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THE BULLETIN

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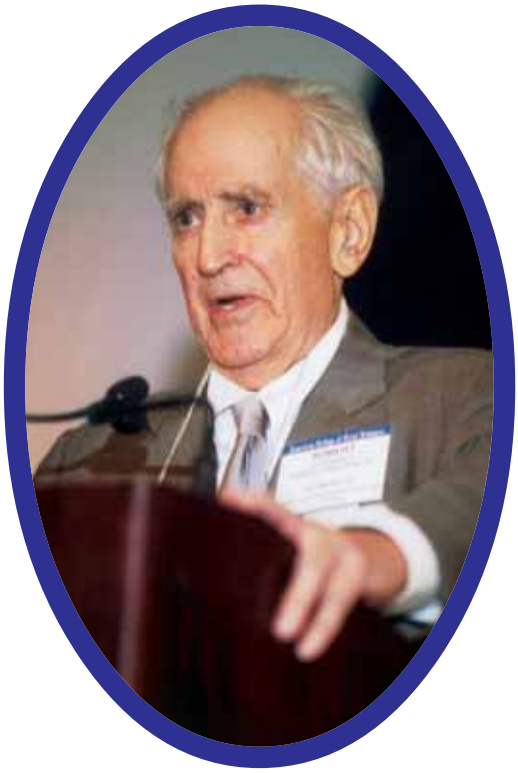
BRYAN A. STEVENSON
COURAGEOUS ADVOCACY AWARD WINNER



JUDGE ROBERT R. MERHIGE, JR.
GATES LITIGATION AWARD WINNER

COLLEGE HONORS LEADERS IN CIVIL RIGHTS

Marking 50th Anniversary of Brown

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Stan Musial and Fans

L-R Frank Jones, Andy Coats, Stan Musial, Frank Gundlach, Jimmy Morris, Gene Lafitte, Mike O'Keefe, David Beck at lunch in St. Louis at the Annual Meeting.

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.

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From The Editorial Board

During the past year the College created an *ad hoc* committee on the *Bulletin*. Growing out of that has been the creation by the Regents at their 2004 Fall meeting of a separate *Bulletin* Committee. That committee will be responsible for the publication of the *Bulletin*, including its format, editorial content and production. It is also charged with ensuring that the *Bulletin*, the principal organ of communication between the College and the Fellows, continues suitably and effectively to carry out that role.

That committee will comprise the Editorial Board of the *Bulletin*. Its members are listed in the 2005 Roster, the Blue Book, and on the *Bulletin*'s masthead. The Editorial Board welcomes your thoughts and comments on how we can make the publication better serve the College.

The Editor, Marion Ellis, a former newspaperman who in another life helped his employer win a Pulitzer Prize for journalism, was one of the authors of the fifty-year history of the College. He has the principal day-to-day responsibility for the *Bulletin*. Information for communicating with him also appears on the *Bulletin*'s masthead.

This issue covers in depth the proceedings at the 2004 Annual Meeting in St. Louis, a major portion of which was devoted to a commemoration of the fiftieth anniversary of the United States Supreme Court's decision in *Brown v. Board of Education*. Some of the program was celebratory; some of it was provocative. We hope that our extensive coverage allows those of you who could not attend to share in some measure in the outstanding program that President-Elect Jimmy Morris put together *and* helps to refresh the recollection of those of you who were there.

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From The Editorial Board

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As you may have noted, we have progressively expanded the variety of features that are a regular part of the *Bulletin*. We have also begun to experiment with new features. For instance, articles submitted by Fellows expressing their opinions on important issues of the day, a recent innovation, have generated enough letters to the editor to lead us to think that this is a useful addition.

A hundred or so Fellows pass from among us each year. We cannot print an obituary of every Fellow who dies. In the past, we have published only tributes to Past Presidents upon their deaths. In this issue, you will, however, see brief accounts of the deaths of three former Regents of the College and a former president of the ABA. When a Fellow in your area dies and you send a copy of his obituary to the College office, please also send us a copy, so that we can have an editorial opportunity to consider his or her place in the history of the College and the profession.

Though the College's website and emails to the entire Fellowship may someday become the principal avenue of communication between the College and its members, the *Bulletin* will continue to serve that purpose for the forseeable future. It belongs to you. We hope that you will read it and that you will feel free to tell us how we can make it better serve you and the College. ◆

Letters To The Editorial Board

Sentencing Guidelines: A Failed Experiment

As a federal District Judge, I could not agree more with the positions taken and views expressed in your monograph. Rarely, if ever, has any explanation of federal sentencing practices been as thoughtful and concise, and so completely accurate.

Sincere thanks for the thought that went into its preparation and publication. Please let those responsible for this publication know that it is deeply appreciated.

James G. Carr, U.S. District Judge, N.D. Ohio, Toledo, Ohio

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The Problem No One Wants to Talk About

(This op-ed opinion article in the Summer 2004 issue on the vanishing trial generated more comment than we can print. Excerpts from some of your letters follow.)

I read with more than a passing interest your recent article in the *Bulletin* about "The Vanishing Trial". What a thoughtful analysis of a disturbing problem! You mention early on in your article that the place of jury trials has been usurped in seven different ways. I would suggest the addition of an eighth.

I would suggest the eighth factor that "No One Wants To Talk About" is that settlements have been arrived at by the lack of backbone of the modern day "litigator." You talk early on in your article about the "litigator who bills the file, takes every deposition conceivable, addresses all issues, briefs every point, and never takes the case to the courthouse." I believe that the genetic absence of the backbone of the

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2004 ANNUAL MEETING COMMEMORATES BROWN V. BOARD OF EDUCATION

Highlighting the 54th Annual Meeting of the College held in St. Louis October 21-23, was a celebration of the 50th anniversary of the United States Supreme Court's decision in *Brown v. Board of Education.*

Special guests recognized at the opening session ,with President David W. Scott presiding, were two past winners of the College's Courageous Advocacy Award. The first was 97-year-old Oliver Hill of Richmond, Virginia, who was one of the original counsel for the plaintiffs in the l951 Virginia case that became a part of *Brown* at the Supreme Court level.

The second was Julius L. Chambers of Charlotte, North Carolina, who represented plaintiffs in many of the local suits, including *Swann v. Board of Education*, brought to force the implementation of Brown in the 1960s and 1970s.

The College gave its thirteenth Courageous Advocacy Award to Bryan A. Stevenson, an African-American lawyer who founded and directs the Equal Justice Initiative of Alabama, whose principal clients are indigent capital defendants, principally persons of color.

An account of this award to Stevenson appears elsewhere in this issue.

In accepting the award, Stevenson paid tribute to Oliver Hill, saying, "Oliver Hill is responsible for my being here. I am a product of *Brown*. I started my education when black children could not go to the public schools . . . and the colored school in my community was this small shack that didn't go past the eighth grade. Oliver Hill and lawyers from the NAACP came into that community and started talking about . . . the demands of *Brown* . . . . As a result of that advocacy, as a result of that commitment, the public schools were opened up. But for that commitment, but for that advocacy, I would not be standing here talking to you this morning."

The Samuel E. Gates Litigation Award was given to retired Eastern District of Virginia United States Judge Robert R. Merhige, Jr. of Richmond, Virginia.

An account of Merhige's award appears elsewhere in this issue.

In his acceptance remarks, Judge Merhige reflected on the more than forty school desegregation cases over which he presided. During that time, his seven year old son had to be escorted to school by United States Marshalls, his guesthouse was burned, his dog shot, the local press called for his impeachment and he was regularly subjected to death threats.

When interviewed by CBS News at the time, Merhige said, "I want you to understand, we are not afraid. I only hope the callers would understand, whoever they are, that their calls are not going to change one single thing, whether it is me or another judge."

President Robert J. Grey, Jr. of Richmond, Virginia, the second African-American president of the American Bar Association, opened his remarks saying, "You have honored two members of my family, Judge Merhige, [my] law partner, and Oliver Hill, who [lived] six blocks away [from where I grew up]." He credits Hill, who escorted him to the podium when he was installed as the ABA president last August, with inspiring him to become a lawyer.

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2004 ANNUAL MEETING

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In introducing constitutional law scholar Dean Gene R. Nichol of the University of North Carolina School of Law, Past President Ozzie Ayscue remarked, "Each of us has his or her perspective on *Brown v. Board of Education*, depending in part on when we were born. Some of us know it as a piece of legal history. Some of us know it from having lived through its implementation. At least one person in this hall today was there at its birth.

"Our next speaker was three years old in 1954. His is the perspective of one who grew up with that landmark decision. It is fitting that in the year of the fiftieth anniversary of *Brown v Board of Education*, we hear from the former director of the Institute of Bill of Rights Law at the College of William and Mary, a constitutional law scholar and teacher and a student of the civil rights movement, who has entitled his remarks '*Celebration of Brown v Board of Education*.'"

Dean Nichols' remarks are reprinted elsewhere in this issue.

The legacy of *Brown* was again invoked by former Delaware Chief Justice, now College State Chair, E. Norman Veasey, who, in introducing another speaker, pointed with pride to the fact that the opinion of Judge Collins J. Seitz requiring desegregation of the public schools in Delaware was the only lower court opinion *affirmed* by the Supreme Court in *Brown*.

The meeting, planned by incoming president James W. Morris, III, was held in a city, once the gateway to the West, celebrating both the 200th anniversary of the departure of the Lewis and Clark Expedition and the 100th anniversary of the St. Louis World's Fair. The opening reception was in the Jefferson National Expansion Memorial in the base of the Gateway Arch. Many Fellows and their guests took advantage of the occasion to ride to the top of the Arch.

Indeed, the Friday night reception and dinner dance celebrated the 1904 World's Fair.

To add to the excitement, during the meeting, the St. Louis Cardinals won the National League pennant in a stadium a few blocks from the headquarters hotel. More than one speaker celebrated the occasion by wearing a Cardinal baseball cap to the dais, and Justice Sandra Day O'Connor wore a cardinal red dress while delivering her address at the Saturday morning program. A group of Fellows had the pleasure of dining with former Cardinal great Stan Musial.

In addition to the program highlights noted above, the participants were treated to an illuminating account of the Lewis and Clark Expedition and its current relevance by historian and philosopher Dr. Robert R. Archibald, President of the Missouri Historical Society.

John Grisham gave a fascinating account of his journey from a small-town Mississippi trial lawyer to a best-selling author. His exchange of humorous repartee with his introducer, Will Denton, FACTL, of Biloxi, Mississippi was one of the highlights of the meeting. *(Tragically, Denton has since died of complications following heart transplant surgery.)*

The winners of the various moot court and trial competitions in the United States and Canada were recognized for their achievements.

Dean Joel Seligman of the Washington University in St. Louis School of Law, a nationally recognized authority on corporate governance, delivered an incisive paper on the "modest revolution" taking place in that arena in the wake of the corporate scandals that have recently

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CELEBRATION OF *BROWN V. BOARD OF EDUCATION*

(*The following address was delivered at the 2004 Annual Meeting in St. Louis by Gene R. Nichol, Dean and Burton Craige Professor of Law at the University of North Carolina School of Law, on the occasion of the fiftieth anniversary of the decision of the United States Supreme Court in Brown v. Board of Education. Reaction to the challenging rhetorical questions the speaker raised toward the end of his presentation ranged from "political" to "prophetic." Whatever perspective one may embrace, they reflect current issues that call for thoughtful civil discussion.)*

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I am of that generation who decided to become lawyers because of *Brown*. There was a good deal of idealism in the air then, when I was in college, in the late Sixties and early Seventies. I think a lot of that was due to the Kennedys and to Dr. King. But a lot of us who became lawyers did that because of *Brown*. We wanted to be Thurgood Marshall, Robert Carter, or Jack Greenberg or Oliver Hill, Earl Warren or William O. Douglas.

One way of making that point concrete: I grew up in rural Texas. The civil rights revolution was slow coming to my family's house. And in Texas we were fortunate to have one of those great courageous southern federal judges, like Judge McMillan in Charlotte or Judge Merhige in Richmond, Judge Johnson or Judge Wright. And ours in Texas, as you know, was the aptly named William Wayne Justice. That meant about once a week at my family's breakfast table my father would read the paper, and Judge Justice would have taken over the schools or the prisons or the legislature, and my father would growl, "That g— d— Judge Justice." Being a teenager, I thought that anybody who could consistently make my old man that mad must really have something going for him. Years later I was on a program with Judge Justice, and I was able to tell him that I became a lawyer because my father hated him so much, and I thanked him for it.

GENE R. NICHOL

For us, for my generation of lawyers, we thought that *Brown* was the promise of America and it was both a celebration and a challenge, an inspiration and an indictment, a dream and a rebuke. And what was true in 1954 can still be true fifty years later.

There is in *Brown* much to celebrate, almost more than can be stated, the unfathomable courage of the plaintiffs who stood up. I think particularly of Reverend DeLaine and the Clarendon County, South Carolina plaintiffs, some of whom we had the honor to meet a few months ago, heroes beyond description, beyond comprehension. And I think of the brilliance of the NAACP's strategists, the power and the character of their claims. Robert Carter, arguing for recognition that blacks are first-class fee simple citizens. Thurgood Marshall, stating powerfully that these infant appellants are asserting the most important claims that can be set forth by children: the claim to their full measure of a chance to learn and to grow, and the inseparably connected, but even more important claim to be treated as entire citizens.

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CELEBRATION OF BROWN V. BOARD

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I think something we haven't focused as much on, and maybe in the broad sweep of things it is less important, but I'm not certain that's so–I think *Brown* also worked to save the United States Supreme Court as an institution, to secure for the Court a vital and necessary role in American government. The Supreme Court has had a long history, and it has not always been glorious. It declared the power of judicial review over acts of Congress in the early Nineteenth Century, but it didn't really use it until the disastrous decision in *Dred Scott*, a ruling that required a Civil War for reversal. In *Plessy v. Ferguson* in the late Nineteenth Century, it wrote the Equal Protection Clause out of the United States Constitution. It battled with the Roosevelt administration over unrestrained capitalism, and it lost. It battled with the Congress for decades over the difference between what is national and what is local, and it lost. When we interned 120,000 Japanese Americans during World War II, when the McCarthy movement gutted freedom of expression a few years later, the Court didn't meaningfully intervene. It continued to lie face down on the canvas, immobile and inadequate, not up to the task.

So, until *Brown*, I think it's fair to say that the major lessons of the Court had been lessons in failure. And as of 1950 many constitutional lawyers thought that the best thing you could hope for from the United States Supreme Court was that it would shut up and not get in the way of progress for other branches of government.

