American College of Trial Lawyers

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IN THIS ISSUE

Judicial Compensation: the Perils of Penury

The salary gap between the federal bench and the private bar is widening at an alarming rate. This, says Fellow CHARLES RENFREW, threatens both the quality and independence of the judiciary. Renfrew assays the problem and calls on the College to act.

In his resignation letter to President Truman in 1950, former College president Simon Rifkind wrote that his term on the federal bench "has convinced me that it is impossible for a judge who has family responsibilities to maintain a reasonable standard of living with the salary now established by law."

Thirty years later, the situation hadn't improved much. "Perhaps you can live on it," resigning U.S. Circuit Judge William Hughes Mulligan told *The New York Times* in 1981, "but you can't afford to die on it."

And you still can't. The compensation of federal judges has deteriorated steadily over the years, most dramatically in the last 15. This is making it increasingly difficult to keep our top jurists and attract the most qualified candidates to the federal bench. The crisis is serious enough to pose a threat to our ability to maintain an independent judiciary.

What has happened to judicial salaries over the last 15 years is, almost literally, unconstitutional. Article III provides that judges' salaries shall not be diminished "during their continuance in office." Yet, while their salaries have indeed grown — from $42,500 in 1969 to $77,300 in 1983 — their buying power has decreased by more than 33%. During that time, the buying power of the average American family has remained constant.

Comparisons with the private bar are even more dramatic:

- The average yearly compensation of a 52- to 59-year-old partner in a 150-plus lawyer firm in 1974-76 was $124,724 — more than 284% higher than that of circuit judges. By 1982, the gap had grown by almost 40%, with the partners' compensation well over the quarter-million-dollar mark: a nominal increase of more than 92%, and a real increase of more than 6%.
- In a 1969 nationwide survey conducted by the Bureau of Labor Statistics, lawyers in the highest salary classification averaged only 69% of a circuit judge's salary. But by 1983, the attorneys' average had increased by 8% in real dollars, and they were making 10% more than the judges.
- The average salary of partners in New York, Washington and Chicago grew from $60,000 in 1977 to $157,000 in 1982, a nominal increase of 161%. The real dollar increase of 64% rose seven times as fast as

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the real gross national product, while a circuit judge's real salary declined almost twice as fast as the GNP grew.

Certainly, nobody enters the federal judiciary to become rich; most are prepared to make a financial sacrifice. But few count on their already low salary being allowed to erode by Congress. This may well account for the recent phenomenon of increased judicial resignations. In the 1950s, seven federal judges resigned; in the 1960s, eight did. In the 1970s, when judicial salaries began to seriously lag, that figure jumped to 12, a number this decade has equaled in just the first four years. This suggests that we may be losing our capacity to retain some of our most able judges.

Of even greater concern is the ability to attract the best lawyers to the bench. Many qualified younger lawyers, whose financial obligations are likely to be at their height, can't even consider the judiciary — especially if they have children in college. In effect, they can't afford to be judges.

A judiciary composed of the independently wealthy and the less successful is obviously not in the best interests of our system of justice. The purposes of the Article III salary provision — the guarantee of judicial independence and a reinforcement of life tenure — are severely undermined by the failure to keep judicial compensation and survivor benefits apace with inflation and with the living standards of the private bar.

True, judges' salaries don't fare badly in comparison with those of congressmen, with whom they are inevitably compared. But the comparison is unfair. Congressmen, whose salaries are admittedly too low, have far greater perquisites and numerous opportunities to earn outside income. Indeed, in 1982 it was reported that 15 senators earned between $50,000 and $100,000 in extra income from lecture fees. The idea of judges stumping for outside income is an appalling thought, and not one that promotes the concept of an independent judiciary.

Congress, which holds the purse strings, has simply failed to keep judges' salaries in line with changes in the economy. Federal judges' salaries are set by the Federal Salary Act and the Executive Salary Cost-of-Living Adjustment Act, which respectively provide for quadrennial and annual salary revisions. But Congress has ignored these opportunities to bring judicial salaries in line with economic reality.

