, make a difference. Consider the three major divisions of our membership. First, our criminal law practitioners show the world daily what real independence is. The press and the public vilify them because of their clients' conduct, and our brothers and sisters at the criminal bar nonetheless stay the course.

In 1996 the Alabama State Bar dedicated a memorial in Monroeville, Alabama, to the ideals personified by Atticus Finch in *To Kill A Mockingbird*. A few days later, I received a letter from Harper Lee who still lives and practices law part-time in Monroeville. In that letter, which hangs in my office, Harper Lee says our profession has always had "some real-life heroes—lawyers of quiet courage and uncompromising integrity who did right when right was an unpopular and dangerous thing to do." Ms. Lee's words describe our Fellows at the criminal bar, who in every sense of the words, strengthen and preserve the mighty fabric of our law. The world watches our Fellows at the criminal bar, and the world marvels.

What about our Fellows who defend corporations regularly? I believe they hold more sway in boardrooms now than ever before. In these times of corporate disrepute, our Fellows lend their names and their sterling reputations to their corporate clients. And the companies benefit from the singular standing of our Fellows, with the jury, with the trial judge and at the appellate level. Robert Louis Stevenson said, "personal honor is the distinguishing badge of the legal profession" and the corporate defendant pays for just that - the good name and honor of our Fellows. And our corporate practitioners, in lending their rectitude when the companies need it the most, insist that their clients listen and change their ways. Fellows of this College regularly demand that their clients ask themselves the question Dean Roscoe Pound posed: "Regardless of whether it is the lawful thing to do; is it the right thing to do?" And top management watches and learns from our Fellows.



WARREN LIGHTFOOT

Our Fellows who practice plaintiffs law have the awesome responsibility of advising truly unsophisticated clients, and they quite literally hold their clients' financial lives in their hands. Giving voice to those who would otherwise go unheard, empowering those who have been bereft of power, and seeking remedy for those who have been wronged can be a high calling. And look at the differences made by our Fellows at the plaintiffs bar: because of them our workplaces, products and recreation areas are the safest in the world, because of them the disabled are accommodated, civil liberties are preserved, the victims of discrimination are made whole, our environment is the cleanest it has ever been. Our colleagues at the plaintiffs bar have literally transformed the face of this continent, and the public good is unquestion-

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Reflections of a Past President

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ably served by this proud segment of our membership. And the *least* among our citizens watch and are encouraged.

Our Fellows go far beyond their courtroom work in serving our profession. As Robbie and I went from city to city, we could see the stature of the men and women we came to know. Our Fellows are leaders at the bar; they teach other lawyers; they teach law students; they teach *judges*. Over and over we learned that when a significant project is undertaken enhancing our justice system, a Fellow leads the way. Many times through College-sponsored activities, our members reach out to and serve the public, and many times they do it on their own. Despite the heavy demands of courtroom work, our Fellows are giving back at an unparalleled level. And young lawyers watch and emulate.

. . .[F]ellows for over a half century have been in the vanguard of our profession, standing squarely between corporations and the wealthy on the one hand and the public on the other.

Despite all this, the press and the public complain about the image of our profession. Our Fellows' answer to those critics is, "We're going to be the best lawyers we can be and our image will take care of itself." We're not in a popularity contest, our Fellows say; we never have been. If Fellow Jim Brosnahan worried about his image, he would never have taken on the representation of John Walker Lindh. If Fellow Fred Gray of Alabama had been concerned about his popularity, Rosa Parks would have languished in jail and the civil rights movement might have foundered.

Finally, I confirmed what I already knew. Our Fellows are not just sages of our craft, they are not just masters of the arena, they live full and multi-dimensional lives. And the spouses are enormously talented; not only do they support our Fellows in reaching the pinnacle of our profession, they are interesting and accomplished individuals in their own right. Among the ranks of our Fellows and spouses are painters, anthropologists, horticulturalists, physicians, sculptors, musicians, journalists, philosophers, novelists, historians and naturalists; and throughout the College we found a universal love of literature, history and travel. Chancellor Gumpert put it well: we can find pleasure and charm in the illustrious company of our contemporaries in this great College.

Justice Oliver Wendell Holmes said this about our profession: "We cannot live our dreams. We are lucky enough if we can give a sample of our best and if in our hearts we can feel that it has been nobly done." What I learned this year about our Fellows, Mr. President, is that across the length and breadth of our continent, they have indeed made a difference, and it has been nobly done.◆

Roster Update

Preparations for the 2005 edition of the ACTL Roster are underway. Address change notices were sent to all Fellows in early July. Please mail any changes to the National Office or e-mail Kathy Good at kgood@actl.com so that she can update your listing. If you have changed firms or moved, please be sure to include your new e-mail address, telephone and fax numbers.

NATIONAL TRIAL FINALS FEATURE 26 LAW SCHOOLS

Twenty-six trial teams from law schools across the United States competed in the National Trial Competition Finals in Austin, Texas March 25-27, 2003. Approximately 125 law schools compete in 13 regional competitions each year, with the top two teams from each regional advancing to the national finals held in Texas. The competition, which was instituted at the request of Fellow David J. Beck of Houston, has been co-sponsored by the American College of Trial Lawyers and the Texas Young Lawyers Association since its inception in 1975, and is recognized as one of the pre-eminent such competitions in the country.

This year, the winning team was the University of Houston Law Center. As the national champion, it has received the Rotating Hon. Jerry R. Parker Championship Trophy, and will receive the Kraft Eidman award of $5,000 provided by Fulbright and Jaworski. Stetson University College of Law was second, and Rena Upshaw-Frazier of Stetson was selected as the best oralist. A representative of the winning team and the best oralist will be invited to attend the Annual Meeting in St. Louis, Missouri and receive the respective awards.

The historical function of the National Trial Competition Committee of the College has been to judge the competition finals. This year, the following officers and members of the Committee, gave of their time in attending and participating in the final rounds of the competition: David W. Scott, President; Charles H. Dick, Jr., Regent Liaison; Judge Phillip R. Garrison, Chairman; Rodney Acker, Dallas, Texas; Douglas M. Butz, San Diego, California; Sam P. Daniel, Tulsa, Oklahoma; J. Clifford Gunter, III, Houston, Texas; Nan M. Horvat, Des Moines, Iowa; Christy D. Jones, Jackson, Mississippi; Judge Garr M. "Mike" King, Portland, Oregon; John C. McDonald, Columbus, Ohio; Oliver C. Mitchell, Jr., Dearborn, Michigan; Brian B. O'Neill, Minneapolis, Minnesota; Judge William Jay Riley, Omaha, Nebraska; Joseph D. Steinfield, Boston, Mass.; Jane C. Voglewede, Fargo, North Dakota; Judge T. John Ward, Marshall, Texas; and Ray A.Weed, San Antonio, Texas.

