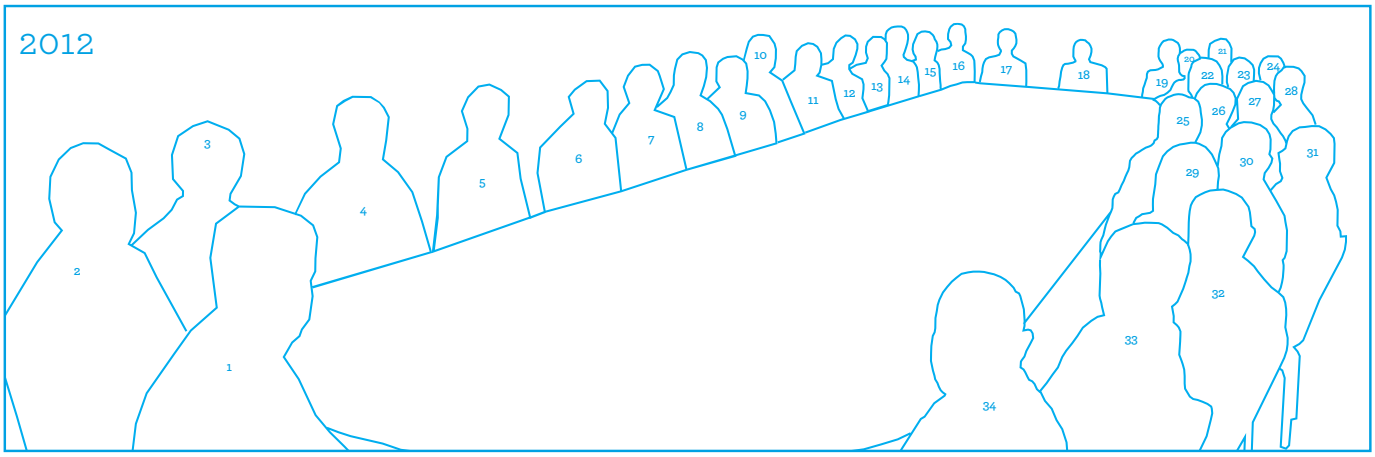
issue 71 / spring / 2013

THE BULLETIN

1950 TO 2012:
The Tradition Continues...

See photo captions inside front fold and story p 6 >>

At the 2012 Annual Meeting at The Waldorf=Astoria in New York City, the College's Officers, Regents and Past Presidents dined in the Conrad Suite to reenact Emil Gumpert's 1951 meeting with Fellows in the same room. Sixty-two years and counting: *collegiality*, combined with the *standards of trial practice*, *the administration of justice* and *the ethics of the profession* remain the hallmarks of the American College of Trial Lawyers.



1. *Thomas H. Tongue, President*
2. *John J. (Jack) Dalton, Past President*
3. *Francis M. Wikstrom, Regent*
4. *Philip J. Kessler, Treasurer*
5. *Chilton Davis Varner, President-Elect*
6. *Paul D. Bekman, Secretary*
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10. *John M. Famularo, Regent*
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13. *Earl J. Silbert, Past President*
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16. *Charles B. Renfrew, Past President*
17. *Robert L. Byman, Regent*
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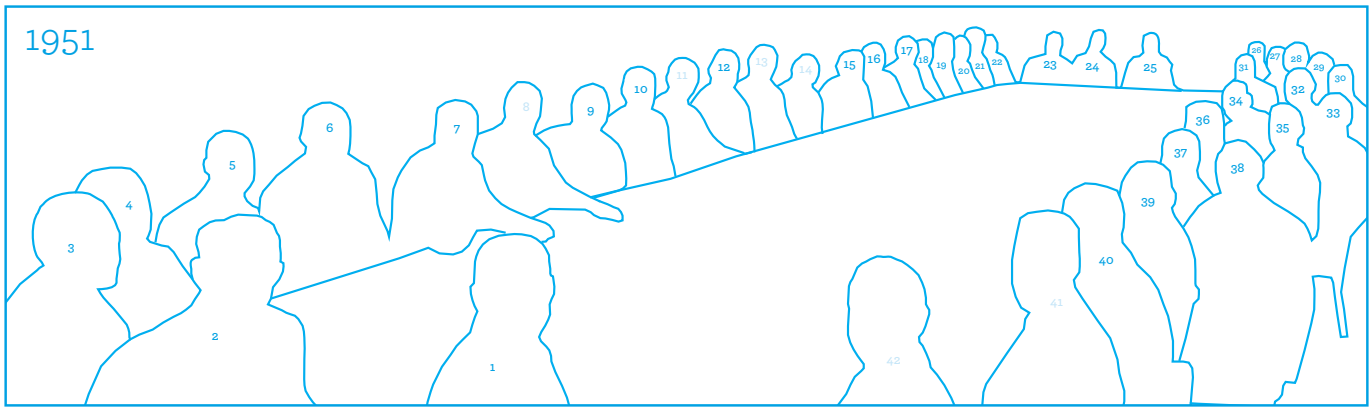
23. *David J. Hensler, Regent*
24. *David W. Scott, Past President*
25. *Mikel L. Stout, Past President*
26. *Douglas R. Young, Regent*
27. *Michael E. Mone, Past President*
28. *Gene W. Lafitte, Past President*
29. *James M. Danielson, Regent*
30. *Stuart D. Shanor, Past President*
31. *Jeffrey S. Leon, Regent*
32. *David J. Beck, Past President*
33. *Joan A. Lukey, Past President*
34. *Robert B. Fiske, Jr., Past President*

LIVING PAST PRESIDENTS UNABLE TO ATTEND:
Thomas E. Deacy, Jr.,
Leon Silverman,
Gael Mahony,
R. Harvey Chappell, Jr. (since deceased),
Ralph I. Lancaster, Jr.,
Andrew B. Coats and
Warren B. Lightfoot



To augment the College archives, we invite you to identify any recognizable Fellows or guests present at the College's inaugural meeting in August 1951. The individuals known to us are identified on the silhouetted version of the 1951 photograph.

If you recognize anyone at the College's 1951 meeting, please let us know by mail or email to the National Office, nationaloffice@actl.com.

Our records indicate the following Fellows of the College in August 1951:

CHARTER FELLOWS:

James A. Ball (city unlisted)
Forrest A. Betts (city unlisted)
E.D. Bronson (city unlisted)
Leslie A. Cleary (Modesto, CA)
Grant B. Cooper (Los Angeles, CA)
Glenn M. DeVore (Fresno, CA)
Lowell L. Dryden (Los Angeles, CA)
Norman H. Elkington (San Francisco, CA)
***13. Cody Fowler** (city unlisted)*
***14. Emil Gumpert** (Stockton, CA)*
Lloyd E. Hewitt (Yuba City, CA)
John T. Holt (San Diego, CA)
Yale S. Kroloff (Stockton, CA)
Hale McCowen (Ukiah, CA)
A.M. Mull, Jr. (Sacramento, CA)
Albert H. Mundt (Sacramento, CA)
Jesse E. Nichols (city unlisted)
C. Ray Robinson (Merced, CA)
S. Ernest Roll (city unlisted)
Clarence B. Runkile (city unlisted)
Herman F. Selvin (Los Angeles, CA)
Roger E. Walch (Hanford, CA)
Jerold Egmont Weil (San Francisco, CA)
Burton D. Wood (San Diego, CA)
Evelle J. Younger (Pasadena, CA)
William Zeff (Modesto, CA)

OTHER FELLOWS:

Bernard Allard (Oakland, CA)
Harold G. Baker (East St. Louis, MO)
Joseph A. Ball (Long Beach, CA)
Reginald I. Bauder (Los Angeles, CA)
Eugene D. Bennett (San Francisco, CA)
M. Mitchell Bourquin (San Francisco, CA)
Edmund G. Brown (San Francisco, CA)
Wayne P. Burke (Ukiah, CA)
Frank Campbell (San Jose, CA)
Thomas M. Carlson (Richmond, CA)
Daniel S. Carlton (Redding, CA)
***8. Hon. Jesse W. Carter** (city unlisted)*
Harry M. Conron (Bakersfield, CA)
Carlisle C. Crosby (Oakland, CA)
John H. Doughty (Knoxville, TN)
Robert F. Dreidame (Cincinnati, OH)
James D. Garibaldi (Los Angeles, CA)
Jerry Giesler (Los Angeles, CA)
Lyman D. Griswold (Hanford, CA)
John E. Gunther (San Francisco, CA)
Edwin A. Heafy (Oakland, CA)
Edgar B. Hervey (San Diego, CA)
Clarence W. Heyl (Peoria, IL)
Gilbert Jertberg (Fresno, CA)
Bert H. Long (Cincinnati, OH)
Thomas C. Lynch (San Francisco, CA)
William H. Macomber (San Diego, CA)
Raoul D. Magana (Los Angeles, CA)
R. A. McCormick (Fresno, CA)
John Wesley McInnis (San Diego, CA)
James A. Myers (Oakland, CA)
Jesse E. Nichols (Oakland, CA)
David E. Peckinpah (Fresno, CA)
James Petrini (Bakersfield, CA)
John D. Randall (Cedar Rapids, IA)
Fred O. Reed (Los Angeles, CA)
Stanley M. Reinhaus (Santa Ana, CA)
Philip J. Schneider (Cincinnati, OH)
Herbert Shaffer (Cincinnati, OH)
Roland G. Swaffield (Long Beach, CA)
***11. Hon. Earl Warren** (Sacramento, CA)*

ADDITIONAL GUESTS PRESENT:

41. James Demsey
42. Harry Gair

American College of Trial Lawyers

THE BULLETIN

Chancellor-Founder
Hon. Emil Gumpert
(1895-1982)

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CONTENTS

FROM THE EDITORS

THE PRIVILEGE IS OURS

When lawyers discuss privilege, it's usually in the context of attorney (solicitor)/ client communications. Looked at another way, though, it's a privileged experience we enjoy as trial lawyers. Clients pay us for the advice we give, the boldness we present, the confidence we offer, the strategy we impart—in essence, our advocacy. In turn, we learn something new about any number of things: the client's personal concerns, business matters, labor practices, medical procedures, product development and the like. Apart from tapping into the problem-solving part of us that provides a great deal of motivation, we have the additional satisfaction of an intellectual pursuit—formulating a strategy, taking depositions, leading evidence and making argument, all designed to lead to a successful outcome.

While privilege is often equated with a "right", this misses the distinction, the overarching aspect of entitlement, the conferred benefit if you will, enjoyed by few over the many. In our case, it's having graduated from law school and been called to the bar. That we ply our trade in the courts, the staunch bulwark against arbitrariness and oppression, one of the critical facets of a free and democratic society, is, in fact, a privilege and one we ought not to take for granted (to the extent any of us do).

It's worth considering, especially as we start another year, that with the privilege of our profession comes obligation; to give back in some way, to our community, the less fortunate, the dispossessed. As trial lawyers, it's also about aiding access to justice, whether taking on a case *pro bono*, assisting a self-represented litigant or acting on a partial retainer basis (taking care to avoid liability concerns). It's also about enhancing the dignity and sanctity of the judicial process itself which, as we are seeing, is not impervious to attack, by political action or otherwise.

In an article in the *New York Times* last year, Doug Glanville, a former professional baseball player, discussed the remarkable staying power of baseball despite the persistent (but apparently no longer rampant) use of performance enhancing drugs. (In this case, Glanville was commenting on the fifty-game suspension of Melky Cabrera, then a San Francisco Giant and winner of the 2012 All-Star game MVP award, now a Toronto Blue Jay). He asked, not entirely rhetorically, whether the game has, in fact, a finite currency. Reasonable doubt (which Glanville defined as "doubt that makes us believe that something could have happened to support the possibility of innocence") about the game's integrity only has so much elasticity. "No currency," he said, "no matter how magical, is infinite."

Former Canadian Supreme Court of Canada Justice and Fellow Ian C. Binnie said much the same thing in a speech a year or so ago when he remarked: "Justice can only take so many bad headlines before the public has an erosion of confidence in the judicial system." It's up to the judges and us, as trial lawyers, to ensure this never happens.

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In addition to our recap of the excellent New York Annual Meeting program and preview of the upcoming Naples spring meeting, we have a few new features, not the least of which centers on *pro bono* forays of note.

We trust you will enjoy the issue.

Andy Coats and Stephen Grant

62nd ANNUAL MEETING
HELD IN NEW YORK CITY

Fellows of the College, their spouses and guests gathered from October 18-21, 2012, at New York City's storied Waldorf=Astoria to install the College's second female President and induct seventy-nine new Fellows.

Two Canadian Supreme Court Justices, the South African Constitutional Court Deputy Chief Justice, the U.S. Solicitor General and the Director of the FBI combined meetings and fellowship amid old-world elegance with an evening on Broadway, all of which guaranteed the sell-out registration for the College's 62nd Annual Meeting.

Left: A Night on Broadway
Right: Fellows croon at the Sing-Along

Morgan Varner and incoming President Chilton Davis Varner, with Andrea Tongue and outgoing President Thomas H. Tongue

After the banging of the maul opened the meeting and Downstate New York Chair **Jim Brown** gave the invocation, Deputy Chief Justice **Dikgang Moseneke** of the Constitutional Court of South Africa and The Honourable Mr. Justice **Michael J. Moldaver** of the Supreme Court of Canada accepted Honorary Fellowships into the College. Moseneke held the assembled guests spellbound with his story of sacrifice for justice in an unstable country. Moldaver charmed the assembled guests with warmth and wit. Moldaver then joined Past President **David W. Scott, O.C., Q.C.** and Regent **Jeffrey S. Leon, LSM** for a question and answer session. A College favorite, The Honourable Madam Justice **Rosalie Silberman Abella** of the Supreme Court of Canada, combined her incomparable humor with a challenge to integrate democracy and justice into the legal system.

The Honorable **Donald B. Verrilli, Jr.**, Solicitor General of the United States, spoke of the responsibility of upholding the law while representing the Executive Branch of the United States, the United States citizenry and the long-term best interests of society. The Lewis F. Powell, Jr. Lecture, presented by **Robert S. Mueller, III**, Director of the Federal Bureau of Investigation and Fellow of the College, paralleled the FBI's work to uphold the rule of law with the ideals espoused by Justice Powell.

Other honored speakers included: **Robert Corn-Revere**, renowned First Amendment attorney and scholar, whose humorous presentation introduced the assembled guests to the complex constitutional considerations in an evolving world with rapidly changing technology; Emory University professors **Patrick Allitt** and **Deborah E. Lipstadt**, with a dual presentation about why history matters if we're trying to go forward; and the always-engaging **DeMaurice F. Smith**, College Fellow and Executive Director of the National Football League Players Association. Smith joined Secretary of the College, **Paul D. Bekman**, in an informal on-stage conversation to discuss the 2009 NFL players' lockout and collective bargaining agreement that tested Smith's legal skills as he led the players to a significant off-field victory.

Friday's General Session included the presentation of the 2012 Emil Gumpert Award, the highest honor conferred by the College, to the Florence Immigrant and Refugee Rights Project of Florence, Arizona. The organization's Executive Director, **Lindsay N. Marshall**, accepted the award and talked about the dire need to foster due process for all detained immigrants. The Emil Gumpert Award, named in honor of the College's founder and Chancellor, is bestowed on an organization at each year's annual meeting.

At the yearly Reorganization Meeting of the Board of Regents, **Michael L. O'Donnell** of Denver, Colorado, and **James T. Murray, Jr.** of Milwaukee, Wisconsin, were elected and welcomed as new Regents.

ANNUAL BANQUET AND INDUCTION CEREMONY

The annual black-tie banquet on Saturday night be- >>

Quips & Quotes

Tom and Andrea are fearless travelers who have traveled to forty-two destinations and met literally thousands of Fellows. With a steady hand on the helm of the College, Tom steps down as President, leaving the College financially sound, brimming with energy and bristling with activity.

New President Chilton Davis Varner

gan with an invocation by Regent **Michael W. Smith** of Richmond, Virginia. The traditional Charge was poignantly made by Past President **Joan A. Lukey** of Boston, Massachusetts, who spoke on behalf of the thirteen Past Presidents who joined her while she recited it to the seventy-nine new Fellows. The Charge, written by Emil Gumpert, has been made to Fellows entering the College since its inception in 1950.

After Past President Lukey's sobering recitation, new Fellow **Steven T. Wax** presented the Response on Behalf of New Inductees. A Federal Public Defender from Portland, Oregon, Wax shared his experiences and impressions, coupled with great honor, representing a detainee in Guantánamo.

Following a Waldorf-quality dinner, President **Chilton Davis Varner** was installed as the 62nd President of the American College of Trial Lawyers. Witnessing the installation with great pride were Varner's husband, attorney Morgan Varner, and her daughter, Ashley Varner, an oncology social worker in Maryland. In her acceptance speech, Varner graciously thanked outgoing President **Thomas H. Tongue** and his wife, Andrea, for their service to the College and their representation of Fellows, states, provinces and regions during the past year.

President Varner shared her eagerness to further Tom Tongue's work and told the assembled guests that she looked forward to visiting with them in the coming year.

"FOR WE ARE JOLLY GOOD FELLOWS ..."

Each of the College's national meetings has been traditionally capped off with dancing in the ballroom and an old-fashioned sing-along in its foyer. The 62nd neither ventured from tradition nor disappointed those with expectations. Singing and dancing into the wee hours was a sign that all was well and that fellowship remained the capstone of College relationships.

The Fellows, their spouses and guests will meet again at the 2013 Spring Meeting in Florida at the Ritz-Carlton, Naples, from February 28 through March 3. In another place, at another time, the tradition continues...

A. Fellow Chris Kitchel, Portland, OR; Hannah Callaghan, Portland, OR

B. Fellows enjoy dinner before a night on Broadway.

C. The City That Never Sleeps

D. Jackie Lafitte, Kelly Brown, Inductee James Brown, New Orleans, LA

E. Inductee Don McKinney, Monica Surprenant, Fellow Mark Surprenant, New Orleans, LA

F. Amee Mikacich, Fellow Eugene Brown, Jr., Oakland, CA

G. Past President Joan Lukey gives Induction Charge as other Past Presidents face inductees.

H. Paul Gobeil, Riky Moldaver, Honorary Fellow Justice Michael Moldaver, Honorary Fellow Justice Marie Deschamps, Ottawa, ON

I. New President Varner and her backup singers

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SOUTH AFRICA'S DEPUTY CHIEF JUSTICE DIKGANG MOSENEKE NAMED HONORARY FELLOW

Deputy Chief Justice **Dikgang Moseneke** was named Honorary Fellow of the American College of Trial Lawyers at the 2012 Annual Meeting at The Waldorf=Astoria in New York City.

Justice Moseneke came to his place in history after being convicted and imprisoned for ten years for participating in anti-apartheid activity. While in prison at South Africa's Robben Island, he studied for his matriculation and successfully obtained his bachelor of arts degree in English and Political Science, followed by his law degree. Moseneke served on the technical committee that drafted South Africa's interim constitution in 1993. Subsequent to the advent of his country's democratic rule, headed by President Nelson Mandela in 1994, Moseneke was appointed in 2005 as Deputy Chief Justice of the Republic of South Africa.

A NEW COUNTRY

Underscoring the historic journey of his people to arrive where they are today, Justice Moseneke said:

> *Our bold and new jurisprudence owes its texture to our democratic transition. We turned our swords into ploughshares. We opted for a negotiated peace and eschewed armed conflict. We chose a truth and reconciliation process in order to unearth the truth, to forgive but never to forget, as we brought to a screeching halt the horror and the madness of colonialism and apartheid.*
>
> *Near miraculously, we crafted a solemn covenant that held out a fresh start for our hateful and polarized people. The covenant ushered in a constitutional democracy with new, if not transformative, ideals.*

A NEW CONSTITUTION

Justice Moseneke spoke of the people of South Africa stepping back "from the edge of a cliff of violence, hatred and chaos" to form a new constitution of "reconciliation, restitution and reconstruction."
Its preamble provides both promise and hope:

> *We, the people of South Africa, recognize the injustices of our past; we honor those who suffered for justice and freedom in our land; we respect those who have worked to build and develop our country; we believe that South Africa belongs to all who live in it, united in our diversity.*

THE RULE OF LAW

With its new constitution, South Africa was duty-bound to implement its new laws. Justice Moseneke reflected:

> *Mere rule of law, I must add, and its attendant positivism is not a sufficient condition to avert repression, to cure bad government and injustice. Apartheid judges did not lack sound legal training, and yet they were duty-bound, and in fact, did enforce laws that wreaked inestimable harm.*
>
> *Our constitution readily recognizes this, and that law has a normative substratum …that spells out its founding values against which all laws and conduct may be scrutinized for constitutional validity. After all, law must – in my view – be a faithful handmaiden of justice. Its only business is to strive for just outcomes.*

To read the full text of Justice Moseneke's presentation, please refer to the College website at www.actl.com. ■

Quips & Quotes

We will get to the top of the hill. We will see the lush green and meandering valleys below again. We are a resilient people. We have had remarkable achievements, remarkable leadership, remarkable strength, following on a wondrous transition.

Deputy Justice Dikgang Moseneke
Honorary Fellow

COLLEGE MAUL A LINK TO OUR HERITAGE

Made from a block of lignum vitae which survived intact the Great Air Raid of May 10th, 1941, It betokens the strength and endurance of the Common Law

Resting on the speaker's podium at every national meeting of the American College of Trial Lawyers since 1957, seven years after the College's founding, has been a bell-shaped wooden ceremonial maul. This ancient symbol reflects an important part of the College's history.

In its early days, the College held its annual meetings in conjunction with those of the American Bar Association, and in 1957 it had taken advantage of that meeting's London venue to invite the participation of a group of distinguished British counterparts. The maul, an ancient symbol of authority over an organization, was presented to the College at a July 25, 1957 luncheon by Sir Lionel Frederick Heald, Q.C., M.P. Heald, who had served as Attorney General of England and Wales under Prime Minister Winston Churchill, had been inducted as an Honorary Fellow of the College two years earlier.

The inscription on the maul reads: "This Maul was presented to The American College of Trial Lawyers during their visit to London in 1957. . . . Made from a block of lignum vitae which survived intact the Great Air Raid of May 10th, 1941, it betokens the strength and endurance of the Common Law."

Lignum vitae, in Latin, "tree of life," is a tree found in Latin America whose wood has an extraordinary combination of strength, toughness and density. The maul was made from timbers that survived the bombing of the ancient Middle Temple Inn of Court in a World War II air raid. Memorialized as "the longest night," this last unsuccessful nightlong attempt by Nazi Germany to subdue England from the air killed 1,436 Londoners, seriously injured another 2,000 and inflicted heavy damage on many historic London buildings. It marked a turning point in that war.

Recognizing that the heritage of the common law trial lawyer has its roots in the London Inns of Court, the College has since regularly returned to London to revisit and strengthen those ties. Over the years, the College has inducted at least thirty-six members of the British judiciary and Bar as Honorary Fellows, and it has regularly sponsored Anglo-American Legal Exchanges, in which chosen representatives from both sides of the Atlantic meet to share ideas about common issues, ranging from civil justice reform to the place of law in a global community that increasingly transcends national boundaries. ■

FELLOWS TO THE BENCH

The following Fellows have been elevated to the bench in their respective jurisdictions:

James Crandall
Irvine, California

Effective December 14, 2012
Orange County Superior Court

Thomas Durkin
Chicago, Illinois

Effective December 19, 2012
United States District Court for the Northern District of Illinois

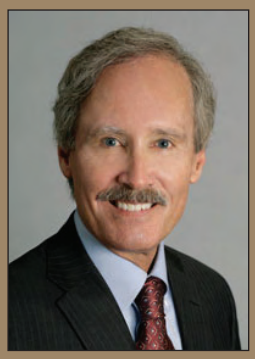
Michael W. Krumholtz
Dayton, Ohio

Effective December 27, 2012
Montgomery County Court of Common Pleas

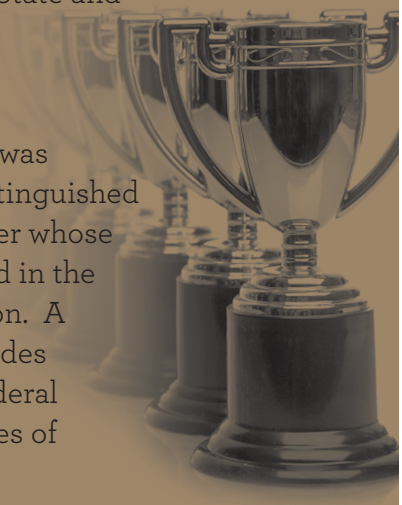
The College extends congratulations to these newly designated Judicial Fellows.

AWARDS & HONORS

John R. Phillips, of Kansas City Missouri, was installed as 2012-2013 Chair of the American Bar Association's Section of Dispute Resolution at its annual meeting in August. The Section's objectives include providing information and technical assistance to members, legislators, government departments and the general public on all aspects of dispute resolution. Phillips was inducted into the College in 2003 and has served on the Missouri State and Admission to Fellowship Committees.



Douglas R. Young, of San Francisco, California, was honored with the Anti-Defamation League's Distinguished Jurisprudence Award. The award honors a lawyer whose humanitarian endeavors have materially assisted in the fight against racism, prejudice and discrimination. A Regent of the College, Young's jurisdiction includes Northern California and Nevada, and the the Federal Criminal Procedure Committee and Federal Rules of Evidence Committee.



MOLDAVER INDUCTED AS HONORARY FELLOW

Joining the ranks of all Supreme Court justices in Canada and the United States of America, The Honourable Mr. Justice **Michael J. Moldaver** accepted Honorary Fellowship in the American College of Trial Lawyers at its 2012 Annual Meeting in New York.

Past President **David W. Scott**, O.C., Q.C, noted that, "this occasion is in accord with our longstanding tradition of recognizing each of the judges of our supreme courts. We in the College regard it as a great privilege to count these distinguished judges amongst the Fellows. With respect, we also suggest that nomination to Honorary Fellowship represents a notable addendum to the appointment of each new member of our cherished institutions."

Justice Moldaver accepted the honor in an endearing address to the Fellows assembled at Saturday's General Session.

I am deeply honored to be here, and I consider it a very special privilege indeed to be inducted into the American College of Trial Lawyers as an Honorary Fellow.

Sadly, I was not able to make it as a regular Fellow.

Before going to the bench in 1990, I practiced criminal law for seventeen years. And much as I was expecting a call from the College in and around the fifteen-year mark, it never came. For two years, I waited patiently by the phone, day in, day out, hoping against hope that I would receive the call, but it never came.

You can well imagine the sense of disappointment I felt on that fateful day in April 1990 when the phone rang and I picked it up and it was the Minister of Justice asking if I would become a Judge of the High Court of Justice. I recall my response to the Minister as though it were yesterday. And I said to the minister, in a barely audible voice, "I guess so."

The Minister picked up on my sense of disappointment, and I remember her saying to me, "Are you all right?" To which I replied, "Yeah, I'm fine. I was just kind of hoping it might have been David Scott."

I ran into David a short while later, and I told him how disappointed I was that now with my appointment to the bench, the Fellowship that I had so coveted was now lost and gone forever. I rhymed off to David the following passage from the induction charge that I had committed to memory:

"You, whose names are freshly inscribed upon our rolls, have, by your mastery of the art of advocacy, by your high degree of personal integrity, your maturity in practice and your signal triumphs at the bar, earned the honor about to be conferred upon you."

And I said to David, "Which one of those did I fall down on?"

Without skipping a beat, he looked me in the eye and he said, "All four."

"But don't despair," he said. "Mediocre advocate, lacking in personal integrity, immature in practice and no triumphs to speak of at the bar. You are destined to be a great judge."

>>

Quips & Quotes

I went into criminal law primarily because of Perry Mason. I loved the guy. Every week he defended another innocent person and got him off. It was marvelous.