The time is here for trial lawyers to strengthen the forum they practice in by rallying to support more realistic salaries and benefits for judges. No group has a greater professional interest in the quality of judges than members of the College. Many of us have a number of influential contacts in Congress and the executive branch. We must urge them to separate judicial pay raises from those of Congress, which are subject to intense political pressures. This will facilitate the process. Key members of the media should also be convinced of the importance of this move to the independence of our judiciary.

The framers of the Constitution were foresighted enough to provide a financial basis for judicial independence. Will we be so shortsighted as to permit that independence to erode? The issue is not merely what the judges want, but what kind of judges we want. ■

(Author Charles Renfrew, chairman of the College's Judiciary Committee and a former federal judge, is a director and vice president of Standard Oil Company of California.)

Is the U.S. Bankruptcy System Becoming a Pawn of Corporate Strategy?

When Manville Corporation and Continental Airlines filed Chapter 11 petitions, they were accused of abusing the process. But so far, both have withstood legal challenges. Below are excerpts from the Spring Meeting program, 'Bankruptcy — Is It a Dodge?'

No: PATRICK MURPHY

While a company need not be technically insolvent to seek bankruptcy protection, the process is too damaging to be tempting to a business that's not genuinely distressed. And the courts have been willing to police abuses. The bankruptcy process has two primary goals: restructuring or discharging the debts of eligible debtors and ensuring equal treatment of creditors. Underlying this is a strong commitment to rehabilitating, not liquidating, the debtor. The decisions being criticized as abuses of the system have simply upheld these worthy goals. Another function of bankruptcy court is to protect creditors from each other. This furor may flow from an attempt by certain creditors to establish priority claims. Continental Airlines has been accused of filing a Chapter 11 petition to escape its labor contract. Yet the company clearly would have ceased to operate if it had not been released from the contract, eliminating the jobs of the people who complained the most. The Supreme Court has unanimously upheld the rejection of collective bargaining agreements in bankruptcy. What, then, did labor want? Proposed labor-backed legislation would give damages from contract abrogation priority status in bankruptcy, illustrating my point on priority claims. The ultimate question in the Manville asbestos case is how to deal with about 17,000 pending tort claims and, even more difficult, with tens of thousands of plaintiffs yet to be stricken with long-incubating diseases. If the company, which is clearly in trouble, is forced into liquidation by satisfying current claims, future plaintiffs will have claims against nothing more than an assetless corporate charter. The proposed "son of Manville" solution transfers the non-asbestos-related assets to a new entity; the old entity would pay all tort claims from revenue generated by the new one. This avoids giving unfair priority to present creditors at the expense of future ones. ■

(Mr. Murphy is a partner in Murphy, Weir & Butler, San Francisco.)

Yes: ROBERT ROSENBERG

A bankruptcy court's broad subject-matter jurisdiction and ancillary powers to reorganize a company should be invoked only when there is an immediate need for restructuring debt to prevent liquidation. Otherwise, there's too much potential for those powers to be taken advantage of by a company's management. They certainly should not be used as a management tool to abrogate a labor contract or eliminate tort liability. The highly disputed facts in the Continental Airlines case may ultimately support the legitimacy of its filing. But the decision in Manville that there is no good-faith filing requirement contradicts 50 years of case law. The reorganization of a solvent company is nothing less than an arbitrary transfer of value from creditors to the debtor and its stockholders. And it bypasses substantive and procedural safeguards available in other forums — all for the sake of some reorganization principle, the need for which has never been established.

The Manville bankruptcy proceeding is nothing more than an effort by the company to limit the value of all tort claims —present and future — and thus preserve the company's billion-dollar net worth for the benefit of its stockholders.

Manville said it filed for bankruptcy "to interdict the tort system." The legislative history makes it perfectly clear that the purpose of eliminating the insolvency requirement in the 1978 bankruptcy code was to avoid forcing companies to wait until they had no resources left to start the process. It didn't even occur to Congress that reorganization would be used by solvent companies as a management tool. The distant possibility that some plaintiffs 12 years down the road may not get paid is too speculative to turn to the extraordinary powers of the bankruptcy court.

That's a problem for the legislature. ■

(Mr. Rosenberg is a partner in Moses & Singer, New York.)

Putting Teeth into Rule 68 to Curb Protracted Litigation

A proposed amendment provides strong incentives to settle cases early. It has sparked sharp criticism from the public interest bar, which contends the suggested changes would close U.S. courts to all but the wealthiest litigants. JOHN ARNESS explains why the change is necessary, how fine-tuning can allay the fears of its critics and what the College is doing to work for the adoption of this vitally important measure.