Now, given *Brown's* legacy and its fundamental success in saying that the Constitution is serious business and that it belongs to us all, the Supreme Court potentially plays a very different role in American life. We know of course that that can be risky too, but I am convinced that we are better served if one of the principal institutions of American government sees itself as charged with enforcing our foundational promises of liberty and equality. And if we have that, we have it because it started with *Brown*. There for the first time, the Supreme Court learned that its power could be exercised in dramatic ways to bolster and sustain democracy, rather than to thwart it. The Court learned that it could use constitutional command to reach for our aspirations, to tap our better angels, rather than to merely drag the country's feet against the tug of progress. It could provide what Alexander Bickel called the sober second thought, asking in fact whether we were as a society living up to the promises we have made to each other and to ourselves. And finally, *Brown* taught that an independent, unshackled, unelected judiciary could be worthy after all. It could help us take strides that apparently we wouldn't make otherwise. It could supplement the elected branches of government to help make the promises of democracy real. It is true, in short, that the Justices' efforts in *Brown* did much for the Civil Rights movement. But the Civil Rights movement also did much for the Court, and the Justices embrace of equality in *Brown* eventually made the United States Supreme Court an institution worthy of its high calling.

I want to focus in the time I have left on another feature of *Brown*, my own favorite chord of the decision, because I am convinced that there is a central component of Chief Justice Warren's opinion that still has the capacity to stir American constitutional law with all of its flaws and all of its challenges. If you remember, Chief Justice Warren admitted in *Brown* that the Court had been asked to struggle with the historic meaning and the legislative intention of the majestic phrase, Equal Protection of the Laws. And after arguments, reargruments and debates and white papers and supplements and amicus briefs, Warren effectively threw up his hands, saying he found the

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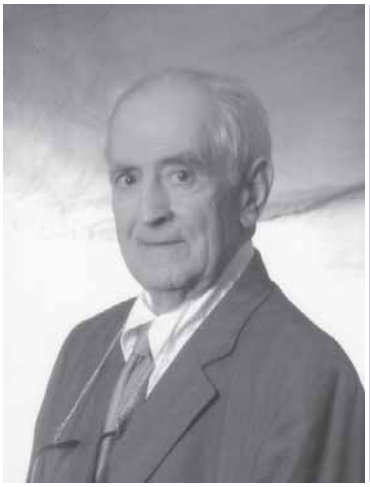
GATES LITIGATION AWARD TO RETIRED UNITED STATES JUDGE ROBERT R. MERHIGE, JR.

Retired United States Dis-trict Judge Robert R. Merhige, Jr. became the nineteenth winner of the Samuel E. Gates Litigation Award at the 2004 Annual Meeting of the College in St. Louis. Created in 1980, the award honors a lawyer or judge who has made a significant contribution to the improvement of the litigation process.



ROBERT R. MERHIGE, JR.

In honoring Judge Merhige, committee chair Paul T. Fortino of Portland, Oregon, noted that the award is special in that it need not be given on an annual basis, but is, instead, reserved for those individuals who have achieved something truly significant.

Judge Merhige's career spans six decades, first as a trial and appellate lawyer for twenty-two years, then as a Federal District judge for thirty-years and now as of counsel to Hunton & Williams in its Richmond office.

The text of the award to Judge Merhige read, in part, as follows:

> [As] a courageous advocate, a fearless judge, a teacher, a mentor and a true professional, you have distinguished yourself. As a moving force behind the founding of the American Inns of Court in Richmond, as the author of a standard text on Virginia jury instructions and numerous articles on trial tactics, as a teacher of advocacy in the universities of the State of Virginia, and as a judicial crusader against delay in litigation, by your contribution to the culture, rules and practices of the United States District Court of the Eastern District of Virginia, the "rocket docket," and by your unselfish acceptance during your long career of countless assignments to federal courts throughout the United States to address congested dockets, you have made immense contributions to the development and improvement of the litigation process. By your life, your courage and your deeds, you have honored our profession.

Over his career on the bench, by his own count, Judge Merhige presided over court in more that one hundred different courthouses throughout the federal system. He regularly made himself available as a roving judge to address crowded dockets in districts other than his own. He presided over litigation arising out of the Kepone pollution of the James River, the Westinghouse Uranium case and the A.H. Robins Dalkon Shield class action.

He also presided over more that forty school desegregation cases in which he was reversed only once, that ultimately by a four-four decision in the United States Supreme Court. During those years, he was subjected to vicious threats. The local press called for his impeachment. His home was picketed, his dog was shot and his guest house was burned. For years, he and his family lived with round-the-clock protection from United States Marshalls. At one point, the problem became so severe that he had to send his family away for their own protection.

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Gates Award Winner

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As Fortino noted in introducing the award, "Throughout this ordeal, Judge Merhige never flinched or wavered. Rather, he remained dignified and professional in the face of hateful criticism. He never lost sight of the vital role of the courts in our society, nor did he ever let the threat of violence cause him to be swayed from doing his duty."

In accepting the award, the eighty-five-year-old judge closed by reminding his audience, "We need each other; don't forget that." ◆

College Establishes Heritage Committee

Former Regent James P. Schaller of Washington, District of Columbia, has been named chair of the new Ad Hoc Committee on College Heritage.

The committee has supervised interviews of past presidents Leon Silverman and Tom Deacy by author and College Fellow John Martel and plans future sessions with more past presidents or their widows.

In addition, the committee is inventorying material at College headquarters and will consult with professional archivists to make a plan for the future.

Schaller asks anyone who has material that might be relevant to contact him or a member of his committee. ◆

Student Winners Honored in St. Louis

Winners of the four student trial competitions in the United States and Canada sponsored by the College were honored at the St. Louis meeting.

It was the thirty-fifth year of the National Trial Competition, with 125 teams participating. The Kraft W. Eidman Award was won by a team from the University of Houston Law Center consisting of Michaelle Benavides, Edward Verbarie and Julie Dawn Gray. Rena Upshaw-Frazier of the Stetson University College of Law in St. Petersburg, Florida won the George A. Speigelberg Award as the Best Oral Advocate in the National Trial Competition.

Team members Anne-Marie Lacoste and Marie-Pier Michon of the University of Montreal won the Sopinka Cup Competition and Shawn Macdonald of the University of Western Ontario in London, Ontario was judged the Best Overall Oralist.

The National Moot Court Competition in New York City was won by a team from South Texas College of Law in Houston made up of Marit M. Babin, Kenneth O. Corley and J. Daniel Johnson. Corley received the Fulton W. Haight Award as the Best Oral Advocate.

The Gale Cup Moot Court Competition in Canada was won by the four-member team of Gordon Buck, Aidan Cameron, Cameron Elder and Adam Perry of the University of Victoria in British Columbia. Daniel Bach of the University of Toronto in Ontario was recognized as the Best Oral Advocate. ◆

BRYAN A. STEVENSON RECEIVES COURAGEOUS ADVOCACY AWARD

Bryan A. Stevenson, the founder and Executive Director of the Equal Justice Initiative of Alabama, and Professor of Clinical Law at New York University School of Law, is the thirteenth winner of the College's Courageous Advocacy Award.

BRYAN A. STEVENSON

Created in 1964, the award is given, in the words of committee chair Trudie Ross Hamilton of Waterbury, Connecticut, "to trial lawyers who both understand and appreciate the intense personal commitment, sacrifice and courage" required for advocacy of unpopular causes.

As a gifted minority lawyer and a 1985 graduate of the Harvard Law School, Ms. Hamilton noted, Stevenson could have "enjoyed the attendant rewards of power, prestige and financial security." Instead, he has devoted his life's work to representing indigent capital defendants in a state where there is no public defender system, where criminal defense lawyers are paid a pittance, and where "the death penalty seemed to be reserved for the poor and people of color."

Operating in a climate that was pervasively hostile and often threatening, where enthusiasm for the death penalty was overt and where enforcing the death penalty was a major vote-getter, his work, which often has taken him alone to courthouses where he was an unwelcome stranger, has subjected him to hostility both from the bench and from members of his own profession.

Stevenson's work was already well known to the College. He spoke to the 2002 Annual Meeting in New York City, asserting, "I don't accept that race bias in the administration of criminal justice is inevitable, that it cannot be challenged, that it cannot be confronted. I do not accept that all we can with the hopeless and the despised and rejected is to put them in prisons forever or to execute them . . . ."

"Constantly dogged by lack of funds," Ms. Hamilton's presentation continued, "Brian has worked day and night for twenty years . . . . [H]is organization is overwhelmed, and he works under the constant threat of execution of the innocent. He has eschewed personal comfort, living in spartan accommodations and working eighty to ninety hours a week for a subsistence wage," and donating his earnings from teaching to this cause.

"His courage, commitment and sacrifice have been extraordinary. His persistence in the face of daunting obstacles is an inspiration to us all."

In accepting the award, Stevenson said, "I cannot think of an award from any group that is more meaningful, that is more empowering, that is more encouraging than an award from you, because I know that you represent people who understand the call of justice, the demands of the law, the requirement to protect and to serve those who would be unprotected and unserved."

Two previous winners of the Courageous Advocacy Award, Julius Chambers of Charlotte, North Carolina, and Oliver Hill of Richmond, Virginia, were in the audience that witnessed the presentation to Stevenson. ◆

2004 Annual Meeting

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dominated the news.

The College awarded an Honorary Fellowship to the Honourable Louis LeBel of Ottawa, Quebec, Canada, a Justice of the Supreme Court of Canada.

ABA President Grey devoted his remarks to his organization's present study of the status of the jury system in the United States, noting that the College has designated Treasurer David J. Beck of Houston, Texas as its liaison to the project.

Virginia Supreme Court Justice Donald W. Lemons of Richmond, Virginia spoke on the legacy of Jamestown, describing the creation of a local government by the colonists themselves as the genesis of democratic government under the rule of law in the New World.

Justice Sandra Day O'Connor delivered the latest in a series of lectures in honor of the late Justice Lewis F. Powell, Jr. After a few personal recollections of the late Justice, she addressed a series of historical vignettes that recalled the tension between the executive and the judiciary that have tested our balanced system of government. The College intends to collect and publish the Powell Lectures for posterity.

James W. Morris, III, of Richmond, Virginia, was installed as the College's new President at the closing banquet on Saturday night, taking the gavel from outgoing President David W. Scott of Ottawa. Other new officers and Regents were elected in the business session on Saturday.

On the final evening of the meeting, Past President Earl J. Silbert administered the induction to 111 new Fellows. Sally Quillian Yates, Assistant United States Attorney from Atlanta, Georgia responded for the inductees.

Excerpts from the remarks of various program speakers are collected under the heading *Notable Quotes*. ◆

Regional Roundup

President Jimmy Morris and his wife Jane attended the two annual dinners of **Pennsylvania Fellows**, Eastern on November 17 and Western on December 1 in Pittsburgh. The Eastern dinner in Philadelphia included five judicial guests—incoming Chief Judge of the Eastern District of Pennsylvania Harvey Bartle, III, Magistrate Judge Thomas J. Rueter, Clerk of Court Michael E. Kunz, Delaware Vice Chandler Leo Strine and Administrative Law Judge James J. Fitzgerald, III, of the Philadelphia Court of Common Pleas.

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The **New Jersey Fellows** Annual Dinner on December 3 in Deal included Supreme Court Justice James R. Zazzali and his wife Eileen as guests.

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President David Scott and his wife Alison along with Regent Mikel Stout and his wife Lee Ann attended the annual meeting of the **Oklahoma Fellows** in San Pancho, Mexico, a beachside community near Puerto Vallarta. ◆

NOTABLE QUOTES FROM ST. LOUIS MEETING

LESSONS FROM THE LEWIS AND CLARK EXPEDITION

Lewis and Clark . . .were the vanguard of American expansion into that huge acquisition made by President Jefferson that more than doubled the size of the country, the Louisiana Purchase. . . . [The expedition] was the idea of Thomas Jefferson . . . who was the consummate westerner, who never made it over the Blue Ridge, but who had this expansive dream of an America in which all people would possess land. . . . Jefferson was also a person intensely interested in the world around him. . . .[H]e was a creature of . . . the Enlightenment, of which we are the inheritors. This was the idea that the world was explainable; that through science and through exploration, explanation, measurement, organization, the world and everything in it could be understood and rationally comprehended by human beings. Lewis and Clark were Jefferson's legs, eyes, arms, ears and, for a time, his mind. . . . [O]n Jefferson's behalf, they were to collect the information that would broaden human comprehension . . . of this world and of the land he had purchased for the United States.

I want to leave you with my sense of how and why it's worth thinking about a 200 year old story. . . . Every generation, every society and all human beings are attracted by adventure, by risk-taking and by going where no human has ever gone before. So, in a sense, Lewis and Clark remind us of some of the commonalities that all human beings share. . . . The second is Sacagawea [the young Native American girl who became a cultural intermediary between the expedition and her people]. . . . I cannot imagine that in this global world we are any less in need of Sacagawea's, who can make mutually unintelligible cultures understand one another. And I am reminded of Shahaka [who taught the expedition how to survive its first winter] and his extraordinary gestures of generosity and friendship to strangers, not suspicion, not mistrust, but friendship and commitment and help. I am reminded, of course, by York [Clark's slave, who wrongly assumed that at the end of the expedition he would win his freedom] of the fact that when our perspectives differ . . . it does not mean necessarily that somebody is lying.

The story makes me think about the balance between science and sacredness, and I wonder how we might behave differently if we really did in some way regard this planet, this earth, our communities, our neighborhoods as sacred places. And that may in fact be the secret of a better world, a world capable of sustaining lives of good quality for our children and children's children. . . . And finally is it possible that we, along with Lewis and Clark, might go through a similar metamorphosis that allows us to see the world a bit different and teaches us how to read an Indian map?

Dr. Robert R. Archibald, President and CEO, Missouri Historical Society, St. Louis, Missouri

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A JUDGE LOOKS BACK ON THE BROWN ERA

[T]here's a power much greater than any court that controls us. . . . I took an oath, and that oath has been in my mind every minute since. . . . God has been good to me, because nobody has had it better . . . the life I've had and the work. . . . [W]e're on a new path now; and we ought to be believing in each other. . . . When they burned the house [his guesthouse during the height of the school desegregation struggle], that was a day that was terrible for me. . . . I rebuilt it; I thought it necessary to do that. I went

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Notable Quotes

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broke, but you can't let the kooks think they are going to chase any Federal Judge, not with Article III behind you. . . . You know, we never did know who did that, but I'm not very angry at them now, because some good has come of it.

Retired United States District Judge Robert R. Merhige, Jr., Eastern District of Virginia, accepting the Samuel E. Gates Litigation Award

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Brown's Relevance Today

Brown is, after all, the greatest decision ever handed down by an American court, saying, I always thought, some very simple, straightforward things, saying that the Constitution means something, that it's to be seriously enforced, that it's not a fraud, that it won't be relegated to rank hypocrisy, that it belongs to us all. Simple things, majestic things, controverted things, words that changed America when it needed changing. . . . For us, for my generation of lawyers, we thought that *Brown* was the promise of America, and it was both a celebration and a challenge, an inspiration and an indictment, a dream and a rebuke. . . .