Increased efforts have been made the last two years to increase participation of the College Fellows as judges of the regional competitions. Each of the State Chairs has been requested to encourage

Fellows urged to participate

Fellows to participate, and thus give the students the benefit of being critiqued by the best trial lawyers in the United States. This year, the State Chairs have also been furnished with a list of law schools that are not now participating in the competition, and have been requested to encourage Fellows to contact their alma maters or other law schools

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National Trial Finals

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with whom they have some influence with the hope that even more law schools will be included next year. These activities are in keeping with the commitment of the College to the competition as a wonderful training ground for young trial lawyers, an opportunity for law students to be exposed to and be judged by Fellows of the College, and in recognition of the fact that it is becoming increasingly difficult for young lawyers to gain practical experience because of the decreasing number of trials in this country.

The National Trial Competition Committee requests that each Fellow living in a geographical area near the regional competitions make an effort to participate in those events as judges, and also to encourage the non-competing law schools to take part in the competition. Next year, the regional competitions will be held during one of the following weekends, as selected by the regional hosts: February 4-6, 2005; February 11-13, 2005; and February 18-20, 2005. The identity of the regional hosts, the location of the regional competitions, and the dates of each regional will be listed on the College's website as they become available at www.actl.com.◆

Nominations Set For Annual Meeting

At the Annual Meeting of the College in St. Louis in October, the officers nominating committee will nominate the following to serve as officers of the College for the year 2005:

President	James W. Morris III, Richmond, Virginia
President-Elect	Michael A. Cooper, New York, New York
Secretary	Mikel L. Stout, Wichita, Kansas
Treasurer	David J. Beck, Houston, Texas

These four and immediate past president David W. Scott will constitute the Executive Committee for the coming year.

Robert W. Tarun, Chicago, Illinois and John H. Tucker, Tulsa, Oklahoma, will be nominated for vacant seats on the Board of Regents. Tarun, who was nominated by the Regents Nominating Committee during the past year to fill the unexpired term of a Regent who had resigned, is eligible for election to serve a full four-year term on the Board. Tucker will be nominated to replace Regent Mikel Stout upon his election as an officer.

Under the College bylaws, a Regents Nominating Committee, chaired by a member of the Board of Regents and composed of two Regents, two Past Presidents and two Fellows at large, nominates candidates for the Board. Regents are elected at a business meeting of the Fellows that usually follows the Saturday morning program at the annual meeting.

The Board elects its officers upon nomination by the past presidents at a reorganizational meeting that follows immediately thereafter. Only a Fellow who has served as a Regent is eligible to become an officer of the College.◆

SULLIVAN HONORED FOR WORK ON INNOCENCE PROJECT

Chicago attorney Thomas P. Sullivan, FACTL, former United States Attorney for the Northern District of Illinois, has been chosen as the 2004 recipient of the American Judicature Society's Justice Award.

This award, the Society's highest honor, is given annually to an individual or group making significant contributions to improving the administration of justice at a national level. Previous recipients have included the late Chief Justice Warren E. Burger, Dwight Opperman and the late Chesterfield Smith.

Sullivan will receive the award on October 21 in Chicago in a ceremony at which Janet Reno, former United States Attorney General, will be the keynote speaker.

During his term as United States Attorney, Sullivan spearheaded Operation Greylord, the initiative that exposed widespread judicial corruption in Illinois. It is widely regarded as the single most extensive investigation into judicial corruption in our nation's history.

Then-Governor George Ryan tapped Sullivan to co-chair his newly created Commission on Capital Punishment. As the result of that Commission's findings, Governor Ryan granted clemency to all Illinois Death Row inmates, a move that prompted widespread national debate over wrongful convictions.

Viewed as a leading expert on issues of wrongful convictions, Sullivan currently serves as Chair of the Advisory Board of the Center on Wrongful Convictions at the Northwestern School of Law. His research paper entitled *Police Experiences with Recording Custodial Interrogations*, documenting interviews of 238 police departments throughout the United States concerning their experience with electronic recording of police interviews with criminal suspects, was published by the Center earlier this year.

That report and its recommendations prompted news articles and editorial comment throughout the country, including *The New York Times,* the *Chicago Tribune*, the *Chicago-Sun Times*, the *St. Louis Post-Dispatch*, and the Nashville *Tennessean.* It also prompted an article in the Spring 2004 issue of the *Bulletin*, entitled *Opinion: Videotaping Interrogations of Criminal Suspects.* Sullivan's report and its appendices are posted online at:http://www.law.northwestern.edu/wrongfulconvictions/Causes/CustodialInterrogations.htm.

The press release of the American Judicature Society stated: "Sullivan is one of the most well-respected trial lawyers in the nation. His career is marked with many profound accomplishments that have helped to improve the nation's justice system. His many leadership roles, both as a private lawyer and public servant, reflect his dedication to the improvement of the court system."

An Army veteran who served in Korea, Sullivan is a senior partner at Jenner & Block, LLP, where, except for his four-year stint as U. S. Attorney, he has practiced since 1954.◆

Fifty Years Ago

(Excerpted from The First Fifty Years of the American College of Trial Lawyers)

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Despite the College's growing prestige and its influence in 1954, it was still trying to define its place and its relationship with other bar organizations, particularly the ABA.

It was fifty years ago that the ABA Board of Governors considered and then rejected creation of a Council of Legal Specialists, which if organized would have threatened the existence of the College and several other specialized associations. The ABA's House of Delegates did conclude at its March 1954 meeting that "some regulation in the various fields of practice of the law for the protection of the public and the bar" was necessary.

Some College leaders were wary of ABA intrusion into organizations that focused on legal specialties. President Cody Fowler delivered the College's views in a September 21, 1954, letter to the ABA Board of Governors in which he wrote, "Organizations of men who are interested in one branch of the law, as long as they do not violate the ethics of the profession, should have the right to do so without interference from the American Bar Association. The American Bar Association does not have to approve them nor should it seek to disapprove such organizations or to say that there can or cannot be such organizations. There are any number of associations of men who are interested in certain branches of the law, for example, International Association of Insurance Counsel, Probate Attorneys Association, Commercial Law League, Federation of Insurance Counsel, Federal Communications Bar Association, American Patent Law Association and the American College of Trial Lawyers."