Few objectives enjoy more universal support than the reduction of protracted and costly litigation. Yet few problems have proved so resistant to solution. One promising measure is a proposed amendment to Rule 68 of the Federal Rules of Civil Procedure that would provide strong incentives to settle cases early. It would make the "offer of judgment"available to plaintiffs and allow an offerer to recover attorney fees and costs from an offeree who rejects the offer and fails to get a more favorable result at trial.

The proposal has been endorsed by the College, but has encountered stiff opposition from critics who fear it will have a chilling effect on public interest litigation and will favor the wealthy litigant. However, two proposed changes to the amendment should allay that fear and ensure that Rule 68 is an effective, fair vehicle for curtailing abuses of the adversary process.

There is general agreement that Rule 68 needs improvement. Currently, it permits only a defendant to make an offer of judgment, at any time more than ten days before trial. If the plaintiff rejects the offer and fails to improve upon it at trial, he or she is liable to the defendant only for the costs incurred after the offer was made. These costs generally don't include the most substantial pretrial expenses, such as witness fees, discovery costs and attorney fees. Thus there is little incentive to settle if the plaintiff feels he has even a slim chance of doing better at trial.

The amendment, proposed by the Advisory Committee of the Judicial Conference of the United States, would address these concerns by permitting plaintiffs as well as defendants to make the offer, and by making the offeree pay not only costs but also reasonable attorney fees and interest on the award from the date of offer, if the final judgment is not more favorable. The new rule would apply to all litigation except class or derivative actions under Rules 23, 23.1 and 23.2.

According to its proponents, the amendment would make it much more difficult to reject a reasonable offer when settlement is appropriate. They believe the rule would bring much-needed relief from the frivolous or harassing lawsuit, in which a litigant may be more interested in inflicting costs on his opponent than in prevailing or reaching a fair resolution of the problem.

Proponents also feel that the amendment has sufficient flexibility to prevent abuses. Trial courts are familiar with "reasonable fee" standards. Therefore, neither exorbitant charges nor automatic assessment of contingent fees should be of concern. And though assessment of the award is mandatory, in extraordinary circumstances the amount — indeed, even reasonable attorney fees — may be reduced. The Advisory Committee note on the rule lists six factors the court may consider in determining whether such a reduction is warranted. They include: whether the award is burdensome; the presence or absence of a reasonable counteroffer; whether the offeree's refusal was reasonable at the time; whether the offer was a sham; and whether the eventual recovery was less favorable to the offeree by only a narrow margin. These mitigating factors would offset the harsh effect of the rule's automatic imposition.

Opposition to the amendment has come from the NAACP Legal Defense Fund, the American Civil Liberties Union and other public interest groups that regularly appear before the federal courts. These groups fear that even a remote possibility of an individual having to pay

substantial fees and costs could coerce him into accepting an unfair settlement offer. Unsatisfied with the amendment's safeguards, they fear that it will close the federal courts to all but the wealthiest litigants.

Opponents also believe the amendment would fundamentally change the "American Rule," which has encouraged private attorneys general by insulating the loser from paying the winner's costs except in very narrow circumstances. And they suggest that the amendment runs contrary to dozens of congressional fee-shifting statutes that permit an award of attorney fees to the prevailing party. Thus, they claim, the amendment goes beyond the bounds of the Advisory Committee's authority.

But these valid concerns can be allayed without discarding the amendment. The congressional intent of fee-shifting statutes can be addressed when the rule is debated in Congress. There, proponents would undoubtedly argue that Congress did not intend these statutes to allow a party to reject a legitimate offer so that it could pursue a more substantial attorney fee award. And the chilling effect that critics feel the amendment would have on public interest litigation can be mitigated by excluding its application from those cases seeking injunctive relief. Policy and practice changes, rather than damage awards, are generally the goal of plaintiffs in these cases.

The College has endorsed the amendment, citing the need for a strengthened Rule 68 and its belief that sufficient discretion is provided to prevent abuses. However, the College has proposed one essential change that would contribute to the rule's fair application: the offeree should be permitted reasonable access to discoverable information needed to evaluate the reasonableness of the offer before being required to respond to it. Although the committee note anticipates that this would be required, the amendment does not expressly provide for it.