I think *Brown* also worked to save the United States Supreme Court as an institution, to secure for the Court a vital and necessary role in American government. . . . I am convinced that we are better served if one of the principal institutions of American government sees itself as charged with enforcing our foundational promises of liberty and equality. . . . *Brown* taught that an independent, unshackled, unelected judiciary could be worthy after all . . . could help us make strides that apparently we wouldn't make otherwise. It could supplement the elected branches of government to help make the promises of democracy real . . . . [T]he Justices embrace of equality in *Brown* eventually made the United States Supreme Court an institution worthy of its high calling. . . .

The greatest lessons of *Brown* . . . are that *Brown*'s questions must be still *our* questions, and that *Brown*'s challenges, which go to the heart of the promise of America, must remain *our* challenges as well, . . . because the virtue of our nation is still in the making. . . . [W]e cannot escape responsibility for the society we create. . . . [T]he greatest American value is that we are all in this together.

Dean and Burton Craige Professor of Law Gene R. Nichol, University of North Carolina at Chapel Hill, commemorating the Fiftieth Anniversary of the Supreme Court's decision in Brown v. Board of Education

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Reflections on the College's Student Competitions

I learned more from that competition [the National Trial Competition] about being a trial lawyer than I ever would in the classroom: how important it is to be confident in the courtroom, how to remain composed when the judge rules against you or when you don't understand the judge's ruling, how important it is to speak effectively to the jury and to advocate for your client. It has been an invaluable experience, and . . . it was as [much] fun as it was educational.

Rena Upshaw-Frazier, Stetson University College of Law, St. Petersburg, Florida, accepting the George A. Spiegelberg Award as the Best Oral Advocate in the National Trial Competition

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By sponsoring this type of competition, the College honors students across Canada who apply what we have only read in books. . . . Most importantly, . . . I thank the American

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President's Report: Judicial Independence

JAMES W. MORRIS, III

After serving as a member and chair of the Virginia State Committee, as a member and Chair of the Admission to Fellowship Committee, as a member of other committees, as Regent for four years, Treasurer for two years, President-elect for one year, and having attended 16 workshops and one College retreat, I thought I had a grasp of what was going on in our College. In the first months as President, I have learned otherwise.

Perhaps because the College and its state, province, general and *ad hoc* committees have grown increasingly more active over these 15 years, or because of recent events and the maturation of incipient initiatives, or because the responsibilities as President require a broader view, or because of all of the above and more, I have been enlightened considerably, if not staggered, by the volume of activity in all aspects of our College.

On the collegial side, a cornerstone of Chancellor Gumpert's vision, it is a rare state/province committee that does not have an annual meeting to enjoy the company of the Fellows and spouses, with an invitation to the President or his surrogate to join in the fun and report on the state of the College. By the time this is published, Jane and I will have attended 15 State/Province/College meetings since St. Louis. We can attest that the spirit of Fellowship is at a very high level in Canada and the U.S.

There are now 11 regional or multi-state meetings, allowing social interaction and educational acopportunities between two or more state/provinces. What with the unavoidable expense of most national meetings and the size limitations of some of our venues, these meetings are particularly important in maintaining the collegiality, the Fellowship, and the sense of a worthwhile connection to the College, so essential if the ACTL is to be more than an honor and a plaque on the wall.

In addition to these collegial elements, the activities of the 61 state and province committees, the 31 general committees, and 4 *ad hoc* or special committees are at an all time high, as reflected by the terse descriptions of the projects and other professional initiatives found in the compendia on our website (www.actl.com).

Nowadays, at a minimum, almost every state/province committee is engaged in support of the laudable *pro bono* effort of the Access to Justice Committee (Christine Carron, Montreal, and Bill Crow, Portland, Co-Chairs) and in the annual trial and appellate advocacy competitions supported by the College, one each in Canada and in the U.S. annually, under the umbrella of the Canadian Competitions Committee (Tom Heintzman of Toronto, Chair), the National Moot Court Competition Committee (Frank Jones of Houston, Chair), and the National Trial Competition Committee (Judge Phil Garrison of Springfield, Missouri, Chair). A growing number of state/province committees are engaged in the teaching of trial advocacy in one form or another to public service lawyers in conjunction with our Trial and Appellate Advocacy Committee (Richard Zielinski of Boston, Chair). Again, a review of the list on the website will enlighten you and, perhaps,

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PRESIDENT'S REPORT

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introduce you to an opportunity to serve, but awe inspiring as the multiplicity and importance of these activities may be, they are not the central topic of my message today.

The *ad hoc* committees are successfully pursuing a number of important and timely projects, including College heritage (Chair, Jim Schaller of Washington, D.C.), relations with the judiciary (Chair, Phil Kessler of Detroit), and possible regional realignment (Chair, Past President Ralph Lancaster of Portland, Maine).

The most recent is the "Outreach Committee" under the leadership of Liz Mulvey of Boston, appointed in response to the clear message from our two annual workshops (attended by all state and province and general committee chairs, the officers and various past presidents) that, however exalted the College may be in the realm of the Supreme Courts of Canada and the United States, among the Law Lords and other bar leaders in Great Britain, and in the judicial conferences and committees of the United States federal courts, the profile of the College in the states and provinces, down where our Fellows live and practice, *must* be raised. This mandate was clearly endorsed by the policy statement adopted by the Board of Regents in response to the recommendations of the 2002 Atlanta Retreat of the College. The charge of the Outreach Committee is to examine what we do now in the way of "outreach" (Liz Mulvey says that "outreach" is Episcopalian for "public relations"), and advise what we should do, i.e., what our message should be, how we should deliver it, to whom (our "public") and more. Even this topic, close to my heart as it is, must wait for the next President's Page, because of the following time sensitive matter.

JUDICIAL DISCRETION AND THE FEDERAL SENTENCING GUIDELINES

Of particular concern to the College, its Fellows and several of our committees is the relentless effort to deprive the judiciary of its independence and discretion. The Judiciary Committee (Chair, Dudley Oldham of Houston), the Special Problems in the Administration of Justice Committee (Chair, Joe Parker of Cincinnati) and the *Ad Hoc* Judicial Relations Committee have been addressing these issues in general, and the Federal Criminal Procedure Committee and the Task Force appointed by then President Warren Lightfoot, chaired by Past President Earl Silbert, have been addressing the Federal Sentencing Guidelines of 1984 (the "Guidelines"), in particular.

As College Treasurer David Beck ably points out in his article "Separation of Powers: Is Our Judiciary Under a Serious Attack?", *For the Defense*, Vol. 47, No. 1, January, 2005, p. 10, the judiciary in our federal system is the weakest of the three branches of government. Madison and Hamilton both instructed us in the *Federalist Papers* that among its inherent weaknesses, the judiciary cannot levy taxes to support itself, nor can it raise an army to enforce its decrees, but is dependent upon the other branches in these and many other important particulars. Yet we all know that liberty and the rights of citizens depend upon an independent judiciary, free to exercise sound, unfettered judgment without influence or intimidation. As David Beck urges, lawyers (and, I think especially Fellows of the College) have a duty to defend these rights and to protect the judiciary against inroads from the other two branches.

The Federal Sentencing Guidelines of 1984, and subsequent amendments, including most notably the 2003 Feeney

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IN MEMORIAM

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

John Burnham Bates, Piedmont, California; Peter J. Boyd, Boise, Idaho; Phillip E. Brown, San Rafael, California; Joe H. Daniel, Jackson, Mississippi; Will Denton, Biloxi, Mississippi; Theodore T. Duffield, Green Valley, Arizona; John G. Gent, Erie, Pennsylvania; David W. Gibbons, Q.C., Vancouver, British Columbia; Lee V. Hornbaker, Junction City, Kansas; Robert J. Huffman, Troy, Ohio; Robert L. Jones, Jr., Fort Smith, Arkansas; Robert M. Landis, Philadelphia, Pennsylvania; Henry Latimer, Fort Lauderdale, Florida; Albert R. Malanca, Tacoma, Washington; John G. Mattimoe, Toledo, Ohio; Allen F. Maulsby, New York, New York; Ted S. Miller, Hot Springs Village, Arkansas; J. Frank Myers, Americus, Georgia; Neal C. Newell, Birmingham, Alabama; William M. O'Bryan, Fort Lauderdale, Florida; Jerome F. O'Rourke, Flint, Michigan; Ray H. Pearson, Miami, Florida; Jackson L. Peters, Cora Gables, Florida; Robert D. Raven, San Francisco, California; Patrick W. Richardson, Huntsville, Alabama; Lewis H. Van Dusen, Jr., Philadelphia, Pennsylvania.

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John (Jack) Burnham Bates, who died September 20, 2004 at the age of 86, was a former Regent of the College and former managing partner of Pillsbury, Madison & Sutro of San Francisco. He and John F. Kennedy were members of the host committee in 1945 for the formation of the United Nations in San Francisco.

A native of Oakland, Bates graduated from Stanford University in 1941 and served in the Navy as a supply officer during World War II on the USS Farragut during the Aleutian, Gilbert and Marshall Island campaigns. He received his law degree from Boalt Hall at the University of California in 1947. He served as managing partner of Pillsbury, Madison & Sutro from 1980 to 1984.

He is survived by his wife of 58 years, Nancy Witter Bates of Piedmont, and three children.

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Former Regent Robert M. Landis, 84, died January 1 in Philadelphia, Pennsylvania. Donations may be made in his name to the Franklin & Marshall College Scholarship Fund at Lancaster, Pennsylvania.

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Former Regent Flavel Allen Wright, 91, died September 30 in Lincoln, Nebraska. He received his bachelor's and law degrees from the University of Nebraska in 1936 and joined the law firm that is now Cline, Williams, Wright, Johnson and Oldfather. He is survived by his wife, Marian, and four children. A Flavel Allen Wright Chair has been established at the University of Nebraska College of Law.

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Robert D. Raven, San Francisco, California, past president of the American Bar Association, died August 14, 2004 after a long illness. A longtime partner in the law firm of Morrison & Foerster, he was inducted into the College in 1970. In 2004 he had been honored by *The American Lawyer* as one of the top twelve legal luminaries of the past twenty-five years. ◆

Notable Quotes

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Marie-Pier Michon

College for having allowed us to be passionate about the legal debate outside the framework of the classroom. . . . Never in University was I shown how thrilling the legal profession can be, . . . and it is because of the American College that I now know that my true calling is litigation. . . . [H]opefully, many more students will benefit from such a worthy experience for years to come.

Marie-Pier Michon, University of Western Ontario, London, Ontario, accepting the Sopinka Cup for the Winning Team in the Canadian Trial Competition

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Kenneth O. Corley

I should have brought a witness or two from class, because nobody is going to believe the stories I bring back–who I was here with today.

Kenneth O. Corley, South Texas College of Law, accepting the Fulton W. Haight Award as the best Oral Advocate in the National Moot Court Competition

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For my teammates and myself, it [the Gale Cup Competition] represented three . . . unique opportunities, First, we were able, for the first time really, to take the skills and the knowledge that we had acquired in law school and apply those skills and knowledge to the facts of a real case in an appellate advocacy exercise that let us do legal research, prepare a written submission, and design and deliver an oral argument. Second, the particular case that was chosen for this year's competition . . . allowed us to consider some of the most interesting and perplexing questions faced in the criminal justice system today. . . . Third and finally, the competition allowed us to travel to Toronto to argue our case in front of esteemed members of our country's judiciary in the historic Osgood Hall Law Courts, and to meet with like-minded students from across the country.

Aidan Cameron, University of Victoria, Victoria, British Columbia, responding for the winning team in the Gale Cup Moot Competition

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The Genesis of Author John Grisham's Writing Career

I was in the courtroom one day out of curiosity, when I saw something that would eventually change my life. As so often happens, I didn't realize it at the time, but it was a life-changing experience. There had been a rape in our small town, the rape of a twelve year old girl by a man who had just been paroled from prison. . . . The little girl was left for dead, but she didn't die. She stayed in the hospital for two weeks, and she survived. The defendant, who was really, really a nasty character, was caught within hours of the attack. . . .

The little girl's father was a man I knew, not well, but I knew him, and he was a nice guy, but not the kind of guy you would pick a fight with. He had a big family, and for

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days after the rape, our little community was just electrified with gossip and rumor about what this family might do. And oddly enough, there were a lot of people hoping that something would happen, real justice, old-fashioned justice. To his credit, he did nothing. He waited for the trial to take place. . . .

[W]hen they had the trial just a few months later, security was very tight. . . . It came time for the little girl to testify and . . . because I was an officer of the court, I could hang around. The judge . . . cleared the courtroom. . . . The only people left were the jurors, . . . the attorneys and defendant, the judge, myself and one other lawyer and a couple of clerks. . . . For two hours the little girl testified. At times she was very brave; at times she was very frail; at times she broke down; at times she was sobbing. In two hours, we, all of us together, went through every emotion known to the human soul—from love to hate to revenge, retribution to total compassion. It was a roller coaster. There were times during her testimony I looked across at the jurors, and . . . all . . . of them were in tears. There were times when the judge was hiding his face. The prosecutor, the DA, who could cry any time he wanted to, was crying. The only person who never shed a tear was the defendant, never showed any remorse for anything.

Finally . . . the judge said, "Let's take a break." . . . In my haste to get out, I had left my briefcase, and I walked back in the courtroom . . . and the only person in the courtroom was the defendant. And he was seated, half asleep, all by himself, with the deputy a few feet away, sort of guarding him, but nobody else was in the courtroom. I walked right by him, and I picked up my briefcase, and I walked by him again to leave. And I was overcome with this thought: "Had that been my daughter, and if I could get that close to the guy, I would get my justice, and I would look at that same jury, and I would say, 'Okay. I did it. Now you convict me for doing something that every one of you would like to do.'"

I left the courtroom and drove home, and the seed was planted for a courtroom drama with that issue, a father's retribution. It became an obsession, this story. I had never written anything in my life, fiction, other than some of my briefs, some of my lawsuits that bordered on fiction. After a few notes and after living with this story, this courtroom drama set in a small town in the South with racial issues and a young, hungry lawyer hoping for the big case, late one night I finally took out my legal pad and wrote the first page of what eventually became *A Time to Kill*.