The Hon. Mr. Justice Michael J. Moldaver
Honorary Fellow

Against that backdrop, you can well imagine the sense of joy I felt a little over a year ago today when the phone rang again, and this time it was the Right Honourable Stephen Harper, Prime Minister of Canada, asking if I would stand as a nominee for the Supreme Court of Canada. I said, "Thank you, Mr. Prime Minister. You have no idea how happy you have made me."

Mr. Harper replied, "That's good. I take it you have been wanting to go to the Supreme Court for some time?"

To which I replied, "No, not really, sir, but I have been wanting, for oh so long, to become a Fellow of the American College of Trial Lawyers. Thanks to you, sir, my time has finally come."

To the Fellows who are here today and to those of your ranks who could not be with us, I want to salute you, and I want to tell you how much I admire and respect you. In a way, being here for me is like coming home. Although I have been a judge now for twenty-two years, at bottom I remain a trial lawyer. That is where it all began, and that is where my heart lies.

While I understand the fame and glory that you and your colleagues enjoy as leading trial lawyers, I also understand the stress and anxiety, the pain and the agony and the long hours and sleepless nights that come with the territory and very much form a part of your being. I understand how you lose a piece of yourself every time you engage in a hard-fought trial.

I understand the agony of losing a client to the penitentiary for life, and I understand only too well how we suffer our losses far more than we relish our wins. In short, I know what you are all about, and you deserve high praise. You are the men and women who do the heavy lifting. You are the men and women who work tirelessly to ensure that our respective justice systems remain strong and vibrant.

You are the persons we rely on to preserve and protect the rule of law, to ensure that the judiciary remains strong and independent, to provide a voice for those who cannot speak for themselves, and generally to ensure that people from all walks of life are treated fairly, with dignity and respect, and that the fundamental values upon which our nations have been built are adhered to and protected.

Your burden is a heavy one, and you fulfill it well. Every day you reaffirm our faith in the legal system, and every day you provide living proof that the law truly is a noble profession.

I commend you. I salute you. And I thank you so much for allowing me to become an Honorary Fellow of this great, great institution. Thank you so much. ■

Quips & Quotes

I was so happy to get away from the trial bench, because as a trial judge, I had to keep my mouth shut. On the Court of Appeal, I could cross-examine lawyers all day. It was wonderful. It is little more constrained now that I am at the Supreme Court. But hopefully in time we will change that a little bit.

Justice Moldaver

ADJUNCT COMMITTEE SEEKS PROPOSALS FOR FELLOWSHIP

The Adjunct State Committee considers and makes recommendations for nomination of attorneys whose trial experiences might not be known to their State Committees. Their practices are either national in scope or these attorneys try cases in states other than their home states and they "fly under the radar" of their respective state committees.

The Adjunct State Committee therefore seeks your proposals or nominations of qualified trial attorneys whose practices may include trial in such areas as intellectual property, product liability, white collar criminal defense or other areas of trial practice outside their home states.

If you are aware of such an attorney, please contact the Adjunct State Committee Chair **David R. Kott**, by email at dkott@mccarter.com or by telephone at (973) 639-2056.

RECENT COLLEGE PUBLICATIONS

Anatomy of a Patent Case

This book, authored by the Complex Litigation Committee of the College, has been published by Bloomberg BNA and is available for purchase. With patent litigation assuming a pivotal role in today's global economy, the manual provides an updated concise, yet thorough and balanced view of the issues of a patent case for both judges and lawyers. See information elsewhere in this issue on how to receive a discount when purchasing the book.

Attorney-Client Privilege Update: Current and Recurring Issues

This white paper addresses a number of recent and recurring issues concerning the attorney-client privilege. It focuses primarily on the scope and reach of the privilege and the circumstances in which a waiver of the privilege may occur due to the involvement of, or disclosure to, certain categories of persons. Authored by the Attorney-Client Relationships Committee, the white paper is available on the College website at www.actl.com

MORE FUN THAN GOING TO THE DENTIST:
Moldaver, Scott And Leon Talk Shop

Following his acceptance of Honorary Fellowship, Justice Moldaver joined Past President **David W. Scott**, O.C., Q.C., and Regent **Jeffrey S. Leon**, LSM, in a conversation ranging from the Justice's law school prowess to his thoughts about the use of cameras in the courtroom.

TOMES OR TEETH

REGENT JEFFREY S. LEON: Let's begin with a bit of ancient history, that is, your law school career. I understand that you were a, let's say, reluctant law student at first.

In fact, it may come as a surprise to some that you failed your Christmas exams in the first year of law school. Notwithstanding that, you seem to have made it to the Supreme Court of Canada.

Something must have inspired you in some way to lead you to finish first in your class and propel you to the top of the profession with a strong interest in criminal law. What was it?

THE HON. MR. JUSTICE MICHAEL J. MOLDAVER:

I am not sure I know the answer to that. I can tell you, though, that I actually did not fail all my exams. I only failed torts, but I did stand in the bottom quarter of the class. That really is a true reflection, I must tell you, of my academic prowess. Winning the Gold Medal is what I label as "you can fool some of the people some of the time."

In the first year, I was under the terribly mistaken belief as a new student in law school that the professors would like to have answers to the questions, so I made the fatal mistake of answering and giving them a solution to the problems that they had set out on the exams. Well, they did not like that. It turned out all they were really interested in were the issues, and I, unfortunately, was not defining the

Regent Jeffrey S. Leon, LSM; The Hon. Mr. Justice Michael J. Moldaver; Past President David W. Scott, O.C., Q.C.

issues. I was giving them an answer, so I stood in the bottom quarter. By the time I got to third year, I realized that no one really cared about the answers and all that really mattered was the issues. I guess that is how you win the Gold Medal.

LEON: Your former partner, Eddie Greenspan [Edward L. Greenspan, Q.C.], is quoted as saying that you have what could best be described as a romantic notion of a criminal defense lawyer. That is, you only accepted clients you believed innocent.

I have two questions for you. The first is: What did you do all day?

JUSTICE MOLDAVER: I was busy studying dentistry, actually.

LEON: And second, what were the types of cases that you found interesting?

JUSTICE MOLDAVER: What Eddie was talking about – and he and I disagreed about this – is that traditionally it is not for a lawyer to be judgmental and it is not for a lawyer to decide whether someone is guilty or not guilty. We are there to take on all causes, popular and unpopular.

If I was going into a serious case, I had to believe, or at least have a reasonable doubt, in my client's innocence. I am not saying it was right, and I am not saying it was traditional. I am just telling you it was me.

I never reached the point where I was the only lawyer left in town who could represent these people. They were capable of getting excellent representation elsewhere, including from Eddie Greenspan.

When I went before a jury and had to stand there and try and convince twelve people that they should at least have a reasonable doubt about my client, if I did not believe it, then I could not sell it. And if I could not sell it, you did not want me there as your lawyer.

I have, on occasion, made legal submissions before various courts that I really did not quite believe in, and I could actually hear the change in my voice as I was pitching those things to the judge. I did not want that. I did not want it particularly when I was speaking to juries, because, despite what a lot of people might think about juries, I happen to think that twelve people from twelve different walks of life bring to that courtroom about five hundred years of common sense and living experiences, and they are really smart.

Winning the Gold Medal was fine and dandy, but I tend to believe there is not necessarily that much of a correlation between how you do in law school and how you do in the real world. I learned more about talking to juries from working on construction in the summers than I learned in all the years of law school.

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EXTRACTING THE TRUTH

LEON: Eddie has also described you as a "ferocious cross-examiner." I can personally attest to this, having appeared before you on the Court of Appeal. What about the art of cross-examination?

JUSTICE MOLDAVER: What can I tell you about cross-examination that you do not already know?

I do know one thing and you know it, too. Good cross-examination comes from preparation, preparation, preparation, and knowing that case backwards and forwards. It comes from having thought out your game plan before you are there, before you go to the courtroom, and knowing where you want to go with the witness so you do not let that witness lead you out to sea.

When you are doing a major cross-examination and you know you have that jury with you and you are kind of leaning on that jury box and they are loving it, it is fantastic. At other times, when it is not going so well, you are looking for that trap door to open. You want to become a puddle of jelly on the floor. It can be an awful experience.

But there is another aspect, as you know, of cross-examination, and that is getting the client up there to withstand the rigors of cross-examination. I think that is one of the most important functions of those who do defense work or plaintiffs work, or civil litigation. You put your client up there, and he or she can make the case for you or break it.

I have found, and I am sure you found it as well, that preparing clients for cross-examination takes hours and hours and days and days. And one of the problems with it, as we all know, is that despite all the preparation and all the time and all the efforts, your clients may not necessarily succeed as you would have hoped they might.

This is one of the reasons, by the way, that I keep telling you that I have had thoughts that I should have gone into dentistry. If you are a relatively competent and skilled dentist, chances are, you are going to beat the tooth. You probably have about a ninety-nine percent chance of beating the tooth. But as trial lawyers, you can prepare to the n^{th} degree and you can still lose. There is no certainty in the courtroom.

The simple truth is that ninety percent of the people who walked through my door were guilty of something. They may not have been guilty of what it was

In the midst of these difficult ordeals, I remember waking up in the morning and wanting to pull the covers over my head. And I remember only too well thinking on more occasions than I care to tell, "If only I had gone into dentistry."

Justice Moldaver

they were charged with, but they were guilty of something. My efforts were best spent trying to get them the help they needed to try to ensure that whatever it was that caused them to run afoul of the criminal law would not happen again. To a larger extent, I felt like a social worker in many respects, but so be it. If that was the role I was to play to help people, then that was what I wanted to do.

Going to trial is not a fun experience. But if you had one of those good cross-examinations and you had that jury with you, it was really wonderful.

THE ROOTS OF JUDICIAL STRENGTH

PAST PRESIDENT DAVID W. SCOTT: Justice Moldaver, there are very few people who have been in your position of having served for a period as a trial judge and then on the Court of Appeal in the busiest province in our country, and now the Supreme Court of Canada. To what extent is prior judicial experience critical or significant for elevation to the Supreme Court of Canada?

JUSTICE MOLDAVER: To me, it's like chicken soup. It couldn't hurt. I think it can be quite helpful, particularly when you are a member of a provincial Court of Appeal, where a lot of your bread and butter is reviewing jury charges.

I say this with great respect toward those who went directly to the Court of Appeal, but I feel that it was really important for me to have actually charged several dozen juries over my time as a trial judge to understand what really went into a jury charge. I was, perhaps, a little bit less critical of trial judges that I was reviewing than those who had not had to undergo the experience of trying to put a good jury charge together.

To put it quite simply, David, my feeling is this: The most critical attributes of being a good judge are common sense, good judgment and a basic understanding of the human condition. It really does not matter if you have been a trial judge or not. If you have those attributes, you are well on your way to being a very good judge.

THE VINDICATION OF STEVEN TRUSCOTT

LEON: As a Court of Appeal judge in 2007, you sat on the panel that reviewed the conviction of Steven Truscott.

In 1959, Mr. Truscott was fourteen years old. And, as a fourteen-year-old boy, he was sentenced to hang for the murder of his classmate, Lynne Harper. His sentence was ultimately commuted to life imprisonment, but this case became one of the most controversial cases in Canadian history.

Throughout his life, Mr. Truscott continued to maintain his innocence, and in 2007, he was successful in applying to the court for a review of his conviction. The court reviewed significant evidence and ultimately the court declared his conviction, after all those years, to be a miscarriage of justice and acquitted him but did not declare him factually innocent.

I have heard you say that case was one of the highlights of your judicial career. Can you tell us about it?

JUSTICE MOLDAVER: This kind of falls under a category that I have called, "I have given up trying to predict life."

One of the things that I mean by that is when I was in law school, I was planning to go back to

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Peterborough where I grew up. My brother was a lawyer there doing corporate commercial work, and I was planning to go back and do the litigation.

However, after I finished third year I had an opportunity to go and spend six months of my articles with G. Arthur Martin, who probably was one of the finest, most distinguished criminal lawyers in the history of Canada. He later became a justice in the Court of Appeal and served there with distinction for many years.

While I was with him we had a very brief conversation one day about Steven Truscott. Steven had been convicted at trial and sentenced to hang, but his sentence was commuted. Several years later, there was a reference ordered to the Supreme Court of Canada, and Arthur Martin represented Steven Truscott at the reference. The Supreme Court of Canada heard it, and it was an eight-to-one decision against ordering a new trial.

We hardly discussed it at all, but one day Arthur Martin mentioned to me how disappointed he was that he had failed to get a new trial for Steven Truscott on this reference that was held several years after the trial. I had not followed the Steven Truscott case. I had not followed the television programs about it or the books that were written about it, but I remembered Arthur Martin's one comment in 1972 about how disappointed he was that the Supreme Court had not ordered a new trial.

Thirty years later, I was a member of the Ontario Court of Appeal, being one of a panel of five that had the opportunity to review this case again. The lawyers had put a tremendous amount of work into the case to uncover matters that had not been disclosed.

As a judge you sit on a lot of cases, and all of them are meaningful, but this one had a very special meaning for me. We had an opportunity, and, to the best of our ability, vindicated a man who had lived with what we believed was a wrongful conviction over his head for the better part of fifty years. It helped me realize how fortunate I was, and how fortunate I am, to on occasion being able to help someone who deserved our help. It restored my faith in the justice system. It was an experience that I have never had before and probably will never have again.

SCOTT: At the time that Steven Truscott as a boy was convicted, Canada had a regime of capital punishment, and it was subsequently changed.

JUSTICE MOLDAVER: You are right, it was subsequently changed. Fortunately I, as a defense lawyer, never had to go through a trial worrying that my client might face the death penalty. I am sure some of you have, and I take my hat off to you. I do not know how you did it. Fortunately, that is not something we have to worry about in Canada.

The other thing that I think you may find interesting is that this fourteen-year-old boy was transferred from the juvenile court to the adult court and had his first trial and two sets of appeals, was found guilty and sentenced to hang, all in six months. All in six months. That was back in the 1950s. Today you would still be getting disclosure at the end of six months.

You would not even have thought about a transfer hearing or a preliminary hearing. It shows you how our justice system has changed. What happened back in those days was ridiculous, but I am not so sure that what we are seeing today in certain instances is not equally ridiculous.

SMILE, YOU'RE ON CAMERA

LEON: That hearing in the Court of Appeal was the first hearing that was televised in the Court of Appeal.

SCOTT: In your court, proceedings are televised and can be viewed on CPAC, the public broadcasting network in Canada. What is your reaction to now being a television star and the televising of proceedings routinely in your court, the Supreme Court in Canada?

JUSTICE MOLDAVER: I do not notice the cameras. Quite frankly, if people are really interested in watching these hearings, more power to them. If you are having trouble sleeping some night, turn it on, because if you could bottle it, you could sell it to

any major pharmacy as one of the greatest sleeping pills ever.

There are some cases that are of public notoriety, and Steven Truscott was one of them. Perhaps there was a bit of an audience that was interested in that. But I think when people think of court hearings on camera, they think of trials. They think of actually seeing witnesses being cross-examined and that kind of thing. I am not sure they think of a bunch of lawyers making what are often very dull and boring submissions to a court. I have no problem with the cameras at all.

SCOTT: Has it changed the process for you in any way?

JUSTICE MOLDAVER: No, I am still rude, and I am still miserable. It really has not changed a thing.

LEON: I think you will all agree that asking Justice Moldaver questions is not like pulling teeth, and we are all the better for it. Thank you very much. ■

R. HARVEY CHAPPELL, JR.: THE PASSING OF A PAST PRESIDENT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS

Robert Harvey Chappell, Jr., Richmond, Virginia, the thirty-sixth President of the College, died December 1, 2012 at age 86 as the result of a fall at his home.

Born November 28, 1926, he grew up in Clarksville, Virginia, a small town on the Roanoke River in the south central part of the state. In 1943 at age sixteen, having run out of high school courses, he entered the College of William and Mary, where he held two jobs, including head waiter in the dining hall, to pay for his education. That was to be the beginning of a lifetime relationship with the nation's second oldest institution of higher learning,

World War II had left few male students on campus, and as soon as he was old enough, Chappell too enlisted in the United States Army Air Corps. Returning after the war, he earned his B.A. in 1948. His scholarship earned him a Phi Beta Kappa key, his leadership, membership in Omicron Delta Kappa. Two years later he earned his law degree from William and Mary's Marshall-Wythe School of Law, the nation's oldest continuingly operated law school, working in the law library to help defray the cost of his education and achieving membership in the Order of the Coif. He had been admitted to the Virginia Bar a year before his graduation.

While a law student, he persuaded the then President of the University to advance $250 to help create what was at first called the William & Mary Review of Virginia Law, now known as the William & Mary Law Review. He then persuaded the *Virginia Gazette* to print the first issue. It was thirty pages long. He served as one of the Law Review's first two editors.

In 1950, he began his career at the Richmond firm Christian, Barton, Parker, Epps and Brent, now known as Christian & Barton, where he practiced for his entire career, serving for many years as its chairman.

Over his lifetime, he held many positions of leadership in the profession: President of the Bar Association of the City of Richmond; President of the Virginia State Bar; a member of the Board of Governors of the American Bar Association, and Chair of the ABA Standing Committee on the Federal Judiciary, charged with that organization's peer review of nominees to the federal bench.

Chappell's local Bar had honored him with its Hunter W. Martin Professionalism Award and the Virginia Bar Association had awarded him its William B. Spong, Jr. Professionalism Award.

Inducted into the College in 1968, he was elected to its Board of Regents in 1979, served as Secretary from 1982 to 1984, as Treasurer in 1984-85, then as President-Elect and, in 1986-87, as President of the College. Early in his presidency, he helped to organize and then presided over a Board retreat at Williamsburg when, for the first time since its creation, the College leadership paused to take stock of its organizational structure. It concluded that the College's method of selecting leaders and the structure of its staff called for no changes, but one pivotal change did emerge from the retreat.

From its inception, the College had been closely associated with the American Bar Association. A number of ABA leaders had been among the College's founders and several Fellows had been president of both organizations. The annual College meetings had traditionally been held in conjunction with those of the ABA. The retreat participants concluded that the size of the two organizations had made these joint meetings increasingly difficult to schedule and that separating the meetings would both increase attendance of College members at its annual meetings and help to establish the College's separate identity. Over time, this change has had a positive effect on the College.

In his native state, Chappell is best known for his role as a leader in the affairs of his alma mater, William and Mary. Immediately after his gradua-

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tion from law school, with several of his classmates, he created the William & Mary Law Alumni Association and in 1951-52 served as its first President.

In 1963-64, he served as President of the independent Society of the Alumni of William & Mary. From 1968 through 1976, he served on the University's Board of Visitors, serving as its Vice-Rector and then for four years as Rector. During this tumultuous era, the University dealt with many issues, including campus debate over the Vietnam War, dormitory visitation rights and the direction of the University's athletic program.

He had been honored with William & Mary's highest award, the Alumni Medallion, and in 1984 it awarded him an Honorary Doctor of Laws degree. In 2000, the Law School awarded him its Citizen-Lawyer Award.

At his death, William and Mary President Taylor Reveley wrote: "Harvey Chappell ranked among the most stalwart and distinguished members of the William and Mary family. He was also a leader in the public and civic life of the commonwealth and in the legal profession of our country . . . With his death, we have lost a great force for good and a dear friend. We will miss him enormously."

In the civic arena, Chappell had served as President of the Children's Hospital of Richmond, as a member of the Virginia State University Board of Visitors, as a Trustee of the Westminster Canterbury Foundation and as President of the Virginia chapter of the Sons of the American Revolution. He had served on the vestry of All Saints Episcopal Church, where his memorial service took place.

Harvey Chappell's first wife, Ann Callahan Chappell, died in 1994. He later married Joan Midkiff Farley, the widow of a Richmond lawyer who himself had been a Fellow of the College.

The factual recitation of one's lifetime accomplishments rarely provides a complete picture. The classic Virginia gentleman, Chappell was known for his impeccable attire. One American College colleague relates that he always wore a coat and tie when traveling by air to College meetings, rather than adopting the casual attire of the typical passenger, because he knew that he could expect to be on the same plane with Harvey Chappell.

When Chappell first brought his new wife, Joan, to a College meeting, one brave Fellow began to interrogate her, first asking how many closets she had allowed Harvey to have. Her response: "How many *closets*? He owns *thirty* suits!" Harvey Chappell's smiling reply: "Isn't a gentleman supposed to own a suit for each day of the month?"

At his memorial service, College Regent Michael W. Smith, who began his career as an associate at Christian and Barton, related in humorous detail his indoctrination into the practice of law under Chappell's tutelage. He had been given a research assignment, to be delivered as a finished product by the next morning, only to find that all the secretaries had already gone home for the evening, leaving him to his own devices with a pile of relevant appellate opinions to mold into a brief and no typing skills.

Chappell's son, Robert H. Chappell, III, observed: "He was one of those people who always felt that people should be judged on their merits, regardless of race or gender. If you did a good job, you deserved credit for it. He set up merit scholarships at William and Mary. The best grades win— pure meritocracy."

At Chappell's death, William and Mary Law School Dean Davison Douglas paid him the following tribute: "He embodied the concept of the 'Citizen Lawyer' as well as anyone I have ever met. . . . His legacy will live on . . . for years to come."

Chappell's survivors include his wife, Joan, his son, his daughter-in-law, a granddaughter and five stepchildren and their spouses and children.

E. OSBORNE AYSCUE, JR. ■

NAPLES, FLORIDA: SITE OF THE 2013 SPRING MEETING

CLE SESSION

"The Traditional Media in the World of Bloggers, Tweeters and Anonymous Speakers: Has the Internet Changed the First Amendment Along with Everything Else?"

INVITED SPEAKERS

The Honorable Antonin Scalia
Associate Justice of the Supreme Court of the United States

The Honourable Madam Justice Andromache Karakatsanis
Justice of the Supreme Court of Canada

The Honorable R. Fred Lewis
Justice of the Florida Supreme Court

James Goldstein, MD

David Lawrence
Former Publisher of *The Miami Herald*

ROBERT S. MUELLER, III, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PRESENTS 2012 LEWIS F. POWELL, JR. LECTURE

The Lewis Powell Lecture Series was established in recognition of The Honorable **Lewis F. Powell, Jr.**, who served as the twentieth President of the American College of Trial Lawyers, from 1969 to 1970. Justice Powell, himself a distinguished and skilled lawyer of national reputation, became, in 1972, the ninety-ninth Justice to sit on the Supreme Court of the United States, where he served with honor and distinction until his retirement in 1987.

Fellow **Robert S. Mueller, III**, Director of the Federal Bureau of Investigation, returned to the College, after having spoken most recently in 2002, to present the 2012 Lewis F. Powell, Jr. Lecture at the 2012 Annual Meeting at The Waldorf=Astoria in New York, New York.

2012 LEWIS F. POWELL, JR. LECTURE, BY ROBERT S. MUELLER, III

Justice Powell took a keen interest in the FBI and in law enforcement in general. Before his appointment to the court, he often wrote and spoke publicly about the rising crime rates in this country. We in the FBI were most fortunate that he seemed to approve of our efforts to address crime. And when Justice Powell died in 1998, our nation lost a devoted advocate for the rule of law.

Today I would like to take a few moments to talk about the FBI's transformation in the years since September 11 and what we are doing to propel the FBI into its next era. But I would like to discuss all of this within the context of the rule of law, for every facet of our mission, the FBI's mission, must be viewed through this prism.

For Justice Powell, preserving the rule of law was paramount to his decision-making. Powell's thoughts are embodied by language he proposed in an early draft of the Court's landmark 1974 decision in *United States v. Nixon*. Powell wrote,

> *We are a nation governed by the rule of law. Nowhere is our commitment to this principle more profound than in the enforcement of the criminal law, the twofold aim of which is that guilt shall not escape or innocence suffer.*

While his words ultimately were not included in the final opinion, their importance cannot be overstated. We are indeed a nation governed by rule of law. It is a hallmark of our democracy, and our commitment to this ideal must never, ever waver.

We in the FBI face significant and evolving terrorist and criminal threats. Regardless of the threats we face or the changes we make, we must act within the confines of the Constitution and the rule of the law -- every day and in every one of our investigations.

Bob [**Robert B. Fiske, Jr.**, Past President, in his introduction of Director Mueller] alluded to some of the changes in the Bureau since September 11. When I took office in September of 2001, I expected to focus on areas familiar to me as a prosecutor - drug cases, white-collar criminal cases, violent crimes, homicides. But days later, the attacks of September 11 changed the course of the Bureau. National security—that is, preventing terrorist attacks—became our top priority. We shifted 2,000 of the then-5,000 agents in our criminal programs to national security. We dramatically increased the number of Joint Terrorist Task Forces with state, local, and other federal agencies. We increased them dramatically across the country.

We also understood that we had to focus on long-term strategic change as well, enhancing our intelligence capabilities and updating our technology. We had to build upon strong partnerships and forge new friendships both here at home and abroad. And at the same time, we had to maintain our efforts against traditional criminal threats, which we have done.

We had to do all of this while respecting the rule of law and the safeguards guaranteed by the Constitution.

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Today, the FBI is a threat-focused, intelligence-driven organization. Of course there have been challenges along the way. Looking back on the past decade, I recognize that I have learned some hard lessons on how to lead an organization at a time of transition. One such lesson relates to the need to delegate.

I was a Marine, and I went to Officer Candidate School where they evaluate you. Initially they evaluate you physically, your ability to do ten-mile runs and pushups and the like, as well as academically, and I did okay in those areas.

But there was another category on that evaluation form that they called "delegation," in which I got an F. I complained to the training sergeant. I said, "What is this delegation business and why are you evaluating me on it?" And I quickly learned the answer to that. It was absolutely an essential component of being an officer, and it is an essential component of running any organization. To whom you delegate and how you delegate is as important as anything else. I have learned some lessons better than others. Some people will tell you I'm still not very good at delegating, and they are the individuals who are currently being micromanaged by me.

The management books write that as the head of an organization, you should focus on the vision. You should be on the balcony and not on the dance floor. While this generally may be true, for me there were and are today those areas where one needs to be substantially and personally involved.

First, there was the terrorist threat and the need to know and understand that threat to its roots; and second, there is the need to ensure and shepherd the transformation of the Bureau's technology. And unfortunately, the management books offered no "how-to" in either of these categories, despite the fact that you receive a fair amount of on-the-job education.

Another hard lesson to learn, particularly difficult in Washington, is the need to understand your place and the need for humility. Several years ago I had a rather salty chief of staff, an old friend by the name of Lee Rawls, who has since passed away, who was a naturally humble individual. He knew how to cut through nonsense and get to the heart of the matter better than anyone I knew. He also knew how to put me in my place. He became my chief of staff. And more than once, when I began to micromanage a situation, he would politely push me to the side, and say, "Don't listen to him. He thinks he's the Director of the FBI, but we can take care of this."

I recall one particularly heated meeting where everyone was frustrated, most of them were frustrated with me, and if I were fair, I would tell you that I was a wee bit ill-tempered. Lee sat silently by and then said out of the blue, "What is the difference between the Director of the FBI and a four-year-old child?" The room grew hushed, everybody awaiting the answer. And finally, he said, "Height." You need a Lee Rawls all the time.

Despite these leadership challenges and a few more substantive obstacles along the way, we have made strides over the past ten years. Together, with our state and local partners, we have thwarted dozens of terrorist attacks since September 11, and we have updated the technology we use to collect, analyze and share intelligence. We have put into place a long-term strategy to ensure that we are doing what is necessary to meet our priorities. And we have new metrics for success based on terrorist attacks prevented, and the long-term impact of our criminal programs at the neighborhood level– not just the number of arrests and convictions, but on the consequent decreases in street crimes and homicides as a result of our collective efforts.

We have changed the way we do business over the past decade, principally to address terrorism. But the question remains: Where does the FBI need to be down the road?

National security remains our top priority. Terrorists remain committed to striking us here at home and abroad, as we saw just this week in New York with the attempted attack on the Federal Reserve, and as evidenced by the death of Ambassador Chris Stevens and three other Americans in Libya several weeks ago.