Fowler continued that he believed none would object if the ABA prescribed the requirements for membership in such organizations. But he added, "I do not, however, believe it would be constructive for the American Bar Association to set up its own organization in opposition to each of these organizations. To do so would bring on conflict between organizations of long standing and consisting of top men in their respective branches of the law."

Fowler, of Tampa, Florida, had been president of the ABA in 1950. Then he was elected the third president of the American College of Trial Lawyers in 1952 and re-elected to a second term in 1954, the only person to serve more than one term.

From his background, Fowler seemed an unlikely candidate for professional leadership. Born the son of a cotton broker in rural Tennessee near Memphis on December 8, 1892, he claimed to be related to the famous Indian scout and Wild West showman William F. "Buffalo Bill" Cody.

Fowler was elected to the ABA House of Delegates in 1941 and in 1946 to its Board of Governors, where he represented Florida, Georgia, Alabama, Mississippi, Louisiana, and Texas. In February 1950 he was nominated for president of the ABA and he assumed office in September at the organization's convention in Washington, D. C.

Fowler had been in office as president of the ABA for less than a month when he

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Fifty Years Ago

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was introduced to the newly formed American College of Trial Lawyers in the fall of 1950. At fifty-seven, Fowler was at the top of his profession and his firm was one of the largest in Florida, with more than fifty lawyers in offices in Tampa and Miami.

In October 1950, Fowler had taken the Santa Fe Super Chief from Chicago to Los Angeles to attend the convention of the State Bar of California. "'I was returning from a speaking engagement when the president of the California bar told me there was a group of men who would like to see me," Fowler recalled. "We stopped at a suite where six or eight men were drinking and eating wild duck. After I was introduced, I was asked, 'Are you a trial lawyer?' My answer was, 'I am the best "blankety-blank" trial lawyer in this room.' They laughed and asked me to sit down and have a few drinks and some duck while they went into the next room for a conference. When the gentlemen returned, they told me that they had formed an organization to be known as the American College of Trial Lawyers and I was invited to join."

Fowler said he would be glad to join, but on the condition that the new organization choose only the best trial lawyers and limit the number. He told them he didn't want to join another bar association because he belonged to plenty of those already.

The group agreed, naming founder Emil Gumpert as the contact, and Fowler got busy. In the next fourteen months he looked for outstanding trial lawyers as he talked to bar groups in thirty-two states and the District of Columbia.

Among the early contacts whose names he supplied to Gumpert were leaders in the American legal profession such as Theodore Kiendle of the Davis Polk firm in New York, Whitney North Seymour of Simpson Thacher and Bartlett in New York and Lewis C. Ryan of Syracuse, New York. The latter two would one day serve as presidents of the College.◆

In Memoriam

The College has received word of the deaths of the following Fellows:

J. Wallace Adair, Boca Raton, Florida; Phillip W. Bartlett, Reno, Nevada; Fred H. Cagle, Jr., Knoxville, Tennessee; Thomas T. Chappell, West Creek, New Jersey; Honorary Fellow Sir George Phillips Coldstream, Q.C., East Sussex, England; Hearst R. Duncan, Des Moines, Iowa; Ben Franklin, Oklahoma City, Oklahoma; Thomas Glen Gorman, Cheyenne, Wyoming; George C. Grant, Macon, Georgia; John J. Greer, Iowa City, Iowa; Henry Harfield, New York, New York; Former Regent George P. Hewes, III, Jackson, Mississippi; Barnard Houtchens, Greeley, Colorado; E. Michael Kelly, Chicago, Illinois; Prentice H. Marshall, Sr., Ponce Inlet, Florida; Frank E. (Sam) Maynes, Durango, Colorado; Joseph V. Pinto, Maple Glen, Pennsylvania; Thomas R. Price, Memphis, Tennessee; Bruce D. Rasmussen, Charlottesville, Virginia; Francis M. Smith, Sioux Falls, South Dakota; J. Edwin Smith, Houston, Texas; Jesse W. Walters, Albany, Georgia; Arnold J. Wightman, Manchester, Connecticut; Donald H. Zarley, Des Moines, Iowa.◆

Fellows to Gather This Fall in St. Louis

St. Louis Mayor Francis G. Slay will welcome Fellows at the College's Annual Meeting on October 21-24.

United States Supreme Court Associate Justice Sandra Day O'Connor will deliver the last of the Lewis F. Powell, Jr. Lecture series. Dr. Gene Nichol, Dean of the University of North Carolina Law School, will speak on the 30th anniversary of *Brown v. Board* of Education. Virginia Supreme Court Justice Donald W. Lemons will speak on "The Legacy of Jamestown."

Other speakers will include Robert R. Archibald, president of the Missouri Historical Society, who will talk on the Lewis and Clark Expedition; Dr. Joel Seligman, Dean of the Washington University School of Law in St. Louis; Iraq Ambassador to the United States, Her Excellency Rend al-Rahim; and Robert J. Grey, Jr., the president of the American Bar Association.

The College's Courageous Advocacy Award will be presented to Bryan Stevenson, founder and executive director of the Equal Justice Initiative of Alabama. The Samuel E. Gates Litigation Award will be given to retired United States District Judge Robert R. Merhige of Richmond.

An honorary Fellowship will be presented to Justice Louis Lebel of the Supreme Court of Canada. Winners of the National Trial Competition, National Moot Court Competition and the Gale Cup will be recognized.

And President-Elect Jimmy Morris of Richmond, who organized this year's program, has promised that a leading lawyer novelist will speak.

Fellows and their guests will witness part of the celebration of the 200th anniversary of the Lewis and Clark Expedition, the 100th anniversary of the St. Louis World's Fair and the 100th anniversary of the first Olympics held on American soil with St. Louis as the host city.

The dates also mark the 100th anniversary of the Louisiana Purchase Exposition, which had been held in St. Louis to mark the centennial of the actual transfer of the territory from France in 1804.◆

Virginia Mock Trial Plays to Packed House

As part of a presentation of Trial Skills for Public Interest Lawyers, the College co-sponsored a mock civil jury trial on March 31 at the Lewis F. Powell, Jr. U.S. Courthouse in Richmond, Virginia.

It was the second part of a program of continuing education for public interest lawyers that began last year.

Virginia Fellows participating in the mock trial were William D. Dolan, Charles E. Witthoefft, Thomas J. Cawley and William H. King, Jr. Virginia State Chair Michael W. Smith acted as moderator and Fellow Craig T. Merritt arranged for jurors, who were chosen from the Governor's School, a public high school in Richmond.

The Honorable Robert E. Payne, Judge of U.S. Court for the Eastern District of Virginia, Richmond Division, was the presiding judge.