After writing for about two weeks, I had finished the first chapter. My wife, Renee, was an English major in college. . . . I really worked up the courage to tell her that I had written the first chapter of a book and to ask her to read it. . . . I was so nervous that when I gave it to her, I left the house that night and went and walked around the block . . . When I came back, she said, "This is pretty good. I'd like to read some more." . . . We started this process of, chapter by chapter, I would show it to Renee. There were times in 1984 through 1987 - it took three years to write the book - there were times when I quit, and Renee would always say, "I want to see the next chapter." There were times when I would walk in a bookstore and . . . see ten thousand titles and all the best-sellers and think, "There's no room for me. Who wants to hear what I've got to say?" And I'd become very discouraged. I went through everything that a young author goes through, but I managed to finish the book early in 1987. It took a lot out of me. It's a very emotional book. . . .

It took two years to write *The Firm*, and I finished it in 1989. And once it was pub-

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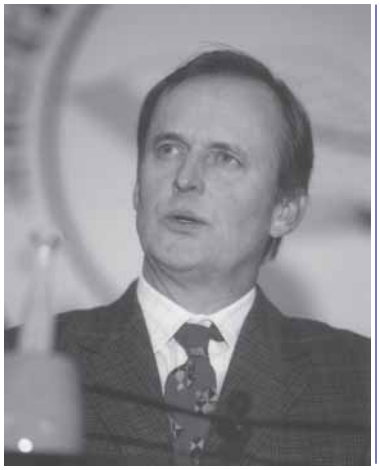
lished early in 1991, life changed for me dramatically. I was able to walk out of a law office one day and never look back and quit politics and never look back. And I still consider myself to be the luckiest person in the world to be able to do this full time.



JOHN GRISHAM

There is no doubt in my mind that I would never have written the first book had I not been a small-town lawyer. It's not a dream, it's not something I've studied. I don't remember one single thought of ever dreaming, even in high school, college, or law school, of being a writer. It's something that came to me with one moment, one moment of inspiration in a courtroom twenty years ago.

Best-selling author John Grisham, Charlottesville, Virginia, relating how he began to write

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REFLECTIONS OF COURAGEOUS ADVOCACY WINNER

I'm a little embarrassed, actually getting an award about courage, because, working and practicing in Montgomery, I'm so much aware of all the people who came before me who had to show so much more courage than we will ever have to show. I'm a lawyer, and I've been in some very difficult, and sometimes overwhelming circumstances, but I've never had to say, as people forty years before me had to say, that my head is bloodied, but not bowed. And that consciousness does do something to me. . . .

We have the highest rate of incarceration in the world. In poor communities and in communities of color, the consequences of this has been devastating. One out of three black men between the ages of eighteen and thirty in jail, prison, on probation, and parole. . . . The collateral consequences from that are even devastating. I talk to young women who tell me that they don't plan to get married because they don't see that as a realistic option. . . .

[I]n Alabama, thirty-one percent of the black male population has permanently lost the right to vote. . . . [T]hese numbers create this despair and hopelessness in ways that you can feel when you walk with these communities. [O]ften in the cases that I work on I talk to the siblings of my clients, and it's always staggering to me when I hear them talking about their futures. I go into the projects and I sit down with these young boys thirteen and fourteen years of age, and they tell me that they don't believe that they are going to live past the age of eighteen. They don't say that because of something that they have seen on TV or that they have heard about; they say that because that's what they are experiencing in their communities. Their friends and their neighbors and their brothers and their siblings are dying from drugs or dying from gang warfare or effectively dying by being sent to prison for the rest of their lives. And this hopelessness, which is so tangible that you can feel it, tends to shape everything. . . .

We can be disabled by comfort; we can be disabled by wealth; we can be disabled by our sense of responsibility here or there. All of those things can make us stay quiet. But we need to speak up. It can make us not believe that there's a role for us in this call for justice, when we actually have so much to give. And so I'm really grateful, because I think what you're saying to me this morn-

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ing by giving me this award is that you want there to be some singing about these problems. . . . I do believe that we have to measure the civility of this society by how we treat the poor, the disadvantaged, the rejected, the hated, the disfavored, not by how we treat the rich and the privileged. In so many ways there are these challenges that have to be overcome in order for us to claim to be in a society that is committed to equal justice. . . .

The work that I do has taught me very basic simple things. I've come to believe that each person is more than the worst thing they've ever done. As an advocate, as a lawyer, as someone committed to justice, as someone who believes in basic fundamental human rights, I've come to really understand that each of us is more than the worst thing. I believe that if you tell a lie, you're not just a liar, I believe that if you take something that doesn't belong to you, you're not just a thief. Even if you kill someone, I believe you're not just a killer. And because of that, there is this basic fundamental human dignity, human right, that must be protected by law. And to be protected by law, lawyers have to be willing to stand up and be heard.

Bryan A. Stevenson, Montgomery, Alabama, Founder and Executive Director of the Equal Justice Initiative of Alabama, accepting the College's Courageous Advocacy Award

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CURRENT TRENDS IN CORPORATE GOVERNANCE

[S]tate corporate law had had the dominant role in corporate governance standards, even as long as the SEC has operated, since 1934. State standards denominate how many directors there will be, how they are selected, how often they are voted upon, what the voting standards will be with very limited exceptions.

[H]istorically the SEC has been stretched thin. Its budget has often not been equal to its existing mandate, and its priorities were clearly areas like the mandatory disclosure system, the regulation of broker dealers, fraud enforcement, the regulation of investment advisors and stock exchanges. When the SEC would think about issues such as corporate governance it was typically way down the priority list. It was something that the Commission often had prudential reasons for not pursuing. . . .

You have seen the SEC Enforcement Division more or less double its activity in the last three years. You have seen an extraordinary increase in the number of derivative actions and federal class actions. . . . [T]he New York Stock Exchange values increased in value over elevenfold between 1980 and March 2000, from about 1.2 trillion dollars to $12 trillion dollars. You saw a period in which the very energy at the end of a bull market deflated into excess. You saw the sense of standards that have typified American corporate governance and corporate law begin to deteriorate and fray at the edges. You saw, in effect, not just legal standards, but cultural standards not operate as well as they might. The response by Congress most memorably was the Sarbanes-Oxley Act, which particularly focused on auditing and accounting . . . . But along with this response have begun initiatives focusing on corporate governance that to this point amount to what I refer to as a modest revolution and may continue to be a real revolution in corporate law or may, as I will suggest, take a very different course . . . .

It is clear that the concept of checks and balances has been revived and strengthened in response to the excesses of Enron and WorldCom and others, and is viewed as a key mechanism for reducing fraud and dysfunction in the future. But this is only the first of the initiatives that is occurring.

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be also be the envy of the world in its corporate governance system?

Dean and Ethan A. H. Shipley University Professor, Joel Seligman, Washington University School of Law, St. Louis, Missouri

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Acceptance Remarks of Honorary Fellow

[W]e share this hope that our societies will remain societies governed by the people for the people, but always under the rule of law, under a system of processes, rules, principles, which has as its focus the integrity of human persons, their autonomy, their equality, and their right to participate and share fully in the lives of our societies. We are part of these dreams. We are part of the achievement of this dream. The College has a long history of trying to make some of these dreams come true, and as members of the judiciary, we have some hope that, yes, at times we have managed to move things forward, to make things happen in the respect of traditions, but also in the respect of persons, keeping in mind that the law must remain faithful to its roots, but that it must move along, move along with the times, accompany life and society. And that's the sense, the meaning, of our work as counsel, lawyers, professors of law and judges. I think my presence today, your presence, mean that we all share of that dream and of those achievements.

Justice Louis LeBel, Supreme Court of Canada, accepting an Honorary Fellowship in the College

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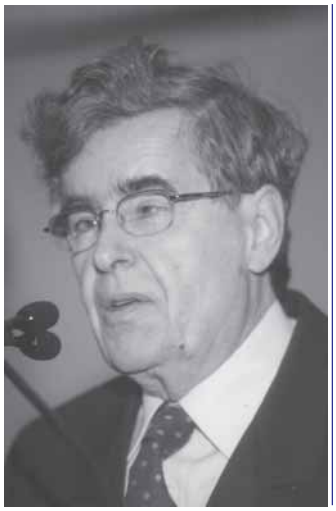
ABA President Extols Jury System

Thomas Jefferson said, "I consider trial by jury as the only anchor ever imagined by man by which a government can be held to the principles of its Constitution." We are the beneficiaries of the jury system, and it has served our country well. It is important, I think, to observe that we have over eighty thousand jury trials a year, that nearly a million Americans serve on juries. Nearly five times that number show up at their local courthouse to report for jury duty. Jurors decide between guilt or innocence, between imprisonment or death, determine liability or assess damages. Their decisions make a difference to the lives of millions in our society every day, have a profound impact on our society and our economy. And there are few civic activities in life that provide such a direct contact with our democracy as does the jury. . . .



Justice Louis LeBel

The jury is the cornerstone of our democracy, the bedrock of our legal system. It must be vital, it must be efficient and it must be current. And we, as the trustees of our legal system, must see to it that there is public confidence and respect for the system that we have adopted. I thank you for being a part of it, for supporting this project . . . .

Robert J. Grey, Jr., President, American Bar Association

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The Legacy of Jamestown

[T]he legacy of Jamestown . . . applies to all trial lawyers and to judges. Sir Walter Raleigh was a member of the Middle

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There is second a nascent movement to separate corporate chief executive officers from the corporate chair . . . . It is the hottest proxy election topic this year in the corporate governance area. And opinions are very broadly split on this one . . . .

A third initiative . . . is a chief regulatory officer who reports solely and directly to the Credit Committee . . . rather than to the chief financial officer or the chief executive officer . . . . Again, it is an area where one can debate, and legitimately debate, is the SEC getting the balance right between law compliance and the need for corporations to be productive and innovative? Nonetheless, this idea will receive a great deal of attention I am sure in the years to come . . . .

ROBERT J. GREY, JR.

It seems to me that the history of corporate governance and corporate law generally during the 20th century has been one of fits and starts. It has been one where we react to crises and sometimes overreact to them. It has been one where, when we are comfortable with the economy as many were in the late 1990s, the interest in the regulatory or the compliance side dissipates . . . . How can we get it right, modulating it for large corporations and smaller ones? How can we get it right so American capitalism, which in many respects has been, even in its darkest days, the envy of the world, can

Temple of the British Inns of Court in London. His attempts of colonialization in the New World were singularly unsuccessful, and back at the Middle Temple where they postmortemed the events and considered the future colonialization of the New World, the discussions moved to the singular domination of one man . . . as they thought about how it was that they were going to colonize this New World. . . .

Captain Christopher Newport had been placed in command of this voyage, and there was a little box that he was entrusted with, and even King James himself said that the box was not to be opened until the voyagers made landfall in Virginia. . . . The tiny band on this savage coast are now without a legally sanctioned leader. . . . Who will the new leader be? The seal is broken and the lid is lifted, the tense silence is broken by the voice reading the names of those appointed to the Council in Virginia. . . . Is this then the anticlimax? Far from it . . . . The Royal failure to designate a leader for the colony has provided the perfect climax. It must chose its own executive. A few days later, Winfield is chosen by the Council in a free election on American soil, and American democracy begins. From that small little box came the structure and the organization that would grow into the first legislative body in the New World and later develop into a free and independent government known as the United States. In the years since, this American expression of democracy born in Virginia has influenced the creation of governments and the modification of governments around the world.

It is fascinating, I think, to note that this American experiment in democracy began by adherence to the concept of the rule of law. The authority of the executive was in that little box. It established the Council, but there needed to be more. . . . It was the adherence to the rule of law that marked

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the beginning of the American experiment in democracy and has sustained it ever since. . . .

And so, you can see that from that little box and the events that followed, the legacy of Jamestown is the rule of law, the rule of law in a unique American experience and experiment in democracy that has flourished here and has been exported abroad. . . .

Justice Donald W. Lemons, Supreme Court of Virginia, Richmond, Virginia

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O'CONNOR DELIVERS POWELL LECTURE

He [Justice Lewis Powell] wrote more than five hundred opinions during his service on the Court from 1972 to 1987. Many were very significant ones.

It was an enormous privilege to serve on the Court with him for six full years, and no one did more than Lewis Powell to help me get settled in as a new Justice. . . . [H]e willing to talk about cases and the issues. His door was always open. I miss those discussions and those opportunities and Lewis Powell to this day. Those who seek a model of human kindness, decency and exemplary behavior and integrity would have to look very long and hard and deep to find a better example than he. . . .

When the Founders crafted the masterful Constitution that survives to this day, could they have . . . anticipated the human dynamics and the battles of will that would pepper the centuries to come and change the course of history in such fascinating ways? Perhaps. Certainly at a minimum, the Framers foresaw that there would be times of crisis, real and perceived, international and domestic, personal and political, and that these times would inevitably put the President in the boundary of pushing the role of defining his own powers, and put the courts in the position, the precarious role, of reviewing the President's acts. They knew, because common sense dictates as much, that institutions that are large in power and large in their impact, inevitably have run-ins that are large in scale and large in their ultimate consequences. But the Framers also trusted that in times of trial, their balanced system of government would provide an even larger perspective. They knew that the people of their fledgling nation could be counted on to choose their leaders wisely and that those chosen could be counted on to respect the roles set forth for them.

JUSTICE SANDRA DAY O'CONNOR

And, as we face the trials of today, I think we can find hope in the dignity with which the presidency and the judiciary have emerged from even the rockiest episodes of the past. No doubt, when this same Lewis Powell speech is given a hundred years from now, it will be remembered that the tasks before *us* were large. And I'm confident that it will also be remembered that we, like our forbearers, were strong enough to meet them.

Associate Justice Sandra Day O'Connor, Supreme Court of the United States, Washington, D. C.

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[T]alking with Kelly [the speaker's daughter] about this evening . . . caused me to reflect on why one becomes a trial lawyer to begin with. Why did any of us choose a

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NOTABLE QUOTES

(Continued from page 24)

profession that renders our life so unpredictable, that places into the hands of twelve strangers the ability to decide the fate of our clients and our own success and failure. And I believe at least part of the reason is because we all want to do something that matters.

Sally Quillian Yates, speaking on behalf of the Inductees

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The advertisement said: "Needed: charm, grace, wit, intelligence, love and dedication to the College." And central casting sent us David and Alison. They fit the profile.

Newly installed President Jimmy Morris, paying tribute to David and Alison Scott

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I'll put it the short way: I want the "trial lawyer" to come back to being a sobriquet, instead of a pejorative.

President Jimmy Morris ◆

PRESIDENT'S REPORT

(Continued from page 16)

Amendment, requiring, *inter alia*, reports about judges who vary downward from the guidelines and further limiting the factors available for discretionary consideration, have long been seen as unwarranted limitations on judicial discretion. Earl Silbert's blue ribbon Task Force was appointed to address the concerns created by these guidelines. At that time, two direct challenges to the very constitutionality of the Guidelines were wending their way to the United States Supreme Court.