At the same time, spies seek our state secrets and our trade secrets for military and competitive advantages. And most particularly, cyber criminals now sit silently on our networks, stealing

Every FBI employee takes an oath promising to uphold the rule of law and the United States Constitution. It is the very same oath that each of you have taken. And for us, as for you, these are not mere words. They set the expectations for our behavior and the standard for the work that we do.

Robert S. Mueller, III

information for sale to the highest bidder. Computer intrusions and network attacks are becoming more commonplace, more dangerous and more sophisticated. That is why we are strengthening our cyber capabilities in the same way we increased our intelligence and national security capabilities in the wake of the September 11 attacks.

We are enhancing our Cyber Division's investigative capacity. We are hiring more computer scientists, and because even traditional crime is now facilitated through the use of computers, we are building the cyber capabilities of all FBI agents. We are converting computer intrusion squads in our fifty-six field offices into Cyber Task Forces that include state and local law enforcement, as well as other federal agencies. And we are increasing the size and the scope of the National Cyber Investigative Joint Task Force, a task force that brings together eighteen separate agencies to coordinate and share cyber threat information.

We are also working closely with our international partners, sharing information and coordinating investigations. We have agents embedded in police departments in Romania, Estonia, Ukraine and the Netherlands, just to mention a few. Yet at the same time, we face a wide range of criminal threats from white-collar crime and public corruption, to transnational criminal syndicates, migrating gangs and child predators. These threats are pervasive, and they will continue to evolve, largely as a result of globalization. *The New York Times* columnist Tom Friedman has argued, rather successfully, I might add, that the world is flat. Advances in technology, travel, commerce and communications have broken down barriers between nations and individuals.

And with the price of smart phones falling lower and lower and with the rise of social media like Facebook, YouTube and Twitter, our world is now hyper-connected. This hyper-connectivity is empowering and engaging individuals around the world. While Friedman describes the impact of globalization in the context of commerce and finance, globalization has affected law enforcement and the criminal justice system just as profoundly. For the FBI, this means that the work we do will almost always now have a global nexus, which presents a number of challenges. Technology has all but erased the borders that once confined crime and terrorism, and yet the traditional nation-state's jurisdictional boundaries remain the same, as do the individual criminal justice systems in these diverse nations. Given these constraints, we are often at a disadvantage in addressing global threats.

How do we prosecute a case where the crime has migrated from one country to the next, with victims around the world? How do we overcome jurisdictional hurdles and distinctions in the law from country to country?

As a prosecutor for the Department of Justice, I happened to work on the Pan Am [Flight] 103 bombing back in 1988, a time at which international terrorism was brought home to Americans in a profound way, and we were able to build bridges between the various investigative agencies here and Scotland and around the world. Partnerships like those forged in that investigation have never been more important. We have come to understand that working side by side is not the best option. It is the only option.

Let me turn for a second to an understanding not just of the threats that we face, because they will continue, and the potential damage that is

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exponential. To successfully address these threats, we must develop new strategies and a legal framework to support these strategies.

We must always strike a balance between thwarting crime and terrorism on the one hand and ensuring that we adhere to the Constitution and the rule of law on the other hand.

The FBI has always adapted to meet new threats, and we must continue to evolve to prevent terrorist and criminal attacks, because terrorists and criminals certainly will evolve themselves. But our values, the Bureau's values, can never change.

In 1972, Justice Powell wrote the majority opinion in *United States v. U.S. District Court,* an opinion that established the warrant requirement for domestic electronic surveillance. And the crux of the case was, as Powell put it, the "duty of government to protect the domestic security and the potential danger posed by unreasonable surveillance to individual privacy and free expression." Justice Powell recognized that the rule of law is the only protection we have against the specter of oppression and undue influence at every level of government. We in the FBI recognize that principle as well. Strict adherence to the rule of law is at the heart of everything we do. In a practice started by my predecessor, Louis Freeh, all new agents visit the Holocaust Museum in Washington to better understand what happens when law enforcement becomes a tool of oppression, or worse, rather than an organization guided by the rule of law.

Every FBI employee takes an oath promising to uphold the rule of law and the United States Constitution. It is the very same oath that each of you have taken. For us, as for you, these are not mere words. They set the expectations for our behavior and the standard for the work that we do.

In my remarks to new agents upon their graduation from the FBI Academy, I try to impress upon each one the importance of the rule of law. I tell them it is not enough to catch the criminal; we must do so while upholding their civil rights. It is not enough to stop the terrorists; we must do so while maintaining his civil liberties. It is not enough to prevent foreign countries from stealing our secrets; we must do so while upholding the rule of law. It is not a question of conflict; it is a question of balance. The rule of law, civil liberties, civil rights. These are not our burdens. These are what make all of us safer and stronger.

In a 1976 meeting of the American Bar Association, Justice Powell said, "*Equal Justice Under Law* is not merely a caption on the facade of the Supreme Court. It is perhaps the most inspiring ideal of our society. It is one of the ends under which our entire legal system exists."

Justice Powell made the rule of law his life's work, and our system of jurisprudence is stronger because of his unwavering commitment. As citizens, we are more secure because of his longstanding dedication to this ideal.

To read previous Lewis F. Powell, Jr. Lectures, please refer to the College website, www.actl.com. ■

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In a practice started by my predecessor, Louis Freeh, all new agents visit the Holocaust Museum in Washington to better understand what happens when law enforcement becomes a tool of oppression or worse, rather than an organization guided by the rule of law.

Director Mueller

REGIONAL MEETINGS PROMISE COLLEGIALITY

The various regions have planned a full calendar of events for spring and summer 2013. Fellows should anticipate receiving announcements about the planned events in their jurisdictions in plenty of time to register. The following dates can be calendared now:

6th Circuit Regional Meeting Kentucky, Michigan, Ohio and Tennessee	April 12-14, 2013	The Hermitage Hotel Nashville, Tennessee
Southwest Regional Meeting Arizona, California, Hawaii and Nevada	April 19-21, 2013	Arizona Biltmore Scottsdale, Arizona
3rd Circuit Regional Meeting Delaware, New Jersey and Pennsylvania	May 10-11, 2013	The Ritz-Carlton Philadelphia, Pennsylvania
Regional Meeting: Connecticut, New York, Ontario, Québec and Vermont	May 17-19, 2013	Otesaga Hotel Cooperstown, New York
Northeast Regional Meeting Atlantic Provinces, Maine, Massachusetts, New Hampshire, Puerto Rico and Rhode Island	June 14-16, 2013	Portland Harbor Hotel Portland, Maine
10th Circuit Regional Meeting Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming	July 18-20, 2013	The Little America Hotel Cheyenne, Wyoming
Northwest Regional Meeting Alaska, Alberta, British Columbia, Idaho, Montana, Oregon and Washington	July 25-28, 2013	Whistler Four Seasons Resort Whistler, British Columbia

For additional information and registration materials, please access the EVENTS tab on the College website, www.actl.com.

BOARD OF REGENTS LOOKS TO THE FUTURE

At the October 2012 Annual Meeting in New York City, the College's Board of Regents discussed various strategic issues confronting the College and assessed current commitments against potential growth and possibilities.

The dialogue on each of the three strategic issues discussed was led by a different officer of the College, with input provided by the past presidents and current regents.

WHAT ARE THE TYPES OF TRIALS THAT ARE LIKELY TO TAKE PLACE IN THE FUTURE ON BOTH NATIONAL AND LOCAL LEVELS?

Prior to the October meeting, Secretary of the College, Paul D. Bekman, chaired a subcommittee to consider the current cases being tried in United States federal and state courts and Canadian Provincial Superior Courts, as well as the types of cases likely to be tried in the future. The subcommittee also proffered suggestions to state and province chairs and their committees to facilitate identification and evaluation of future Fellows of the College. Through a look at the past, the College hopes to put together a view of the future.

A decline in the number of candidates considered for Fellowship has been attributed, in large part, to the "vanishing jury trial" phenomenon, as reported by the College's Jury Committee. Data from many sources supports the fact that the census of cases tried in both state and federal courts has significantly decreased in the past fifteen years.

Information obtained from the Federal Judicial Center for the period 2006 through 2011 reflected the percentage of civil cases terminated by trial (by the court or jury), ranged from 1.1% in 2011 to a high of 4.1% in 2007.

The FJC also reported that during the same time frame, the types of civil cases being tried were: Civil Rights – employment and others; Prisoner Petitions – Civil Rights and Prison Conditions; Fair Labor Standards; Labor Litigation; Commercial; Patents, Copyright and Trademark; Contract – breaches and insurance; and Personal Injury – motor vehicle, medical malpractice, product liability and other. Although the Canadian court's electronic database provides less information, Trial Coordinators of Ontario mirrors the types of cases in the United States superior courts, e.g., commercial, contract, labor, medical malpractice, personal injury and motor vehicle.

This data tracks many of the areas from which the College has traditionally selected its Fellows. In recent years, Fellows have been selected from various areas of criminal practice, both prosecution and defense. The general areas of cases being tried remain similar throughout the United States.

Secretary Bekman's subcommittee's recommendations support the Board of Regents' view that there should be no lowering of the standards of admission to Fellowship in the College. The subcommittee reports that the State and Province committees are doing a good job

in identifying candidates for Fellowship but acknowledge that chairs and committees can do more to identify potential candidates. A further recommendation reflects that suggestions to identify outstanding candidates, as discussed at the chairs' workshops, should be formalized and included in the Manual for State and Province Committees.

Specific recommendations by the subcommittee are:

1. Great care and attention should be exercised in the selection of the state and province chairs, with a focus on competent, energetic, hard-working and dedicated individuals.

2. State and province chairs should meet with their regents at the beginning of their terms to discuss the existing list of candidates being considered for fellowship, changes in committee membership, review of a watch list for future candidates and scheduling of meetings for the term.

3. State and province chairs should communicate with all Fellows, including Judicial Fellows, in their jurisdictions at the beginning of each term to request names of potential candidates. Confidentiality of the names of potential candidates should be emphasized.

4. State and province chairs should review and consider potential candidates from non-College rankings (national and local), compiled by the National Law Journal, the American Lawyer, Chambers and other organizations, including membership rosters of recognized legal colleges and academies in specialized areas of the law.

5. State and province chairs should contact state and province lawyers, preferably Fellows, for potential candidate names in specific trial areas, including those who practice in public-interest areas of the law.

6. Chairs and regents should review the roster of Fellows within their regions to obtain a profile by practice area, with a view toward the need to expand Fellowship into other practice areas.

7. State and province committees should circulate exemplary sample due diligence investigation reports for review by the committee members.

8. Fellows and regents on state and province committees should inquire of judges if there are trial lawyers who have appeared before them if the judges believe certain lawyers meet the criteria of outstanding and best.

9. Fellows and regents on state and province committees should attempt to identify potential candidates from those who have tried cases with or against current Fellows.

10. Female and minority candidates should be vigorously reviewed and updated for consideration.

Because the College's revenues are almost exclusively based on dues, the addition of new Fellows significantly impacts its financial well being. If each of the College's fifteen regions advances additional qualified candidates for admission, the financial result will be similarly substantial. Through hard work, dedication and perseverance, not only will Fellowship numbers increase, but the College and the legal community will be the beneficiary. ■

The subcommittee's report detailed membership in the different classes of Fellows of today's College:

5,781
Active Fellows, actively engaged in the practice of law

3,982
Full Dues-Paying Fellows

144
Partial Dues-Paying Fellows (public sector Fellows)

1,310
Emeritus Fellows, retired due to age or no longer practicing law

305
Judicial Fellows, inducted as trial lawyers, later assuming positions on the bench

40
Honorary Fellows, specially elected Fellows due to high degree of respect and eminence in judicial or other roles in the profession or public service

The requirements of the four classes of membership are fully defined in Section 3.1 of the Bylaws.

LONGING FOR THE FUTURE:
BRAVE FIGHTERS FOR A NEW SOCIETY

"A remarkable package of legal acumen, energy, charm, accomplishment and style," is how President-Elect **Chilton Davis Varner** described The Honourable Madam Justice **Rosalie Silberman Abella** of the Supreme Court of Canada. One of Canada's leading experts in human rights law, a graduate of the Royal Conservatory of Music in classical piano, and an Honorary Fellow of the College since 2007, Justice Abella was the first speaker on Saturday's General Session at the College's 2012 Annual Meeting in New York.

Beginning with a lively opening act that included several humorous references to the College (*see the* Quips and Quotes *throughout this article*), Justice Abella set the stage for a presentation that garnered both laughter and tears as she described changes needed in the civil justice system and the responsibility of lawyers to be world leaders in the crusade for justice.

Last night was a fun night on Broadway for many of us, so I want to segue into this morning's activities by describing a Broadway show I saw a few years ago and loved.

The play was *Copenhagen* by Michael Frayn, a fictionalized account about what happened at a real meeting in Copenhagen in September, 1941, between two Nobel Laureates, Niels Bohr and his former student, the German physicist Werner Heisenberg. Together, the two men had revolutionized atomic physics in the 1920s with their work on quantum mechanics and the uncertainty principle.

The moral question at the heart of the play is what Heisenberg's duty was as a loyal German and as a scientist in charge of its nuclear program. Was he obliged to help protect Germany by developing the atomic bomb, or was he obliged to protect the world from Germany by sabotaging its production?

As you know, the atom bomb was never developed in Germany, and the play leaves unclear whether this was due to Heisenberg's deliberate derailment or just as a result of getting the calculations wrong.

The genius of the play is the way it plays on the tensions between the mentor, Niels Bohr, half-Jewish and living self-consciously and proudly in occupied Denmark, developing nuclear expertise for the Allies, and the acolyte, Werner Heisenberg, working conscientiously and proudly for the occupier and the honor of German science. Both scientists blame themselves and each other for perceived breaches of their moral responsibilities as scientists. Bohr blames himself for coming to America, where he worked at Los Alamos and played what he called his "small but helpful part" in the deaths of 100,000 people at Hiroshima and Nagasaki. Heisenberg blames himself for working for a crazed dictator.

I found the most interesting speech in the play to be Heisenberg's explanation for his ambivalence when he says, "We have one set of obligations to the world in general, and we have other sets, never to be reconciled to our fellow countrymen, to our neighbors, to our friends, to our family, to our children. All we can do is look afterwards and see what happened."

The point of the play is not what actually happened at the meeting between Bohr and Heisenberg, because no one really knows, but about what it tells us about how we make moral choices and

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I remember when we saw the play a few years ago. At the beginning it was so sophisticated, I turned to my husband and said, "Couldn't you get tickets to My Fair Lady?"

The Hon. Madam Justice Rosalie Silberman Abella

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how the context of the moment may not be a sufficient defense in history's court. It is time, in other words, that judges how just we be.

If Heisenberg was right and we look afterwards and see what happened, how will time judge us, those in the legal system, and how we dispensed justice in our lifetime? That is the question I want to explore with you this morning. Let's start with the house of justice we live in.

IF A TREE FALLS IN THE FOREST AND NO ONE HEARS IT, DOES IT STILL MAKE A SOUND?

When I was in first-year Arts at University of Toronto, everyone said to me, "You've got to take Professor Marcus Long's philosophy course." In the very first class, he asked, "If a tree falls in the middle of a forest and no one hears it, does it still make noise?"

I turned to my best friend, Sharon, and I said, "I'm out of here. Who cares?"

Now that I am older and do not have the answers to everything the way I thought I did when I was eighteen, I realize what a wonderfully instructive metaphor Marcus Long's question was. If you cannot hear something, you do not know about it. If you do not know about it, then it probably does not exist for you. And if it does not exist for you, you do not have to do anything about it.

But that does not mean the tree did not fall and make a noise, and it does not mean necessarily that we can ignore it. It might have caused a lot of damage, and the longer you leave the damage, the harder it is to fix.

So what is the noise I think our profession cannot ignore? The sound of a pretty angry public.

"I'M MAD AS HELL AND I'M NOT GOING TO TAKE THIS ANYMORE!"

It is a public that has been mad at us for a long, long time. Like the character from the movie *Network*, I am not sure they are going to take it anymore. And frankly, I do not know why they should.

I am talking, of course, about access to justice, but I am not talking about fees or billings or legal aid or even pro bono. Those are our beloved old standards in the access to justice repertoire, and I am sure all of you know those tunes very well. I have a more fundamental concern. I cannot, for the life of me, understand why we still resolve civil disputes the way we did centuries ago.

In a famous speech to the American Bar Association called "The Causes of Popular Dissatisfaction with the Civil Administration of Justice," Roscoe Pound

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My mother said to me growing up, "You know, you've got a good personality and you're smart, but your looks... I don't know."

As I got older, I thought what she wanted was to not have me focus on my looks, because that would be superficial. So of course I grew up focusing entirely on my looks.

The very first time I was on television in 1973, talking about family law reform, I became obsessed with how I looked [on the television program].

I called my mother right afterwards, and I said, "Did you see the show?"

She said, "Yeah."

I said, "How was it?"

She said, "Oh, you were so articulate."

I said, "Yeah, but how did I look?"

And she paused, and she said, "You looked so articulate."

Justice Abella

criticized the civil justice system's trials for being overly fixated on procedure, overly adversarial, too expensive, too long and too out of date.

The year was 1906.

1906 was three years after the Wright Brothers' maiden flight at Kitty Hawk, ten years after *Plessy v. Ferguson* told blacks that segregation was constitutional, eight years before the most cataclysmic war the world had ever fought, a generation before rural North America became urbanized, and two generations before its governments became decidedly distributive.

Consider what has happened to the rest of our reality since then. The horse and buggy of 1906 have been replaced by cars and planes. Morphine for medical surgery has been replaced by anesthetics and the surgical knife by the laser.

Caveat emptor has been replaced by consumer law. Child labor has been replaced, period.

A whole network of social services and systems is in place to replace the luck of the draw that used to characterize employment relationships.

The phonograph has been replaced by the compact disc player.

The hegemony of the majority has been replaced by the assertive diversity of minorities, and adoring wives have been replaced by exhausted ones.

Yet with all these profound changes over the last 106 years in how we travel, live, govern and think, none of which would have been possible without fundamental experimentation and reform, we still conduct civil trials almost exactly the same way we did in 1906. Any good litigator from 1906 could, with a few hours of coaching, feel perfectly at home in today's courtroom. Could a doctor from 1906 feel the same way in an operating room?

If the medical profession has not been afraid over the century to experiment with life in order to find better ways to save it, can the legal system in conscience resist experimenting with justice in order to find better ways to deliver it?

BE THE CHANGE

The public does not think it should take years and several thousands of dollars to decide whether children should live, whether their employer should have fired them or whether their accident was compensable. They want their day in court, not their years. How many lawyers themselves could afford the cost of litigating a civil claim from start to finish?

We cannot keep telling the public that this increasingly incomprehensible, complicated process is in their interest and for their benefit, because they are not buying it anymore. The public knows we are the only group who can change the process. They simply cannot understand why we won't.

When we say, "it can't be done," and the public asks, "why not?" they want a better reason than "because we've always done it this way." We cannot talk seriously about access to justice without getting serious about how inaccessible the result, not the system, is for most people.

Process is the map, lawyers are the drivers, law is the highway, and justice is the destination. We are supposed to be experienced about the best, safest and fastest way to get there. If much of the time the public cannot get there because the maps are too complicated, then as Gertrude Stein said, "There is no there there." And if there is no there there, what is the point of having a whole system to get to where almost no one can afford to go?

We should be on the frontline of reform looking at the system from the ground up, where the public lives, and start from scratch, instead of nibbling around the system's edges, satisfied by bite-sized pieces of reform.

So let's be bold and acknowledge that the public has adjudged our relationship with incremental change to have been largely suscipient. The tinkering at the edges may have been a necessary rehearsal, but it has not exactly been the hit with the public we thought it would be. I think it may be time to finally think about designing a whole new way to deliver justice to ordinary people with

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ordinary disputes and ordinary bank accounts. That is what real access to justice needs, and that is what the public is entitled to get.

JUDGING THE JUDGES

Two Sundays ago, I read an editorial in *The New York Times* about how the ousting of three Iowa Supreme Court justices a couple of years ago for their same-sex marriage ruling had spawned moves in other parts of the country, like Florida, to unseat progressive judges. I find this kind of politicized intimidation scary. I also find it contrary to what the framers had in mind.

Alexander Hamilton said, "Where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter, not the former." This was an exhortation to the judiciary to defend the people from legislative acts not in conformity with the Constitution. In other words, the wishes of the majority as expressed through elected governments are subject to the demands of the Constitution as interpreted by judges. And what was there in the American Constitution that made its framers so determined to keep its judicial reach beyond the grasp of the state?

The protection of rights, the culmination of an historical evolution that started with the Magna Carta, wandered through the war with the Stuart kings, found expression in the act of settlement and denial in the execution of Sir Thomas More, and ultimately escaped full panoply from the bizarre brow of King George III.

The framers had experienced the ignobility of noble rule and were determined to create a new polity in which the government derived its moral authority from the will of the people and the parameters from the Constitution. Governments were constrained from encroaching on the constitutive rights of its citizens, but if they did, there was an independent judiciary to keep those rights safe.

Yet we seem to be trapped at the moment in a frenetically fluid, intellectually sporadic, rhetorically tempestuous, ideologically polarized and economically narcissistic discourse that is clamoring for our attention. It includes, notably, an intense verbal whirlpool about judges, constitutions and rights, a conversation in which loaded phrases are perpetually spun and important concepts conveniently disregarded.

The most basic of the central concepts we need to get back in the conversation is that democracy is not, and never was, just about the wishes of the majority. What pumps oxygen no less forcefully through vibrant democratic veins is the protection of rights through courts, notwithstanding the wishes of the majority. It is the second crucial aspect of democratic values that has been submerged in the swirling discourse.

EVERYONE'S A CRITIC

The critics have made their arguments skillfully. They call the good news of constitutional rights the bad news of judicial autocracy. They call minorities seeking the right to be free from discrimination, "special interest groups seeking to jump the queue." They call efforts to reverse discrimination, "reverse discrimination."

They pretend that concepts are words, like "freedom," "equality" and "justice." They pretend that they had no preexisting political aspect, and they bemoan the politicization of the judiciary. They trumpet the rights of the majority and ignore the fact that minorities are people who want rights, too.

They say courts should only interpret, not make, law, thereby ignoring the entire history of common law. They call advocates for equality in human rights "biased," and defenders of the status quo, "impartial." They urge the courts to defer to legislation unless they disagree with the legislation.

They say judges are not accountable because they are not elected, yet hold them to negative account for every expanded right. They claim a monopoly on truth, frequently use invectives to assert it, and then accuse their detractors of personalizing debate. They want judges to be directly responsive to public opinion, particularly theirs, without understanding that when we speak of an independent judiciary, we

It is wonderful to be back at the American College. I first came in 2002 and I will never forget the generosity of this group, so when the President-Elect asked me to speak on a certain topic, I was very happy to do it. And the topic Chilton has asked me to speak on this morning is the importance of the role of women in the American College of Trial Lawyers.

The American College of Trial Lawyers was founded in 1950. Since then, it has had two women presidents, Joan Lukey and Chilton Varner.

Thank you. [sits down]

Justice Abella

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are talking about a judiciary free from precisely this kind of influence.

As Lillian Hellman once said, "I will not cut my conscience to fit this year's fashions."

PUBLIC OPINION IS NOT EVIDENCE

Public opinion in its splendid indeterminacy is not evidence. It is a fluctuating idiosyncratic behemoth incapable of being cross-examined for the basis of its opinion and susceptible to mood swings. In framing its opinions, the public is not expected to weigh all relevant information or to be impartial or to be right. The same cannot be said of judges.

This does not mean judges are not accountable. They are accountable, not to public opinion, but to the public interest, for independent decision-making based on discernible principles rooted in integrity. There is no doubt that performing the task properly may mean controversy and criticism, but better to court controversy than to court irrelevance, and better to court criticism than to court injustice.

For example, when *Brown v. Board of Education* was released, President Eisenhower was very unhappy. He told his speechwriter, "I'm convinced that the Supreme Court decision set back progress in the South at least fifteen years. Feelings are deep on this, especially where children are involved. We can't demand perfection in these moral things."

In context, Eisenhower was not wrong to worry about the ensuing public controversy and criticism. Almost sixty years later in some quarters, the decision is still an open sore. But how has time judged the judgment?

The answer may well be in these poignant words quoted a few years ago in *The New York Times* at the fiftieth anniversary of the decision. A fourteen-year-old African-American boy said, "In Arkansas when I was little, my dad would ask for directions, and they would just look at him like he was crazy. I said, 'Maybe they didn't hear you.' I didn't really understand, but now I do. It still goes on through your whole life."

That is how injustice sounds, and that is how injustice feels, and that is why judges and lawyers have a duty to confront it. To paraphrase Martin Luther King, the arc of the moral universe may be long, but it decidedly and increasingly does not always bend towards justice.

Why does that matter? Because it means that too many children will never get to grow up period, let alone grow up in a moral universe that bends towards justice. It is that moral universe that finally gets me to democratic values and international justice.

IS THE UNITED NATIONS THE BEST WE CAN DO?

International justice in my generation started with the United Nations [U.N.] charter which

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Chilton, let me tell you how honored I am to be invited, introduced and hosted by you. You are the very best our profession is capable of producing, a lawyer committed to promoting the rule of law, the compassion of law and the fairness of law, a lawyer, in short, committed to promoting justice and to ensuring that law and justice never leave each other's side as they patrol the universe.

All this combines in you, in a magnificent juggernaut of enthusiasm, wisdom, warmth, generosity and humility. I am so proud of you, as is everyone in this room.

I would sum it up the way Truman Capote summed up his close friend, Babe Paley: "She has only one fault: She's perfect. Otherwise, she's perfect."

Justice Abella

said the peoples of the United Nations "determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" are here gathered to form a new institution. The human rights revolution that started with the U.N., after and because of World War II, seems to have too few disciples in the countries that need it most.

Compare this state of affairs with the revolution in international trade law. Like international law generally, international economic laws witnessed an institutional proliferation of organs, like the OECD [Organization for Economic Co-operation and Development], the IMF [International Monetary Fund], the World Bank and GATT [General Agreement on Tariffs and Trade].

In 1994, the Marrakesh Agreement established the World Trade Organization, dramatically extending the reach of trade regulation and creating a comprehensive international legal and institutional framework for international trade. After only sixteen years in operation, the WTO is, in essence, international law's child prodigy. Despite occasional criticism, the WTO and its dispute-settling mechanism are regarded as legitimate, effective and influential in international relations.

Here is my point: Unlike international human rights law, states comply with international trade law. In the event of noncompliance, an effective dispute settlement mechanism is available to resolve disputes. In other words, what states have been unable to achieve in sixty-five years of international human rights law is up and running after only sixteen years of international trade regulation.

I find this dissonance stark and unsettling. The most unsettling for me is that unlike the U.N., the WTO is incredibly difficult to join. That means that the global community feels that obtaining membership in a trade organization should be more onerous than obtaining membership in an organization responsible for saving humanity from inhumanity.

We changed the world's institutions and laws after World War II because they had lost their legitimacy and integrity. Are we there again? Is it time to ask the hard questions about the U.N. as a deliberative body? I think it is.

We have to acknowledge that many of the U.N.'s agencies have achieved great success in a number of years. Peacekeeping, UNICEF, and the World Health Organization are agencies that have undoubtedly raised awareness about violence against women, the environment and the plight of children.

But the U.N. was the institution the world set up to implement never again. Its historical tutor was the Holocaust, yet it seems hardly to be an eager pupil. What was supposed to happen never again has happened again and again.

Over ninety years ago, we created the League of Nations to prevent another world war. It failed, and we replaced it with the United Nations. The U.N. had four objectives: To protect future generations from war, to protect human rights, to foster universal justice and to promote social progress. Its assigned responsibility was to establish norms of international behavior. Since then, forty million people have

died as a result of conflicts in the world. Shouldn't that make us wonder whether we have come to the point when we need to discuss whether the U.N. is where the League of Nations was when the U.N. took over?