However, another proposed alteration — that the application of the rule be discretionary — is unwise. Justice wears a blindfold for good reason. Discretionary application would inevitably be inconsistent application, and would plunge the already maligned adversarial system into further disrepute.

The amendment — altered only to permit discovery before acceptance and to exclude cases seeking injunctive relief — should be adopted.

There is no doubt that it will encourage settlement and help reduce unnecessary litigation, without permitting the abuses that its opponents fear. ■

(Mr. Arness, chairman of the College's Federal Rules of Civil Procedure Committee, is a partner in Hogan & Hartson, Washington.)

U.S. Foreign Policy and Human Rights

Consistency is the best policy when it comes to safeguarding global freedom. WARREN CHRISTOPHER, a former Deputy Secretary of State, says that repressive regimes make uncertain allies.

A strong human rights policy is basic to our national interests. To succeed in our foreign policy, we must identify ourselves with the rising tide of human aspirations around the world — not only in Poland and Afghanistan but also in Central America, Africa and Asia.

One way to do this is to strike a consistent stance. Human rights policies should not ignore abuses by authoritarian regimes on the right while attacking those of totalitarian regimes on the left. By opposing political murder in Guatemala, we will strengthen our position against repression in the Soviet Union.

This is not an abstract moral crusade. As the Vietnam protests proved, our values are inseparable from our interests. And shared values make strong alliances. Take NATO as an example. Its existence is due to a common enemy; but its strength flows from a shared dedication to freedom. On the other hand, governments that repress their own people are ripening themselves for rebellion, and are thus uncertain allies. The Philippines is a case in point. Human rights abuses by the Marcos government are endangering critical U.S. defense installations by risking a successor regime hostile to our interests.

In El Salvador, right-wing death squads routinely attack the mayors, teachers and labor leaders committed to peaceful reform. By eliminating this vital center, they hope to retard reform and preserve their privileges. The rightists are confident that the U.S., fearing the alternative, will continue to prop them up, just as it maintains warm relations with military dictatorships in Chile and Guatemala. Once again, we're learning that, in human rights, mixed signals can be fatal. ■

(These are excerpts from remarks delivered by Mr. Christopher, a Fellow, at the College's Spring Meeting. Also speaking on foreign affairs were Ambassador Max Kampelman and W. Tapley Bennett, Jr., Assistant Secretary of State for Legislative and Intergovernmental Affairs.)

Committee Update

Below, chairmen report on the recent activities of their committees.

Canada-United States

The committee met for the first time last November and outlined a strategy for expanding membership among Canadian advocates and forging lasting ties between U.S. and Canadian Fellows.

The most promising cooperative venture appears to be an exchange program between the Fellows of both countries, proposed by Chief Justice Warren E. Burger last year. It was suggested that the first exchange — on civil trial practice — might be financed jointly by the Law Foundation in Canada and the College. Continuing legal education, moot courts, trial competitions and training for trial advocacy in law schools offer other possibilities for developing the College's presence in Canada.

The potential for growth in Canada far exceeds the current level of participation. Only in one province, Nova Scotia, has membership reached the 1% ceiling set by the College. Ten of the province's 960 lawyers are Fellows. More typical is Ontario, whose 12,000 lawyers include only 19 Fellows of the 120 allowed.

Committee resolutions included: that the College needs to better acquaint Canadian lawyers — who are already served by a three-tiered system of local, provincial and national law associations — with its unique purposes and functions; that objections to "secrecy" in the nominating procedure be overcome by making the process understood; and that, in light of an apparent bias in the Martindale-Hubbell ratings toward lawyers in non-trial work, province committees should not hesitate to nominate otherwise-qualified trial advocates who lack a top "a-v" rating.

The committee unanimously recommended that instead of having only one regent with responsibility for Canada, individual provinces be assigned to regents in nearby U.S. regions. —*James E. S. Baker*

Qualifications For Trial Lawyers

Pilot programs to remedy inadequacies in the performance of trial attorneys in the federal courts have been implemented in 12 districts. There are three major programs: the establishment of peer review/professional counseling panels; the creation of a separate "trial bar"; and the imposition of an examination requirement to practice before a given District Court.