The Silbert Task Force produced an outstanding report, "United States Sentencing Guidelines 2004: An Experiment That Has Failed," which in September 2004 was adopted as a policy statement of the College by the Board of Regents. The committee reported that the Guidelines drastically diminished the use of sound discretion in sentencing, effectively transferred the power to depart downward from statutory minimum sentences to the Office of the United States Attorney, caused many documented Draconian sentences, which failed egregiously "to fit the crime," and concluded that the Sentencing Guidelines had failed to achieve their original purpose of fair and uniform sentencing.

This Report of the College called for the replacement of the existing Federal Sentencing Guidelines by simplified non-binding guidelines, the repeal of the Feeney Amendment, the repeal of all mandatory minimum sentences for drug and non-violent crimes, and the reconsideration of all other mandatory minimums.

To quote from the College's press release of September 13, 2004:

This Report concludes that to the extent the Guidelines have achieved their goal of reducing disparity in sentencing, they have done so at an unacceptable price: the Guidelines regime is "too complex, rigid and mechanistic," it represents a substantial and unwarranted "incursion on the independence of the federal judiciary;" it has brought about "a transfer of power from the judiciary to prosecutors;" and it has

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PRESIDENT'S REPORT

(Continued from page 25)

> *resulted in a "proliferation of unjustifiably harsh individual sentences." The Report urges its replacement by "non-binding guidelines that judges may use to inform their sentencing discretion, but from which judges may depart for good reason explained on the record and with the sentence subject to review on an appeal for abuse of discretion."*

The Report and press release can be found at the College's website – www.actl.com.

The Report concluded that the recommendations should apply whether the Guidelines survived the constitutional challenges in *Booker* and *Fanfan* in whole or in part.

Since the Silbert Report, the U.S. Supreme Court in *United States v. Booker* and *United States v. Fanfan* ("*Booker/Fanfan*"), held the Guidelines unconstitutional to the extent that they were mandatory, but preserved them as "advisory," essentially the result advocated by the College in its Report.

The College's Federal Criminal Procedure Committee, chaired by Liz Ainslie of Philadelphia, is addressing the Guidelines after the impact of *Booker/Fanfan*, and the potential response of Congress.

Some in and outside Congress have suggested that the rulings in *Booker* and *Fanfan* should be "fixed" in various ways, e.g., additional Congressionally established mandatory minimum sentences.

Clearly, such a response would restore the untoward effect of mandatory minimum sentences noted by the College in its Report (p. 35). The Sentencing Commission itself has said that they " compromise proportionality, a fundamental premise for just punishment and a primary goal of the Sentencing Reform Act."

The members of the Federal Criminal Procedure Committee strongly oppose any quick "fix" to the perceived "problem" of *Booker/Fanfan*, especially the implementation of more and stricter minimum sentences.

The reasoning of the College Report and the current recommendation of the Federal Criminal Procedure Committee of the College caution against such a Congressional reaction, at least until the system envisioned by the Supreme Court, use of the guidelines as a guide to sentencing, subject to appellate review, has a chance to work, and, if the result of discretionary sentencing proves to be chaotic or inappropriate, then Congress could consider alternatives.

Those who believe that the independence of the judiciary is a cornerstone of liberty and of our system of justice, and who support the recommendations contained in the College's Report and advocated by our Federal Criminal Procedure Committee, might well consider addressing the matter with their own Congress people, now, before a precipitous "fix" becomes an irresistible impulse in Congress. The grounds for your approach to Congress for restraint have been eloquently stated in the College's Report opposing these mandatory minimums, and favoring discretion in sentencing, as restored to the judges by the Supreme Court in *Booker* and *Fanfan*. ◆

LETTERS TO THE EDITORIAL BOARD

(Continued from page 4)

modern day lawyer is as responsible as any other factor. Lawyers who have established themselves as "litigators" who have never tried cases, are mentoring and teaching the younger lawyers: "to avoid a trial at any cost". . . .

There are clients out there who "need" many of their lawsuits settled, and "need" some of their lawsuits "tried." The client's search for the lawyer willing to ride into the courthouse is becoming more difficult.

What can the American College and other legal organizations do about this ever increasing problem? Seminars and programs should be directed toward educating the modern day trial lawyer that the client is often best served by "trial." Outside forces such as the American College should conduct "interventions" in the continuing institutionalized "settle at any costs" mentality being passed down from generation to generation of "litigators." Lawyers must be taught that there is nothing wrong with "losing" if the client wants a trial. All is wrong with the "fear of losing" being ingrained in our "litigation" bar to the detriment of our clients.

Kenneth L. Tekell, Houston, Texas

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I agree with Mr. Tekell's letter to you . . . . It might be further added that the less experience a "litigator" has, then the more abusive he or she seems to be relative to discovery. There exists a clear correspondence in that regard, but, how else, pray tell, can one overwork and, thusly, overbill a file? Surely, not at the courthouse.

Ronald D. Krist, Houston, Texas

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Solving the problem is going to take more imagination that we have exhibited lately. Perhaps we have been too intent on chasing paper and the dollar.

T. Maxfield Bahner, Chattanooga, Tennessee

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Your observations and opinions, . . in my judgment, are very correct. . . . I . . . hope the leadership of the bar as a whole takes notice. However, I doubt it will.

I am 84 years old and was admitted to the Kentucky Bar in 1942. Except for four years in the Army, I have been a civil trial attorney ever since. Like you, I experienced Code Pleading, the emergence of the Federal Rules of Civil Procedure and their abuse in recent years. I personally know the basis of your opinion. May you continue to educate the bar on its problems.

Uhel O. Barrickman, Glasgow, Kentucky

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We have created a legion of glorified clerks as opposed to trial lawyers. [The] comments on discovery abuse denote the main problem . . . . Deposing everyone in sight and asking elementary questions at great length do very little to resolve lawsuits.

Hence, the absolute need for mediation, arbitration, or settlement in general. Economics dictate no other path. We, in the profession, are to blame for the "vanishing trial."

Garfield R. Jeffers, Wenatchee, Washington

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As I recall, it was in the mid—late 1970's that a "new breed" of lawyer appeared—the "litigator," which I have always distinguished from "trial lawyers.". . .

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Letters to the Editorial Board

(Continued from page 27)

To me, most of the judges are no longer trial judges, but "case managers." . . . With Judge [Gerhard] Gesel, life was simple—he held a status conference weeks after the answer was filed to meet counsel, and to let them know that civility was to prevail, and that he did not tolerate combative discovery—and God help the lawyer who was out of line, either during discovery or at trial! . . .

The other problem has been "over-lawyering" by the "litigators." . . . In my opinion, your view that a significant change is needed is eminently correct.

Stephen A. Trimble, Washington, District of Columbia

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From the time I was a little boy reading about Abraham Lincoln and Atticus Finch, I wanted to be a trial lawyer. The dream came true . . . . Unfortunately, increasingly my practice seems headed towards your definition of a litigator. I would like to stop the slide, but the practical realities of acting in the best interest of clients in the present system drives me, and my brother and sister trial lawyers, relentlessly in the direction of the litigator.

Edward T. Hinson, Jr., Charlotte, North Carolina

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(Out of deference to the heading of the following communication, which read "UNOFFICIAL AND PERSONAL," and given its source, we exercised our discretion not to publish the opinions it contained, but the introduction was simply too good to pass up. Ed.)

I am nowise certain as to which course we might take to improve the jury trial scene, but I am kinda like Jerry Clower's coonhunter (who had climbed a tree to shake a coon out and found a bobcat up there)—"Go ahead and shoot on up in here, one of us has got to have some relief!"

[The Honorable] Wm. R. Wilson, Jr., Rasputin Mule Farm, Little Rock, Arkansas [whose day job is United States Judge for the Eastern District of Arkansas] ◆

Honorary Fellow in Unusual Lawsuit

One of the College's Honorary Fellows in England has ended up in a bizarre lawsuit that eventually may result in the continuation of legal foxhunting, a wildly controversial and complicated situation in that country.

According to the January 24-31 issue of The New Yorker, Sir Sydney Kentridge, whom the magazine calls "the country's most eminent constitutional lawyer," has been hired by the fox hunters organization to appeal for a judicial review of the ban against fox hunting in England.

"It is unlikely that Kentridge, who spent the better part of his career defending political prisoners in South Africa, cares a whit about foxhunting," the magazine says. "But he does care about the law, and he knows that legal scholars have been waiting a long time for someone to take a crack at the Parliament Act [of 1949]."

In an eight-page article, the magazine's Jane Kramer writes that Kentridge will argue that the 1949 act is illegal because, among other reasons, it passed Parliament without the consent of the House of Lords. ◆

Bon Mots from St. Louis Meeting

I was a young lawyer, and I was given a criminal appointment. . . . I went into federal court and I was representing a man who had been already convicted of stealing treasury checks. He had pled guilty, was given a suspended execution of sentence. But he violated the provisions of the court order, so they brought him in for a hearing to take away his probation and put him in prison. So I represented him on that relatively not complicated issue. I'm sitting next to him in the courtroom, and the United States Attorney comes in. He is standing by his desk shuffling papers and getting ready. I'm sitting next to my client at the counsel table, and the Magistrate comes in, and he says to the U.S. Attorney, "Counselor, is the government ready to proceed?" He says, "Yes your Honor, the government is ready to proceed." He turns to me and he looks at me and he says, "Is the defense ready to proceed?" And I said, "Yes, your Honor, we're ready to proceed." Then a gentleman in the courtroom comes around and whispers in my ear, "Counselor, in federal court you are supposed to stand when you address the judge." My client looked at me, goes like this [presses his open palm against his forehead] and slides down in his seat. (Pause for effect). He's already served his three years . . . by now.

The Honorable Francis G. Slay, Mayor of St. Louis

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Mayor Slay has municipal responsibilities and will be on his way. As he leaves, I did want to say that this morning at the breakfast . . . in our culture, we address the Mayor as "Your Worship," which is the English tradition. I said, "Good Morning, Your Worship, " and he looked startled, a little taken aback, but I think he liked it. So if you are in the process of getting a building permit I would suggest . . . .

David W. Scott, Q.C., President of the College, introducing the Mayor of St. Louis

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I am honored to be here. I looked over the list of attendees and I can say, I think without fear of refutation, that I have never before been in a single room with this much talent. In Chapel Hill, we would say there hasn't been this much talent assembled in a single venue at least since Michael Jordan dined alone. I realize that at the White House, and maybe the University of Virginia, they might use other comparisons. . . .

[Y]our President, Mr. Scott . . . indicated almost immediately that I don't look like he expected a law school Dean to look. I hear this from time to time as I travel around the country. At first I took it as a compliment, thinking that maybe I'm not as nerdy or as arrogant as is usually called for in my line of work. But then I realized that people were really just saying I'm a lot larger than they ever expected a law school dean to look. I explained this to my wife of twenty years, and she said, I'm sure generously, that I'm a lot larger than she ever expected me to look either. . . .

Dean Gene R. Nichol, University of North Carolina School of Law

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And I might tell you, Mr. Scott, that the gentleman who referred to the Judge as "Your Worship," that's not bad. Is it Jimmy [Morris, the president-elect of the College, who sat beside him on the dais]? Jimmy managed to do that before every case he tried. . . . .

There were two people in my [first-year law] class – two men – who took over the lectures. And I used to think: "If they know what they're talking about, I'm not getting this." I really had in my mind to leave. . . .

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BON MOTS

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A professor in one particular course I remember said, "I'm gonna give you all an exam tomorrow to teach you how to take a law school exam." . . . And about a week later he said, "I've graded the papers" – and he's probably done this a hundred times, but I didn't know that – "I've graded the papers, and, as I call your name, come up and get your paper." He called my name first in what I consider was a rather rude way. He didn't say Mister, he just said "Merhige." So I got up and went towards his desk, and as I approached him, he said, "You got a 38." And even now, the hairs on my arm stand up. That was 60 years ago. And of course, the giggling started, and the two people I mentioned before were leading it. I remember the thought that came to my mind was, "I'm going to kill him." And I meant it. And then he hit me my divine moment: he just sort of leaned over and said, "Incidentally, gentlemen, that was the highest grade." It was that moment that I felt: "You're gonna do it, and you're gonna be good at it, and you're gonna like it."

Retired Judge Robert R. Merhige, Jr., recipient of the Samuel E. Gates Litigation Award

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I learned more from that competition about being a trial lawyer than I ever could in the classroom: how important it is to be confident in the courtroom, how to remain composed when the Judge rules against you or when you don't understand the Judge's ruling . . . .

Rena Upshaw-Frazier, Winner of the Best Oral Advocate Award, National Trial Competition

Rena was gracious enough not to say that the judge's ruling that she was unable to understand was mine. And the three of four judges—real judges–who were there, Rena, you should know, could not understand the ruling either.

David W. Scott, Q.C., President of the College, who was the presiding judge in the finals of the National Trial Competition

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Our next speaker, I mean our next *real* speaker, will be a guy who is cheap and takes advantage of his friends. Last time I got invited by Mr. [John] Grisham to meet with him, was a few weeks ago. He called and said that it was a great opportunity for us to get together, and we met in New Orleans at a fund-raiser, a political fund-raiser. Being a yellow dog Democrat trying to exist in a Trent Lott society, I welcomed the opportunity to get out of the environment for a few hours and be with an old friend. It turns out, however, we had to make a thousand-dollar contribution to get in the door. Worse still, I convinced a prominent Biloxi businessman who had been trying to get an audience with Mr. Grisham for months and months and months to put up a thousand dollars and to send his personal envoy, a retired prominent newspaper editor, to perhaps get a chance to speak to John on this auspicious occasion. Well, after waiting for hours, the candidate came and spoke and went, and no Grisham. So I'm trying someway to explain this, although I fully had expected it; didn't surprise me. But I had to explain it to my guest who had just put up a thousand dollars. And next day it turns out, we learned that Grisham, *was* in town, except he went to speak to the twenty-thousand-dollar donator club, and just left us kind of in a lurch there. . . .

[W]hen I got this invitation, [to introduce John Grisham] . . . I had a little bit of misgiving. Couldn't help but think about the time President Kennedy invited William Faulkner, who had a chair out at the University of Virginia at the time, to come to the White House for a formal dinner, and Faulkner said, refusing, it seemed like an awful long way to go just for supper. . . .

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BON MOTS

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And so when I told Lucy, my wife, that the invitation had come in, she said, bless her heart, she said, "Can we afford it?" Then, when it became apparent that he [Grisham] was not going to volunteer to send down his private jet to get me, we sold some cows. Yesterday Lucy helped me fix the flat on the truck, and we got on up here. . . .