The program was co-sponsored with the Special Committee on Access to Legal Services of the Virginia State Bar.◆

INTERNATIONAL COMMITTEE SUBMITS REPORT ON INTERNATIONAL CRIMINAL COURT

As the world grows smaller and seemingly more lawless, dealing with the perpetrators of war crimes and crimes against humanity becomes an increasingly vexing issue.

Indeed, the 1999-2000 Anglo-American Legal Exchange, which the College helped to sponsor, devoted a day to the impact of supranational tribunals such as the International Criminal Court on domestic tribunals. One of the British delegates had in fact authored the first British appellate decision in the Pinochet extradition case.

At the 2003 Spring meeting in Boca Raton, former Ambassador-at-Large David J. Scheffer spoke for, and State Department advisor Edwin D. Williamson spoke against the participation by the United States in the new International Criminal Court.

Then, at the 2003 annual meeting in Montreal, international human rights lawyer Dr. Irwin Cotler, now the Minister of Justice of Canada, and Canadian Supreme Court Justice Louise Arbour, former chief prosecutor of the war crimes tribunals for Yugoslavia and Rwanda, both spoke passionately in favor of that Court.

At least two Fellows of the College have already recently defended criminal defendants at the Hague and have written and spoken on their experiences. The International Criminal Court, which has been ratified by more than 90 countries, will inevitably impact clients of Fellows of the College who practice criminal law.

A subcommittee of the College's International Committee has drafted and submitted to the Regents for possible publication a comprehensive report that provides a useful insight into the history of the International Criminal Court's creation, its role and its process and procedures. It explores the delicate political and legal issues that led to the United States' decision to oppose the creation of the Court in its present form and with its present rules.

Accepting the political reality that the United States is unlikely to submit itself to the jurisdiction of that Court in the foreseeable future, and without taking sides on the question whether the United States should or should not ratify the Rome Statute that created the Court, the report suggests areas where the College is equipped to make a contribution to insure fairness in its procedures.

The report points out in particular the need for strengthening the provisions for adequate defense of an accused brought before the Court and for development of an institutional criminal bar to provide that defense.

It is anticipated that the report will be submitted to the Regents at the annual meeting with a recommendation that they authorize its publication, as a resource for further study and debate. ◆

Threesome Presents College Codes to Federal Judges

Seattle Fellows C. William Bailey, Charles C. "Chuck" Gordon and James L. "Jim" Magee, representing the College's Professionalism Committee, presented the College's Codes of Pretrial and Trial Conduct to approximately fifty attendees at a conference of Chief District Judges and Clerks of Court of the 9th Circuit on August 17.

After introducing the College, the presenters used the Codes and excerpts from relevant writings, addresses and written orders and opinions to engage the audience in exploring how the bench and bar might work together to bring an end to the incivility, arrogance and sharp practices that characterize zealous advocacy out of control.

The presentation provoked a lively and frequently humorous exchange with the audience, and was well received by the judges and clerks who participated.

President David Scott, recognizing that this program might be the first of its kind in the College's history and a "door opener" for future such presentations, has asked the participants to preserve and make available the materials they used, so that other Fellows can make use of them in similar presentations.

The College has made arrangements to have the two Codes, which have been printed and bound together, distributed to all federal judges. Fellows are reminded that copies of these Codes are available in quantity from the College office for use in educational programs.◆

Former Georgia Governor Honored

Former Georgia Governor **Roy E. Barnes**, FACL, was honored on August 9 by the American Bar Association Standing Committee on Pro Bono and Public Service with its Pro Bono Publico Award. Established in 1984, this award recognizes lawyers, law firms and other legal institutions for extraordinary or noteworthy contribution to extending free legal services to the poor and disadvantaged.

At the end of his term as governor, Barnes served a six-month tenure as a volunteer staff lawyer for the Atlanta Legal Aid Society, exemplifying his long commitment to providing legal services to the poor. According to the citation that accompanied his award, "During this time with the Atlanta Legal Aid Society, Barnes devoted himself to using his formidable litigation skills to help clients, particularly elderly and disabled victims of predatory lending practices. Beyond donating his legal services, he committed to sharing his considerable legal knowledge and experience by participating in ongoing training programs at Legal Aid, and he leveraged his excellent reputation among Atlanta's lawyers to improve the delivery of legal services to low income people and to increase *pro bono* involvement throughout the city."◆

PRESIDENT'S REPORT

(Continued from page 6)

pursue this undertaking so that Fellows are made available to act as judges in the regional run-offs leading to the national finals. Richard Zielinski reports that in New England, in cooperation with the New England Legal Services Training Consortium, Fellows of the College, under the leadership of the State Committee, conduct a trial advocacy workshop for legal services lawyers. Participants, utilizing a modified version of the NITA Trial Advocacy format, receive training in the full range of trial skills from opening statements to closing arguments. In Virginia, Mike Smith's Committee followed up on a successful day-long program for the teaching of trial skills to public interest lawyers last year with a mock trial presentation for the public interest Bar this year. The lawyers were Fellows of the College and the jury consisted of 12th graders from one of Richmond's public high schools. It is anticipated that these programs will continue to be presented in the future.

Many similar programs are offered in States and Provinces across the continent. The outline above represents only a small sample. Further, programs are in the planning stages and will be presented in the current year or next year, hopefully with a continuum into future years. For example, the State Committee in Maryland is at work on the development of an education committee to increase participation in local law schools; Jim Virtel in Missouri has planned a trial demonstration program in Kansas City for September, including a demonstration of trial skills by College Fellows; Richard Herschel in Louisiana has organized a trial advocacy program for public interest lawyers in cooperation with North Louisiana Legal Services, adopting the program available through the College; and Steven Kirsch in Minnesota is at work with the law schools in the State, planning to present the College ethics course based upon the materials outlined above. In addition, a number of States and Provinces are preparing historical rosters of Fellows past and present. In particular, in Oklahoma, Floyd Walker has undertaken an ambitious program of developing such a roster which will include not only identification of past Fellows of note, but also biographical details identifying special moments in their careers as trial lawyers.

It is regrettable that it is not possible to outline all of the projects conducted in States and Provinces, but once again I would urge the Fellowship, from time to time, to consult the website on which we have developed an increasingly detailed picture of what is currently in play. It can be seen that a great deal is being done at the State and Province level to develop projects which will become identified in the minds of the judiciary, law school teachers, public interest lawyers and the profession at large with the American College of Trial Lawyers. This has not always been the case in our history. Presently, much more is being done than heretofore in ensuring that the inventory of trial skills expressed by the profile of Fellows in the College is utilized in a practical way in the interests of the next generation of professionals.