The U.N. eventually reacted in Libya, and it wagged its finger at Syria, but I waited in vain to hear what it had to say about the protests in Iran, Tunisia, Egypt, Yemen and Bahrain. Isn't that magisterial silence a thunderous answer to those who say it would be a lot worse in this world without the U.N.? Worse how?

I know it is all we have, but does that mean it is the best we can do? In a world so often seeming to be on the verge of spinning out of control, can we afford to be complacent about the absence of multilateral leadership, making sure the compass stays pointed in the most rights-oriented way?

I think the global community needs to rethink its almost reflexively protective attitude towards this institutional behemoth, stop making excuses for its inexcusable and seemingly infinite patience for injustice and start insisting that it do the job it was set out to do. And we lawyers are the people who can do it. It is why we are lawyers.

CRUSADE FOR THE FUTURE

I decided to become a lawyer over sixty years ago. My family had just come to Canada from Germany as Jewish refugees. Just before the Second World War started, my father became a lawyer. He was a graduate of the law faculty at the University of Krakow.

The day World War II started, he married my mother. Instead of practicing law, as he had hoped, he and my mother spent most of the war in concentration camps where their two-year-old son and most members of their family were killed. Miraculously, they both survived and ended up in a displaced person's camp in Stuttgart, Germany, where I was born in 1946. In Germany, my father taught himself English and was appointed a counsel by the Americans to provide legal services for displaced persons in southwest Germany.

My father died a month before I graduated from law school. He never saw me get called to the bar, never met his two grandsons, both of whom became lawyers, and he never lived to see me revel in the life of the law.

One of the American lawyers my father worked with in Germany wrote him a personal letter in 1947 that continues to remind me what being a lawyer means. He said, "Mr. Silberman, under extreme difficulties you helped make life bearable for your friends, co-nationals and those of other nationalities by advising them on everyday legal problems in their lives. You were battered, but you did not allow yourself to be beaten. You continue to fight for your rights and for those of your fellows in fate, like brave fighters for a new society."

That is how I see all of you in the American College of Trial Lawyers: brave fighters for a new society, fighters for rights, battered but not beaten.

My life started in a country where there had been no democracy, no rights, no justice. It created an unquenchable thirst in me for all three. I grew up believing deeply that democracies and their laws represent the best possibility of justice and that those of us lucky enough to be alive and free have a particular duty to make that justice happen, to do everything possible to make the world safer for our children than it was for their grandparents, and to ensure that all children, regardless of race, color, gender or religion, can wear their identities with pride and dignity and in peace.

And so to end with Broadway, as I began, here are the poetic words of the final chorus of *Les Misérables*.

> *Will you join in the crusade? Who will be strong and brave and free somewhere beyond the barricades? Is there a world you long to see? Do you hear the people sing? Do you hear the distant drums? It is the future that they bring when tomorrow comes.*

Here's to the future, to the world we long to see, and to you, American College of Trial Lawyers. I love you all. Thank you. ■

SOLICITOR GENERAL OF THE UNITED STATES, DONALD B. VERRILLI, JR., ADVOCATE OF THE UNITED STATES

Donald B. Verrilli, Jr., Solicitor General of the United States, addressed the assembled Fellows and guests at Friday's General Session of the 2012 Annual Meeting in New York, New York. Beginning with a quip, "You may have heard, I had an eventful year this past year," Verrilli alluded to the year's banner cases before the Supreme Court of the United States and the press that accompanied his participation in those arguments.

Immediately assuring everyone that, like the forty-one Solicitors General who preceded him, Verrilli treasures his experience in the best-of-all-lawyers'-positions and acknowledges that it is a privilege to be part of "these momentous times when the stakes are so high and the issues are so challenging."

In discussing the different aspects of his job, Verrilli said that a significant responsibility of his post is deciding the United States' position in litigation in front of the Supreme Court and the courts of appeals. He shared a particular example involving a case before the Supreme Court where extraterritoriality took on a new application and led to a modified position based on changed circumstances. When tasked with balancing competing interests that were consistent with existing law, Verrilli was challenged by Justice [Antonin] Scalia, who noted the new position and asked "why should we listen to you rather than the opposite [previously held] position. Why should we defer to the views of the current administration?"

Eliciting laughter from the audience, Verrilli stated that he responded to Scalia, "Well, we think they [the current administration's views] are persuasive, Your Honor."

Quoting one of his predecessors, Francis Biddle, from 1940, Verrilli described the job of Solicitor General: "For the Solicitor General, the client is but a mere abstraction and the SG's guide is only the ethic of his law profession framed in the ambience of his experience and judgment."

HOW SHOULD THE SOLICITOR GENERAL DECIDE THE POSITION OF THE GOVERNMENT?

Verrilli posited three schools of thought in deciding what the position of the government should be:

Quips & Quotes

In a case like this one, the United States has multiple interests. We certainly have a foreign relations interest in avoiding friction with foreign governments. We have interests in avoiding subjecting United States companies to liability abroad, but we also have interest in ensuring that our foreign relations commitments to the rule of law and international human rights are not eroded.

Solicitor General Donald B. Verrilli, Jr.

THE TENTH JUSTICE MODEL:

The Solicitor General is sometimes referred to as the tenth Justice whose role it is to assert independent judgment and advocate his or her own view to the Supreme Court.

THE INSTITUTIONAL MODEL:

A second approach holds that the Solicitor General should advocate long-term institutional interests of the Executive Branch, without variance from administration to administration.

THE ADVOCATE OF THE PRESIDENT MODEL:

The third position holds that the Solicitor General is part of the President's administration, advocating the President's legal policy and appropriate Constitutional law.

THE VERRILLI MODEL:

Verrilli chose a fourth route: "We are advocates for the United States Government, and we are trying to advance the government's interests. We are not a part of the Court. We are not exercising a judicial function. We are advocates."

He conceded that the Executive Branch carries great weight. He agreed that the Justice Department enforces criminal law. More importantly, there should be "room for legal policy judgment in this role. Not partisan politics, but legal policy judgment."

As he expounded on his earlier response to Justice Scalia, Verrilli demonstrated his common-sensical model: "It seems perfectly reasonable to me that one administration could have a different view about the importance of the rule of law and international human rights as a practical tool of our foreign relations." And, "The trick, of course, is in deciding when institutional considerations predominate and when legal policy judgments can appropriately justify a change. There's no algorithm for figuring that out. It is a matter of practical wisdom and situation sense and pragmatic judgment."

To read the full text of Solicitor General Verrilli's presentation, please refer to the College website, ww.actl.com.

Quips & Quotes

As to when the government changes its position on the law:

I think it is important that the answer be persuasive, not just in the sense of being a persuasive reading of the legal materials, but persuasive in the sense of being a justified change in position, a rare but justified change in position, given the strong institutional value of stability.

Solicitor General Verrilli

OF SEVEN DIRTY WORDS AND WARDROBE MALFUNCTIONS: CONGRESS SHALL MAKE NO LAW?

"Whatever it was that the Framers of the Constitution had in mind when they adopted the First Amendment, those understandings were shattered when the Supreme Court came to consider cases involving new technologies like cinema or broadcasting. The Court was slow to recognize that the protections of the First Amendment as they were beginning to develop in American law in the twentieth century also applied to new technologies."

In a humorous address involving "seven dirty words," none of which he uttered during his presentation, First Amendment lawyer **Robert Corn-Revere** explained to the audience how the Supreme Court has not kept pace with modern technology in the media, creating ambiguity and confusion that awaits resolution.

A sluggish pace has characterized the issue for many years, Corn-Revere noted, pointing out that when William Howard Taft was Chief Justice, "he wanted to put off the issue of radio for as long as he possibly could, because to him, it seemed akin to the occult. He really did not want to get into that issue, something that the current Supreme Court has in common."

Summing up the quandary, Corn-Revere asked, "In a nation protected by the First Amendment, where the law protects even people who lie about winning military honors, or it protects the likes of the Westboro Baptist Church and their funeral protests, the question is: How you can have a law where the government can tell broadcasters what is appropriate to broadcast and not?"

Rather than offering an answer to the question, Corn-Revere gave examples of the inexplicit rulings of the Supreme Court over the years. He cited a 1938 case in which NBC was admonished for the "inflections" of one of its actresses in a radio show, and *Miller v. California* in 1973, which established a three-part test for obscenity. However, without a definition of what was meant by "indecency," the Federal Communications Commission was left to come up with a standard. This is where the "seven dirty words" came in.

THE FCC'S DILEMMA

"The FCC has a dual mandate of both restricting certain kinds of speech but also not censoring speech. How is the FCC supposed to serve both goals?" Corn-Revere asked. "I think the easy answer is that it has tried to make it up as it goes along."

In 1973, Pacifica Radio incorporated parts of comedian George Carlin's Filthy Words routine, which included the "seven dirty words," in a serious program about how society reacts to and uses language. The FCC held that the broadcast was indecent and set forth for the first time a standard to define "indecency." Pacifica Radio appealed unsuccess-

fully to the Supreme Court, and for nine years after the Court's 1978 ruling in *FCC v. Pacifica Foundation*, the FCC "maintained a well-understood but unwritten policy that it would enforce that policy based on the specific facts of *Pacifica*."

"This made the indecency test the only standard in history, so far as I know, ever created by a standup comic," Corn-Revere said.

In the late 1980s the FCC adopted a "generic indecency standard," while reaffirming its "restrained enforcement policy," indicating it would not enforce the standard against unplanned, unintended or "fleeting" expletives. Yet only a decade later the FCC rejected its own practice when it began to enforce the standard against fleeting expletives in a complaint-driven process. The ambiguity of the FCC's rulings led to television broadcasters' uncertainty of what they can broadcast without sanction. In 2000, the FCC dismissed a complaint about nudity in *Schindler's List*, saying that nudity had to be considered in the full context. There is, however, an unresolved complaint against NBC due to its broadcast of the 2004 Olympics Opening Ceremony which showed actors dressed as Greek statues in the buff. In another recent example, network executives wanted to show *Saving Private Ryan* as a tribute on Veterans Day, but fearing fines from the FCC, opted instead to show reruns of the innocuous *Andy Griffith Show*.

THE COURT'S DECISIONS

Whatever the FCC's practices have been, the Court still has not provided clear policy. "Between the 1978 *Pacifica* decision and today, the Court invalidated every other attempt to expand the indecency rules. It stated that the rules could not be expanded to cable television or the Internet, and it constantly narrowed the scope of the indecency standard." In its 2012 decision in the Super Bowl "wardrobe malfunction case" known as *FCC v. Fox Television Stations*, the Supreme Court decided only that the FCC violated the network's rights to due process. The Court did not address the First Amendment issues, again putting off clear guidance on the FCC's scope of authority.

Quips & Quotes

One of my favorite headlines of the year in the Capitol Hill newspaper, Politico: "Indecency Ruling Didn't Decide $#*!"

Robert Corn-Revere

Corn-Revere acknowledged the possibility that the Justices did not go very far in their 2012 decision because of the idea that "broadcasting is uniquely pervasive and uncontrollable, and now it is being treated differently because it is a safe harbor, a walled garden for children." However, he then reminded the audience that while the broadcasts of indecent material are prohibited from 6:00 a.m. to 10:00 p.m., those rules apply only to broadcasting. Certain channels may be restricted from having certain kinds of programs at certain times, but they are not prevented from being omnipresent on a wide variety of media, including computers, handheld devices, or from being viewed at different times on digital video recordings.

"The rules are an anachronism and a poor excuse for having an entirely separate constitutional standard for the broadcast medium," Corn-Revere concluded. "The broader constitutional issues at the end of the day remain unresolved, and the disparate treatment of broadcasting is still the law. In the meantime, technological change continues, making the old rules and constitutional principles outmoded."

To read the full text of Corn-Revere's presentation, please refer to the College website, www.actl.com. ■

COLLEGE ELECTS NEW LEADERS

New Officers and Regents are elected each year at the College's Annual Meeting. Immediate Past President **Gregory P. Joseph** led the Officers Nominating Committee that submitted the names of **Robert L. Byman** and **Francis M. Wikstrom** to the Fellowship for consideration. At the 2012 Annual Meeting in New York City, Byman was elected Treasurer and Wikstrom elected Secretary. Two new Regents were also elected.

The College is proud to introduce the new Officers and Regents of the College for the 2012-2013 term.

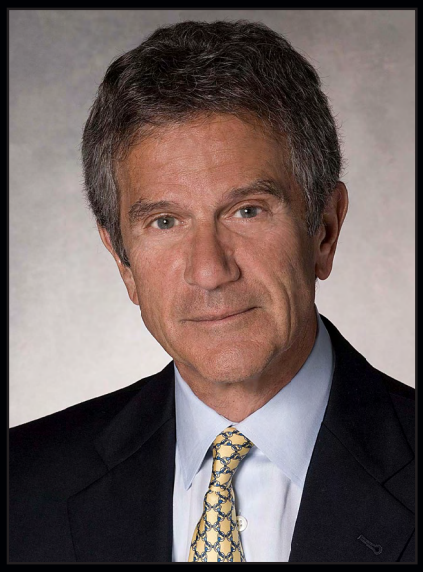
Robert L. Byman and **Francis M. Wikstrom** were elected to the Executive Committee at the 2012 Annual Meeting of the College in New York City.

Robert L. (Bob) Byman was elected Treasurer of the College for 2012-2013. Inducted at the 1992 Spring Meeting in Palm Springs, Byman served as Regent to the states of Illinois, Indiana and Wisconsin from 2008 to 2012. During that time he also supported the work of the Alternative Dispute Resolution, Bulletin, Federal Civil Procedure and Public Defenders Committees. He had previously served the College as Chair of the Regents Nominating Committee, the Ad Hoc Committee on Judicial Independence, the Ad Hoc Committee on Judicial Compensation and the Federal Civil Procedure Committee. He served as a member of the Task Force on Discovery and Civil Justice, the Outreach Committee and the Illinois-Upstate State Committee.

Byman's law practice is focused on complex commercial litigation. He is a frequent speaker at seminars on e-discovery issues and is a regular columnist for the National Law Journal on Federal Civil Procedure issues. He is an experienced arbitrator and devotes considerable time to criminal pro bono work, having among things secured the release of two different individuals wrongfully convicted of murder.

Byman and his wife, Jane, live in Lake Forest, Illinois, where they have served as co-presidents of the community theater and on various other civic boards. They have three sons, two daughters-in-law and 3 ½ grandchildren.

Francis M. (Fran) Wikstrom of Salt Lake City was elected Secretary of the College for 2012-2013. Wikstrom was inducted at Amelia Island, Florida, at the 1995 Spring Meeting. As Regent from 2008 to 2012, he served the

From left to right:
Francis M. Wikstrom, Parsons Behle & Latimer, Salt Lake City, Utah
Robert L. Byman, Jenner & Block LLP, Chicago, Illinois
James T. Murray, Jr., Peterson, Johnson & Murray, S.C., Milwaukee, Wisconsin
Michael L. O'Donnell, Wheeler Trigg O'Donnell LLP, Denver, Colorado

states of Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming, and provided support to the Judiciary, Adjunct, Prosecuting Attorneys, and Samuel E. Gates Litigation Award Committees. Wikstrom previously chaired the Judiciary and Utah State Committees and was a member of the Task Force on Discovery and Civil Justice and the Regents Nominating, Access to Justice and Legal Services, Federal Civil Procedure, and Outreach Committees.

Wikstrom is a "dinosaur" trial lawyer who thus far has been able to avoid specialization. He tries a variety of cases ranging from patent trials general commercial cases to white collar criminal cases. He formerly served as an Assistant United States Attorney, and as U.S. Attorney for the District of Utah. For many years he has chaired the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure, and in 2011 he received the Utah State Bar's Lifetime Service Award.

Wikstrom and his wife, Linda Jones, an appellate lawyer, live in Salt Lake City.

Elected to replace **Bob Byman** and **Fran Wikstrom** were **James T. Murray, Jr.** of Milwaukee, Wisconsin, and Michael L. O'Donnell of Denver, Colorado. Murray's and O'Donnell's terms began at the conclusion of the 2012 Annual Meeting in New York and will continue until the conclusion of the 2016 Annual Meeting.

The new Regents of the College were nominated by the 2012 Regents Nominating Committee, chaired by Regent **Samuel H. Franklin**. The members of the committee were **Earl J. Silbert**, J**ohn J. (Jack) Dalton**, **Trudie Ross Hamilton**, **Douglas R. Young**, **Kathleen Flynn Peterson**, and **Stephen G. Schwarz**.

James T. (Jim) Murray, Jr.'s general litigation practice emphasizes product liability, commercial disputes and insurance bad faith. His regional jurisdiction includes Illinois, Indiana and Wisconsin, as well as the Adjunct State and Canada-United States Committees. A former Chair of the College's Wisconsin State Committee, he also chaired the Canada-United States Committee. Murray and his wife, Mary Fran, reside in Milwaukee, Wisconsin, and have four children.

Michael L. (Mike) O'Donnell's litigation defense practice focuses on complex civil litigation involving product liability, professional liability, torts, class actions and mass actions, commercial litigation, and bet-the-company matters. His regional jurisdiction encompasses Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming, the Federal Civil Procedure and Judiciary Committees. In addition to serving as Chair of the Colorado State Committee, O'Donnell has been a member of the College's Adjunct State, Complex Litigation and Special Problems in the Administration of Justice (U.S.) Committees. O'Donnell and his wife, Brett, have three children and live in Englewood, Colorado. ■

Seventy-Nine Inducted at Annual Meeting in New York

ALASKA
Jeffrey M. Feldman
Anchorage

ALABAMA
S. Allen Baker, Jr.
S. Greg Burge
Birmingham
Frank J. Stakely
Montgomery

CALIFORNIA-SOUTHERN
William C. Price
Los Angeles

CONNECTICUT
Paul M. Iannaccone
Hartford

DISTRICT OF COLUMBIA
Dane H. Butswinkas
Ruffin B. Cordell
K. Chris Todd
Washington

FLORIDA
Roberto Martinez
Coral Gables
Jonathan Barnet Trohn
Lakeland

GEORGIA
Jeffrey O. Bramlett
Robert P. Monyak
Atlanta
James E. Brim, III
Gainesville
Frederick S. Bergen
Savannah
Susan W. Cox
Statesboro

HAWAII
Michael K. Livingston
Honolulu

IOWA
Joel T.S. Greer
Marshalltown

IDAHO
Wendy J. Olson
Boise

ILLINOIS-UPSTATE
Anita M. Alvarez
Chicago

ILLINOIS-DOWNSTATE
Stephen C. Mudge
Edwardsville
David L. Drake
Springfield

INDIANA
Nicholas C. (Nick) Deets
John F. Kautzman
Indianapolis

LOUISIANA
Robert N. Habans, Jr.
Baton Rouge
Rebecca L. Hudsmith
Lafayette
James A. Brown
Don S. McKinney
John W. Waters
New Orleans
Bernard S. Johnson
Shreveport

MASSACHUSETTS
Paul M. McTague
Boston
Vincent A. Bongiorni
Springfield
Peter L. Ettenberg
Worcester

MARYLAND
Howard G. Goldberg
Pikesville

MICHIGAN
Elizabeth Phelps Hardy
Birmingham
David J. Gass
Grand Rapids

MINNESOTA
Paul F. Schweiger
Duluth
Rodger A. Hagen
Barry G. Vermeer
Minneapolis

MISSOURI
Douglas R. Dalgleish
Kansas City

MISSISSIPPI
Phil B. Abernethy
Walter C. Morrison, IV
Ridgeland

MONTANA
Micheal F. Lamb
Helena

NORTH CAROLINA
Tamura D. Coffey
Bermuda Run
Robert J. King, III
Greensboro

NEW HAMPSHIRE
Karen Ann Gorham
Manchester
Michael A. Pignatelli
Nashua

NEVADA
Jack Gabriel Angaran
Reno

NEW YORK-UPSTATE
Michael J. Roach
Kathleen M. Sweet
Buffalo
Philip G. Spellane
Rochester
Edward Z. Menkin
Syracuse

NEW YORK-DOWNSTATE
Nicholas M. Cannella
George R. Goltzer
New York

OHIO
Gregory M. Utter
Cincinnati
Rita A. Maimbourg
Cleveland
C. Craig Woods
Columbus
Howard P. Krisher
Dayton

OKLAHOMA
David L. Bryant
Dan S. Folluo
Tulsa

OREGON
Peter R. Mersereau
Jane Paulson
Steven T. Wax
Portland
Gordon L. Welborn
Redmond

PENNSYLVANIA
Howard M. Klein
Denis J. Lawler
Marc S. Raspanti
Philadelphia
John P. Gismondi
Richard W. Hosking
Pittsburgh

SOUTH CAROLINA
E. Paul Gibson
Marvin D. Infinger
John S. Wilkerson
Charleston
Walter H. Bundy
Mount Pleasant

TENNESSEE
Rosemarie Luise Hill
Chattanooga

VERMONT
R. Jeffrey Behm
Burlington

BRITISH COLUMBIA
Joseph J. Arvay, Q.C.
Vancouver

ONTARIO
Paul H. Le Vay
Martha McCarthy
Toronto

QUÉBEC
Louis Belleau, Ad.E.
Montréal

Kevin W. Griffin of White River Junction, Vermont, was inducted by President **Chilton Davis Varner** on December 17, 2012, in Burlington, Vermont. Effective January 2013, Griffin has assumed his new role as a judge on the Vermont Superior Court.

INDUCTEE RESPONDER SHARES REPRESENTATION OF GUANTÁNAMO DETAINEE

Federal Public Defender **Steven T. Wax** of Portland, Oregon, was selected to present the response on behalf of new inductees at the 2012 Annual Meeting of the College in New York. After thanking the assembled Fellows for the opportunity to contribute to the College and its work, Wax shared his experience representing a Sudanese man detained at the prison at Guantánamo Bay.

A good trial lawyer is not just a contentious person. He or she must also enjoy relating with people and have compassion. I have been blessed throughout my career with a number of great mentors and role models who were brilliant, fast on their feet, and full of compassion. In the thirty-four years I have been running federal defender offices, I have had the opportunity to pass some of those lessons on to the hundreds of people with whom I work, and I have tried to emulate my role models and represent my clients with both skill and compassion.

I want to tell you about one client in particular, a man named Adel Hassan Hamad. Adel was a Sudanese aid worker and hospital administrator who was being held in the prison in Guantánamo when I met him.

UNFAMILIAR TERRITORY

I met Adel because seven years ago, I offered the services of the Federal Defender Office in Oregon to help in the representation of prisoners at Guantánamo. We were assigned by the court in Washington, D.C., to represent six people. We had no idea at the time if they were hardened terrorists, al Qaeda or Taliban fighters, or innocent shepherds. What we knew was that they were being held with no process whatsoever and we needed to fight for our clients and for the rule of law.

After months of skirmishing, we were finally able to get to Guantánamo to visit our clients in March 2006. After landing at night, we were taken to the place that was called the CBQ, the Combined Bachelor Quarters. It is a funky college dorm-like place

that was on the leeward side of the base where we stayed during our visits. I was surprised when I woke up the next morning and looked out the window to see cactus! I thought I had travelled to a tropical paradise in the Caribbean, but the U.S. Naval Base in Guantánamo is on the dry part of Cuba.

We took a bus to a ferry that transported us to the windward side of the base, the main side where the prison is located. Our escorts took us on another bus through a dusty town that could have been anywhere in eastern Oregon, New Mexico or Arizona, past a Kentucky Fried Chicken, a McDonalds, and some sort of ersatz Starbucks.

We drove past subdivisions with quaint names like Sunrise Terrace and Iguana Terrace, and the driver detoured past an "iguana tree" where hundreds of reptiles sat underneath. We passed a sign that said a $10,000 fine would be assessed to anyone injuring or killing an iguana. Over the years I came to view that sign with increasing sadness because it seemed that our government was giving more protection to those reptiles than to the men in the prison.

The bus went around a bend, and off in the distance, sitting on a bluff right above the beautiful waters of the Caribbean, was the chain link and razor wire fencing of the prison. Our escort took us through a double set of gates into an inner courtyard that was ringed with wooden buildings, each building with two doors. We were taken to door number twelve.

The door opened and there, behind a little table, was a very dark-skinned black man wearing white pants, a white shirt and a white kufi. My eye was drawn to an eyehook in the floor and a chain coming out of it to my client's leg.

"How do I deal with this situation?" I wondered to myself.

As lawyers, we have the need to establish rapport with our clients in many different settings, but this was different. There I was, visiting a Muslim in the prison, and I am a Jew, and I work for the federal government.

Furthermore, we had been told that the jailers told our clients, "be wary of those lawyers that the government is going to send down, especially the Jewish lawyers."

I said, "hi," and my assistant who was with me said, "hi," and we talked. We listened, we talked, and somehow we overcame the prejudices that each of us had brought into the room.

GETTING TO KNOW ADEL

Over the next two days, Adel told us his story of seventeen years living and working in Afghanistan and Pakistan with his wife and growing family that reached four daughters by the time he was in prison. He described working his way up in charities as an aid worker, administrator, and eventually a hospital administrator. He said he abhorred violence and al Qaeda. He told us how he was seized from his bed by the Pakistani intelligence police who were led by a blond American.

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Quips & Quotes

I was born just across the East River in the great borough of Brooklyn - the borough that should never have surrendered its independence to Manhattan, and should n ever havessurrendered the Dodgers to Los Angeles.

Steven T. Wax

He told us that he had told his captors what he was telling us.

Adel described being taken to the U.S. Air Base in Bagram, Afghanistan, in January 2003. He described torture, and he described being flown to Guantánamo in March of that year.

At the end of the second day when it came time to leave, the assistant defender reached out his hand and said goodbye. I reached out my hand, and Adel took it in his right, and then he reached out and covered both our two right hands with his left. I reached out my left hand and put it on top. We stood there, in silence. I could see the ray of hope that our visit had brought to him starting to fade. Here we were, the first friendly faces this man had seen in four years, heading back to our lives. He was staying in the prison. He looked at me, and finally he said, "Steve, when will I go home?"

"Adel," I said, "I don't know. All I can tell you is that we will do all we can to get you out of here."

AROUND THE WORLD IN DEFENSE OF THE TRUTH

We left and went back to Oregon. Eventually our notes were cleared through the government censors, and we started doing what we do in every case. I had no idea if this man had told me the truth. What he had told me was certainly not what the government had told me.

Two teams of lawyers and investigators from the office volunteered to go to the war zone in Afghanistan and Pakistan. They came back several weeks later with scores of hours of video tapes attesting to the innocence of Adel and three of our other clients.

But we could not present the evidence. The courthouse doors were closed to us. Even though the Supreme Court had said in 2004 and 2006 that the Guantánamo prisoners could petition for habeas corpus, the Detainee Treatment Act of 2005 and Military Commissions Act of 2006 had stripped the federal courts of jurisdiction.

We turned to the court of public opinion and we joined in a press release with a number of large law firms and the Center for Constitutional Rights. Because we had evidence of innocence, our clients made the front pages of *The New York Times* and *The Washington Post*. They continued to languish in prison.

One of the younger lawyers on the team said to me, "Steve, we have got to do something. We have to take this to another level. Let's post a video on YouTube." I looked at him and said, "What's that?" It was 2006 and I had not heard of YouTube, but we posted the video, and it rose to number one on the political chart. Our clients remained in the prison.

We knew in the spring of 2007 that some prisoners had gone home through diplomatic means, so in April, my Chief Investigator and I got on a plane and flew off to the Islamic Republic of Sudan. It was

Quips & Quotes

Why am I a lawyer? And particularly why a criminal defense attorney?

My bride of thirty years, Kathleen, found part of the answer in a moldy box in our basement one day when she pulled out a copy of my junior high school yearbook, The Warrior, Class of 1962.

Leafing through it, she stopped on the "Can You Imagine?" page. There in the midst of the "can you imagines," – the bald teacher with hair, the brightest girl in the class flunking anything – she found my name: "Can you imagine Steve Wax agreeing with anybody?" Criminal defense and me – we were made for each other.