In *The Rainmaker,* John . . . said nice things about me in the acknowledgment section of the novel [acknowledging Denton's assistance with respect to the legal aspects of the book], most of which are not true. And it certainly changed our lives forever, because you know his novels are published worldwide, and I've gotten calls from as far away as North Africa from people needing representation: great cases, like two guys in North Africa wanted for me to develop a class action against Budweiser for those people in that part of the world who had long mustaches, because the hairs of their mustache would get caught in the crevices of the beer can . . . . Then, there was a call from a lady in France who had some idea that she owned some part of England, going back a thousand years.

William L. Denton, FACTL, Biloxi, Mississippi, introducing John Grisham

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Twenty-five years ago when I was in law school at Old Miss, Will Denton started extracting huge sums of money from insurance companies in bad-faith cases along the Gulf Coast in Mississippi. And he was a pioneer. He was one of the first guys to do it down there, and his courtroom victories and talents and antics and verdicts became almost legendary. . . . If you think he sold some cows to get here, you are crazy. . . .

Jimmy [Morris] asked me sixteen months ago . . . , "Could you come speak in St. Louis on October 22?" And I did some quick math, and I said, "That's a perfect time to be in St. Louis, Jimmy. I'll be happy to come speak." And he said, "Well thanks, but why is that a perfect time?" And I said, "Well, that's the morning after the Cardinals will win the pennant."

I met Jimmy six years ago . . . . I was sued by a plaintiff who was and is asking for eight million dollars in damages . . . . The case is still ongoing so I can't talk about it, but we haven't gone to trial yet. Jimmy has done a great job in six years of keeping the thing away from the jury. I hired him because of his reputation as a great trial lawyer and people tell me all the time that this guy's from the old school; he's an old Southern trial lawyer who rarely, rarely loses, and juries will follow him anywhere. That's nice to hear, but I haven't seen that yet, because we can't get my case to trial. I'm the defendant. I really don't want to rush the court, but after six years of this lawsuit, Jimmy's cumulative fees are slightly more than what the plaintiff is demanding. . . . I've heard Speilberg say one lawsuit per movie is part of the overhead. But frankly, with people like Jimmy Morris in the overhead, it's almost cheaper to stop writing books. . . .

[S]ix months to the day after I finished law school, I found myself sitting in a crowded courtroom, looking at one hundred prospective jurors, and they were looking at me. I had never tried a case before and had not planned to try one on that day. The docket was very crowded. There were three criminal cases above mine. At the last minute all three of them went off on pleas, and the judge turned to me and said, "Mr. Grisham, you are next. Under the rules of our court, it's time to go. Are you ready?" Well, you can't say you are not ready. I said, "Sure judge, let's have us a trial." Seated next to me as we looked out at the jury pool was my client, who was charged with murder. It was a murder trial, not capital murder, but it felt like it. . . . I was stumbling my way

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(Continued from page 31)

through jury selection. And it became apparent right off the bat that I really did not know what I was doing. I was sure I didn't belong there. My client suspected it early on. . . . [T]he jury sat there for three days and watched as I made every mistake that an ignorant rookie could possibly make. . . . I had no idea of what I was doing. At the end of the first day, my client moved his seat as far down to the defense table to get away from me as he could, and basically [he] stopped speaking to me after the first day. . . . [T]he pathologist particularly fascinated me, because he testified with unbelievable detail that the greatest distance the barrel was away from the deceased's head at any time during which the six bullets entered his head was four inches. I quizzed my client about it during a recess, and his response was, "I thought it was a hell of a lot closer than that." . . .

[T]hroughout this trial I kept telling myself, "You'd better work on that closing argument cause it's going to have to be good." . . . And so, after three days of trial late in the afternoon, the moment had arrived, and the prosecutor, the district attorney, got up to make his final summation, his final appeal to the jury. . . . [We] listened with great attention, great fascination, as he put together a very compelling reason why my client should be sent to prison for forty years. I could tell the jurors hung on every word. It was quite a performance. I was sitting there with a legal pad in front of me without a single word written on it. I felt very alone and very sick. I hadn't slept in three days, and I was worried about getting sued for malpractice or disbarred, or that's what should have happened to me. And the judge who was a great old trial judge, who had been through it as a young lawyer, he finally said, "Mr. Grisham, it's your turn for the closing argument." And I stood up, and when I did my knees just turned to jello, and I leaned on the table and I said, "Judge could I approach the bench."

Well, I'd been approaching the bench for three days, every five minutes, trying to hope that somebody would tell me what to do. The prosecutor had long since just thrown in the towel. He wouldn't even go to the bench with me. He didn't care what I said up there. He waved me up. He didn't even get out of his seat. And I walked up to the bench, really just a nervous wreck. And the courtroom was crowded and the jury was ten feet away. The judge slid the microphone to the side, he leaned down and I leaned up, our noses were about that far apart, and he said something that I will never forget. He looked down and he said, "Do you need to go vomit?" And I said, "Judge, I don't know what I've got to do, but I've got to go." He said, "Okay, but this is what I'm gonna do. I'm gonna keep everybody right here. We're just going to take a little time out. I'm not going to call a recess. I'm going to keep the jury in the box. Go through that door. Upstairs there's a restroom. Hurry up." I sprinted out of the courtroom. Nobody moved. I came back five minutes later. I felt somewhat better. I looked at the judge and he looked at me, and I looked at him, and he looked at me. Then he finally looked over at the jury as if they're all yours. And I walked over a few feet and I had no idea of what to say. And I said, "Folks, I apologize for what just happened. I'm sorry I had to leave like that. But I also want to apologize for the way I've handled this case. It will come as no surprise to you that this is my first case, and I really wasn't ready for it. Six months ago I was in law school, and I'm sorry. I'm just sorry for the way I've defended my client, and I'm just kinda sorry for being here, you know. I just . . . ." They started nodding a little bit, you know. And I kinda got warmed up; I kinda got a little rhythm, and I said, "You know, I'm sorry that I wasn't better prepared, but my client here, this is his only day in court. This is the only trial he's gonna get and he certainly deserved far better than what he got for a lawyer. And I hope you won't hold it against my client, my performance notwithstanding. I've already apolo-

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gized for that. My client deserved better. You folks are about to home, and I'll go home, and we'll all go home, but for my client, it's his only day in court." And you know, I thought I had their attention, and I said something that I later took back. I said, "Look folks, the last three days have not been particularly enjoyable for me or for you. I'm not sure I'm going to do this again. If y'all will give my client a break on his lawyer, I promise you this is the last case I'm gonna try."

The DA jumped up and objected, and the judge sustained, but I'd made my point. I got, you know, I relaxed, I was able to relax in front of the jury, and I was able to talk to them and talk about the weaknesses. It was a self-defense case, and our case was not as hopeless as I made it sound. And when I finished I realized that the courtroom was quiet, and the jurors were listening, and I turned and thanked them. I looked at the judge, and he winked at me, and I went and sat down. When I sat down my client had moved his chair back down close to mine, and he put his arm around me and he told me that he loved me. At that point I really needed to be loved. And it wasn't long before the jury brought back a verdict of not guilty. . . .

Best-selling novelist and lawyer John Grisham

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John [Grisham], while you are here, you might have a word with Jimmy about your case. Last night at our reception I was talking to Mike Smith, who is a lawyer in Richmond, who said, "It's too bad about John Grisham not being able to make it." And I said, "What do you mean not being able to make it?" And he said, "Well, his case is starting on Monday in Richmond." He said, "It's number four on the list of cases, and the first three have settled!"

President David W. Scott, Q.C.

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I said "Dean, do you remember when you allowed me to come and interview at the law school? Do you remember that young wiry, lanky kid from Richmond, Virginia who walked into your office in 1973 wearing the fabric de jour, double-knit polyester with a tie wide enough to be referred to as a chest protector, an Afro that was so large that when the wind blew, I had to resist it with all effort in my neck muscles?" He said "Robert, I do, I do remember you." And I said "Dean, do you remember how we looked at each other when I walked into your office, how we looked at each other in horror?" He said "Robert, I do." I said, "Dean, I was afraid of that." But do you know what he said , he said, "I am so very proud of what you've accomplished." And I said, "Dean, I appreciate your not judging the book by its cover."

Robert J. Grey, Jr., Richmond, Virginia, President of the American Bar Association, on encountering the dean of the law school at Washington and Lee University, Dean Roy Steinheimer, for the first time in twenty-one years.

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On every single one of these trips, my uncomplaining wife Alison, a fabulous supporter of the College and its President, has been by my side. Our only disagreement, which occurred every week, was what time to leave for the airport. . . .

President David W. Scott, looking back on his year as President of the College

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He has done all this strictly adhering to his credo, which some in this room have personally experienced: "Early to bed and early to rise, and you miss the opportunity to meet a lot of interesting people."

President Scott, paying tribute to his successor, James W. Morris, III ◆

CELEBRATION OF BROWN V. BOARD

(Continued from page 8)

examination "inconclusive." Warren said inconclusive, but I have always thought he really meant beside the point. Beside the point, because given the breath-taking harshness that was pressed in *Brown,* the nature of the discrimination, and given the overarching importance of the rights at stake, Chief Justice Warren concluded that if the American idea of equality was un-troubled by this crushing subordination, then frankly, the American idea of equality wasn't worth much. We might talk about it in the Declaration of Independence, we might pledge our mythical allegiance to it, but in fact it was a sham, a fraud. And that conclusion, the idea that the American aspiration to equality was worthless, Earl Warren, to his eternal credit, was both unable and unwilling to accept.

And surely this morning, fifty years later, Earl Warren's question about the reality of the American commitment to equality could be our question as well. We could ask this day if the American ideal of equality would mean much if the United States Department of Justice ever prevails in its claim that a United States citizen can be grabbed off the streets of Chicago, declared an enemy of the State, thrown into a Navy brig in South Carolina, no charges, no lawyer, no hearing, no jury, no trial, no law, a stranger to the Constitution forever on the basis of the signature of a single politician, as if anyone in our government has that much power.

And we can ask if the American equality notion means much if the wealthiest nation on earth, the richest nation in human history, allows a fifth of its children to live in crushing poverty, a record far worse than many other industrial nations, nations who don't talk so much about equality, almost a quarter of black and Latino kids officially poor, as if any theory of justice or virtue could explain the exclusion of innocent children from the American dream.

And does the American idea of equality mean much if all over my own state and much of the nation, we countenance rich and poor public schools, not just private schools, rich and poor *public* schools, as if it were thought acceptable for our government to treat some of our children as second and third and fourth class citizens? Our religions teach that every child is equal in the eyes of God. We fund our schools as if we didn't believe it.

And does the American idea of equality mean much if now over forty-five millions of us have no health care coverage of any kind, leaving us standing alone among the major industrial nations in failing to provide universal coverage? We spend more per capita on health care than any other country in the world, but we also leave more of our fellows outside the system, in the shadows, though as Martin Luther King reminded, of all the forms of inequality, injustice in health is the most shocking and inhumane.

And does the American idea of equality mean much if our own system, the legal system, is perhaps the most inequitable of all? Jimmy Carter wrote years ago that ninety percent of the lawyers represent ten percent of the people. We are over lawyered and under represented. That may be an exaggeration - might be - but the legal system surely prices out, fences out, a huge segment of our community. Study after study shows that at least eighty percent of the legal need of the poor and of the near poor goes unmet, making "equal justice under law" a mockery on our courthouse walls in every state, in every city, in every county of this country.

Does the American idea of equality mean much if, across the nation, we continue to yield to a growing trend of resegregation, exacerbated by economic inequalities and a regime of claimed public accountability that allows some of us to purchase advantage for our children, while others remain locked at the bottom of economic and social life?

(Continued on page 35)

CELEBRATION OF BROWN V. BOARD

(Continued from page 34)

And does the American idea of equality mean much where in my State and across much of the South children of undocumented workers, who against all odds navigate our middle schools and graduate from our high schools, no matter how hard they work and no matter how rigorous their programs, they are locked out of our public universities and community colleges and of their chance for a powerful future, as if they were strangers to the states in which they have lived most of their lives, members of a permanent subclass, welcomed here for cheap labor, but denied the broader benefits in their communities?

Does the American idea of equality mean much if almost five million Americans can be denied the fundamental right to vote because of felony disenfranchisement laws, with blacks and Latinos heavily over represented in that five million?

The greatest lessons of *Brown* for us then are that *Brown's* questions must be still *our* questions, and that *Brown's* challenges, which go to the heart of the promise of America, must remain our challenges as well. *Brown's* challenges must be our own. *Brown's* challenges must be our own particularly where *I* live, because the South is the native home of American poverty, where we produce more poor people and more political leaders who are untroubled by it than the rest of the country, where we have the longest history of government aimed at separating the royalty from the riffraff, the chumps from the swells, and where we tend to believe, all facts to the contrary, that the only thing wrong with this country is that those at the bottom have too much and those at the top don't have enough.

Brown's challenges must be our own because these rank denials of equality represent a marginalization that is contrary to the most basic promises we make to each other as a nation, and it is not a close call. . . .

Brown's challenges must be our challenges if we believe with Dr. King that the arc of the moral universe is long, but it bends toward justice, if we believe with Robert Kennedy that history will judge us by the extent to which we have used our gifts to lighten and enrich the lives of our fellows. And *Brown's* challenges must be our challenges because John Lewis, Congressman John Lewis . . . was right when he said that America is a very, very different place than it was in 1954, and it's different because thousands and thousands of people chose to get in the way. Citizens got in the way; lawyers got in the way; judges got in the way, even Presidents got in the way.

And *Brown's* challenges must be our challenges even when this work is not as popular or as shared or as supported as it ought to be, because Fannie Lou Hamer didn't do an opinion poll when she started the Mississippi Freedom Democratic Party and Rosa Parks didn't conduct a focus group before she sat down for freedom.

Brown's challenges must be our challenges because the virtue of our nation is still in the making. Our contributions, this generation's contributions, are still on the line. We, too, are called upon to add our chapter. And in the crucible of this time, this immensely challenging and dangerous time for civil rights, it is vital that we become fully engaged in what Daniel Webster called the great work of humans on earth, achieving justice.

I am haunted by a passage from Ralph Ellison's novel, *Juneteenth*. There he wrote, "We are a nation born in blood, fire and sacrifice. Thus we are questioned, judged, weighed by the ideals and the events which mark our boundaries. These transcendent ideals interrogate us, judge us, pursue us in what we do and what we do not do. They accuse us ceaselessly, and

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Celebration of Brown v. Board

(Continued from page 35)

their interrogation is ruthless, scathing until, reminded of who we are and what we are about and the cost we have assumed, we lift our eyes to the hills and we arise."

Our ideals of equal justice question and interrogate us. They examine us repeatedly and they find us lacking. The excuses we offer do not satisfy, not if we are who we claim to be.