All of us are keenly aware of the phenomenon expressed by the reduction in absolute numbers of civil trials. The ramifications of this phenomenon are many, not the least of which is that the opportunity for less experienced lawyers to develop trial skills is markedly reduced. All the more reason why the Fellows of the College will wish to contribute to the elimination of this deficiency by developing permanent local projects of a seminar or teaching kind. In the course of so doing, we validate the College's claim that the Fellows represent the very best of the trial Bar.◆

PRESIDENT-ELECT MORRIS

(Continued from page 1)

sides of his family. His uncle, the late John Barrs "Jack" Browder, an early Fellow from Virginia, was his role model and mentor, as was Richard L. "Dick" Williams, also a Richmond Fellow, now a federal district judge.

"I thought about doing nothing else," Morris said. When he graduated from the University of Richmond law school in 1958, he immediately joined his Uncle Jack's firm. (Morris's brother, Philip, also a Fellow, joined the firm in 1960, and they have practiced together for 44 years and with Jack Browder until he died in 1989.) He had entered a hotbed of trial lawyering in Richmond, where greats such as Lewis Powell and Harvey Chappell, both College presidents, George E. Allen, Sr. and Oliver Hill, both Fellows, practiced. (Allen was the first winner of the College's Courageous Advocacy Award in 1965. Hill won the Award in 2001.)

Morris quickly found that he had a talent arguing cases before juries. "I have tried more than five hundred jury trials to conclusion," he said, "and countless non-jury trials. Essentially, I have been a small town trial lawyer, mainly a 'dented fender' insurance defense lawyer, some plaintiff's work, but over time I have tried almost every kind of case there is on the civil side."

Over the years, Morris has found himself in demand as a product liability defense lawyer and for commercial and professional trial matters. He is proud that he is called in to represent lawyers and law firms in a variety of matters and that much of the trial work that comes to the Morris brothers is referred by other lawyers.

"Trial work is never boring, but if you don't happen to like it, you won't last long," Morris said. "To quote Warren Lightfoot, 'You go to sleep at night terrified that you might give less than your best to your client.' When you give your best, even a losing client has a sense of satisfaction and respect for the system."

Quoting a Rudyard Kipling poem that his lawyer grandfather read to him as a child—"For the strength of the pack is the wolf, and the strength of the wolf is the pack"— Morris says the College must capitalize on its strength, the outstanding reputation of individual Fellows in their own communities, particularly when a new Fellow is inducted.

"People in the states and provinces may not know the College well, but they will know who the Fellows are," said Morris, whom everyone knows as Jimmy.

"We are very well known in the highest courts in the Unites States and Canada, even the law lords of England, but surveys suggest that out in the states and provinces not all the judges, not everybody who practices law, even trial lawyers, have a firm grasp of who we are and what we are about. We must continue to emphasize what makes us stand out from these other 'Colleges' and 'trial lawyer' organizations. This means relating to those persons that we consider our 'public.'" Recent successful efforts include the publication of our joint Codes of Pretrial and Trial Conduct, the continued upgrade of the *Bulletin* and the website and heightened efforts, such as Tombstone announcements at the State and Province level, to identify with our inductees and Fellows.

"We must communicate effectively with the Fellows and offer an opportunity to participate directly and meaningfully in the affairs of the College to those who wish it. The College has to mean more than an honor and a plaque on the wall.

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PRESIDENT-ELECT MORRIS

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Currently the activities of our State/ Province and General Committees are at a high water mark (see the website listing) and we plan to keep it that way."

JAMES W. MORRIS, III

The College also must continue to identify and bring more women and minorities into the fellowship, Morris said. Although the College ranks include many more women, including chairs of various committees and two current Regents, minorities are still few and far between, he said. "It's a whole lot better, but a long way from where we ought to be. We can do better and we will."

"The independence of the judiciary is under attack directly and by erosion from various sources," Morris said. Particular threats are legislative-driven sentencing guidelines, which diminish the discretion of trial judges, "oversight" of judges, which challenge independence. Loosened restrictions on election campaign rhetoric and contributions further diminish respect for the bench and the justice system.

"Unjustified attacks on the American jury also contribute to loss of respect for the justice system," Morris said. "The right to a trial by jury is sacred and essential to the public's connection to and satisfaction with the justice system. The College should stand foursquare in support of the American jury, strive to improve it, honor it and at every opportunity should refute unfair criticism of that institution. We hope to establish a new standing committee at the College focusing on the jury."

Morris is concerned about the attacks on the trial lawyer profession, exemplified recently with the candidacy of John Edwards for vice president. (Edwards, a Democratic U.S. senator from North Carolina, is the only member of Congress who is also a Fellow.)

"Whether you are a Democrat or a Republican, attacking him because he is a 'trial lawyer' is an attack on trial lawyers themselves," Morris said. "There are excesses, which prompt legitimate complaints about some elements, but such are properly addressed as aberrations and individual failings, not by turning the honored appellation 'trial lawyer' into a pejorative."

When he is not working, Morris likes to relax with his wife Jane, their children and grandchildren at Virginia Beach. He and Jane have been married forty-seven years and have a son, James Watson "Jimmy" Morris, IV, and a daughter, Carolyn Morris O'Connor, both in Richmond. Son Jimmy IV is single and operates his own landscaping business. Daughter Carolyn, a court reporter, is married to Paul O'Connor, who applies computer science to the warehousing industry. They have two daughters, Janie, twelve, and Katie, ten.

Morris became a life master in contract bridge thirty years ago, when he "had more time," and intends to resume that pursuit, if and when he retires. Now his leisure time is consumed with voracious reading, three daily newspapers and especially historical biographies, novels by Texas writer Larry McMurtry and sea adventure author Patrick O'Brian. He is personally acquainted with lawyer novel-

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President-elect Morris

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ists John Grisham, John Martel, FACTL, and David Baldacci, and particularly enjoys their work.

"I love spectator sports; I used to play tennis, but my elbow doesn't let me do that any more," Morris said. "In my firm here the young people have taught me to play fantasy football and fantasy golf. I'm every bit as competitive about that as I am about trying lawsuits. As a matter of fact, I won the firm trophy in fantasy football this year."