The nine peer review/professional counseling programs are foundering, largely because of the reluctance of judges to refer attorneys to the panels, but also because some attorneys have been unwilling to accept recommendations for improving their performance.

Only four districts have created a separate trial bar echelon with prescribed experience qualifications. This represents only one-third of the pilot districts, and indicates a resistance to segmentation of the bar.

The examinations, given in seven districts, differ greatly in content and in their pass/fail rates.

The most successful program has been the creation and expansion of continuing legal education programs, some of which are given as preparation for the districts' bar examinations. —*Michael A. Cooper*

Attorney-Client Relationships

Committee surveys of rulings on this subject reveal a decisional as well as a statutory broadening of the courts' authority to award attorney fees.

In a decision in March, *Blum v. Stenson,* the Supreme Court affirmed an award of attorney fees to the Legal Aid Society of New York for its successful representation of a class of Medicaid recipients who had challenged the state's procedure for termination of Medicaid benefits. However, the Court eliminated a 50% "bonus" that the District Court had added to the fee as compensation for such factors as the complexity of the case and the quality of representation. The Court said the record in this case did not support an award of more than a reasonable hourly rate multiplied by a reasonable number of hours.

There were interesting developments in several other relevant areas.

In *Matter of Goodwin,* a state court upheld a contempt finding against counsel who had refused to proceed with trial because of his client's anticipated perjury. The court ruled that counsel should have let the client testify in narrative form, and then avoided reference to that testimony in summation.

College News

In *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, a federal court vacated a settlement in a personal injury case for failure of plaintiff's counsel to disclose the client's death during negotiations. The settlement was held to have been based largely on defense counsel's assessment of the impact of the plaintiff's testimony. —*Walter Barthold*

Oral Argument In the Appellate Courts

Despite the College's continuing support of oral arguments in non-frivolous appellate matters, the judicial attitude remains mixed. A statistical survey for the years 1975 through 1982 casts serious doubt on the effectiveness of attempts to mandate the behavior of the individual federal circuits. The study indicates that an attempt to set minimum standards through a 1979 amendment of the Federal Rules of Appellate Procedure has produced no significant change in the frequency with which oral argument is granted. (The rate has remained at about 70% for all circuits.) Nor has the amendment succeeded in ensuring that the criteria for granting or rejecting requests for oral argument are uniform throughout the circuits. (Although state courts appear to grant oral argument more freely, there is still a risk of curtailment in the future.)

To emphasize the College's continuing interest in this issue, the committee recommends that the Board of Regents reaffirm the substance of its 1979 resolution supporting the preservation of oral argument, and that this resolution be widely distributed among the courts.

—*Bruce M. Stargatt*

Stein Appointment

Jacob Stein's appointment as independent counsel in the investigation of presidential adviser Edwin Meese 3d makes him the third Fellow named to this position since it was created by statute in 1978. Fellows Leon Silverman and Arthur Christy have also held the post. (The late Leon Jaworski served as Watergate Special Prosecutor in 1973-74.)

New Fellows

The Board of Regents accepted 235 new Fellows into the College at the Maui meeting. They will be eligible for induction at the annual meeting in Chicago on August 4.

Meetings

Details on the July 7-14, 1985, annual meeting in London and Paris will be sent to members in September. Highlights include a four-day pre-convention seminar in Paris, focusing on arbitration and Common Market problems. Paris hotel and round-trip air reservations will be made through the College's travel agent; London hotel reservations, through the ABA.

Awards

Judge Robert E. Keeton of the U.S. District Court for the District of Massachusetts has won the Samuel E. Gates Litigation Award. A three-member team from the University of Kansas Law School won the National Moot Court Competition. The winners of the 1984 Emil Gumpert Award are Emory University School of Law in Atlanta and Samford University's Cumberland School of Law in Birmingham, Ala.