Steve Wax

not a terribly pleasant place. The war in Darfur was raging at that time. But for its own geopolitical reasons, the Sudanese government opened its doors to us and we met with all the top officials.

One day in the Foreign Ministry we were meeting with the State Minister and his crew. After several rounds of tea and juice, the State Minister finally said, "Mr. Wax, how can we help you?"

I said, "Sir, we are here to talk to you about some of the innocent Sudanese citizens in Guantánamo, and in particular, Adel Hassan Hamad."

The State Minister looked at me, smiled and laughed, and said, "Mr. Wax, I know all about Adel Hamad. We've seen him on YouTube!"

By the time we left, the Sudanese had written a letter from the State Minister to Secretary of State Rice asking for the return of their men. Adel was at the top of the list.

GOING HOME

A few months later, the State Minister came to the United States and began negotiations with Deputy Secretary Negroponte. They talked about Darfur, they talked about Guantánamo, and they talked about my client, Adel.

Finally on December 12, 2007, after five years, four months and twenty-five days of captivity, he was sent home and reunited with his family.

Over the next two years, our Afghan clients went home the same way, through diplomatic means.

Then after the third Supreme Court decision, in *Boumediene*, a case argued by a Fellow of this great College, habeas rights were restored by the Supreme Court, we had hearings for our last two clients, both judges declared their imprisonment unlawful and they were settled safely in third countries.

GRATEFUL TO SERVE

For whatever reason, Oregon has seen more than its share of national security or terrorism cases since September 11. Our work in those cases actually began in October of that year, and I have spent the greater part of my time in the last eleven years working on those cases.

I do not hold myself out as an expert on national security law or on international terrorism, but what I do know is that it is because I am a member of this great legal profession that I was privileged to meet with Adel Hassan Hamad and the other clients in Guantánamo and was able to help them.

And I know that in this country, perhaps among all others in the world, we are unique in that a federal public defender is paid by the government to fight the government on the most important issues of the day, and that government has left us alone to do our work as we believe it should be carried out. We all should be thankful for that.

Quips & Quotes

I take particular pleasure in speaking here on the East Side of Manhattan because my dad, whose parents had recently walked down the gangway from the boat that brought them to this great nation from the western fringe of Russia, was born exactly one hundred years ago in the tenements just forty blocks north of this hotel. I am sure he is smiling at the sight of his son wearing his tuxedo in this grand ballroom.

Steve Wax

It is also, I believe, only on this great continent of North America, in the United States and Canada, that a group of the finest private practitioners in our respective countries would open their doors to public servants and recognize a practitioner, a guy like me, who spends his time fighting the type of fight that I have just described.

It is, indeed, an honor to be welcomed to this College, and I thank you all again on behalf of all of the inductees. Thank you. ■

PRESIDENT'S MESSAGE TO FELLOWS

This is a reprint of President **Chilton Davis Varner's** online message to Fellows and the public

The American College of Trial Lawyers was founded in 1950 as an organization to recognize the very best of the courtroom bar. The College has never limited the term "trial lawyers" -- as so many do -- to plaintiffs' personal injury lawyers. Instead, our membership is composed of civil lawyers, criminal lawyers, plaintiffs' lawyers, defendants' lawyers, public interest lawyers and state and federal prosecutors and public defenders. The primary constant is that Fellows of the College must have proven themselves in actual trial practice. There is an intensive vetting process to assure this. Membership is by invitation only, to persons who have distinguished themselves in trial practice for at least fifteen years and who are recognized leaders in their local communities. The College looks for lawyers who are considered by other lawyers and judges to be the best in their states or provinces, lawyers whose ethical and moral standards are the highest, and lawyers who share the intangible quality of collegiality.

The College is the only organization in which all Justices of the United States Supreme Court and all Justices of the Supreme Court of Canada are honorary members. The College is privileged to be able to make this statement because every Justice has elected to accept Honorary Fellowship in the College and to address the College at one of its national meetings. The Past Presidents of the College include such outstanding lawyers as former Supreme Court Justice Lewis Powell and former U.S. Attorney General Griffin Bell.

From its founding in 1950 through today, the threefold mission of the College has been to maintain and improve:

- The standards of trial practice;
- The administration of justice; and
- The ethics of the profession.

As an example of this mission, only a few years after the College was founded, its *Code of Trial Conduct* (which set out aspirational standards of conduct) was first cited as authority in a 1954 court opinion. The current revised and expanded version of the Code, *The Code of Pretrial and Trial Conduct*, is available on this website. The College has also prepared video vignettes and a teaching syllabus to assist in teaching the Code to law schools, Inns of Court, and local bar associations.

The College serves its mission every day through thirty-five standing committees and sixty-one state and province committees in the United States and Canada. In 2012-2013, the College will be active on many fronts:

- Preserving the independence of the judiciary;
- Maintaining the jury trial as a fundamental part of our democratic system of government;
- Encouraging young lawyers and law students to pursue their work within a framework of high ethical standards;
- Teaching trial skills to local public interest lawyers;
- Participating in the rule-making processes of the federal courts through independent research, the production of written comments and attendance at Advisory Committee meetings;
- Funding and staffing national trial and moot court competitions;
- Presenting each year two national programs of the highest quality.

And there is much, much more.

It is my great privilege to be part of this organization that accomplishes so much of value within a collegial atmosphere. The year promises to be a busy one. We turn to it with enthusiasm.

PRESIDENT VARNER'S PROMISE TO THE FELLOWS

At the Induction Ceremony and Black-Tie Banquet, newly-installed President Chilton Davis Varner spoke of her goals for the coming year:

To "do no harm" to the College. Tom [Tongue] and his predecessor [Greg Joseph] left the College as a strong and robust institution. Trial lawyers still covet membership. Even non-lawyers understand that this organization is different. Essentially different. Enviably different. It is not your average professional association.

I grew up in a firm where membership in the College was viewed, quite literally, as the capstone of any litigator's career. I follow two great presidents of the College from my firm: Frank Jones, whom we lost just this past August, and former Attorney General Griffin Bell, whom we lost in 2009. Both taught me how to practice law, and both taught me early on, that it was only the best lawyers who were selected for membership in the College. They said that to have that College plaque on your wall was the brightest jewel in our crown. So I hope that I can give something back to the College, and to Frank and to Judge Bell, during this next year, and if I am lucky, I can leave the College next fall as strong as I found it.

The day-to-day business of the College in the meantime will go forward, and none of the goals that we have for the College next year will surprise you. You will recognize them. They are the missions on which we have been embarked for years and on which we will continue to promote. Everything from preserving the independence of the judiciary, maintaining the jury trial as a fundamental element of our democracy, encouraging young lawyers to frame their work with a high barrier of standards and ethics, teaching trial skills to public interest attorneys, participating in the rule-making processes of the federal courts, funding and staffing national trial and moot court competitions, preserving our traditional high standards for membership in the College and last, but not least, providing two national programs of the very best speakers on the most stimulating topics.

The work goes on. None of our goals is easy to reach. And even if we reach them, we have to guard them diligently to keep them from slipping away from us.

But finally, I think I would be remiss if I did not say that this year, we will continue to protect and celebrate our collegiality, a characteristic that fundamentally sets this organization apart.

President Chilton Davis Varner

WHY HISTORY

"It is fitting that President-Elect Varner would have invited two noted professors of history, two teachers, to address a group of mostly trial lawyers. After all, isn't that what we do? We teach."

With that introduction, Past President **John J. (Jack) Dalton** welcomed Emory University scholars **Patrick Allitt**, Cahoon Family Professor of American History, and **Deborah E. Lipstadt**, Dorot Professor of Modern Jewish and Holocaust Studies, to address the Fellows gathered for the College's 2012 Annual Meeting in New York.

MATTERS

PARTICIPANTS IN HISTORY

Beginning his presentation on "Why History Matters," Professor Allitt explained that the way in which history is taught is important in helping individuals connect with it on a personal level as they determine what lessons may, or may not, be drawn from past experience.

Allitt believes that the best way of learning about history is through conversation. As a child he was fascinated by his parents' stories of life in Europe during World War II, and the conversations he had with them fostered his appreciation for history.

Through conversation with his students, Allitt endeavors to help them realize that they are participants in history and that history is a continuing process. "Just because history did happen in a certain way," he said, "it was not bound to happen that way. It could have happened many, many other ways."

Allitt contends that the history of the United States is taught with a progressive arc, that with each problem the country faces, it appears to overcome the challenge and move to a higher moral plane. This style of teaching may lead students to develop a false sense of contentment or closure about history that would not happen if they examined more-tragic histories of other countries. "Justice doesn't always triumph," he said. "Power turns out to be far more important than the moral high ground."

Furthermore, Allitt discourages students from drawing fast conclusions to predict the future. "It's hardly ever the case," he stated, "that a historical event discloses to us one unambiguous lesson." While studying history provides experience to apply to contemporary decisions, it is nearly impossible to predict the future. "We ought to be careful about being too confident that we know what the world is like and what lessons history teaches us."

HISTORY ON TRIAL

In the second part of *Why History Matters*, Professor Lipstadt recounted her experience of being sued for libel in the United Kingdom following the publication of her book, *Denying the Holocaust: The Growing Assault on Truth and Memory*. In the book, Lipstadt accused David Irving, a well-known denier of the Holocaust, of deliberately misrepresenting historical evidence to support his beliefs.

Full of gratitude and praise for her team of lawyers, Lipstadt explained that their strategy was not to prove the Holocaust happened, but to prove that what David Irving said happened was not true. She described how they used historians to establish their case, and that at trial those historians refuted every one of David Irving's claims. The judge found in favor of Lipstadt, calling David Irving a deliberate falsifier of history.

Denial of the Holocaust is a form of anti-Semitism and racism, Lipstadt declared. The study of history, the study of what really happened, matters because the only way to fight anti-Semitism and racism is with the truth.

To read the full text of both presentations, please refer to the College website, www.actl.com.

FELLOW DEMAURICE SMITH, EXECUTIVE DIRECTOR OF THE NFL PLAYERS ASSOCIATION, DISCUSSES PLAYER LOCKOUT AND COLLECTIVE BARGAINING AGREEMENT OF 2009

At the 2012 Annual Meeting in New York City, Secretary of the College **Paul D. Bekman** sat down with Executive Director of the National Football Players Association, **DeMaurice F. Smith** for an informal, frank discussion ranging from Smith's hiring to his plans for the future.

SECRETARY PAUL D. BEKMAN: De, renowned federal prosecutor, successful trial attorney working at a distinguished law firm in the District of Columbia, why would you leave your existing life to become executive director of the NFL Players Association?

DEMAURICE F. SMITH: Probably a deep desire for an ever-burning ulcer is the best answer I can give.

At the time (2009) in my career, I thought I was headed back to the Justice Department to work. I had started to serve on the transition committee for the then-president-elect, and one day the phone rang, and it was from a group looking to interview people to be considered to replace a man named Gene Upshaw. My first response was that they had the wrong number.

There is a tremendous difference between Gene Upshaw and me, and you can truly say "size."

But after talking with my wife and sitting down and looking at where the football players were, the challenges they were going to face in the next two years and whether or not we thought we could bring a plan, a strategy and a will to the players - to have them face and overcome and win the battle that they were going to face, my wife and I decided that I would say yes and put myself in the ring to be considered.

BEKMAN: What was your strategy?

SMITH: I think the greatest thing about trial

lawyers, in addition to our unfettered ability to tell lies about ourselves. Because on TV, I'm much taller and far more handsome, and as I like to say, faster than anybody else in the National Football League. Of course none of it is true, it is our ability to take very intricate, multi-faceted problems, pull them apart, analyze them individually and put them back together in a way that is advantageous for our clients. Taking a look at where the football players were at the time, this was the situation: economically, they were facing a group of owners who had developed a $4 billion war chest to lock the players out. The owners had asked the players give up their pensions and to take a 20% reduction in their salaries. And the owners demanded as part of their new strategy that players play two additional games in an already-grueling schedule. For me, the conundrum became one of how do you attack this problem? I had to pull all of the pieces apart.

The second half of the problem involved taking a very careful look at the assets we had with which to prepare a strategy to overcome. I come from a long line of Baptist preachers where none of us thinks about meeting a challenge, we think about overcoming one.

BEKMAN: When you ran for the office of Executive Director of the NFLPA, as a trial lawyer, an outsider, people who were running against you were insiders. They were players. How did you win?

SMITH: You'll have to ask the players. But for me, the election and the decision about what the players were going to face was much less a decision about what person, what individual, would be elected to the office, but a question (that I posed to the players) of whether or not they wanted to commit themselves to the mighty battle of protecting themselves and protecting their families and whether or not this group of men in 2009 was going to join the ranks of people who came before them, like Gene Upshaw, Bill Radovich, Freeman McNeil, Reggie White, and whether or not they were going to make the decision to rise above everything that everybody thought they couldn't do.

In our somewhat short history, we compared and saw strikes in the '80s that were not successful. We saw high-profile players like Joe Montana, Randy White and virtually every one of the

Quips & Quotes

Everyone in my family went into the ministry; now you know why I didn't. I had a little bit of a smart mouth.

DeMaurice F. Smith, FACTL

Dallas Cowboys cross picket lines, leaving their fellow teammates on the picket line in shame. The question I had for the players in 2009 was whether or not they wanted to take

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control of their own destiny. If they wanted to do that, I explained how they needed to analyze their problems. And we were going to need new people to step up to the plate and become leaders.

And coming from great parents who instilled in me a sense of leadership and having had the opportunity to work alongside a guy like Bob Mueller, it didn't take much to realize that most of the challenges we faced demanded not only a critical analysis of the problem, but a critical analysis of myself and whether or not I wanted to take it upon myself to win.

Quips & Quotes

I have a very simple strategy about negotiation. If you can sit down, and cooler heads can look at the issues and figure out where there are joint wins, that is a wonderful and beautiful way to work out resolutions.

De Smith

BEKMAN: Your election in 2009 was unanimous. How did that happen?

SMITH: Everybody voted the same way.

Now you know why I didn't go into the ministry like everyone else in my family. I had a little bit of a smart mouth.

I believe our players recognized the battle that was in front of them. While all of you certainly love our game, and I love the game of football, all of us enjoy watching the greatest athletes playing the best game on the planet. The great thing about my job is that when you meet someone like Drew Brees, whom you know through the television set, and you find out that for as much courage as he has on the field, he has ten times more courage as a leader off the field.

And for the men who lead our organization, whether it's Brian Dawkins or Mike Vrabel or Kevin Mawae, all took upon themselves not only to lead, but also to risk failure. One thing I love about our guys is their willingness to risk failure. That is the one thing that separates them not only as great athletes, but is the one trait that separates them from players with whom they played in college. None of our guys fear failure. They do things and will themselves into situations that I can only dream about because they have that ability to see themselves and project themselves as winners.

And let's be blunt. It took Reggie White the courage to risk his career to sue for free agency. It took Freeman McNeil the courage to risk his career for free agency.

John Mackey became the first president of our organization as an all-pro tight end with the Baltimore Colts. The day he became the president to lead the players in the first strike, he lost his starting job. As Ed Garvey said, somewhat magnificently, when John Mackey finished the season, he was an all-pro. During the summer, he became the president of the NFL Players Association and led the players in the first strike. At the beginning of season, he lost his job as a starting tight end. And Ed said, "[w]hen exactly did he lose a step?" Well, in the eyes of the owners, John Mackey lost a step because he made a decision to stand up and fight for the players who were going to come after him.

When I stood up in front of our players in 2009, my only question was whether there would be people in the room who would dare to take it upon themselves to have the courage and the will of a man named John Mackey. The great news is, they did.

BEKMAN: Let's set the stage for 2009 when you became Executive Director: One noted commentator described the situation that you faced when you were elected: "Smith is going to need to be ready to roll on day one. The NFL owners voted last year to exercise a reopener clause in their labor agreement, which is likely to lead to a lockout unless cooler heads prevail. I think the NFL owners are really ready for war this time, which means the new Executive Director of the NFL Players Association, who has some big shoes to fill replacing Gene Upshaw, needs to buckle his chinstrap and be ready to start, figuratively, hitting people." Is that what happened in 2009?

SMITH: We hit hard. The reality of the war that we were about to face was simple and direct. The owners made a decision they were going to lock our players out. A person once said that a lockout by the owners was just another strategy in the collective bargaining process. The reality is, it isn't. A lockout is designed to be a very simple management tool. I don't fault them for it, but I also make no apologies for describing what it is. A lockout is designed simply to choke an employee out, to make them take a deal that is worse than the one that they can get in a collective bargaining agreement. There's no reason to mince words. That's what it is.

So when the owners made a decision to lock our players out, it not only meant that they were going to threaten to stop games, the reality was that they made a decision to lock our players out in March. So when you're the executive director and you have to walk into a locker room and look at sixty men, you know that on average, four or five of those men had wives and families at home who were expecting children who lost their insurance policies. We had over fifty players who had children with special needs who lost their insurance coverage.

And while I understand and realize that a lockout is a legitimate tactic by the owners, I'm not sure I ever shied away from an opportunity to describe a lockout in distinct moral terms about what it meant for our players. And some did take a bit of offense when I called it a war.

I know some of the owners certainly took offense when I called the National Football League a cartel. I'm sure some of them, based on one article, were a little upset in the way I addressed the owners at our first meeting when I said that it was certainly going to be a war that we were willing to fight to the death. Well, if you don't want a war, don't bring one. When the National Football League owners made a decision that they were going to bring a battle to our players, we sure as heck were going to bring the battle back.

BEKMAN: Share with us your strategy about how you were going to go about dealing with the potential lockout and to ultimately resolve the dispute.

SMITH: I have a very simple strategy about negotiation. If you can sit down, and cooler heads can look at the issues and figure out where there are joint wins, that is a wonderful and beautiful way to work out resolutions. All of us [lawyers in the audience] are employed and have jobs because that never works.

Whether we are asked to sit down and negotiate between two companies, or whether a battle escalates to a courtroom, or whether we are fighting battles in a pretrial stage by writing good briefs, or whether we are engaging in extensive arbitration, we know that when two business sides get together with a battle looming, at the moment they don't want to get along. Sometimes the strategy must be to force people to get along.

One apparent battle for us was that the owners understood, appreciated and knew the history of the lack of solidarity between our players over the last forty years. Yes, for some of you who are slightly older than me, I was but a wee boy in 1980. That's a joke. You remember the strikes in the early and mid '80s. They were failures. Many of our men stood on the picket line and fought for something called free agency, and

Quips & Quotes

So the first part of our strategy was whether our men were going to stick together. Very quickly it became clear that we not only had to have our rank and file members as a part of the fight, but in the same way that a high-profile quarterback crossed the line, I was going to be sure that our high-profile players were going to tow the line.

And who were they? Some guy named Brees, some guy named Brady and some guy named Manning.

De Smith

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players like Joe Montana crossed the line. Players like Randy White crossed that line. And many of the men who fought on the picket line watched the strike and watched solidarity crumble. Were the owners banking on that? Absolutely.

So the first part of our strategy was whether our men were going to stick together. Very quickly it became clear that we not only had to have our rank and file members as a part of the fight, but in the same way that a high-profile quarterback crossed the line, I was going to be sure that our high-profile players were going to tow the line.

BEKMAN: And who were they?

SMITH: Some guy named Brees, some guy named Brady and some guy named Manning.

Then it became time for us to look for leaders in the union, Drew Brees sat on our executive committee. Tom Brady made the decision to represent his team as a player rep. Peyton Manning made a decision to be a named plaintiff to sue the National Football League. And there were people who followed all the way behind them, players like Matt Ryan, Matt Shaw. And that is a tradition, thankfully, that has carried on even yesterday when Colt McCoy decided to be a representative to lead his team. So having high-profile players and strong players toe the line became issue number one.

Issue number two became the stark economic reality that we were facing. The owners gained the television contracts to do one thing. The owners gained the television contracts so that they would gain $4 billion in lockout insurance. When the League renewed their television contracts leading up to the lockout, they convinced every television station and network to give them money for a year even if the games were not played. So you had two choices when you were facing a $4 billion war chest. The first choice was to curl up in a fetal ball and cry. I got over that in about twenty minutes.

Okay, twenty-five. But the question about that $4 billion became a real one. The second choice was either to come up with a strategy to attack that $4 billion or everyone would remain curled up in a fetal ball crying.

We filed a lawsuit in the District Court in Minnesota alleging that the National Football League owners violated the CBA by not maximizing profits, as was their obligation. The discovery in those cases demonstrated that they took less money for the television contracts of which the players are beneficiaries. The judge found in favor of the players, and suddenly the $4 billion war chest became in question. At the same time, we urged all of our players to save money. We created a war chest for every one of the players that would pay them thousands of dollars in case we missed games. At the same time, three months after I was elected, we engaged in the process that led to the purchase of the first-ever employee lockout insurance – for approximately $750 million.

BEKMAN: So the court ruled that it was an unfair labor practice for the owners to not maximize profits, they couldn't collect their 4 billion, and you had an insurance policy that would provide your players $750 million, while the owners were unable to pay their bills.

SMITH: You make it sound so negative.

Would you rather go into a gunfight with a knife or with a gun? The reality of this was that by taking economic steps not in the best interest of the players, they secured a $4 billion war chest. So the strategy was fairly simple: Knock out their war chest, gain our war chest. We kept the insurance policy secret until about a week, ten days, before we signed the ten-year deal.

BEKMAN: Is there any doubt in your mind that that's what led to the resolution?

SMITH: I think it was a lot of things. Going back to something that I said earlier, I think that good business deals are ones where both sides leave somewhat unhappy. If both sides are unhappy and don't get everything they want, that's a good business deal. I do know that a bad business deal is one where someone is stepping on your neck while they make you sign.

The elimination of their $4 billion war chest and the creation of an ability to pay our players for one full year in the event they continued their lockout,

The first choice was to curl up in a fetal ball and cry. I got over that in about twenty minutes.

De Smith

made both parties come to the negotiating table to figure out what they needed to do to get the job done and what they needed that they thought was fair. And in the end, the three things that we refused to concede, we didn't concede. We were not going to give 20% of the players' salaries back. Our players were not going to play two more games in an already-grueling schedule. And sure as heck, our players were not going to give up their defined-benefit plan. There is no way that our players were willing to look back at what Reggie White accomplished and what Freeman McNeil accomplished and what John Mackey accomplished and say to that legacy that they weren't strong enough to fight for the things that they gained.

BEKMAN: You also had an issue with retired football players, football players who felt that they had been cast aside as forgotten men, who were the ones responsible for the rise of the National Football League. How did you deal with that?

SMITH: Two things: One was to make sure that for those players who felt that way, we made sure they were educated about the facts. Every one of our players stands on the shoulders of players who came before them. For us, that means that even though our players are here one day and gone the next, our constitution obligates us to serve players past, present and future. We were involved in a very nasty lawsuit with former players over imaging rights. It made sense to settle that case for all the reasons it makes sense to settle those cases, and we did.

Second, our leadership made a decision that we were going to add former players to the executive committee that runs our organization.

And last, while I know that some of the former players felt that they had been forgotten, it was important to remind them that they had not been. And in the collective bargaining agreement, one of our demands was that the owners for the first time in history were to contribute to a legacy fund that reached backward to improve the pensions of players who had come before us. I'm proud of our leadership, and I'm certainly proud of our union, because it was within the collective bargaining agreement that we created $1billion in new benefits for players who had already stopped playing. I don't know many unions or businesses in the country that create a billion dollars in new benefits for people who used to work for them. We were able to do that because our guys not only had courage, but they had a tremendous amount of vision, because I'm sure that they never forgot the people that came before them.

BEKMAN: Let's get back to football. It's a violent game. Some people have said that it's like gladiators on grass. Let's take a look at some action.

[Video footage shown of hard collisions on the football field.]

This is a violent game.

Last month, the American Academy of Neurology came out with a report indicating that players that engage in professional football

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have a 400% greater chance of developing serious neurological conditions like Alzheimer's and ALS. What have the NFL Players Association and you done to approach the issue of player safety?

SMITH: This collective bargaining agreement is the first collective bargaining agreement that I believe embraces safety and recognizes safety where it needed to be in the National Football League. We just saw a number of cataclysmic, apocalyptic collisions on that tape. The reality is that football is a dangerous game. There are also two false paradigms. The first paradigm that I abhor to my very being is a paradigm where people believe that the people who play this game are gladiators. They're not. They're athletes. A gladiator is someone who is forced to fight to the death, generally against his will. Our guys aren't gladiators. They're men. So the first false paradigm that we try to undo is the paradigm that somehow because these individuals have chosen this as their profession, that somehow they are due less morality, that somehow they are due less than what the law gives them.

The second false paradigm is the paradigm that because the game is dangerous, the game cannot be made more safe. Near the end of the tape, you saw a number of plays and a number of hits that you cannot do in the National Football League anymore. When I was playing in high school, horse collars, pull-downs with the back of your facemask, hits to the head with your forearms were all legal. Those things are now not legal. Why? Because we changed and we rejected the paradigm that the game can be made more safe. So the first thing we did in this new collective bargaining agreement are things that I consider significant. The sad thing is that it took until 2011 to get it done. For example, there is now a provision in the collective bargaining agreement that requires medical professionals to adhere to every federal, state and local professional and ethical standard. How many people would be shocked that this is the first collective bargaining agreement that contains that provision? Imagine going to a bargaining table where you sit down as the head of the Players Association and you say, "We want to have a standard that doctors comply with the same standards that they comply with for ordinary individuals in America"? Shocking. But now it's in the new collective bargaining agreement because we believed, as the players, that it needed to be. We created new neuro-cognitive benefits. Again, that reached backward to players who may have suffered neuro-cognitive injuries. And we did something else: we made those virtually no-proof clauses.

The third thing we did was to make sure that the League embraced a standard that I think that over time they had refused to embrace: The game is dangerous. The game has risk. The one thing we now demand from all our medical professionals is that our guys receive informed consent about the risks that they will take. The one thing I found appalling in the National Football League is the speed and the ease with which medical professionals and even non-medical professionals dispensed painkilling drugs. It is a violent game, but for my son, whether he's playing lacrosse or soccer, whether it's my daughter, whom I continue to coach in basketball, my belief is that as an athlete, they are due a minimum level of rights, and those things include things like informed consent. Those things include recognizing the risks that are inherent in the game.

Quips & Quotes

Last month, the American Academy of Neurology came out with a report indicating that players that engage in professional football have a 400% greater chance of developing serious neurological conditions like Alzheimer's and ALS.

Secretary Paul D. Bekman

The last thing when it comes to professional football players is that when our guys get hurt at work, the one thing that we demand is that they are compensated for the injuries that they suffer at work. Right now, the National Football League continues to fight us in about 2,000 workers comp cases. About 2,000. The appalling part is that under the collective bargaining agreement, the players actually compensate the teams for out-of-pocket costs that the team would suffer paying out workers comp payments. Nonetheless, virtually every team fights virtually every workers comp claim. You have to ask yourself why does the team fight workers comp claims when they are not losing out-of-pocket money? The reason is control. I believe it comes down to control. I can't come up with an economic reason for them to do it. All I can come up with is they do it because they can. And for a guy who leads an organization of great athletes, we look at our job as representing not only our athletes but our families, those are the kind of fights that get me a little wound up. And that's why we structured this workers comp or structured this CBA in a way to ensure that our players got their medical records, to ensure that doctors comply with medical standards.

Now for the first time, we have the ability to file grievances within the system if we believe that a doctor's care falls below a generally accepted care or a generally accepted practice or duty.

BEKMAN: What contact did you have with the team physicians?

SMITH: None. Team physicians are employed by the teams. And my view of that is in the same way an employer in America has an obligation to provide a safe-as-possible working place, they also have an obligation to do so when our employees get hurt at work. It's their job, it's their duty to provide proper medical care. We work with the group of physicians in the Head, Neck and Spine Committee. It was also important for me as a union president, important for our leadership, to create our own Physicians' Practice Research Group, and here's why we did it: when I took this job in 2009, the head of the League's Concussion Committee was a rheumatologist.