The impressive looking loving cup—the John Barrs Browder trophy—sits in a place of honor on a window ledge in Morris's twelfth floor corner office in downtown Richmond.◆

James W. Morris, III

Attended Richmond Public Schools; Virginia Military Institute and Randolph Macon College; graduate of the University of Richmond School of Law; Partner, Browder, Russell, Morris and Butcher (1960-1989); Chairman, Morris and Morris (1989-____); Special City Attorney for Anti-Trust Matters, City of Richmond (1983-1985). Member of the Richmond Bar Association (President 1998-99); Virginia State Bar; American Bar Association; Virginia Association of Defense Attorneys, a founder and Past-President, recipient of Award for Excellence in Civil Litigation (1995); Permanent member, Judicial Conference, U.S. Court of Appeals, 4th Circuit; Supreme Court Historical Society (Board of Trustees, 1997-_____); Defense Research Institute and Trial Lawyers Association, Past-President and Chairman of the Board; International Association of Defense Counsel; Sustaining Member, Product Liability Advisory Council (Board of Directors,1989-1991); Member, Lawyers for Civil Justice, Board of Directors (1988-1990); Fellow, Virginia Law Foundation; Fellow, American Bar Foundation; Fellow, International Academy of Trial Lawyers; Fellow, American College of Trial Lawyers.

Fellows To The Bench

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

William Lucero, Presiding Disciplinary Judge, Colorado Supreme Court, Denver.

John C. Murray, Superior Court of Justice, Milton, Ontario.

James L. Robart, Judge, United States Court for the Western District of Washington.◆

OPINION: THE VANISHING TRIAL AND THE PROBLEM NO ONE WANTS TO TALK ABOUT

The trial bar has been absorbed recently with anguished discussion of the phenomenon we have labeled "The Vanishing Civil Jury Trial."

In December 2003, the American Bar Association's Litigation Section sponsored a three-day symposium on the subject. That same month, American College of Trial Lawyers president David Scott appointed an Ad Hoc Committee on the Future of the Civil Trial to study the simultaneous "litigation explosion and trial implosion" that have characterized the last four decades and to assess their implications for the College. That committee will render its report to the College's Board of Regents at the annual meeting in St. Louis.

That a problem exists has been easily documented—and quantified—through court statistics from jurisdiction to jurisdiction.

Most civil cases deserve to be settled. There is usually some sweet spot toward which an objective risk/reward analysis, aided by sound advice from counsel, points both parties. In an ideal world, the process works because both parties know that if they do not reach some accommodation, their conflict will be resolved—and they are entitled to have it resolved—by a jury of their peers presided over by an knowledgeable judge.

That ideal world does not now exist. The place of jury trials in resolving disputes has been usurped by:

- Summary judgment after exhaustive discovery has taken place,
- Compulsory court-ordered mediation or arbitration or other forms of ADR, also usually at the end of discovery,
- Settlements arrived at, not by weighing the merits, but to avoid the cost of navigating the procedural hurdles imposed by the system between filing and trial,
- Settlements arrived at, not by weighing the merits, but to avoid delay in adjudication resulting from those same factors,
- Settlements arrived at through acquiescence to strong-arm tactics by a judge whose mandate is to get rid of cases, instead of trying them, and
- Settlements arrived at by weighing other non-merits-based factors, including the lack of adequate judicial resources to get cases to trial.

All of these factors except the last are inherent in the procedural framework under which our courts now operate in most jurisdictions.

One would have to have tunnel vision not to recognize that any accounting of the cost that results from this systemic problem must include not only the expense of prosecuting or defending a civil action, but also the money paid on claims *not* owed and the money *not* paid on valid claims because the party with the valid claim or the valid defense has been priced out of the system. How many valid claims go unaddressed because it takes too long and costs too much? How many cases are settled, not on the merits, but because the cost of the game is not worth the candle?

Add to this the intangible cost to us all of not having a jury trial available to resolve disputes that cannot be otherwise resolved. One has only to reread on the College website the

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OPINION: THE VANISHING TRIAL

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impassioned remarks of Judge William G. Young at the College's Spring 2004 meeting or of Canadian Bar president and Fellow Simon V. Potter at the Spring 2003 meeting (Summer 2003 *Bulletin*) to be reminded that when we deprive potential litigants of the right to jury trial, our society—our system of government— is the real loser.

The studies done to date have identified multiple discrete causes for the decline of civil jury trials. Some of these are, to a greater of lesser degree, a part of the problem. Some are causes, some are merely symptoms.

But we have not done, I submit, what good lawyers have always done when they address a *client's* problem: We have not gone back to basics and started with an objective look at the procedural framework in which we operate in civil cases to see whether we may there find the seeds of the problem.

The stated purpose of the 1938 Federal Rules of Civil Procedure was the "just, speedy, and inexpensive determination of every action." No one, however, would argue that today we enjoy just, speedy or inexpensive determination of civil actions.

My question is very simple: Do we not owe it to ourselves, owe it to the civil justice system, to ask ourselves whether in this new Information Age the sixty-six-year-old approach of the Federal Rules of Civil Procedure has outgrown its usefulness?

To all but scattered trial lawyers with gray hair and at least some academics, the history of those Rules is lost in the mists of time. We inherited from the courts of England "forms of action." To get into court one had to find a common law pigeonhole—trespass, trespass on the case, contract—into which one could fit one's case. The result was that many meritorious cases never found their way into court. That system was replaced by the Field Code, adopted in New York in 1848, which many states copied. It required a statement of facts sufficient to state a cause of action. This, in turn, required pleading skills, the ability of counsel to articulate facts that plainly evidenced a cognizable claim. It, like common law pleading, allowed of no discovery other than, in some jurisdictions, the adverse examination (deposition) of the opposing party. The theoretical result in some cases was trial without adequate information, trial by surprise. Furthermore, the federal courts were generally required to apply the procedural law of the state where they sat, so that they administered a non-uniform patchwork of procedures.

The Federal Rules reflected an attempt to create a uniform system of civil procedure for the federal courts, which ideally the states would follow. They essentially eliminated any meaningful barriers to entry into the civil litigation arena. You paid the filing fee and filed a complaint that needed to say no more than, "I have rights; you violated them; I have been damaged." The premium the Field Code placed on counsel's pleading skill was eliminated. Only those cases in which it was clear from the complaint that the plaintiff could not succeed on any theory were filtered out of the system at this point. You were otherwise then free to conduct discovery to uncover evidence to support your claim. In reality, this frequently meant discovery to find out whether you *had* a claim or a defense. Summary judgment, which tested whether a litigant had contested claims or defenses that merited trial became the first real threshold, and frequently the final arbiter, of a lawsuit.

Thirty odd years later, the discovery rules were refined and broadened, particularly as to discovery of documents broadly defined. Those changes coincided with the advent of the billable hour, a concept that

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few remember was first thrust upon a reluctant trial bar by liability insurance carriers seeking to control their costs. Lawyers, who controlled how much they did and how long it took, came to be paid by the hour for their services. The confluence of virtually unlimited discovery and billable hours was an economically toxic mix for our clients.