So *Brown's* challenges must be our own, because we cannot escape responsibility for the society we create. I close with a statement from Lord Brougham, the nineteenth century Scottish lawyer and statesman, a charge that is more essential today than even when he spoke it. "It was the boast of Augustus that he found Rome brick and left it marble, a phrase not unworthy of a great Prince. But how much nobler would our sovereign's boast be when he shall say he found law dear and left it cheap, found it a sealed book and left it a living letter, found it the patrimony of the rich and left it the inheritance of the poor, found it the two-edge sword of craft and oppression and left it the staff of honesty and the shield of innocence?"

So *Brown's* challenges must be our own, because the greatest American value is that we are all in this together, one nation indivisible, seeking Providence, committed to human dignity and liberty and charged with *Brown's* promise of equal justice to all. ◆

Foundation Reports 22 Percent Increase

ACTL Foundation President Lively Wilson reports that returns from investments, together with contributions from the Fellows of more than $180,000, resulted in an overall increase in the Foundation's assets and unpaid pledges of 22 percent for the fiscal year ending June 30, 2004.

After grants were made, the Foundation ended the year with assets and unpaid pledges of $1,585,000.

Grants were made to the National College of District Attorneys, National Criminal Defense College, School of Law at the University of Missouri at Columbia, National Children's Law Network, National Constitution Center in Philadelphia, the Mass Tort Manual, Mercer University, the National Mock Trial and Moot Court Competitions and the International Judicial Academy.

In fund-raising, the entire membership of Alabama Fellows led the way by donating one hour's worth of time to the Foundation. Alabama was followed by identical pledges from all Fellows in Delaware, Kentucky, New Jersey, Oklahoma, Pennsylvania and New Mexico.

Rotating off the board were Andrew Coats, Tom Deacy and Gene Lafitte and coming on are Frank Jones, Warren Lightfoot and Jerry Graham. ◆

Fellows In Print

Fellow David Boies of New York, New York is the author of *Courting Justice: From NY Yankees v. Major League Baseball to Bush v. Gore.*" 416 pp. Miramax Books. ◆

"CLOSING ARGUMENT": A SON'S TRIBUTE

By: Matthew James Miller

During his last few weeks of life, one of the nurses asked Dad what he did for a living. Dad sat up in bed and with a twinkle in his eye said, "I was a trial lawyer." My Dad was a real life Atticus Finch, a trial lawyer who loved the courtroom and the law second only to his family. To him the law represented the best about people: honesty, achievement and fundamental fairness. I saw this through the eyes of a wide-eyed boy.

Dad taught me about honesty when he told me about a client he kicked out of his office because the client lied to him. "But don't clients pay you money?" I asked, incredulous.

Dad taught me about achievement when he returned from induction into the American College of Trial Lawyers. Dad aspired to this from the day he began to practice and considered it the highest honor a lawyer could receive. He showed me a Burberry trench coat he bought during the trip. "I have always wanted one of these," he told me.

"So why didn't you just buy one?" I asked.

"Son, rewards come with hard work," he told me.

I learned about fundamental fairness when I watched Dad represent a board of directors for a farmers' cooperative against a large insurance company represented by a formidable big city law firm. The case was nearly hopeless but Dad fought like it was his most important one. "They just want to know somebody is standing up to fight for them," he told me. It was what he loved best about the law.

I learned about integrity when Dad left the firm he helped start twenty-five years earlier because the firm was treating one of the partners unfairly. I learned about courage when he started over again. "The most important thing you have as a lawyer and as a person is your reputation," he told me. Leaving was the right thing to do and he never looked back.

TED S. MILLER

Dad also showed me how to work hard. Dad worked most days of the week and often nights. Despite a grueling schedule, he came home for dinner with us every single night. More impressively, he never missed a single event in which my brother or I were involved—a record which can be equaled but never broken. Frequently he arrived at a basketball game still in his vest and tie. At those times, I knew I had the best of both worlds, a dad who loved me and a hero to admire.

Despite the intensely hard work, Dad taught me about the important of loving what you do. I walked to his office late one night to get a ride home. As we walked into the cool night air, he put his arm on my shoulder and said, "Son, you might really like this some day." I never heard him complain about his job and grew up believing there could be no higher aspiration than to be a trial lawyer. After he retired, Dad once said, "I will never quite get over missing the practice of law."

Now the old trial lawyer has finally rested his case, but not before leaving a legacy of love for his family and deep passion for the practice of law.

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[MATT MILLER, AN FBI SPECIAL AGENT, RECEIVED HIS J.D. FROM INDIANA UNIVERSITY IN 1992. HE WROTE THIS TRIBUTE ABOUT HIS FATHER, TED S. MILLER, FACTL, WHO DIED ON NOVEMBER 21.]

AVERAGE NOMINEE AGE, LEVEL OF EXPERIENCE REMAINS STEADY

The 130 nominees submitted to the Board of Regents at its Fall meeting reflected no significant change in the profile of candidates from previous meetings. The average nominee was slightly in excess of fifty-four years old and had been licensed to practice for a little over twenty-seven years.

Despite the College's fifteen-year threshold eligibility level, only eight nominees had practiced twenty years or less and only six were forty-five years or less in age. The overall statistics were:

YEARS OF PRACTICE	NUMBER OF NOMINEES	AGE	NUMBER OF NOMINEES
15-20	8	40-45	6
21-25	32	45-50	26
26-30	58	51-55	49
31-35	19	56-60	30
36-40	11	61-65	18
Over 40	2	Over 65	1

COLLEGE ELECTS NEW LEADERS

At its reorganization meeting on October 23, 2004, the Board of Regents elected the following to serve as officers for the coming year:

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

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These four and Immediate Past President **DAVID W. SCOTT, Q.C.** will constitute the Executive Committee.

At the annual meeting of the Fellows, the following were elected to four-year terms as Regents:

ROBERT W. TARUN, Chicago, Illinois–Illinois, Indiana, Wisconsin

JOHN H. TUCKER, Tulsa, Oklahoma–Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming ◆

THE 2004 ANGLO-AMERICAN LEGAL EXCHANGE

ANGLO-AMERICAN EXCHANGE DELEGATES AND SPOUSES BEFORE WADDESDON, THE COUNTRY HOME GIVEN BY LORD JACOB ROTHSCHILD TO THE NATIONAL TRUST

By: Michael A. Cooper

Continuing a tradition that dates back roughly three decades, the College sponsored an Anglo-American Legal Exchange from September 12 through September 15. The Exchange participants were United States judges and lawyers and their British counterparts. The discussions were held in London and Oxford. The British hosts planned the program. We will have the privilege and delight of reciprocating when they visit us next September.

The United States team was led by Justices Antonin Scalia and Stephen Breyer of the United State Supreme Court and included Chief Judge Deanell Reece Tacha of the Court of Appeals for the Tenth Circuit, District Judge Martin L.C. Feldman of the Northern District of Louisiana and Justice Randy Holland of the Delaware Supreme Court. The lawyer delegates, as has been customary, were all College Fellows, but this may be the first Exchange in which a majority of the Fellows were not present or past officers or members of the Board of Regents. I was asked by President David Scott to lead the lawyer cohort and was joined by Past President Charles Renfrew, Fletcher Yarborough of Dallas,

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ANGLO-AMERICAN EXCHANGE

(Continued from page 39)

Chilton Varner of Atlanta, Alan Sullivan of Salt Lake City and Seth Waxman of Washington, D.C. The British team consisted of Lords Scott of Foscote and Rodgers of Earlsferry, both of whom are Lords of Appeal in Ordinary (or "Law Lords"), Lady Justice Arden and Lord Justice Dyson of the Court of Appeals, Mrs. Justice Hallett and Mr. Justice Richards of the High Court, Joanna Korner, Q.C., Professor Jeffrey Jowell, Q.C. and Charles Plant.

The British team selected four broad topics for discussion; they were varied in subject matter, but had the common thread of being relevant to current and recent developments in the British judicial system. The topics were (i) the role of the Supreme Court (there are proposals in Parliament to transform the Appellate Committee of the House of Lords into a self-standing Supreme Court), (ii) Global-law-the impact of foreign law and international tribunals, (iii) Civil litigation-access to justice, costs and related matters, and (iv) Court procedures in civil cases-use of experts and other matters. Both sets of delegates prepared papers on these topics, varying in length and scholarship, which furnished a framework for our discussions. The discussions, each of which lasted about three hours, were thoughtful, candid and spirited; rank was set aside, and collegiality prevailed throughout.

I do not mean to suggest that we worked without respite. We visited the President's House and Library at Magdalen College, Oxford, dined with Lord and Lady Rothschild at Waddeston Manor, the lovely country home given by their family to the National Trust, and had our farewell dinner at the residence of the United States Ambassador to the Court of St. James.

Is there any point to the Exchanges beyond providing a delightful three-day visit for the fortunate participants? I have not the slightest doubt that the Exchanges are valuable, even if their value cannot be fully quantified.

Lord Woolf, whose study a decade ago when he was Master of the Rolls led to sweeping reforms in the British civil justice system, is reported to have said that he was significantly influenced by what he learned during an Exchange, and there are in fact many parallels to our Federal Rules of Civil Procedure in the British Civil Procedure Act of 1998. In like manner, as I prepared a paper discussing the expert evidence regimes in the United States and Great Britain, I noted some procedures in the latter that we would do well to consider incorporating in the Federal Rules. The cross-fertilization facilitated by the Exchanges goes back many years. The American Inns of Court movement can be traced to an earlier Exchange.

Sponsorship of the Exchanges has also cemented the relationship between the College and our Supreme Court and enhanced the stature of the College here and abroad. When the British participants spoke of the College during our discussions and after hours, they did so with a respect that clearly was genuinely felt.

(Michael A. Cooper is the President-Elect of the College)◆

AWARDS, HONORS, AND ELECTIONS

JAY GOLDBERG, New York City, is one of fifteen trial lawyers selected for outstanding opening or closing arguments in a new book, "In the Interest of Justice: Great Opening and Closing Arguments of the Last 100 Years" by Joel Seidemann. Goldberg has represented such clients as Donald Trump, Johnny Cash, Bono, P. Diddy, The Rolling Stones, Willie Nelson, Miles Davis, Dr. Armand Hammer and the *New York Daily News*.

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MAURICE B. GRAHAM, a principal in the St. Louis firm Gray, Ritter & Graham, P.C., has been honored with The Foundation Award, presented by the St. Louis Bar Foundation. The award is given each year to a member of the legal profession who exhibits exemplary charitable spirit and service to the community and profession.

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EARL CHERNIAK, Q.C. of Lerners, LLP, Toronto, has received the Ontario Bar Association's first award for excellence in civil litigation.

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CHRIS G. PALIARE of Paliare Roland Rosenberg Rothstein, LLP, Toronto, was one of five recipients of the 2004 Law Society Medal. The Law Society Medal was struck in 1985 as an honor to be awarded by the Law Society of Upper Canada, the governing body of the lawyers of Ontario, Canada, to members who have made a significant contribution to the profession.

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JAMES F. STAPLETON of Day, Berry & Howard, LLP, Hartford, Connecticut, has received the Whitney North Seymour Award, recognizing outstanding public service by a private practitioner, from the Federal Bar Council. In the nineteen year history of this award, this is the first time a Connecticut lawyer has been honored.

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PETER KORN of McDonough, Korn & Eichhorn, P. C., Springfield, New Jersey, has received the Trial Bar Award from the Trial Attorneys of New Jersey given to trial lawyers who have distinguished themselves in the cause of justice.

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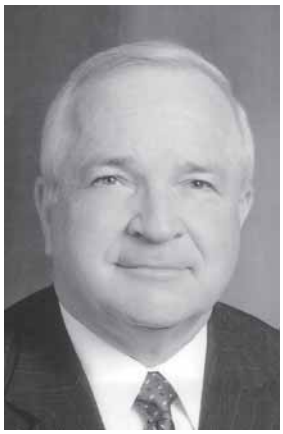

GORDON R. BROOM

GORDON R. BROOM, senior partner with Burroughs, Hepler, Broom, MacDonald, Hebrank & True, LLP, Edwardsville, Illinois, was elected president of the Association of Defense Trial Attorneys at its 2004 annual meeting in Dublin, Ireland.

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WILLIAM S. REYNOLDS, senior partner at O'Shea, Reynolds & Cummings, Buffalo, New York, was honored as the 2004 Defense Trial Lawyer of the Year by the Western New York Defense Trial Lawyers.

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JAMES R. WYRSCH of Wyrsch Hobbs & Mirakian, P.C., has received the Kansas City Metropolitan Bar Association Lifetime Achievement Award. It has been presented only twenty-four times since its creation in 1960. Previous winners include U.S. Senator Thomas F. Eagleton and U.S. Supreme

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Awards, Honors, Elections

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Court Justices Harry Blackmun and Clarence Thomas.

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Donna D. Melby of the Los Angeles office of Sonnenschein Nath & Rosenthal LLP, has become the first woman to be elected president of the American Board of Trial Advocates. Founded in 1958, ABOTA has more than 6,000 lawyers and judges as members spread among ninety-four chapters in all fifty states and the District of Columbia.

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Robert W. Spearman, partner in the Raleigh, North Carolina office of Parker, Poe, Adams & Bernstein, has been honored by the North Carolina Justice Center for his decade-long battle on behalf of low wealth school districts.

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E. Osborne Ayscue, Jr. (Past President of the College in 1998-99), Helms, Mulliss & Wicker, PLLC, Charlotte, North Carolina, has received the Distinguished Alumni Award from the University of North Carolina at Chapel Hill School of Law.

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Larry A. Brisbee, senior partner with Brisbee & Stockton LLC, Hillsboro, Oregon, has been honored as the first recipient of the Washington County Bar Association Professionalism Award.

Larry A. Brisbee

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A scholarship has been established in the name of **Harold Warnock** and his wife at the University of Arizona School of Law. Warnock died in 1997. He and his son, John Warnock, published *Effective Writing: A Handbook with Stories for Lawyers* in 2003.

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Fellow **Carolyn F. Short** of Reed Smith LLP, Philadelphia, has been appointed general counsel to the Judiciary Committee of the U.S. Senate by committee chair Senator Arlen Specter. ◆

Award Winner Honored
(L-R) President Jimmy Morris, Bryan Stevenson, Trudie Ross Hamilton and Past President David Scott

OPINION: SAY NO TO MANDATORY SANCTIONS

By a vote of 229-174, the US House of Representatives recently passed H.R. 4571, the "Lawsuit Abuse Reduction Act of 2004." Among other things, the Act would re-impose mandatory sanctions under Rule 11 of the Federal Rules of Civil Procedure.