When I took this job in 2009, the head of the League's Concussion Committee was a rheumatologist.

De Smith

Quips & Quotes

I wish that was just the punch line of a very bad joke. But the reality is that when I took the job in 2009, the head of the League's Concussion Committee was a rheumatologist. There were no standard return-to-play guidelines for when a player was concussed on the field. There were no routine set of tests in order to figure out if a player had the ability to come back. There were no standards for how to treat a concussed player. So we formed something called the Mackey-White Committee. We named it after John Mackey; we named it after Reggie White. As irony would have it, we took some of the money that remained after the Reggie White settlement and used that money to retain the best neuro physicians that we could find to advise the players on what rules we should propose to make the game safer. Our job is always to make the League accountable for its obligations, and those start with recognizing the risks and committing itself to maintaining a workplace that is as safe as possible.

BEKMAN: A lot of us who watch football saw something unusual this year, replacement referees.

SMITH: You're using "replacement" loosely.

BEKMAN: Let's take a look.

(Video footage shown of replacement referees' calls.)

There was also a player safety issue involved, wasn't there?

SMITH: There was *only* a player safety issue involved.

BEKMAN: Let's take a look at one more clip.

(Video footage shown of replacement referee

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A gladiator is someone who is forced to fight to the death, generally against his will. Our guys aren't gladiators. They're men.

De Smith

throwing ball cap onto field of play, with player slipping on the cap.)

Here's the reality of the paradigm of football. And just for a second, all of you are going to be lucky enough to be in a locker room in the way I talk to our guys. There were 4,500 reported injuries in the National Football League last year. There are only 1,850 players who play football. By the NFL's own estimation, the injury rate in the National Football League is 100%. It is not a question of "if you get hurt." The reality in the business of football is "all of you will get hurt." The other thing is, most of you will only play 3.5 years. That's the average career in the National Football League. And the last thing for everybody in this locker room, that I want you to get your head around, is - we always do the same thing in every locker room we walk into. I walk in, stand in front of everybody, and I say "let's divide the room up into thirds, so everybody on this side of the room, statistically everybody on this side of the room in this locker room will need a major hip, knee, joint replacement by the time you're sixty years old." That's the business of football. And by the time you get to be that age, that surgery will cost you upwards of $300,000 or $400,000. So into a business paradigm where you play 3.5 years, there are 4,500 injuries, you will need major surgery by the time you are the age that you are now in this room.

And the National Football League made a decision to take a group of referees who had a collective experience of 1,500 years off the field and replace them with some referees who were fired by the Lingerie Football League.

So while I hear commentators talk about how much the National Football League is a product, the reality is for those who play this game, when they go home to be with their wives and children, my guess is they aren't perceived as a product. The National Football League made a decision with the referees not to lock them out during the off season. They made a decision to lock them out during the season where we know and we believe that our referees are the first responders for health and safety on the field. And that decision by the National Football League is probably the most shameful thing that I've seen this League do since I started watching football. Why? Because it was self-inflicted, it was stupid, and they put our players at risk.

BEKMAN: How and why did it get settled?

SMITH: Well, you'll have to ask the folks in the room about how it ultimately was settled. I wasn't involved in the negotiations. Certainly we made our feelings known. We were prepared to file a grievance against the National Football League for violating what we believed is a general duty of safety that's implied by the collective bargaining agreement. The money difference between the referees and the League was reported to be only $2.6 million a year, about $46,000 per club. So they wanted the referees to give up their defined benefit plan. I know that they wanted rollbacks in salaries. To me, the decision to take 1,850 players and put their careers at risk at a time when we are trying to make the game of football safer, that was one of the most shameful things I've ever seen.

BEKMAN: Well, you've mentioned money. Has professional football, has the NFL replaced Major League Baseball as the nation's pastime?

SMITH: As a baseball coach, I would say that they are both tremendous sports. But when you look at viewership, revenues, the most-watched sporting events by individuals, football is clearly number one. In the middle of our worst recession, the National Football League generated in excess of $9 billion a year. The deal that we signed over the next ten years was designed to basically be a ten-year, $100 billion deal. With respect to any other sport, some would argue with respect to some small countries, the National Football League does tremendously well.

BEKMAN: Your counterpart is Roger Goodell. How do De Smith and Roger Goodell get along?

SMITH: Well, Roger represents the owners. I represent the good guys. I represent the players. And to me, that simply means that we have constituencies that have natural conflicts and certainly natural different views of the world. Our view of the world, our football players, my constituency, our paradigm is defined and even governed by the injuries that occur to our players, the shortness of their careers and their relative youth as players. His paradigm is defined by owners who owned teams for decades, who have continuous increases in franchise value. And, let's be frank, a group of men who run businesses that are shielded from the very competition that has defined American business. That results in a fundamentally different view of the world that we live in.

So does that mean that we have clashes? Yes. But as I've said before, I am not necessarily a believer in something called labor peace. I can tell you that if our union was weak, if our players were shy, if they didn't care about making their lives better, we would have labor peace. We would be crushed into nonexistence. When we make decisions about issues that we care about, we're going to fight. And because we have a strong union that has resources, because we have tremendous people who work for us, because every now and then we come up with a novel legal strategy or two, we're going to have battles.

And I'm sure that with respect to something called The Bounty, I'm sure the League thought that this was going to be a simple Star Chamber process. That's not what the CBA dictates.

With respect to our ability to fight for our players and what we believe is right, we will fight to the death.

BEKMAN: One last question: Gene Upshaw served as executive director of the NFL Players Association for twenty-five years. You'll finish your sixth year in 2015. What does the future hold for De Smith?

SMITH: Well, I look at my six years as dog years, so I think walking into a job three years before a lockout and fighting through the lockout, I am physically at that twenty-five-year mark.

I certainly had more hair and less gray hair and, oddly, more hair in places where I thought I wouldn't have hair since before taking this job.

I have had the pleasure of serving in the best job on the planet. Your question will really come down to my boss, Mrs. Smith. We've been married for twenty-one years. She's the toughest person I know, and she's the only person I'm afraid of, and I'm man enough to admit it. So we'll see.

I've had the pleasure of doing a number of great things, and I have had the pleasure of enjoying every single minute of it. So we'll see. ■

Quips & Quotes

There were 4,500 reported injuries in the National Football League last year. There are only 1,850 players who play football. By the NFL's own estimation, the injury rate in the National Football League is 100%. It is not a question of "if you get hurt." The reality in the business of football is "all of you will get hurt."

De Smith

ALABAMA FELLOWS HONOR JERE F. WHITE, JR.

The Alabama Fellows recently honored the life of the late **Jere F. White, Jr.,** with a sold-out dinner and Continuing Legal Education program in Birmingham. Inducted into the College in 1998, White was a founding partner of Lightfoot, Franklin & White, along with Past President **Warren B. Lightfoot** and current Regent **Samuel H. Franklin**.

Prior to his premature death in October 2011, White and his wife, Lyda, established the Jere F. White, Jr. Fellows Program at his alma mater, Cumberland School of Law at Samford University. The Fellows Program seeks to recruit outstanding students with strong academic credentials and a history of leadership and commitment to service. The program was established to promote the development of lawyers who share White's ideals, and the weekend's events raised over $140,000 to further the program.

The November 30, 2012 dinner was hosted by Fellows **Harlan I. Prater, IV** and **Walter W. (Billy) Bates** and attended by President **Chilton Davis Varner** and two Past Presidents**, John J. (Jack) Dalton** and **Warren B. Lightfoot**.

The Jere F. White, Jr. Trial Institute, an all-day seminar, was held the following day. All of the speakers were Alabama and Georgia Fellows, and the program covered all aspects of a trial, from voir dire examination to closing arguments, presenting both plaintiff's and defendant's perspectives. The keynote speaker at the meeting was Fellow **Bobby Lee Cook**, a personal friend of White and his father, the second litigator of the four-generations of Whites. As the inspiration for the television program, "Matlock," Cook regaled the attendees with his wit and many humorous courtroom stories.

A video was shown of the plain-spoken White addressing associates in his law firm in which he outlined the ten characteristics of a great trial lawyer.

Past President Warren Lightfoot with wife Robbie; Past President Jack Dalton with wife Marcy; President Chilton Davis Varner with husband Morgan; Regent Sam Franklin with wife Betty

TEN TRAITS OF A GREAT TRIAL LAWYER

By Jere F. White, Jr.

1. **Great trial lawyers have a passion for the practice of law.** They enjoy what they do. Although the work is tough, they can't imagine what they'd do if they had to have a "real job." They have intensity, a fire-in-the-belly, without which, they'd be lost.

2. **Great trial lawyers hate losing.** It's not so much that they love winning, but great lawyers aren't afraid to step into the batter's box. A Hall of Famer with a .300 batting average loses 70% of the time.

3. **Great trial lawyers take responsibility and ownership of their cases.** They aren't so task- or assignment-oriented that they rely solely on a checklist. If it's their case, they remember that it's not against the rules to think; it's not against the rules to be creative.

4. **Great trial lawyers possess integrity and credibility.** They are honest, never misleading the judge, the jury or opposing counsel. Their names mean something. They possess total knowledge of their subject matter. They don't fake it. They are facilitators of the truth, and they present the truth in an honest, understandable and persuasive manner. They present information that assists the decision-maker. They do the right thing.

5. **Great trial lawyers show empathy.** They don't go through life with blinders on. They know that their side isn't the only side of a case. They try out the other side's case and from it, they often learn ways to answer and best deal with the issues. They work hard at showing respect for their adversaries, both inside and outside the courtroom.

6. **Great trial lawyers know the law.** They don't rely solely on the younger lawyers in their firms. They know the law inside and out. And as good storytellers, they know how to present the law.

7. **Great trial lawyers don't take matters personally and don't get personal**. Their faith isn't shaken by someone's belief that they aren't capable of taking on a specific case. They don't lower their standards by taking cheap shots; they remain professional.

8. **Great trial lawyers are curious and are prodigious readers.** They are by nature nosey; they're gossips; they can't stand it when someone knows something they don't know. They read everything they can get their hands on, whether newspapers, magazines, novels or non-fiction; they have an insatiable curiosity for information.

9. **Great trial lawyers have good work habits.** They realize there are many demands on their time and that life can often be difficult. They realize that they must manage and learn what is and what is not important. They are able to set priorities.

10. **Great trial lawyers learn from other great trial lawyers.** They identify other great trial lawyers; they ask to be taken under another great trial lawyer's wing. They do what they can to learn from great trial lawyers.

The common thread? All these traits can be achieved on your own. Jere White used a baseball analogy to explain that there is no perfect major league pitch. Like baseball, the law is best practiced over and over again. It can't be perfected, but it is a perfectly satisfying profession. ■

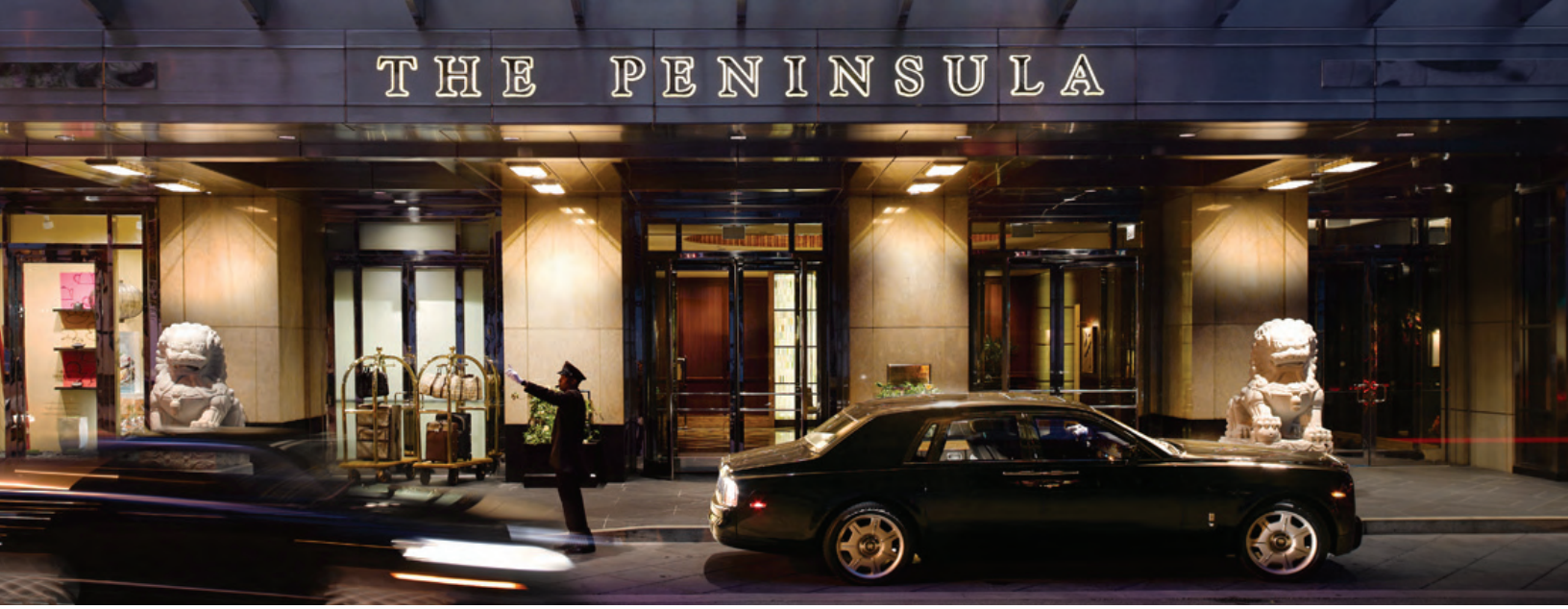
ANNUAL CHAIRS WORKSHOP HELD IN CHICAGO

Chairs of the College's state, province and general committees gathered November 1-4, at The Peninsula Chicago for the 2012 Chairs Workshop. Held annually in the fall, the workshop provides an opportunity for new and returning committee chairs to learn about the College's activities and participate in relevant training.

Following a reception Thursday evening, the business of the workshop began early Friday morning with a presentation about the Board's strategic discussions [*see coverage of the discussions elsewhere in this issue*]. A mock meeting of the Board of Regents' deliberations demonstrated the process to approve nominees for Fellowship. Breakout sessions were conducted, tailored to the specific needs of each committee. Fellows reconvened in the afternoon for a CLE program on ethics and professionalism led by **Harry D. Cornett**, Chair of the Legal Ethics and Professionalism Committee. The video vignettes demonstrated part of the College's *Teaching Syllabus for the Code of Pretrial and Trial Conduct*, and are available by request to the National Office to Fellows who want to coordinate CLE programs in their area. An afternoon breakout session provided additional opportunities for chairs to ask questions and share ideas. Past President and Foundation President **Michael A. Cooper** spoke about the Foundation and its recent grants and shared how his New York City office was coping with the effects of Superstorm Sandy which had passed through the east coast a few days before the workshop.

Saturday morning's breakout sessions pertained to planning regional meetings, judicial selection and the face of the College and its outreach. General session presentations covered the criteria for the College's awards and chairs provided updates on committee projects. The workshop concluded with dinner on Saturday night at which Past President **David W. Scott**, O.C., Q.C., reflected on the bonds between Canada and the United States as he discussed judicial independence.

In a post-workshop survey, attendees expressed enthusiasm about sharing their new knowledge and ideas with committee members and noted their appreciation for the opportunity to meet with other chairs. ■



PAST PRESIDENT SCOTT SPEAKS ABOUT JUDICIAL INDEPENDENCE

Based on discussions at the College's 2012 Annual Meeting in New York and reports from Regents in various states in the United States, it is clear that there are troubling developments in some judicial election states. Large sums of money emanating from identifiable and ideological interest groups are being spent on electing, or defeating, judges whose application of the law is regarded as inimical to their interests. Once the judiciary is seen to do the bidding of any interest in society, as opposed to clinically applying the law, democracy is in peril.

There is a very important role for the American College of Trial Lawyers to mount a carefully developed and persuasive program of education to arrest the challenge to the independence of the judiciary wherever it occurs.

The College is better suited than any other institution to address this subject. We are the closest observers of the judiciary at work. Our mandate includes the preservation of the trial process and the administration of justice, which has as its core an independent judiciary. No organization of lawyers and judges in our two countries has a higher stake in this subject than do we.

I recognize that the challenge here is extreme by reason of the fact that the election of judges is firmly embedded in many state constitutions. Notwithstanding that, what the American College of Trial Lawyers should focus on is a road-based education program which ideally ought to be developed in partnership with the law schools. The College remains an organization of trial lawyers, a profession that regrettably does not conjure up the most persuasive of images amongst the general public. Accordingly, a partnership which goes outside our own ranks, and indeed into the ranks of the judiciary as well, is necessary in order to generate an objectivity which may create public interest.

I believe an attempt to forestall a troubling development should become a principle preoccupation of the College, and our charge is of critical importance in contemporary society. While efforts by the College in this direction may take many years to become absorbed and bear fruit, the cause is important and should be undertaken.

Past President David W. Scott, O.C., Q.C., in comments at the 2012 Chairs Workshop

COLLEGE COMMITTEES FOCUS ON OUTREACH

In keeping with the College's recent outreach efforts, many of the State, Province and General Committees have initiated activities that raise the profile of the College and advance the College's mission to further the administration of justice and the ethics of the profession. The following summaries offer a sample of recent committee efforts:

ATTORNEY-CLIENT RELATIONSHIPS

Dean J. Kitchens, Chair (2011-2013)

The Committee recently released *Attorney-Client Privilege Update: Current and Recurring Issues*, a white paper focused on the scope and reach of the attorney-client privilege and the circumstances in which a waiver of the privilege may occur due to the involvement of, or disclosure to, certain categories of persons. The paper is available on the College website, www.actl.com.

UTAH

George A. Hunt, Chair (2012-2013)

George M. Haley, Chair (2010-2012)

The State Committee Chair and Vice Chair met with the new Chief Justice of the Utah Supreme Court to discuss how the College and the Utah Fellows can help improve the administration of justice and the independence of the judiciary. The Chief Justice was impressed at the list of Fellows and appreciated the Fellows' willingness to help in the event of attacks on judges by the media or legislators for unpopular decisions.

SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE (UNITED STATES)

Daniel J. Buckley, Chair (2010-2013)

The committee has undertaken several projects related to the *White Paper on Judicial Elections*, developed by the Judiciary, Jury and Special Problems Committees and approved by the Board of Regents in October 2011. While recognizing elected judges who perform their duties with integrity, courage and conviction, the committees recommended that the College opposes contested judicial elections. The Special Problems Committee is focused on collecting the growing literature about *Citizens United v. Federal Election Commission* and its impact. Members are compiling a list of Fellows who support judges whose independence is under attack and are preparing templates of letters and articles that may be used in the particular elections or jurisdictions.

MISSOURI

James R. Hobbs, Chair (2012-2013)

Maurice B. Graham, Chair (2010-2012)

The Missouri Fellows held their second annual retreat in May 2012 at Big Cedar Lodge near Branson.

The event included a CLE presentation about ethics problems confronted by lawyers which resulted in significant malpractice cases. Leading civil rights lawyer **Fred D. Gray**, an Alabama Fellow, presented a moving keynote address recounting the combat of racism in America. Regular newsletters from the Chair keep the Missouri Fellows informed of College activities.

TEXAS

David N. Kitner, Chair (2012-2013)
Tom Alan Cunningham, Chair (2010-2012)
The State Committee has held meetings across the state to engage Fellows in different geographic areas. Local Fellows have participated in outreach efforts, including assisting with the regional and final rounds of the National Trial Competition, serving as instructors at the Texas Trial Academy and participating in trial training programs for lawyers engaged in legal services programs. The Committee supported Texas Lawyers for Texas Veterans for the Emil Gumpert Award. While the organization did not receive the award, the Foundation of the American College of Trial Lawyers donated $20,000 to further their efforts to provide legal services to veterans.

ALABAMA

Allan R. Chason, Chair (2012-2013)
Randal H. Sellers, Chair (2010-2012)
State Fellows met with the deans of two law schools to increase awareness of the College its resources to educate the next generations of lawyers. The result of one of these meetings was the Jere F. White, Jr. Trial Institute held November 30, 2012, at the Cumberland School of Law. Coverage of the event is found elsewhere in this issue. Other CLE ethics presentations are planned in coming months.

INDIANA

Norman T. Funk, Chair (2012-2013)
David O. Tittle, Chair (2010-2012)
The State Chair's outreach efforts have included distribution of the College's trial teaching materials to public interest organizations in central Indiana, provision of the College's *Jury Instructions Cautioning Against Use of the Internet and Social Networking* to all Indiana Fellows and distribution of materials to the Indiana Supreme Court Chief Justice and all law school deans in Indiana regarding the College's work, including a list of Indiana Fellows and the *Code of Pretrial and Trial Conduct*. The Chief Justice of the Indiana Supreme Court has since included the *Code* in materials at his presentation on civility at an Indiana Trial Lawyers Association conference.

VIRGINIA

Glenn W. Pulley, Chair (2012-2013)
Thomas E. Albro, Chair (2010-2012)
With approval from the Board of Regents, the State Committee created the Chappell-Morris Young Trial Lawyer's Award. Named for two Past Presidents of the College from Virginia, R. Harvey Chappell and James W. Morris III, the award will be presented to beginning lawyers demonstrating professionalism, high ethical and moral standards, excellent character and outstanding trial skills. The first award will be presented at the Virginia Fellows Annual Banquet in February 2014.

COMPLEX LITIGATION

Henry B. Gutman, Chair (2011-2013)
Anatomy of a Patent Case, Second Edition has been published by Bloomberg BNA and is available for purchase. The treatise specifically addresses the complex technical, procedural and legal issues inherent in a patent lawsuit not found in other types of civil litigation. The concise, yet thorough, publication has been added to the Federal Judicial Center's resource library for district court judges and their law clerks. See information elsewhere in this issue on how to receive a discount when ordering the book.

COLLEGE AND FOUNDATION PRESENT 2012 EMIL GUMPERT AWARD TO FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT

The Gumpert Award is the highest award bestowed by the College on a program. It is named for the founder of the College, Emil Gumpert. It is to recognize programs, whether public or private, whose principal purpose is to maintain and improve the administration of justice. The American College Foundation has funded a cash award for the use of the program in receiving the award to help it fulfill its mission.

Now, when you hear the name "Florence," you may think of a nice place in Europe. When I had the pleasure and honor of bringing the Foundation's substantial check to the Project in Florence, Arizona, it was 115 degrees. Nine thousand men, women and children annually come into detention centers in Arizona, the largest of which is in Florence. 115 degrees this last August. Through its staff and pro bono lawyers, the Project provides free legal services in the many languages of the indigent men, women and children detained in Arizona for immigration removal proceedings.

The Florence Project was founded in 1989 at the request of Immigration Judge John McCourt. The Project's work greatly facilitates the fair and speedy disposition of the detention process. At the ceremony that I attended, the Immigration and Customs Enforcement Agency, known as ICE, public defenders and legal aid attorneys all were present and told me personally how much they greatly valued the contributions made by the project to the fair administration of justice. The grant from the College Foundation is intended to be used to make their work product and assistance available in other states.

President Thomas H. Tongue

Executive Director Lindsay N. Marshall of the Florence Immigrant and Refugee Rights Project, in Florence, Arizona, accepted the 2012 Emil Gumpert Award at the Annual Meeting in New York City.

Marshall thanked the Fellows and the College for supporting the Florence Project, stating that in Arizona, immigration is the current heated and divisive issue of its residents. In her remarks, Marshall invoked an image of immigrants that dispelled current notions of people unlike those in the audience. While a confused, vulnerable and agitated person in detention-center scrubs, wearing translation headphones, presenting himself in the courtroom comes to mind, it is just as likely that the many people impacted by the immigration system may not be those who you more-readily consider:

> *They are parents of U.S.-citizen children. They are long-term, lawful, permanent residents or green card holders. They are asylum-seekers. They are veterans. They are farm workers and laborers. They are survivors of domestic violence and people struggling with serious mental or medical issues. Many have all the same ties in this country as those of us who are United States citizens: families, jobs, a home, a church, a community. And in many ways, they are just a reflection of us in our ever-evolving population.*

The Florence Project was the first organization in the country to provide legal services to detained immigrants in a systematic way. From a small prison town in the desert, the organization pioneered a model that has been replicated and used to train organizations around the country. It became the blueprint for what is now known as the National Legal Orientation Program funded by the Department of Justice, helping individuals in detention centers from Tacoma, to El Paso, to Denver, to Atlanta, to New York City. The model is founded on empowering the *pro se* respondents and encouraging them to take ownership over their cases and preparing them to represent themselves thoroughly and zealously in court.

To read the full text of Ms. Marshall's presentation, please refer to the College website, www.actl.com.

Quips & Quotes

In the eyes of our judicial system, they don't have the same rights or protections. Because immigration proceedings are civil in nature, and the right to counsel does not attach, nearly 90% of detained immigrants appear *pro se* before a judge because they cannot afford to hire an attorney to represent them.

Lindsay N. Marshall

SOUTHERN CALIFORNIA CHAIR INTRODUCES COLLEGE TO JUDICIARY

Fellow **Robert K. Warford** took it to heart when state and province chairs were challenged to extend outreach to the local judiciary as a way of introducing the College and its programs to a broader audience. At the November 2011 Chairs Workshop in Half Moon Bay, California, then-President Thomas H. Tongue asked the chairs to visit judges in their jurisdictions to introduce and promote the College and its publications and videos.

During the 2012 calendar year, Warford visited approximately thirty area state court judges to familiarize them with the College. When meeting with the judges, he enlisted the judges' assistance in recommending trial lawyers for potential investigation. In the process, Warford has encountered several judges involved in local Inns of Court or other programs where the judges have hoped to improve the ability and professionalism of lawyers who try cases, or who want to try cases.

After describing, in particular, the NITA trial program (see the list of available outreach materials in the side bar) and the College's program on written advocacy, four judges specifically requested copies of the College's video programs or publications, indicating an interest in seeing and using them.

Warford has also been contacted by the director of a local legal-aid organization who indicated that its in-house lawyers seek improvement in law and motion practice and trial abilities, particularly in light of the recent increase in foreclosure actions. Warford offered to contact a local Fellow to assist them and is providing College publications relating to the organization's assistance of indigent individuals.

Fellows interested in promoting the College and its programs may contact the College's National Office (nationaloffice@actl.com), to obtain any of the below outreach materials:

CLE Teaching Syllabus to the Code of Pretrial and Trial Conduct: Available on thumb drive, the video presents ethical and professionalism vignettes with various fact patterns and suggestions to stimulate discussion. Accompanying the video is a teaching syllabus with references to the applicable provisions of the American College of Trial Lawyers *Code of Trial and Pretrial Conduct* and the American Bar Association's Model Rules of Professional Conduct. Prepared by the Legal Ethics and Professionalism Committee, the video is available from the National Office (nationaloffice@actl.com).

Mock Trial: Also available on thumb drive, *NITA Housing Authority v. Ladonna Johnson,* presents a mock trial that may be used in whole or in part. The video offers excellent trial practice training for trial lawyers, particularly public interest lawyers likely to handle cases similar to the one shown. This CLE presentation was prepared by the Teaching Trial and Appellate Advocacy Committee, with the assistance of Stetson University School of Law.

Persuasive Advocacy through Effective Writing: Prepared by the Teaching Trial and Appellate Advocacy Committee, this course, available on CD/DVD, includes supplementary documentation to accompany the video portion of the program. The course is designed to be used in its entirety or in parts.

Judicial Vignettes: This CLE program serves as an outstanding introduction of the College to the judiciary in your area. Two independent series of vignettes present issues frequently confronted by the courts, with suggested solutions to the various scenarios. The first series deals with in-court problems judges may encounter with lawyers. The second series deals with pre-trial problems judges may also confront. The program was prepared by the Federal Judicial Center and the College's Jury Committee.