Bora Laskin 1912-1984

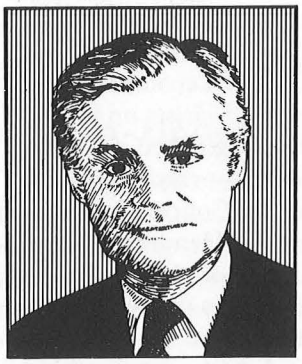
Bora Laskin, Chief Justice of the Supreme Court of Canada, was one of the outstanding jurists on this continent, a distinguished gentleman and a revered Honorary Fellow. In an address to the Court on April 2, Fellow Gordon F. Henderson stated:

"As a teacher, Bora Laskin enriched the traditions of the law in his ability to universalize a principle from a particular case. As an arbitrator, he broke new ground in the definition of labor/management obligations. "But it was as a jurist that Chief Justice Laskin achieved international acclaim. He had a complete appreciation of the role of the Court in matters involving civil and human rights. In time, it will be recorded that he presided in a Court that resolved the major constitutional issues of our age."

Richard W. Pruter 1924-1984

The College will remain everlastingly indebted to Dick Pruter, our departed executive director. He was totally committed to the College's ideals, objectives and fellowship. He was a master at arranging our meetings, and his attention to detail ensured the efficiency of his office management and of his staff. Dick's quick wit and intellect and his gentle manner endeared him to us all. A graduate of Stanford University, he was named executive director in 1972, after serving as an association manager for several organizations. His wife, Gwen, is presently serving as acting executive director of the College. Dick gave to the College his love and profound respect. We will always be grateful. —*Gene Lafitte*

President's Report



Gael Mahony

As you can see, there's been a change in our newsletter, the President's Report. For one thing, it's no longer the President's Report; it's the *Bulletin of the American College of Trial Lawyers.* The name-change signifies a broader purpose.

What you have before you is the first issue of a redesigned publication that will provide a more comprehensive account of the proceedings of the College than our old format allowed. To accomplish this, it will be published more frequently and contain more pages than in the past. This will enable us to expand the coverage of our substantive work, while continuing to provide the organizational news we've stressed in the President's Report.

Communication is vital to an organization such as ours, whose members are scattered across the continent. For those Fellows who can't attend the general meetings, our written communications provide the only continuous link among us. It's vital that it be a strong one.

For some time, a number of us have discussed the possibility of turning the President's Report into a more effective vehicle of communication. We've had two principal objectives in mind. First, we need to inform the Fellows sooner and more effectively about the positions taken by the Board of Regents on the important questions confronting the bar. Second, we need to solicit the opinions of the Fellows on issues the College is considering, and to enlist their help in the projects the College is working on. The communication we are seeking runs both ways, but it must start with a truly effective publication by the College.

Last year we decided it was time to act. We retained the services of a professional publishing consultant with an impressive background in law-related publications. The reason for this decision was to ensure that we would accomplish more than simply presenting more information more often. We want the newsletter to work. And that means making it compelling reading. Whether we have succeeded will depend on how widely and closely the newsletter is read.

In this edition, we have presented analyses of two critical issues in which the College is currently involved. The first of these is the urgent need for salary increases for federal judges. The article on this subject, written by Charles Renfrew, chairman of the College's Judiciary Committee, outlines the extent to which salaries of federal judges have been eroded by inflation — a situation that must be corrected if we are to maintain the high quality of the federal bench. The issue is especially timely now, because the Quadrennial Commission is scheduled to report — and the President and Congress are scheduled to act — on the subject of judicial compensation before the end of this year. This is a subject on which you will be hearing more from the College.

The second issue analyzed in this edition is the proposed amendment to Rule 68 of the Federal Rules of Civil Procedure. The purpose of the proposed amendment is to encourage settlements and to reduce the cost to litigants and the public of unwise or vexatious litigation. If adopted, this amendment could have far-reaching implications on trial practice. The article explaining the proposed amendment—and the reasons for the College's decision to support it—has been written by John Arness, chairman of the College's Committee on the Federal Rules of Civil Procedure.

In addition, we have included précis of two key sessions of our recent meeting in Maui—Warren Christopher's timely address on the role of human rights in foreign policy, and a lively debate moderated by Richard L. Levine of Boston on the potential for abuse of the bankruptcy process, as has been charged in the Manville case.

Sections of the newsletter also contain updates on committee activities and other organizational news. The "President's Report" page will be the president's vehicle for keeping the Fellows informed on matters of general importance.

Any suggestions you may have for improving the newsletter will be very welcome.

Don't hesitate to write!

Gael Mahony