The inevitable result over time has been the creation of a new species of lawyer, the "litigator," a shuffler of documents, taker of depositions and briefer of motions who has never had to try a case. And stand-up, first chair trial lawyers, lawyers who merited consideration by the College, began to seem like a minority.

Academics tell us that there is no empirical evidence that the existence of excessive discovery is a serious problem. I am not an economist, but I have only to look at the boxes of useless papers produced in even the most simple case today to know that something is badly awry: depositions, taken, filed away and never used, of witnesses who could simply have been interviewed; documents painstakingly disinterred, copied, inspected, catalogued and never again viewed, much less put to use; needless wrangling and endless briefs supporting motion practice over the venue of depositions, the scope of document requests, the responsiveness of the discovered party. And we have not even gotten to summary judgment, in which we dump reams of paper on the court in an effort to try our case before the court before trying it before a jury.

In recent years, we have seen various courts attempt by case law to raise the pleading bar in some of the categories of cases—antitrust cases come to mind—that typically involve burdensome expense. We have seen legislation—notably in securities fraud class actions—with the same avowed purpose. We have tried to reinforce Rule 11 to sanction frivolous claims and defenses, and that has spawned a whole new cottage industry for litigators. We have narrowed the permissible scope of discovery to issues pled, but, at the insistence of the judiciary, left judges with the discretion to broaden the scope in a given case. It remains to be seen whether any of these measures is more than Band-Aid therapy.

Matsushita and *Celotex* raised the bar in summary judgment proceedings. They have produced trial by paper as a surrogate for trial by jury in many cases.

For my first nine years out of law school I practiced in a state that still had the Field Code, preparing and trying tort and contract cases week in and week out. I took the deposition of the opposing party, got out of my office chair and talked to all the other witnesses, asked my opponent for the documents I really needed, subpoenaed them for trial if he did not produce them and tried the case. When I graduated to substantial business-related cases in the federal court, I practiced before a judge who believed, and said, "There are no complicated cases, only cases that lawyers make complicated." The local rules, civil and criminal, were eight pages long. There were no discovery conferences, no pretrial conferences, no "case management." Cases were calendared for trial in the order in which they were filed. You knew that whatever discovery you needed to do you had to get done on your own. From among the ninety-odd federal districts in the United States, that two-judge district, which tried cases instead of managing dockets, consistently ranked among the three highest in trials per judge.

In 1978, I tried a complicated five-week commercial case involving a thirty million

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dollar claim, the preparation for which had required over fifty depositions around the country and the production of several boxes of documents. We had never been in court on a discovery motion. We did not have a pretrial conference. It was tried eighteen months after it was filed. At the time of trial it was the second oldest case pending in the Western District of North Carolina. The oldest was awaiting trial on remand from the Court of Appeals.

Today, even the simplest cases I tried back then would produce a bankers box of paper. The files in the most complicated would fill several workrooms and require an army of assistants to manage them. The results would be the same—if they ever got to trial. The only difference—a huge difference—would be the cost.

One day in my first-year civil procedure class forty-seven years ago this Fall, my Dean, Henry Brandis, who over the years has proven to have been prophetic on many subjects, had just finished giving us a lecture on the Federal Rules of Civil Procedure, of which he was an avid proponent in a day when our state courts still used the Field Code. Then he looked up and said something to this effect: "We outgrew the common law pleading we inherited from England. It reached the point where it was doing injustice instead of justice. We adopted Code pleading, which required you to state the facts on which you were proceeding and the law that supported your claim or defense. The courts have loaded it up with technicalities that depend more on the skill of the pleader than on the rightness of his client's cause. The Federal Rules were designed to get cases into court where they can be tested on the facts, rather than on the pleadings. Someday, you will outgrow them too. They are, after all, just procedural tools."

Over the years since then, I have heard more than a few speakers, judges and academics, publicly question whether the balance between Rule 8 and the rules of deposition and discovery needed to be reexamined, whether Rule 8 sets too low a threshold for invoking the processes of the court and whether the discovery rules impose too heavy a burden. Their remarks have always been greeted with silence. No one wants to talk about this.

In the 1990s, our British brethren created a commission, chaired by Lord Woolf of Barnes, then the Master of the Rolls and now the Chief Justice, to examine the handling of civil litigation from top to bottom. The result was a complete reordering of civil procedure in England and Wales, sweeping away centuries of practices they had outgrown. We, on the other hand, seem quite ready to talk at length about our problems, but reluctant to address how we might cure them.

The Federal Rules of Civil Procedure were adopted sixty-six years ago. There were then no word processors, no copying machines, no faxes. If you wanted to make an extra copy of something, your secretary put a sheet of carbon paper and an onionskin in her typewriter and pounded the keys harder. We were a largely unregulated society. The federal securities disclosure laws were in their infancy. Corporations that uncovered wrongdoing did not appoint an outside committee to report it to the world. Manufacturers did not have to report their product failures to the government. There were no computers to store and regurgitate data, no internet search tools, no emails. You could not uncover opponents' life histories by "Googling" them. People did not go on Oprah or Larry King Live to discuss their innermost secrets.

We face a crisis in one of the fundamental institutions that set our system of law and

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OPINION: THE VANISHING TRIAL

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government apart. Do we not owe it to ourselves in this Information Age to ask whether we need to take a hard look at whether we are still well served by a procedure that imposes a minimal threshold for getting into court and weeds out virtually no case, regardless of its apparent merits, at that stage, that allows virtually unlimited discovery without even a minimal threshold showing of merit and that weighs the evidence on paper at the end of that process before allowing the parties to proceed to trial?

And do we not owe it to ourselves to do this while there are still a few people around who remember that it was not always this way to needle us into doing so?

Changing times call for fresh thinking, and not for clinging to a past we have outgrown. Surely a legal establishment that created a form of government that has lasted for over two hundred years, devised a process for ousting a sitting president without a shot being fired and changed the face of society with a single monumental court opinion can devise a system that insures that disputes with a genuine factual and legal basis can be tried before a jury as our founders intended.

E. Osborne Ayscue, Jr.◆

AWARDS, HONORS, AND ELECTIONS

Former Secretary of Transportation **WILLIAM T. COLEMAN, JR.** has been awarded the National Constitution Center's We The People Award for his lifetime of achievement in civic engagement. Coleman is Senior Counselor to O'Melveny & Myers, LLP, of Washington, D.C.

JOHN D. LIBER, of counsel and former managing partner of Spangenberg, Shibley & Liber, Cleveland, Ohio, was installed as the fortieth president of the International Society of Barristers at its recent annual convention in Naples, Florida.