For additional information about any of the above teaching tools, please contact the National Office (email, nationaloffice@actl.com or telephone, 949.752.1801). For a list of College publications, please refer to the College website, www.actl.com, under the Publications tab. ■

Fellows wishing to introduce the College to judges may provide a sampling of materials such as:

- A copy of the printed tri-fold brochure about the College
- A copy of the *Code of Pretrial and Trial Conduct or Canadian Code of Pretrial Conduct and Canadian Code of Trial Conduct*
- A copy of the College's *White Paper on Judicial Elections* or sometimes, instead, the College's publication, *Judicial Independence: A Cornerstone of Democracy*
- *Cross-Border Litigation Manual*
- A copy of the College's *American Code of Conduct for Trial Lawyers and Judges Involved in Civil Cases with Self-Represented Parties* (available on the College website)
- A list of the area's Fellows
- An exemplar form of the letter the committee sends to judges and lawyers in connection with an investigation of a candidate
- A copy of the rating form used in an investigation
- A list of the basic qualifications for Fellowship as established by the Board of Regents

FELLOWS PROVIDE ACCESS TO JUSTICE

Fellows throughout the American College of Trial Lawyers are using their skills every day to provide pro bono services and access to justice to many who are disadvantaged or are victims of occasions where our justice system has failed.

The College's Access to Justice and Legal Services Committee is dedicated to finding meaningful pro bono opportunities for Fellows interested in participating in such important pro bono matters. The Committee maintains a website at http://www.actl.com/Content/NavigationMenu/StateProvince/Justice/Library_Resources.htm, which lists contacts in the states and provinces that can connect willing Fellows with significant pro bono projects in their geographic areas or elsewhere in the world. Further, the Access to Justice Committee is coordinating with the National Legal Aid and Defender Association to serve as a clearinghouse for significant pro bono assignments identified by the members of the NLADA throughout the country. If you are willing to undertake a pro bono assignment, please contact Charlie Weiss, caweiss@bryancave.com, or Guy Pratte, gpratte@blg.com, Co-Chairs of the Access to Justice and Legal Services Committee.

The following are just a few examples of recent successes of our colleagues who have assisted those in need of justice.

FELLOWS SUCCESSFULLY DEFEND LAWYER WHO HAS "REDEEMED" HIS LIFE

Fellow **Mary Nold Larimore** of Indiana successfully convinced the Supreme Court of Indiana that the Indiana Supreme Court Disciplinary Commission ("Commission") had overreached in its attempt to discipline Ohio attorney Derek Farmer for the unauthorized practice of law in Indiana. The dismissal of these disciplinary charges is another significant chapter in the compelling story of how College Fellows have provided critical pro bono assistance to this extraordinary lawyer as he struggles to establish his law practice.

Farmer's life is a story of redemption and perseverance. He earned both his high school and college degrees in Ohio's Lucasville penitentiary, where he spent eighteen years after being convicted of double murder. Farmer was not the shooter, but an accomplice. After his release from prison, Farmer obtained his law degree because he did not expect to pay back, recognizing that he could not bring back the lives that had been lost, but wanted to pay forward. He subsequently obtained his LLM in trial advocacy.

Judge Walter Rice of the United States District Court, Southern District of Ohio (Dayton), who corresponded with Farmer throughout his Lucasville incarceration, testified live at the Indiana disciplinary hearing that during Farmer's time in Lucasville, "he changed from a bitter, angry, confrontational individual into a very mature, thoughtful person with whom I enjoyed corresponding."

Before Farmer could be admitted to the bar in Ohio, there was a contested Character and Fitness hearing where Ohio Fellow **David C. Greer** successfully represented Farmer. After listening to testimony on Farmer's behalf, all three panel members were in tears. And Farmer received his Ohio license to practice law. Greer described his pro bono representation of Farmer at the fitness hearing as the jewel of his professional career. And, Greer has won many legal victories in his storied litigation career.

However, Farmer's professional path forward has not been without controversy and setbacks. Since his admission to the bar, Farmer has been subjected to constant and incessant attacks by those "who simply did not feel that someone with Farmer's background ought to be practicing law." He has been repeatedly dogged by disciplinary investigations and, in some cases, treated harshly by judges or opposing counsel who did not believe that a person convicted of double murder should be licensed to practice law.

Most recently, the Indiana Supreme Court Disciplinary Commission alleged that Farmer had been practicing law without an Indiana license or pro hac admission in the State of Indiana for a client in a post-conviction matter. The Commission sought to enjoin him from ever again practicing law in the state. Greer knew that the charges required skilled legal representation of Farmer by Indiana counsel, so Greer persuaded Larimore to undertake Farmer's representation in the Indiana disciplinary proceeding on a pro bono basis.

Larimore explained her willingness to accept the engagement:

> *As the first woman in the State of Indiana inducted into the College, when David Greer contacted me as*

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a Fellow, my initial thought was that it is my duty to help Derek, as others have helped me throughout my career. Looking back, it wasn't a duty, it was a privilege. I am grateful that Erin Webley [Larimore's colleague at Ice, Miller] *and I had the opportunity to work with and learn from Judge Rice, David Greer and Derek Farmer.*

After an evidentiary hearing at which both Judge Rice and Greer testified on Farmer's behalf, and briefing and oral argument to the Indiana Supreme Court, the Court unanimously denied the Commission's petition, finding that Farmer's conduct involved occasional visits to Indiana for a single client in a single legal matter, not multiple matters or clients or any systematic or continuous presence in Indiana.

Moreover, the Court dismissed the Commission's claim that Farmer could not have reasonably expected to be authorized by an Indiana court to appear in the post-conviction case at some time in the future. After all, a federal judge (Rice) and an attorney in Ohio (Greer) testified regarding Farmer's good character and competence as an attorney and indicated that they would have supported, by affidavit, Farmer's application for pro hac admission in Indiana.

If the Commission had been successful, Larimore believes there could have been disastrous implications for organizations like the Innocence Project that work to help inmates throughout the country with post-conviction relief. Fortunately, Larimore won the day for her client.

Larimore described her reaction to the Court's decision:

I am left with nothing but admiration for Derek and how hard he has to work to obtain an education and combat the prejudices of others as a result of his past, and for David Greer and Judge Rice, who have mentored him every step of the way. For Derek, the constitutional principles of our country have meaning that stretch beyond my understanding.

Both Larimore and Greer report that their pro bono efforts to assist and defend their remarkable client as he attempts to persevere in his legal practice provided them with some of the most gratifying work of their careers. Their work on behalf of Derek Farmer is just another chapter in the remarkable chronicle of College Fellows stepping forward to undertake significant pro bono representations for clients in dire need. From the detainees in Guantanamo or the prisoners on death row, to the tenant unfairly evicted, or the abused spouse, Fellows have repeatedly stepped forward to provide their considerable trial skills and judgment to those in need who could not afford to pay for their services.

Reported by:
John P. Gilligan
Vice-Chair, Access to Justice and Legal Services Committee

THE CASE OF WALTER SNIDER

In late 2009, Fellow Charles Weiss received a telephone call from the sister of Walter Snider, a prisoner in the Missouri State Penitentiary, requesting pro bono legal help for her brother. After talking to Walter Snider by telephone and after a preliminary, factual investigation, Weiss and his Firm, Bryan Cave LLP, agreed to take on the representation of Walter Snider, and Weiss enlisted several associates in his firm to assist.

Walter Snider had a nonviolent criminal history as well as a history of drug addiction. He understood his affliction and wanted to get help. But he was never able to break his destructive habits. Snider had pleaded guilty in 2007 to second degree robbery and was given a fifteen-year suspended sentence and five years of probation. In early 2008, he was charged again with misdemeanor stealing and appeared before a St. Louis County, Missouri, circuit judge for a probation revocation hearing. The judge understood Snider's affliction and need for help. The judge revoked Snider's probation and sentenced him to a long-term treatment program under the Missouri statute authorizing such a sentence.

Under the Missouri statute, execution of an offender's term of incorporation is suspended while the offender is in a treatment program, and the offender has the right to be considered for probation when the program is successfully completed. If the offender does not successfully complete the program or does not participate cooperatively, the offender is removed from the program and must serve the prescribed sentence and shall not have the right to be considered for probation. The Missouri Department of Corrections makes the determination as to whether or not the offender has successfully completed the program or is cooperatively participating in it.

Walter Snider entered the long-term treatment pro-

gram at the Ozark Correctional Center in Fordland, Missouri in March 2008. He successfully completed the thirty-day "behavior contract," participated in at least one hundred self-help meetings, completed all of his assigned tasks and received no conduct violations in the six months he was in the program.

However, in September 2008, a new counselor was assigned to Snider, and within two weeks of the counselor's assignment, she referred Snider to the program's review committee based on mistaken information that recommended he be terminated from the program due to a "lack of therapeutic gain," despite the fact that the committee's hearing report noted that Walter's "work is good" and "attendance is good" and that he "did not receive any violations." The Missouri Department of Corrections' procedures provided that a program committee could issue a negative termination to an offender for "lack of therapeutic gain." To do so, however, "frequent and well documented interventions must be made in the treatment file." In Walter Snider's case, there were no frequent or well-documented interventions in the treatment file, and he was never given a conduct violation. Exactly six months after entering it, Snider was terminated from the program and immediately transferred to the Missouri State Penitentiary in Jefferson City, Missouri to begin his fifteen-year sentence.

Snider's transfer to the Missouri State Penitentiary began a four-year bureaucratic nightmare. Although he pursued the available administrative appeal procedures, the various Department of Corrections and Probation and Parole officials who considered his administrative appeals admitted that mistakes had been made and he had a basis for appeal, no one would make the decision to correct the matter and order him placed back into the treatment program.

In October 2008, Snider appealed to the Superintendent at the Ozark Correctional Center and to the Program Director, who determined that his dismissal from the treatment programs for lack of therapeutic gain was appropriate, and they recommended no further action. In November 2008, he then appealed those findings. Six months later, in May 2009, the Assistant Division Director of a Substance Abuse Services for the Department of Corrections, found that "it appears that the facts of the case appear to support your basis for appeal. Please contact your institutional parole officer if you have questions regarding your case."

Snider then contacted his parole officer, who informed him that his next step would be to contact the court because "it would be up to the Court to decide that you were wrongly terminated, reestablish jurisdiction in your case and order your long-term treatment." However, under the law, there was no authority for the original sentencing court to re-order long-term treatment. Snider then filed a pro se motion for reduction of sentence in the St. Louis County Circuit Court. That motion was denied in October 2009.

After Weiss and his team agreed to assist Walter Snider, they requested his files and records from the Ozark Correctional Long-Term Treatment Program and the Missouri State Penitentiary. Although the Missouri Statute authorizing the long-term treatment program provided that when an offender is removed from the program, termination reports must be sent to the sentencing court, none of the files or records received from the Correctional Center showed that any such termination report was provided to the sentencing court. Weiss and his team continued to press the Department Corrections for all records regarding Snider's dismissal. In July 2010, an official from the Office of Probation and Parole advised:

> *It is evident that the Department conceded that both you and the Department made mistakes that led to you being put out of the long-term program. It is evident that the Department would not oppose it if the Court orders you to once again attempt to complete long-term treatment. The Department of Corrections has no power to place you in treatment under Section 217.362 without an order from the original court.*

Weiss and his team then filed a petition for writ of habeas corpus in the Circuit Court of Cole County, Missouri, where Snider was imprisoned. The court, however, denied the petition for writ of habeas corpus. Weiss's team continued to press Snider's case and filed a writ of habeas corpus directly with the Missouri Court of Appeals. That court, after reviewing the petition and the evidence submitted with the petition, including the Office of Probation and Parole's statement that the Department of Corrections would not oppose Walter's re-placement to the program, issued written questions to be answered by the State, including an explanation why Snider's internal administrative appeal was not concluded and why he continued to be given the run-around. The State initially opposed Snider's reinstatement to the treatment program, contending that the Office of Probation and Parole had no

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authority to speak for the Department of Corrections when its official said that it wa evident the Department would not oppose an order directing reinstatement into the program.

Subsequently, on November 30, 2012, the Department of Corrections filed its formal Return to Preliminary Writ of Habeas Corpus stating that "In compliance with this Court's order, petitioner's 2009 grievance was reviewed and the Department granted his grievance appeal. Petitioner shall be reinstated into the long-term treatment program and the sentencing court shall be notified."

After four frustrating years of administrative appeals, the Department of Corrections conceded that Walter Snider was correct and that he improperly and without good reason had been wrongly dismissed from the long-term treatment program.

Despite his termination from the long-term treatment program at the Ozark Correctional Center, Snider remained firmly committed to his drug treatment when he was transferred to the Missouri State Penitentiary. By December 15, 2009, he had successfully completed a one-year, 8,760-hour intensive therapeutic community intervention program, which he had asked to enter while in prison. He also successfully completed an 8-session anger management course and the "Impact of Crime on Victims" class. Snider is motivated and dedicated to improving his life and to becoming a truly productive citizen.

Snider has been transferred to the long-term treatment program, and Weiss and his team are confident he will successfully complete the program to become a productive citizen in society.

On December 12, 2012, Weiss received a Christmas card from Snider, in which he said:

Mr. Weiss, Merry Christmas & Happy New Year. You believed in me and stuck by me when I needed someone the most. Thank you. I'll see you soon.

Reported by:
Charles A. Weiss
Co-Chair, Access to Justice and Legal Services Committee

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After four frustrating years of administrative appeals, the Department of Corrections conceded that Walter Snider was correct and that he improperly and without good reason had been wrongly dismissed from the long-term treatment program.

Charles A. Weiss, FACTL

THE WRONGFUL CONVICTION OF RÉJEAN HINSE

Wrongfully convicted of armed robbery in 1964, Réjean Hinse was sentenced to fifteen years in prison. In 1997, he was finally acquitted by the Supreme Court of Canada, eight years after the Québec Police Commission reopened his case and concluded that Mr. Hinse was the victim of a botched investigation. Despite his exoneration, the federal and Québec governments refused to offer an apology or compensation. More than a decade later, Réjean Hinse proceeded to trial on his civil lawsuit against them. At the request of the Associate Chief Justice, Fellow **Guy J. Pratte** of Montréal and a number of his colleagues undertook to represent Réjean pro bono.

Pratte and his colleagues worked tirelessly in preparing the case for trial, and after a six-week civil trial at the Montréal courthouse in November and December of 2010, Réjean was awarded a total of $13.1 million from the federal and Québec governments, the most significant compensation ever awarded in Canada for a wrongful conviction. The federal government was ordered by judgment to pay $8.6 million (including interest), combined with a previous $4.5 million settlement, which the province of Québec concluded prior to and after the trial.

In her seventy-three-page ruling, Superior Court Justice Helene Poulin criticized the federal government for its negligence in failing to properly investigate Réjean's claims that he was innocent, which he had repeatedly made as far back as the 1970s. Indeed, a careful examination of the written record reveals outrageous bureaucratic indifference and incompetence: lost documents, repeated requests for information already provided, refusals to act. Dickens' "Circumlocution Office" in *Little Dorrit* comes to mind.

A victim of wrongful conviction can develop a profound distrust for authority, including the justice system and lawyers. Pratte noted that working with Réjean was not always easy, particularly in the early going when Pratte and his colleagues began to as-

sist Réjean in 2008. Pratte explained that it was not that Réjean had anything to hide, but it was simply because his story was so incredible that people would not believe him. No one could believe that he was the subject of three lineups – where the police chief clearly identified him beforehand by placing a hat on his head. No one believed that he was held in prison over the holiday season while his pregnant wife was at home without knowing the whereabouts of her husband or the reason for his disappearance. No one believed that he would have escaped from prison after sawing through the jail bars with a saw provided by another inmate, one of the few that believed in his innocence when no one else would. No one believed that he never had a chance to tell his full story during the course of his fifty-year legal battle.

Finally Réjean was given his chance. During his trial, he testified over a three-day period and withstood grueling cross examinations. At the end of Réjean's testimony, no one was as proud, grateful and relieved as was his attorney when Réjean was finally attentively listened to. Sitting at the counsel table just a few feet away from where Réjean gave his evidence, tears welled up in my eyes as I understood what access to justice really means.

The federal government appealed the judgment, and oral argument was heard earlier this year. Today, Réjean waits for the Québec Court of Appeal's judgment.

Reported by:
Guy J. Pratte
Co-Chair, Access to Justice and Legal Services Committee

THE WRONGFUL CONVICTION OF GEORGE ALLEN

This is the case of George Allen who was walking on the wrong street at the wrong time on March 14, 1982. Allen spent more than thirty years in prison before being freed in November, 2012.

In 2008, the Innocence Project in New York contacted Missouri Fellow Charles A. Weiss, requesting assistance in pursuing a habeas corpus case for George Allen in St. Louis. Weiss agreed to serve as St. Louis counsel and to work with the Innocence Project on the case. Subsequently, Weiss enlisted other associates in his firm to work with him on the case.

George Allen's thirty-year nightmare began on the morning of February 4, 1982, when Mary Bell, a thirty-one-year-old St. Louis Circuit Court reporter, was found murdered in her LaSalle Park home during one the heaviest snowstorms in St. Louis' history. Initially, the police questioned Bell's estranged husband and her then-boyfriend and were searching for a known sex offender, Kirk Eaton, whose brother lived in the same apartment complex as Bell. Eaton was wanted for questioning in a rash of rapes in the area that occurred in the early morning hours. On March 14, 1982, the police picked up George Allen several blocks from the victim's house, mistakenly thinking he was Eaton, the sex offender. Although they eventually realized their mistake, the police decided to interrogate Allen anyway. Allen lived about ten miles away from the crime scene and had a history of mental problems. Allen had been diagnosed as schizophrenic and had been admitted to psychiatric wards several times. He had no access to a car. To commit the crime, Allen would have had to walk ten miles to and from his University City home in twenty inches of snow because public transportation was not available on that snowy day.

Upon questioning, Allen eventually made a recorded confession. On the recording, he informed the officers that he was under the influence of alcohol. Throughout the interrogation, an officer prompted George Allen to give answers inconsistent with the facts surrounding the crime. The detective prompted Allen to give answers to fit the crime, often asking Allen to change his answers to do so.

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Quips & Quotes

> ... Their pro bono efforts to assist and defend their remarkable client as he attempts to persevere in his legal practice provided ... some of the most gratifying work of their careers. Their work ...is just another chapter in the remarkable chronicle of College Fellows stepping forward to undertake significant pro bono representation for clients in dire need. From the detainees in Guantanamo or the prisoners on death row, to the tenant unfairly evicted, or the abused spouse, Fellows have repeatedly stepped forward to provide their considerable trial skills and judgment to those in need who could not afford to pay for their services.
>
> *John P. Gilligan, FACTL*

Quips & Quotes

It was simply because his story was so incredible that people would not believe him. No one could believe that he was the subject of three lineups – where the police chief clearly identified him beforehand by placing a hat on his head. No one believed that he was held in prison over the holiday season while his pregnant wife was at home without knowing the whereabouts of her husband or the reason for his disappearance. No one believed that he would have escaped from prison after sawing through the jail bars with a saw provided by another inmate. ... No one believed that he never had a chance to tell his full story during the course of his fifty-year legal battle.

Guy Pratte, FACTL

After the "confession," Allen was charged with capital murder. The first trial ended in a deadlocked jury in favor of acquittal. The State, however, elected to retry Allen a second time, and he was convicted on July 23, 1983 of the capital murder, rape, sodomy and burglary of Mary Bell. Allen escaped the death penalty when a juror was excused before deliberation during the sentencing phase of the trial. Instead, Allen was sentenced to ninety-five years in prison in July 1983.

At the trial, Allen's mother, sister and his sister's boyfriend testified that Allen was at home at the time of the murder. They all testified that early in the morning of February 4, 1982, Allen helped push his sister's car out of the snow and never left the house afterward. Defense attorneys argued that it would have been impossible for Allen, who did not have access to a car, to have traveled approximately ten miles from his home to the victim's apartment to commit the crime.

The prosecution relied heavily on the confession and on serial logical semen evidence that they claimed corroborated Allen's confession. A police lab analyst testified that the only antigens recovered from seminal fluid at the scene were A and H antigens, which could not exclude Allen as the source of the semen. The prosecution, in its closing argument, told the jury that if Allen had been excluded as the source of the semen, "we wouldn't be here. We'd know that he couldn't have, but it's consistent. There is no other physical evidence linking Allen to the crime scene." The prosecution also presented a witness who said that other than the victim's, there were no usable fingerprints found at the scene.

Working with the New York-based Innocence Project, Weiss's team persuaded the St. Louis City Attorney's Office to agree to DNA testing of the crime's still-remaining evidence. The attorneys obtained the police investigation file that included police and lab documents not previously disclosed to the prosecution or defense and which included material exculpatory evidence that indicated the police had found the semen of two different men on the robe worn by the victim when she was attacked.

Although one of the semen donors had a blood type consistent with the Allen's blood type, the victim's then-boyfriend and the victim's estranged husband, subsequent DNA tests showed that the semen was not from Allen but rather that it was from the victim's boyfriend. The other donor's semen contained B antigens. As a "non-secretor," Allen could not have been the donor of the semen that contained B antigens because as a non-secretor, he does not secrete any antigens in his semen. The B antigens also excluded the victim's boyfriend and the victim's estranged husband. Thus, the presence of this other semen sample excluded Allen, but matched someone other than the victim's consensual sex partners. This result was strong evidence indicating that someone other than Allen had committed the crime – evidence that was withheld from both the prosecution and defense attorneys. The documents also showed that prior to Allen's arrest, the police had collected samples from other potential suspects to determine their blood types, in a belief that the perpetrator was someone whose semen contained B antigens. The lab documents also reflected that the exculpatory portions of the report had been scribbled through, although the writing, fortunately, was still legible.

The results of the DNA tests showed that Allen's DNA was not present on any of the remaining crime evidence. The DNA testing did, however, uncover an unidentified male DNA profile on a towel in which the murder weapon had been wrapped. The DNA was tested, and excluded George Allen, the victim's boyfriend and the victim's estranged husband.

Weiss's team also uncovered evidence that police and prosecutors had influenced the testimony of a critical prosecution witness who had been called to corroborate a small, but significant, detail of Allen's confession. In the so-called confession, Allen told the police that while he was in the victim's home, he had heard someone calling to an individual named Sherry. At the trial when Allen was convicted, prosecutors called a friend and coworker of the victim who had been to the victim's apartment at about the time of the murder. The friend testified that she had been at the apartment and had called out Mary's name after she knocked on the door. After being interviewed by Weiss's attorneys in the habeas corpus case, the witness stated that she did not remember whether or not she had, in fact, called out the victim's name. The witness stated that when she initially spoke with the police, she told them that she did not recall calling out Mary's name. Weiss's team, however, discovered that the witness had undergone hypnosis at the police's request to help her remember if she had called out the victim's name. The fact that she underwent hypnosis to "remember" the detail had not been disclosed to either the prosecution or the defense.

It was learned that usable fingerprints, not Allen's, had been found at the scene. After Allen's "confession," the police attempted to identify the person to whom the fingerprints belonged. At the trial, the prosecution's witness testified these had been no foreign prints found at the scene.

The Innocence Project, with Weiss's team, filed a writ of habeas corpus on behalf of George Allen on September 26, 2011. In it, they presented the evidence establishing that George Allen was innocent of the 1982 murder and rape of Mary Bell for which at that time, had served more than twenty-nine years in prison.

The attorneys for George Allen and the State eventually agreed upon a Statement of Uncontroverted Material Facts and submitted the statement of the facts to the court. A hearing was held on the petition for habeas corpus. On November 5, 2012, Cole County Circuit Judge George Daniel Green granted the motion for habeas corpus. His seventy-five-page opinion vacated the murder and rape conviction of George Allen based on the State's failure to disclose numerous pieces of exculpatory evidence which included the blood test results that pointed to George Allen's innocence.

In his decision, Judge Green wrote:

The undisclosed evidence, considered together, points unavoidably to the conclusion that the police – and Detective Riley in particular – ignored and hid evidence pointing to someone else as the perpetrator in their zealous pursuit of Allen's conviction.

Upon hearing Judge Green's opinion, Allen's mother said, "I have been waiting a long time for justice for my son. Nothing can replace the many years he has lost, but it is my greatest wish that I see the day that he walks out of prison."

The Court ordered Allen's release from prison barring the St. Louis City Prosecutor's decision, within ten days, to retry George for the murder. The St. Louis City Prosecutor announced - within two days - that Allen would not be retried. The Missouri Attorney General, however, filed an appeal to the Missouri Court of Appeals opposing Allen's release. Nevertheless, the circuit court promptly ordered Allen's release without bond pending appeal. George Allen, at the age of fifty-six, walked out of prison on Nov. 14, 2012, looking forward to celebrating Thanksgiving and Christmas with his family for the first time in thirty years.

As he walked out of prison into the sunlight he was asked how it felt. "Real good," George replied. "I have spent thirty years in prison as an innocent man, and those have been difficult years for me and my family. But I never gave up hope. I knew that some day the truth would come out. Thank God this nightmare is finally ending."

On December 26, 2012, the Missouri Court of Appeals rejected the Attorney General's appeal.

The Attorney General announced that he would not appeal further.

George's thirty-year ordeal finally ended.

Reported by:
Charles A. Weiss
Co-Chair, Access to Justice and Legal Services Committee

IN MEMORIAM

In this issue, we record the passing of another thirty Fellows of the College, twenty of whom had lived to age 80, four of those into their 90s ✦ They include nine World War II veterans and four who served in the Korean era ✦ One, a Navy fighter pilot in World War II, had been made an honorary member of the crew of a destroyer he saved by shooting down a Japanese kamikaze as it was about to plunge into the ship ✦ Fourteen had been married for over fifty years, four of those for more than sixty years ✦ Among them were one Past President of the College, one former Regent who had been Secretary of the College and four who had been State or Province Chairs ✦ Five had served on the bench, two of them at more than one level ✦ Two had served on the American Bar Association Board of Governors ✦ One had chaired the ABA Standing Committee on the Federal Judiciary, which conducts independent peer reviews of all Article III nominees ✦ All five children of one Fellow were themselves lawyers ✦ Another had eleven children, seven of whom were lawyers, two of them judges ✦ Their practices were widely varied ✦ Many had been actively involved in the civil rights movement of the sixties and seventies ✦ Five had represented *pro bono* death row inmates in successful post-conviction proceedings ✦ One had been involved in litigation arising from major aircraft disasters —Tenerife, the Concorde, the 9/11 attacks ✦ One had brought suit against Exxon in the wake of the Alaskan oil spill ✦ Two were African Americans who collected a string of "firsts" ✦ One of them was an All-American basketball player, the college roommate of legendary football player, Jim Brown, who turned down a career in the National Basketball Association to enter law school instead ✦ One of Attorney General Robert Kennedy's first minority hires, he became a role model for the generation that followed ✦ One was a pioneer female attorney ✦ Their interests were varied ✦ One was the son of immigrants who became a noted philanthropist✦ One had been a major participant in the 1968 presidential campaign of Senator Eugene McCarthy ✦ One was a commercial-rated pilot, a sailor, a gourmet cook, a cyclist and a banjo player who died at his retirement home in southwestern France ✦ One had been a part owner of minor league baseball teams ✦ One was a judge who had teamed with a fellow judge and musician to form a duo they named "Judicial Harmony" to entertain patients at a local Veterans Administration hospital ✦ One helped to develop the SR-71 Blackbird, the world's fastest plane ✦ One was the author of three books about his life experiences ✦ One died while working in his garden ✦ One was remembered for her prowess on the dance floor ✦ One gave lessons in tying bow ties to young lawyers in his Wall Street firm, but "by appointment only" ✦ Some lived the life of the dedicated conventional trial lawyer ✦ The lives of others would have played on the big screen with no editing ✦ The ranks of the Greatest Generation are thinning ✦ The editors of *The Bulletin* once tried unsuccessfully to encourage those who had fought in World War II to tell us their stories ✦ Now, those stories are emerging, not from them, but from the tributes of those who knew them ✦ Fellows once regarded in the civil rights era as troublemakers have in retrospect become the heroes of their times ✦ Collectively these departed Fellows represent a remarkable picture of the lasting values that undergird their chosen profession

— **E. OSBORNE AYSCUE, JR.,** EDITOR EMERITUS

The date following the name of each deceased Fellow represents the date of his or her induction into the College.