And while the contemporary wisdom is that the Bill is dead on arrival at the Senate ("House Votes to Bring Bite Back to Rule 11," *The National Law Journal* September 27, 2004), that wisdom was pronounced before the election increased the Republican majority. Don't get me wrong—Republicans are fine folks, some of my best friends are Republicans. But some Republicans sometimes align themselves as opposed to what they pejoratively call (gasp) "trial lawyers" and this Bill isn't over until the fat lady sings. We need to speak to our Senators and make sure they know that this is a terrible Bill, a terrible idea.

When mandatory Rule 11 sanctions were adopted with the 1983 amendments, sanction motions quickly became a cottage industry that swamped the courts and made litigation distinctly more costly and contentious. Greg Joseph has reported, in his treatise, *Sanctions: The Federal Law of Litigation Abuse*, that more than 7,000 Rule 11 decisions were reported in the 10 years following the 1983 amendments—but that was merely *reported* decisions, and an unscientific review of five districts suggests that there may have been 15 actual cases for every one reported. (See p. 14, n. 9.)

The College was instrumental in getting Rule 11 amended in 1993 to eliminate mandatory sanctions; the Federal Civil Procedure Committee (with the Executive Committee's endorsement) recommended that "shall" be changed to "may" and that a "safe harbor" provision be inserted into the Rule. The result was a Rule that gave judges reasonable discretion to deal with abuses but which did not require them to invest their limited resources in mandatory review of virtually every failed pleading. I have had some difficulty with proper attribution of the following quote, but all rational lawyers should agree with it: "A mandatory sanctions rule is one good judges do not need and bad judges (if there are any of those) should not have."

This Bill would not only return us to the dark days of mandatory sanctions without safe harbor; it has other insidious details which are highly troubling.

The Bill would impose mandatory sanctions for document destruction; no such provision is necessary for judges to deal with legitimate abuses, but mandatory sanctions will lead to inevitable unjust results. Just as it is impossible to keep insect parts out of chocolate (so we publish federal regulations to define how many parts we will tolerate), in the age of electronic data there will invariably be lost and altered information. Judges need discretion, not arbitrary, rigid rules, to deal with our constantly changing present and future.

The Bill would impose itself upon State court proceedings that affect interstate commerce-which would be virtually all state proceedings.

This Bill flies in the face of the Rules Enabling Act approach to amending rules of procedure. Congress may from time to time chafe at the slow process of rules amendment; but that process, which draws on the expertise and reflection of lawyers, judges, and Congress itself, is the best we have devised so far—cer-

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Opinion: No to Sanctions

(Continued from page 43)

tainly better than this Bill, which ignores proven history and circumvents input from the very people who must live with and enforce the proposed rule.

Frankly, it is difficult to understand how such a terrible collection of ideas garnered such a large majority in the House of Representatives. It is politically correct to reduce lawsuit abuse, and it is hard to vote against such an emotional title. But this Bill is itself an abuse and we cannot take it on faith that the Senate will get it right. I intend to, as I hope other Fellows will as well, contact my Senator to voice opposition to H.R. 4571.

Robert L. Byman, FACTL (Mr.Byman is a partner in the Chicago, Illinois firm of Jenner & Block) ◆

Adjunct State Committee Assumes Expanded Role

Recognizing that the nature of trial practice has changed and that many lawyers with national practices who ought to be considered for Fellowship have been overlooked, the activity of the Adjunct State Committee has been expanded.

Such lawyers, though known by the Fellows with whom they try cases around the country and the judges before whom they try them, frequently are less well known by the Fellows and judges in their own states or provinces.

Sensing that the College is diminished by the omission of such lawyers, and that their inclusion as Fellows would enhance the College, the Adjunct State Committee has made an active effort to identify and bring their nominations forward for consideration.

The Committee undertakes to collect information about potential candidates, including procuring case lists and interviewing lawyers and judges who have dealt with them. That information is then turned over to the appropriate state or province committee for its further investigation. If, as a result of this process, the nomination is sent forward to the national office, the nominee is included on the poll of Fellows in the state or province where he or she maintains his or her principal office.

The nomination comes to the Board of Regents identified as a nomination of the Adjunct State Committee, but the Regent's follow-up investigation and the presentation of the nominee's credentials are done by the Regent in whose region the nominee maintains his or her principal office.

This process insures that the Board of Regents has before it information about the nominee's professional reputation and accomplishments among those with whom he or she has dealt around the country, as well the information the Board normally has from a nominee's state or province.

Six nominees whose nominations were initiated by the Adjunct State Committee are among those approved by the Board of Regents at its fall 2004 meeting and have been invited to Fellowship.

The identity of the chair and the members of this committee are listed in the College roster. The committee welcomes suggestions of potential nominees who appear to have been overlooked because of the geographical dispersion of their practices. ◆

COLLEGE HONORS RETIRING CHAIRS

The following distinguished Chairs have been sent a plaque in recognition of their services:

STANDING COMMITTEES—Sylvia H. Walbolt, Tampa, Florida, ACCESS TO JUSTICE AND LEGAL SERVICES; Richard P. Campbell, Boston, Massachusetts, ADJUNCT STATE; John S. Siffert, New York, New York, ADMISSION TO FELLOWSHIP; James D. Zirin, New York, New York, ALTERNATIVES FOR DISPUTE RESOLUTION; Michel Decary, Q.C., Montreal, Quebec, CANADIAN COMPETITIONS; Alan T. Radnor, Columbus, Ohio, LEGAL ETHICS; Griffiin B. Bell, Atlanta, Georgia, LEWIS F. POWELL, JR. LECTURES; Harry L. Shorstein, Jacksonville, Florida, NATIONAL COLLEGE OF DISTRICT ATTORNEYS; Paul C. Saunders, New York, New York, NATIONAL MOOT COURT COMPETITION; James L. Magee, Seattle, Washington, PROFESSIONALISM; John H. Tucker, Tulsa, Oklahoma, SAMUEL E. GATES LITIGATION AWARD; J. Donald Cowan, Jr., Greensboro, North Carolina, SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE; David L. Grove, Philadelphia, Pennsylvania, TECHNOLOGY IN THE COURTS.

STATE AND PROVINCE COMMITTEES—Richard H. Gill, ALABAMA (Montgomery); Robert A. Goodin, CALIFORNIA (San Francisco); Joseph C. Jaudon, Jr., COLORADO (Denver); Richard E. Poole, DELAWARE (Wilmington); John M. Gray, DISTRICT OF COLUMBIA (Washington); Paul W. Painter, Jr., GEORGIA (Savannah); Sidney K. Ayabe, HAWAII (Honolulu); J. Walter Sinclair, IDAHO (Boise): James P. Hayes, IOWA (Iowa City); Gary J. Clendening, INDIANA (Bloomington); Jerry R. Palmer, KANSAS (Topeka); Herschel E. Richard, Jr., LOUISIANA (Shreveport); Barry K. Mills, MAINE (Ellsworth); Kenneth Armstrong, MARYLAND (Rockville); William A. Sankbeil, MICHIGAN (Detroit); Steven J. Kirsch, MINNESOTA (St. Paul); Lucien C. Gwin, Jr., MISSISSIPPI (Natchez); James J. Virtel, MISSOURI (St. Louis); Karen S. Townsend, MONTANA (Missoula); James M. Bausch, NEBRASKA (Lincoln); James R. Olson, NEVADA (Las Vegas); Cathy J. Green, NEW HAMPSHIRE (Manchester); David M. Gouldin, NEW YORK (Binghamton); Alan Levine, NEW YORK (New York); James T. Williams, Jr., NORTH CAROLINA (Greensboro); Jane C. Voglewede, NORTH DAKOTA (Fargo); Paul T. Fortino, OREGON (Portland); Christine L. Donohue, PENNSYLVANIA (Pittsburgh); Alvaro R. Calderon, Jr., PUERTO RICO (San Juan); John W. Kershaw, RHODE ISLAND (Providence); Thomas G. Fritz, SOUTH DAKOTA (Rapid City); George W. Bramblett, Jr., TEXAS (Dallas); Francis M. Wikstrom, UTAH (Salt Lake City); Karen McAndrew, VERMONT (Burlington); Michael W. Smith, VIRGINIA, (Richmond); Wayne E. Babler, Jr., WISCONSIN (Milwaukee); J. Kent Rutledge, WYOMING (Cheyenne); J. Patrick Peacock, Q. C., ALBERTA (Calgary); George W. MacDonald, Q.C., ATLANTIC PROVINCES (Halifax, Nova Scotia); E. William Olson, Q.C., MANITOBA/SASKATCHEWAN, (Winnipeg, Manitoba); Chris G. Paliare, ONTARIO (Toronto); Lynne D. Kassie, QUEBEC (Montreal.) ◆

L-R, OLIVER HILL, JR., DAVID SCOTT, AND OLIVER HILL AT ST. LOUIS MEETING

ONE HUNDRED ELEVEN FELLOWS INDUCTED AT ST. LOUIS MEETING

ALABAMA: M. Christian King, Birmingham, Harvey B. Morris, Huntsville, Robert D. Segall, Montgomery, Randal H. Sellers, Birmingham **ARIZONA**: James R. Broening, Phoenix, D. Reid Garrey, Scottsdale **ARKANSAS**: Bill W. Bristow, Jonesboro **NORTHERN CALIFORNIA**: Mario L. Baltramo, Jr., Fresno **SOUTHERN CALIFORNIA**: Marilyn E. Bednarski, Pasadena **COLORADO**: Gary Lozow, Denver **DISTRICT OF COLUMBIA**: William D. Coston, Richard L. Cys, W. Neil Eggleston, James F. Murphy, Washington **FLORIDA**: Alan Chipperfield, Jacksonville **GEORGIA**: Wade K. Copeland, Atlanta, Gerald M. Edenfield, Statesboro, Terry L. Readdick, Brunswick, Sally Quillian Yates, Atlanta **IDAHO**: Paul T. Clark, Lewiston, Trudy Hanson Fouser, Boise, James D. LaRue, Boise, Steven K. Tolman, Twin Falls **ILLINOIS**: Dan L. Boho, Matthew J. Egan, David T. Pritikin, Ronald S. Safer, Chicago **INDIANA**: J. Lee McNeely, Shelbyville **IOWA**: Marion L. Beatty, Decorah, Greg A. Egbers, Davenport, R. Jeffrey Lewis, Des Moines, Steven Scharnberg, Des Moines, Rand W. Wonio, Davenport **KANSAS**: Thomas J. Bath, Jr., Mark D. Hinderks, Overland Park **KENTUCKY**: Stephen F. Schuster, Louisville **LOUISIANA**: Ronald E. Corkern, Jr., Natchitoches, S. Gene Fendler, New Orleans, John Hoychick, Jr., Rayville, Michael A. McGlone, New Orleans **MAINE**: Mark G. Lavoie, Portland **MARYLAND**: Paul B. DeWolfe, Rockville, Richard M. Karceski, Towson **MASSACHUSETTS**: James M. Campbell, Boston, Robert A. Curley, Jr., Boston, Michael S. Hussey, Worcester, Edward J. McDonough, Jr., Springfield, Thomas E. Peisch, Boston **MICHIGAN**: Elizabeth Gleicher, Royal Oak, James N. Martin, Mount Clemens, Kenneth M. Mogill, Lake Orion, Daniel J. Scully, Jr., Detroit, Douglas C. Smith, Bay City, James L. Wernstrom, Grand Rapids **MINNESOTA**: Charles B. Bateman, Duluth, Craig D. Diviney, Minneapolis, Jim Kaster, Minneapolis, John D. Kelly, Duluth, Timothy D. Kelly, Daniel R. Shulman, Douglas J. Williams, Minneapolis **MISSISSIPPI**: Gaines S. Dyer, Greenville, R. David Kaufman, Jackson **MONTANA**: Carey E. Matovich, Billings **NEBRASKA**: Patrick G. Vipond, Omaha **NEW HAMPSHIRE**: James Q. Shirley, Manchester **NEW MEXICO**: Esteban A. Aguilar, Douglas A. Baker, Albuquerque **DOWNSTATE NEW YORK**: Celia Goldwag Barenholtz, Barry A. Bohrer, Austin V. Campriello, Evan R. Chesler, Peter J. Driscoll, Jeh Charles Johnson Debra L. Raskin, David B. Tulchin, New York **UPSTATE NEW YORK**: Catherine A. Gale, Fayetteville, John C. Herbert, Rochester, Richard T. Sullivan, Buffalo **NORTH CAROLINA**: Catharine Biggs Arrowood, Raleigh, Peter S. Gilchrist III, Charlotte, Mark W. Merritt, Charlotte, Keith W. Vaughan, Winston-Salem **NORTH DAKOTA**: Ronald H. McLean, Fargo **OHIO**: Stephen C. Fitch, Columbus, J. Michael Murray, Cleveland **OKLAHOMA**: Joseph R. Farris, Larry A. Tawwater, Oklahoma City **OREGON**: David K. Miller, Gregory R. Mowe, Portland **PENNSYLVANIA**: Thomas E. Birsic, Pittsburgh, Patricia L. Dodge, Pittsburgh, Arthur T. Donato, Jr., Media, Keith R. Dutill, Malvern, Christopher C. Fallon, Jr., Philadelphia, Charles B. Gibbons, Pittsburgh, Arthur L. Schwarzwaelder, Pittsburgh **RHODE**

(Continued on page 47)

FELLOWS INDUCTED AT MEETING

(Continued from page 46)

ISLAND: C. Leonard O'Brien, Providence **SOUTH CAROLINA**: Carol B. Ervin, Charleston, Mason A. Goldsmith, Greenville **SOUTH DAKOTA**: Steven W. Sanford, Sioux Falls, Nancy J. Turbak, Watertown **TEXAS**: J. Mark Mann, Henderson **VIRGINIA**: William O. P. Snead, III, Fairfax **WASHINGTON**: Keith L. Kessler, Hoquiam, Jeffery P. Robinson, Seattle **WEST VIRGINIA**: Richard L. Douglas, Martinsburg, Scott S. Segal, Charleston **MANITOBA/SASKATCHEWAN**: A. Blair Graham, Q.C., Winnipeg **ONTARIO**: T. David Little, London, William M. Trudell, Toronto.

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Sally Quillian Yates, Assistant United States Attorney, Atlanta, Georgia, gave the response. ◆

NEW INDUCTEES AT THE 2004 ANNUAL MEETING IN ST. LOUIS

FELLOWS TO THE BENCH

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

RICHARD A. FRYE, state court trial judge, Franklin County Common Pleas Court, Columbus, Ohio.

JOHN V. DENSON, Circuit Judge, Lee County, Alabama.

ROBERT S. SMITH, New York Court of Appeals, Albany, New York.

ROGER T. CLARK, Circuit Judge, Gulfport, Mississippi.◆

The Bulletin
of the
American College of Trial Lawyers
19900 MacArthur Boulevard, Suite 610
Irvine, California 92612

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