Regent **EDWARD W. MULLINS, JR.** of Nelson Mullins Riley & Scarborough LLP, Columbia, South Carolina, has been recognized as one of twenty-seven outstanding law firm leaders in an edition of *Of Counsel* magazine. The list was compiled from a survey of a dozen legal recruiters and consultants from across the country.

HARRY M. REASONER and **JEROLD S. SOLOVY** were recently honored by the American Inns of Court with the Circuit Professionalism Award, which honors senior practicing judges or lawyers who exhibit the highest standards of their profession. Reasoner is a member of Vinson & Elkins of Houston. Solovy is a member of Jenner & Block of Chicago.

LEO BEARMAN, JR. has been elected a Trustee of the American Inns of Court Foundation. He is a shareholder in Baker, Donelson, Bearman, Caldwell & Berkowitz, PC in Memphis, Tennessee.

An endowed scholarship fund for Illinois judges has been established in the name of **MICHAEL A. POPE**, the National Judicial College has announced. Pope, who is a partner in the Chicago firm McDermott Will & Emery LLP, is a former chair of the board of trustees of the Judicial College.

LARRY S. STEWART has been elected to the Council of the American Law Institute. He is a member of Stewart Tilghman Fox & Bianchi, P.A. of Miami, Florida.

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Awards, Honors, Elections

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Duke W. Thomas is the 2004 recipient of the Bar Services Medal, the highest honor awarded by the Columbus Bar Association. Thomas is a partner in Vorys, Sater, Seymour and Pease LLP of Columbus, Ohio.

Former ACTL President **Thomas E. Deacy, Jr.** (1975-76) has been honored with the Missouri Fellows Award of Merit. He is a member of Deacy & Deacy, LLP of Kansas City, Missouri.

Wade M. Smith has been named the best criminal lawyer in the state by *Business North Carolina* magazine's annual poll of North Carolina lawyers. He and his brother, **Roger W. Smith**, also a Fellow, were the subjects of a feature article in *The Charlotte Observer* on May 16. They are members of Tharrington Smith of Raleigh.◆

Regional Roundup

New England Meeting Hosts President Scott

More than 95 Fellows and their spouses gathered on May 21-23 on Cape Cod for the regional meeting of the New England Fellows, according to Fellow Liz Mulvey of Boston.

Fellows hosted President David Scott and his wife Alison and participated in a CLE program on computer evidence, a golf tournament and a dinner featuring a barbershop quartet with Fellow Dave Hanrahan as one of the singers.

The meeting rotates among the New England states from year to year.

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Florida Fellows Honor William J. Sheppard

More than 200 Fellows and guests, including President David Scott, were on hand to fete Fellow William J. Sheppard of Jacksonville at a meeting of the Florida Fellows on June 24 in Boca Raton, according to Fellow Ben Hill of Tampa.

Sheppard was selected as the attorney recipient of the Florida Bar Foundation's Medal of Honor Award for work that included inmates' rights cases which resulted in substantial and widespread reforms in the Florida jail and prison systems.

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Texas Fellows Hold Their First Ever Meeting

More than 90 Fellows and guests, along with President David Scott, gathered on April 23-24 in San Antonio for the first ever meeting of the Texas Fellows, according to State Chair George Bramlett, Jr. of Dallas. Co-chairs were Fellows Emerson Banack, Jr. and Lewis Plunkett, both of San Antonio.

Fellow Gerry Goldstein of San Antonio gave a special presentation on his mentor, Maury Maverick. Five federal judges, all Fellows, gave a CLE presentation on federal trial practice.

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Philadelphia Meeting Features Five Judges

Five judges from the Philadelphia area participated in a program, *Daubert, Frye and "Daubert-Like,"* addressing the state of the law in the federal courts of Delaware, New Jersey and Pennsylvania at a tri-state regional meeting on May 20 in Philadelphia, according to Fellow Christine Donohue, Pennsylvania State Chair.

ACTL President David Scott also was on hand, along with Regent Dennis Suplee, Delaware State Chair Richard Poole and New Jersey State Chair Martin McGreevy.

Headquartered at the Rittenhouse Hotel, the two-day event included educational programs and a dinner reception for Fellows from the tri-state area at historic Carpenters' Hall.◆

Ohio Fellows to Conduct Mock Murder Trial

At the Federal Bar Association national convention on October 5 in Cincinnati, eight Ohio Fellows will be involved as faculty in the re-enactment of an important historic case involving the Underground Railroad.

U.S. District Judge James L. Graham, a Fellow, will preside over the trial, *State of Ohio v. Margaret Garner*. Actors fill the roles of the key persons in this courtroom drama.

In early 1856, the case dominated the headlines. An escaped slave from Kentucky, Margaret Garner was charged with murder after she stabbed her two-year-old daughter to death when federal marshals were attempting to arrest her. She was reported to have declared that she would rather see her child dead than return her to slavery.

The mock trial approximates the opening of the Underground Railroad Museum in Cincinnati, the city which played such a significant role in the era.

Participating Fellows are Kathleen Brinkman, Thomas W. Hill, David Peck, Rick Kerger, Neil Freund, Robert Trafford, Mark Devan and Frank A. Ray.◆

Bulletin Article Reprints Available

The last issue of the *Bulletin* contained two articles expressing opinions on current issues. One of those articles, entitled *Playing According to the Rules*, in particular generated much positive response. In addition to letters commending the author, several Fellows approached the College seeking permission to use copies of it in connection with classes they were teaching or lectures they were giving to law students. Some of those letters appear elsewhere in this issue.

Consistent with its mission to improve standards of trial practice, the administration of justice and the ethics of the profession, the College generally hopes that its publications can reach the widest possible audience.

Any Fellow, law school or other legal organization that wishes to reprint an article published in the *Bulletin* for a use consistent with the mission of the College may seek permission to do so by making a request to the College office.

The College copyrights all its publications, including the *Bulletin*. The College staff has made provision for making available, upon request, reprints of *any* individual *Bulletin* article, carrying a notation that the copyrighted article is being reprinted with the permission of the College. This will be sent to the party requesting it in pdf form from which the recipient can then reproduce the needed number of copies.

If the number of requests justify it, the individual article will also be posted on the College website in a form that can be downloaded and reprinted. In light of the existing demand for reprints of *Playing According to the Rules,* it is being posted on the College website. ◆

The Bulletin

of the

American College of Trial Lawyers

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Statement of Purpose

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

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"In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships."

—Hon. Emil Gumpert,
Chancellor-Founder, ACTL