The Honorable Rudi Milton Brewster, '78, a Judicial Fellow from San Diego, California, Senior Judge of United States Court for the Southern District of California, died September 10, 2012, at age 80 of pneumonia. A native of Sioux Falls, South Dakota, he was a *cum laude* graduate of Princeton University. Entering the United States Navy after graduation, he flew anti-submarine attack planes, making day and night landings on the *USS Philippine Sea, CVS-47*. After three years in service he entered Stanford University School of Law, graduating in 1960 and joining the San Diego firm Gray, Cary, Ames & Frye, where he concentrated on aviation law. He retired from Naval Reserve JAG Corps in 1981 as a Captain. Appointed to the Federal bench in 1984, he became widely known as a mentor for younger judges. He took senior status in 1998, thereafter concentrating on patent cases, including computer and cellphone technology. He had served as president of the San Diego Legal Aid Society and as President of the Lewis M. Welsh American Inns of Court. A past president of the San Diego Rotary, he was active in civic affairs, his contributions ranging from reading to students at a local elementary school to presenting a mock trial video for the Children at Risk Committee of his local Bar Association. A clarinet player, he and fellow judge and pianist Marylin L. Huff, naming their duo "Judicial Harmony," regularly entertained patients at the local Veterans Administration Medical Center. The State Bar of California had inducted him into its Trial Lawyer Hall of Fame to honor "a career that exemplified the highest of values and professional attainment." In 2005, he had been awarded the Ninth Circuit Professionalism Award. His survivors include his wife of fifty-eight years, two daughters and a son.

James W. Buchanan, '74, a Fellow Emeritus from Denver, Colorado, died November 23, 2012, at age 83. A graduate of the University of Colorado and of the University of Michigan School of Law, where he was a member of the Order of the Coif, he began his practice as a JAG Corps officer in the United States Navy in the post-Korean era. At the time of his induction into the College, he was a partner in the Boulder, Colorado firm Hutchinson, Black, Hill, Buchanan & Cook. He had served briefly as Associate Dean and Associate Professor of Law at the University of Colorado School of Law and for a number of years thereafter was a visiting lecturer in trial advocacy. He had been President of the Boulder County Bar. Retired for many years, since 1996 he had been listed in the College directory in a Denver firm that bore his name. An accomplished woodcarver, fly fisherman and hunter, he had written three books about his life experiences. His survivors include his wife of sixty years and four sons.

Robert Harvey Chappell, Jr., '68, the thirty-sixth President of the College, died December 1, 2012, at age 86 as the result of a fall. His life is the subject of a separate article in this issue.

Merrell Edward (Ted) Clark, Jr., '68, a Fellow Emeritus from New York, New York, retired from Winthrop, Stimson, Putnam & Roberts, died September 19, 2012, at age 90. A 1943 graduate of Yale College and of the Yale Law School, his legal education had been interrupted by service in the United States Army in World War II. Returning from military service, he was Editor of the *Yale Law Journal*, graduating in 1948. A frequent lecturer on antitrust law, he had been President of the Association of the Bar of the City of New York, where he is remembered for his early advocacy for greater representation of minorities in the profession, and a member of the American Bar Association House of Del-

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egates. An advocate who was involved in many high-profile cases, he was obviously not without a sense of humor. In a February 19, 1988 article, *The New York Times* noted an annual one-day event "of dignified frivolity" at which the venerable firm of Winthrop, Stimson spoofed itself, and, by implication, the "arcane stuffiness and sartorial solemnity" of the legal profession, by requiring everyone in the firm to wear a bow tie. Prizes were given, photographs taken. Bow Tie Day Trainers were appointed for each floor. The article went on to note that, "However, one trainer, Merrill E. Clark, Jr., a senior partner, gives bow-tying lessons by appointment only."

Vincent Hamilton Cohen, '97, a Fellow Emeritus from Washington, District of Columbia, died December 25, 2012, at age 75 of a pulmonary embolism. Born in Brooklyn to a native of Jamaica, he was a *cum laude* graduate of Syracuse University, which he attended on a basketball scholarship. He was an All-American basketball player and a roommate of the legendary NFL running back, Jim Brown. Drafted to play in the National Basketball Association, Cohen instead enrolled in the Syracuse University School of Law, from which he graduated with honors in 1960, serving as an editor of the *Syracuse Law Review*. Unable to find a job in a Wall Street law firm, he joined the legal department of Consolidated Edison. Two years later, his big chance came when he was hired by Attorney General Robert Kennedy as a trial attorney. Five years later he became the Director of Compliance for the United States Equal Employment Opportunity Commission. Two years later he joined the Washington firm, Hogan & Hartson and three years later became its first African American partner. Aware of what he had been through, he became known for promoting the legal careers of younger African Americans. He was, in the words of longtime friend and retired Washington Post columnist William Rasberry, "a godfather to young black lawyers." He retired from law practice in 2001. He had served as Chair of the Board of the District of Columbia Public Defender Service and of the Washington Convention Center. A Vice-Chairman of the District of Columbia Commission on Judicial Disabilities and Tenure, he was a member of the Executive Committee of the American Civil Liberties Union. His survivors include his wife of forty-nine years, two daughters and a son, the latter the Principal Assistant United States Attorney for the District of Columbia.

Thomas M. Conlin, '84, a Fellow Emeritus from North Oaks, Minnesota, retired from the St. Paul firm Murnane, Conlin, White & Brandt, died September 23, 2012, at age 82. A graduate of Mankato State College and the William Mitchell College of Law, he served on the law school's Board of Trustees and was an adjunct professor. When he retired, his firm established The Thomas M. Conlin Scholarship Endowment in his honor. In 2004, he had been honored with his law School's Hon. Warren E. Burger Distinguished Alumni Award. His survivors include his wife of fifty-seven years, three daughters and three sons.

James Julian Cromwell, '82, a Fellow Emeritus from Rockville, Maryland, retired from Miles & Stockbridge, PC, died October 30, 2012. Born in 1935, he was a graduate of the University of Virginia and of its School of Law. He had first served as Assistant State's Attorney and as Deputy State's Attorney for Montgomery County, Maryland. He had been a member of a number of gubernatorial commissions and of the Attorney Grievance Commission of Maryland and served as Chair of the Maryland Appellate Judicial Selection Commission. A Past President of the Montgomery County Bar, he had chaired the College's Maryland State Committee. He was also a Fellow of the Ameri-

can College of Probate Counsel. A widower who had remarried, his survivors include his wife, a daughter and two sons.

Guy Desjardins, Q.C., '85, a Fellow Emeritus from Montréal, Québec, retired from Desjardins Ducharme, L.L.P., died December 3, 2012. Born in 1923, he was a graduate of Loyola College, Montréal and earned his law degree from the University of Montréal. Special Adviser to the Ministry of Justice of Canada from 1955 to 1959, he was Chief Prosecutor of the Crown from 1960 to 1964. Named a Queen's Counsel in 1961, he had chaired the Discipline Committee of the Bar of Montréal. He was known as an eloquent orator with a sense of theater. His survivors include a daughter and a son.

Robert Morton Duncan, '90, Columbus, Ohio, retired from Jones Day, died November 2, 2012, at age 85. A graduate of Ohio State University and of its School of Law, where he was President of his class, he had then served in the United States Army for four years during the Korean Conflict. His was a career of "firsts" for an African American lawyer. He had served in the Columbus City Attorney's Office and the Ohio Attorney General's Office as head of Workers' Compensation and as Chief Counsel to the Attorney General. He was later elected to the Columbus Municipal Court and then to the Supreme Court of Ohio. Appointed by President Richard M. Nixon to the United States Court of Appeals for the Armed Forces, he became its Chief Judge. In 1974, he was confirmed to the United States Court for the Southern District of Ohio. He retired from the bench in 1985 to become a partner in the Columbus office of Jones Day. He was later Vice-President and General Counsel and Secretary to the Board of Trustees of Ohio State University, and he eventually became Chair of that Board. He served on numerous civic and corporate boards and was the recipient of a host of awards, commendations and honorary degrees. His survivors include his wife of fifty-six years, two daughters and a son.

Alfred H. Ebert, Jr., '79, Andrews & Kurth, LLP, died December 29, 2012, at age 83. A Phi Beta Kappa graduate of Washington & Lee University, for four years thereafter he had flown helicopters in a United States Navy anti-submarine squadron during the Korean Conflict, and he remained an officer in the Naval Reserve for another fourteen years. He earned his law degree from the University of Texas School of Law and spent his entire career with Andrews, Kurth, where he had been the managing partner. He had served on the Board of the Nature Conservancy of Texas and was a member of the choir of his local Episcopal Church until the year of his death. His survivors include his wife of fifty-three years, two daughters and two sons.

William Thomas Egan, '69, a Fellow Emeritus, Edina, Minnesota, retired from the Minneapolis firm Rider Bennett Egan & Arundel, died October 22, 2012, at age 86. After high school, he had enlisted in the United States Army Air Corps in World War II. He was a graduate of the University of Minnesota and of its School of Law. He had served the College as Chair of the Minnesota State Committee, as a member of the Board of Regents and as Secretary. He had also been President of the International Society of Barristers and the Minnesota Defense Lawyers Association. He had served his church as a Trustee of his parish, as President of the Sisters of St. Joseph of Carondelet Ministries and as a Trustee of St. Thomas Academy. He was a member of the Equestrian Order of the Holy Sepulchre of Jerusalem. His survivors include his wife of sixty-two years, two daughters and two sons.

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Morton Lee Wayne Friedman, '78, a Fellow Emeritus, retired from Friedman, Collard & Panneton, Sacramento, California, died December 5, 2012, at age 80 of supranuclear palsy. The son of Russian Jews who had immigrated to South Dakota in the early 1900s, he grew up living above the family's general store. After attending undergraduate school at the University of Michigan on a track scholarship, he transferred to Stanford University, from which he received both his undergraduate and law degrees. He had served as President of his local Bar and in leadership roles in other legal organizations, including the State Bar of California. A plaintiffs' attorney who had handled a number of high-profile cases, he was well-known as a businessman and philanthropist. His real estate developments became a major factor in the growth of Sacramento and his contributions to charitable and civic causes, notably to programs that promoted literacy, safe neighborhoods and racial and ethnic tolerance, were well known. He and his wife had made the lead gift in the expansion of the Crocker Art Museum. He had been actively involved in support of Democratic political candidates. Devoted to his religious faith, he had served on the national Boards of the American Israel Public Affairs Committee and the Anti-Defamation League. He and his wife, known for their hands-on approach to philanthropy, for instance washing dishes at fund-raising events, adopted an elementary school in which they became involved participants and which they helped to transform into a California Distinguished School. His survivors include his wife of fifty-seven years and three sons.

Coming Ball Gibbs, Jr., '88, a Fellow Emeritus, special counsel to Gibbs & Holmes, Charleston, South Carolina, died September 27, 2012, at age 76. A graduate of Princeton University and a *magna cum laude* graduate of the University of South Carolina School of Law, he had clerked for Judge Clement F. Haynsworth, Jr. on the United States Court of Appeals for the Fourth Circuit. Notable was his participation in post-conviction proceedings representing a convicted murderer that involved three appearances before the South Carolina Supreme Court and two before the United States Supreme Court before the client was granted a new trial on the ground of ineffective assistance of counsel. He had served as President of the Charleston County Bar Association and had been an organizer of the local Legal Services office. He had worked both as a lawyer and a mentor for lawyers dealing with substance abuse issues. His law school's alumni association had honored him with its Compleat Lawyer Award and his local Bar had honored him with its first James Luis Petigru Medal. His obituary noted that he "embodied the ancient command that the law be not a money-making trade, but a profession." His survivors include his wife and four daughters.

Edwin W. Green, '78, who had practiced with the Los Angeles, California firm Bronson, Bronson & McKinnon, died from complications related to a heart attack on August 3, 2012, at his home in southwest France at age 76. Raised by his maternal grandparents on a California ranch, he was a graduate of the University of Southern California and of its School of Law. After a year in the San Diego, California City Prosecutor's office, he began practice in Los Angeles. Representing aircraft manufacturers and airlines, he tried aviation cases all over the world, including cases arising from the Tenerife airport disaster in which two Boeing 747s collided on the runway, resulting in the deadliest aviation accident in history, taking 583 lives, and the 2000 Paris crash of a Concorde in which all aboard were killed. He was involved in the last wrongful death case arising out of the 9/11 attack. A commercially rated pilot, he flew his own plane, rode motorcycles, biked a portion of the Tour de France, led bicycle

tours in southern France, was a gourmet cook, played the banjo and was a sailor who once sailed his forty-six foot sailboat to Hawaii with his son. A pioneer in jury research, he was a mentor who actively encouraged young female lawyers to pursue trial work. He and his wife had purchased a stone farmhouse in Southwest France and over twenty-nine years, created both a home for themselves and a retreat for their friends. His survivors include his wife and two sons.

George William Healy, III, '75, a Fellow Emeritus from New Orleans, Louisiana, Of Counsel to Phelps Dunbar, LLP, died November 20, 2012, at age 82. A graduate of Tulane University and of its School of Law, he had served as a United States Naval Reserve legal officer, defense counsel and trial counsel the during the Korean Conflict, seeing active duty in both the United States and South Korea. A maritime lawyer, he had served in the American Bar Association House of Delegates and as President of the New Orleans Bar Association and the Maritime Law Association of the United States. He had also served on the boards of numerous civic and legal organizations. A titular member of Comite Maritime International, he had represented the Maritime Law Association at conferences in at least seven different countries around the world. As court-appointed counsel, he had successfully represented a citizen convicted of first degree murder and confined on Death Row in Angola, for which he had received the President's Commendation from the Louisiana Association of Criminal Defense Lawyers. An avid sportsman, he owned and trained several accomplished Labrador retrievers and was a member of several syndicates that campaigned thoroughbred race horses. He was also a member of several local Carnival organizations and social clubs. His survivors include his wife of thirty-five years, a daughter and four sons.

David D. Hoff, '95, a member of Tousley Brain Stephens PLLC, Seattle, Washington, died August 16, 2012, of PML, a rare viral disease, at age 74. A graduate of the University of Washington and of its School of Law, he served as a law clerk for a Justice of the Washington State Supreme Court before entering private practice. He had been President of the Washington State Bar Association, the Western States Bar Conference and the Seattle Public Defender Association and had been a Trustee of the Seattle King County Bar Association. His survivors include his wife and law partner, three daughters and a son.

Kirk Nathaniel Kirkconnell, Jr, '10, a member of Kirkconnell, Lindsey, Snure, Yates & Ponall, PA, Winter Park, Florida, died September 7, 2012, of cancer, at age 69. A graduate of the University of Florida and of its School of Law, he was a criminal defense lawyer who had begun his career as an FBI agent. A former President of the Florida Association of Criminal Defense Lawyers, in one notable case he had been employed by the Moroccan government to represent one of its citizens who had pled no contest to a murder charge without an understanding of the implications of his plea under Florida law. His survivors include his wife, a daughter and a son.

Edwin Lee Klett,'86, of counsel to Buchanan, Ingersoll & Rooney, PA, Pittsburgh, Pennsylvania, died October 7, 2012, at age 76 after a year's illness. A graduate of Bucknell University, he served as an officer in the United States Army Transportation Corps, then attended the Dickinson School of Law at Penn State University, where he served as Editor-in-Chief of the *Dickinson Law Review*. He began his career with Eckert, Seamans, Cherin & Mellott, then founded Klett, Rooney, Lieber & Schorling, PC, which later merged with Buchanan, Ingersoll. A Life Member of the American Law

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Institute, he had been President of the Allegheny County Bar Association, a Trustee of Bucknell University, a member of the Pennsylvania Judicial Conduct Board, of the Penn State Law Board of Counselors and of the American Bar Association House of Delegates. He had served as the Chair of the College's Pennsylvania State Committee. His survivors include his wife, two daughters and three sons. All five of his children are graduates of the Dickinson School of Law.

Edward M. Kowal, Jr., '09, Campbell Woods, PLLC, Huntington, West Virginia, died August 29, 2012 at age 69. A graduate of Washington & Lee University and of its School of Law, he had spent ten years in the United States Air Force before beginning his college education. Discharged as a Captain, he had been involved in the engineering of the Lockheed SR-71 Blackbird, a stealth plane capable of speeds up to Mach 3.2. His survivors include a daughter and a son.

C. Frederick Leydig, '82, a Fellow Emeritus, retired from Leydig, Voit & Mayer, Ltd, Chicago, Illinois, died April 17. 2012, at age 87. He had attended the University of Detroit and, through the United States Navy's World War II V-12 officer program, earned his undergraduate degree from Illinois Institute of Technology, where he played varsity tennis and basketball. After graduation, he served on the battleship *USS New Jersey, BB-62,* in the Pacific Theater. He earned his law degree in night school at DePaul University while employed in the patent department of Standard Oil Company, then entered private practice in1954. An intellectual property lawyer, he had chaired the Illinois Young Republicans, served as Chair of the Intellectual Property Law Association of Chicago and as a member of the Board of the American Intellectual Property Association. He had also chaired his community's United Way. His survivors include his wife of sixty-two years, two daughters and a son.

The Honorable Roy Miller Lilly, '70, Thomasville, Georgia, a retired Judge of the Georgia Superior Court, died June 29, 2012, at age 93. He had attended Norman College in Norman Park, Georgia and earned his law degree from Mercer University School of Law. A World War II veteran, he had served first as a recruiter in the United States Navy and then on a destroyer, *USS Woolsey, DD-437,* in the Pacific Theater. He had practiced with Alexander, Vann & Lilly in Thomasville until his 1979 appointment to the state bench, where he served actively for fifteen years, taking senior status in 1994 and retiring in 2007. He had served as Mayor of Thomasville for nine years before going on the bench and had chaired a number of civic and business boards. His survivors include his wife of fifty-five years, a daughter and two sons.

Escum Lionel Moore, Jr., '92, a Fellow Emeritus from Lexington, Kentucky, died November 26, 2012, at age 70 of Parkinson's Disease. A graduate of the University of Kentucky and of its School of Law, he had clerked for Federal District Judge before commencing law practice. He served in the United States Army Reserve during the Vietnam War and was a licensed pilot who flew his own plane. A longtime adjunct professor of trial practice at the University of Kentucky School of Law, he had lived with Parkinson's for the last decade of his life, and had been a trusted confidant of others with the disease. His survivors include his wife, a daughter and a son.

Robert F. Muse, '89, a partner in Muse & Muse, Boston, Massachusetts, died November 29, 2012, at age 92. A graduate of Boston College, in World War II he was a decorated fighter pilot in the Pacific Theater, a member of the United States Marine Corps VMF 323 Death Rattlers Squadron.

Flying gull-winged F4U Corsairs, the squadron was first involved in the invasion of Okinawa and, in the following four months leading up to the surrender of Japan, shot down 124 enemy planes without the loss of a single plane. In the Okinawa engagement, Muse saw a kamikaze diving toward the destroyer *Henry A. Wiley*, flew through the flak and downed the attacking plane. Because of his heroic act, three hundred men on the destroyer lived. In a tribute at the time of his death, the *Boston Globe* noted: "He got to know many of those men, who adopted him as an honorary crew member. And he never forgot the Japanese pilot, whose eyes he looked into before he shot him down." His daughter noted that "He prayed every day for the young man he killed. He learned the value of life by taking the life of another human being." After the war, he attended Boston College Law School and then Suffolk University Law School, from which he received his law degree. He counted as his single greatest accomplishment as a lawyer spending nine years without compensation in a successful attempt to free a wrongly convicted young black man who had spent fifteen years in prison. He became mentor to his client, who had made a career of working with at-risk Boston youngsters. A few weeks before Muse's death, he told the client, "You left the bitterness behind and made something of yourself. You gave back to a city that took so much from you." The client responded, "Everything I did, I did to honor you." Muse's survivors include his wife of sixty-seven years, herself a lawyer and a retired Justice of the Boston Probate Court, eleven children, seven of whom are lawyers, two of them judges, thirty-six grandchildren and ten great-grandchildren.

J. Gordon Petrie, Q.C., '87, Stewart McKelvey, Fredericton, New Brunswick, died November 5, 2012, at age 72. He had earned his undergraduate and law degrees from the University of New Brunswick and an L.L.M. from the University of Michigan School of Law. Appointed Queen's Counsel in 1985, he was a longtime counsel to the University of New Brunswick and a founding member of the Canadian Association of University Solicitors. He had been recently appointed to the Regional Advisory Committee of the Supreme Court Advocacy Institute. He had been awarded an Honourary Degree by the University of New Brunswick. His survivors include his wife of forty-nine years and three sons.

Morris David Rosen, '73, an Emeritus Fellow, retired from Rosen, Rosen & Hagood, LLC, Charleston, South Carolina, died October 15, 2012, at age 92. A graduate of the College of Charleston, he had served as an officer in the United States Coast Guard in the Pacific Theater in World War II. He then earned his law degree from the University of South Carolina School of Law and practiced in Charleston for sixty-seven years. He had been a member of the South Carolina State Board of Law Examiners. For many years Corporation Counsel for the City of Charleston, he served during the tumultuous civil rights era and had a role in the desegregation of the local municipal golf course, the first public integrated facility in the area, several years in advance of the Civil Rights Act of 1964. In the words of Charleston Mayor Joe Riley, "He was a great warrior [who] played a very important role in the city's modern history." A Past President of the Charleston County Bar Association, the South Carolina State Bar and the South Carolina Municipal Attorneys Association, he had been honored by the College of Charleston with an Honorary Doctorate of Humane Letters and had received his local Bar's highest honor, the James Louis Petigru Award. His survivors include his wife, a daughter and two sons.

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Bruce M. Stargatt, '72, a Fellow Emeritus, retired in 2000 from Young Conaway Stargatt & Taylor, Wilmington, Delaware, died July 19, 2012, at age 82. A graduate of the University of Vermont and of the Yale University School of Law, he had then served as Staff Judge Advocate General Officer in the United States Air Force during the Korean Conflict. Early in his career, he had served as Counsel to the Delaware River and Bay Authority. He had been President of the Delaware Bar Association and of the Delaware Bar Foundation and had been a member of the Board of Governors of the American Bar Association. He had been honored with the Delaware Bar's First State Distinguished Service Award, the American Judicature Society's Herbert Harley Award and Delaware's Order of the First State. He had served as President of Congregation Beth Shalom and the Jewish Community Cemetery Association. He had chaired the College's Delaware State Committee and its Committee on Oral Argument in the appellate courts. His survivors include his wife of almost fifty-eight years, a daughter and a son.

William Daniel Symmes, '91, Spokane, Washington, died October 3, 2012, at age 74 after a two-year illness. A *cum laude* graduate of Georgetown University, which he attended on a national scholarship, he earned his MBA from Columbia University, which he also attended on a fellowship, and from Stanford University School of Law, where he was President of the Stanford Law Forum. After practicing for three years in Los Angeles, he joined the Spokane firm, Witherspoon, Kelley, Davenport & Toole, where he practiced for forty-three years, serving as its managing partner for nineteen years. Early in his career, he had been named the Spokane Outstanding Young Man of the Year. Active in youth sports, he had coached Junior National Football for twenty years and Babe Ruth and Pony League teams for five years. He had at various times been a co-owner of two minor league baseball teams. He had been honored in 2012 with the Eastern Washington Federal Bar Association's Michael J. Hemovich Award. His survivors include his wife of fifty-three years, a daughter and a son.

The Honorable Mr. Justice Allan Douglas Thackray, Q.C., '85, Vancouver, British Columbia, died November 11, 2012, at age 80 while tending his garden. A graduate of the University of British Columbia and of its School of Law, he practiced for twenty-nine years before being appointed judge of the British Columbia Supreme Court in 1990. Elevated to the British Columbia Court of Appeal in 2001, he retired in 2007 and became an advisor to Harper Gray LLP. A master story-teller and a talented writer, he had written articles on many subjects. His survivors include his wife of fifty-five years, a daughter and a son.

Betty Ann Thompson, '89, Arlington, Virginia, died September 24, 2012, at age 88. A graduate of George Washington University and of its School of Law, she was a pioneer female attorney in domestic relations and matrimonial law. A trailblazer, she was the College's first female Fellow from Virginia. She had been President of the Arlington County Bar Association, served on the Board of Governors of the Association of Trial Lawyers of America (ATLA) and of the International Academy of Trial Lawyers (of which she was the first woman member), was a Past President of the Melvin Belli Society and a Trustee of the Roscoe Pound Foundation. She had been recognized by the Virginia General Assembly and by many bar

groups for her more than sixty years of service to her community and the legal profession. At her death, one of her fellow lawyers commented, "[H]er sense of style was only exceeded by her enjoyment of life, and she could cut a rug on the dance floor! She will be sorely missed."

Ted M. Warshafsky, '95, a Fellow Emeritus, retired from Warshafsky, Rotter, Tarnoff, Reinhardt & Bloch, S.C., Milwaukee, Wisconsin, died October 14, 2012, at age 85 after suffering a stroke nearly a year earlier. Born of immigrant parents who divorced when he was four years old, he grew up poor in Chicago and started working when he was eleven years old. At age eighteen, he joined the United States Marines. Thereafter entering the University of Wisconsin on the GI Bill, he earned both his undergraduate and law degrees from that institution. As one of his daughters put it in his obituary, he devoted his life to "making things right in the world." His older children had participated in boycotts of the local schools to support their desegregation and had participated with him in a march to support an open housing ordinance. One remembered that after he had spotted a white policeman pulling over a young black driver, he also stopped to make sure that the policeman knew that there was a "witness" present. A high-profile plaintiff's personal injury lawyer and civil rights activist, he was Vice Chair of the delegation of Senator Eugene McCarthy at the tumultuous 1968 Democratic National Convention in Chicago and later was field finance director for McCarthy's presidential campaign. At the convention, he made the symbolic nominating address for civil rights activist Julian Bond, an organizer of the Student Non-Violent Coordinating Commission and the chair of an alternate delegation from Georgia. Bond, who was then only twenty-eight years old and thus ineligible, then withdrew. On behalf of the Trial Lawyers for Public Justice, Warshafsky had brought suit against Exxon on behalf of the fish and wildlife of Alaska in the wake of the Valdez oil spill. A prolific writer and lecturer, he authored a *Trial Handbook for Wisconsin Lawyers*. He was a member of the Inner Circle of Advocates, a diplomat of the American Board of Trial Advocates. He had been national Secretary of the Association of Trial Lawyers of America and President of both the Wisconsin Academy of Trial Lawyers and Trial Lawyers for Public Justice, as well as of the local chapter of the ACLU. The *Wisconsin Law Journal* had honored him with its Lifetime Achievement Award. Warshafsky's survivors include three daughters and two sons.

Joseph Wyatt Womack, '85, a Fellow Emeritus, retired from the Miami, Florida firm Kimbrell & Hamann, P.A. and living in Mocksville, North Carolina, died August 14, 2012, at age 85. He had enlisted in the United States Navy in World War II, then earned his undergraduate degree from the University of Florida and his law degree from the University of Miami School of Law. His practice had consisted primarily of litigation arising out of aviation crashes. His survivors include his wife of sixty-two years, two daughters and a son.

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Annie Anderson Jones, Macon, Georgia, widow of Past President Frank C. Jones, whose August 29, 2012 death was reported in the last issue of the *Bulletin*, died November 24, 2012 after a sudden illness.

THE BULLETIN

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— **Hon. Emil Gumpert,**
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Statement of Purpose

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