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2020-2021 PRESIDENT
RODNEY ACKER
AND JUDY K. ACKER
OF DALLAS, TEXAS

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JOURNAL

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

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contents

FEATURES

FELLOWS IN ACTION

ANNOUNCEMENTS

IN EVERY ISSUE

LETTER FROM THE EDITOR

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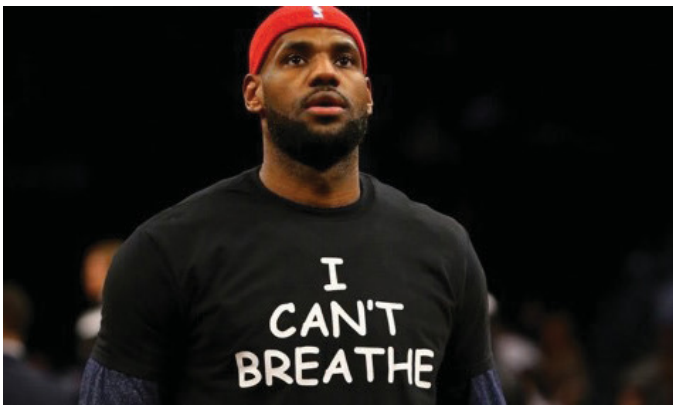
The College does not take positions on political issues, for very good reason. The three legs of the College's metaphorical stool are excellence, integrity and collegiality. There are lots of organizations that honor excellence or achievement, without worrying too much about character. As Berthold Brecht once observed, the motto most people, and the groups in which they congregate, live by is "grub first, then ethics." Then there are many organizations, a smaller subset to be sure, but still many, that require integrity and ethics as additional qualifications for membership. But precious few organizations add the third criteria, what Former Regent **John Famularo** described as the "Would I want to spend a day in a fishing boat with you?" test.

Collegiality. We make it a requirement for admission. It is why we enjoy getting together. And since nothing dampens the mood faster than a political divide, the College just doesn't get into politics.

That doesn't mean that individual Fellows leave their opinions at the portals when the Induction Charge is delivered. Individual Fellows are allowed, even expected to have opinions. So, as an individual Fellow, let me share my opinion. Hopefully, you won't feel you have to jump out of the boat.

In my opinion, we have too much politics. George Floyd should not be a political issue. It should not matter who you vote for to stand against murder, to stand for effective changes in a system that makes minorities justifiably fear for their safety from the very people sworn to protect us all. Face masks should not be a political issue. Good people of all political bents should be able to endure the inconvenience of simple social measures that save lives.

Rethinking whether we ought to have monuments and military bases celebrating Confederate generals should not be a political issue. Erwin Rommel was one of the great generals of all time, but no one would seriously suggest that a U.S. base be named for a general who took up arms against the United States. John Bell Hood graduated forty-fourth in his West Point class of fifty-three cadets; his sole combat action was in the service of the Confederacy. He may or may not have been a great general, but he never fought *for* the U.S.; he only fought *against* it. It ought not be a political issue to rethink whether Fort Hood should be renamed.



The Confederate flag? Okay, I may be skating too far onto the thin ice here, I know this is a political issue. It is, as our President tells us, a matter of free speech. But really? Free speech doesn't justify yelling fire and doesn't condone screaming out the N word in a crowded theater. The swastika started out a benign symbol; but its use by the Third Reich has made it socially abhorrent to use that emblem now in polite society. The Washington Redskins announced in July that they will change the name they have defiantly used for eighty-seven years. Why? Reportedly, the team caved because commercial sponsors like FedEx recognized that the name was racist and hurtful and threatened to withdraw support. Look, I am sensitive to these things. My high school was TF South – our nickname was "The Rebels" and we flew the Confederate flag; my college was the University of Illinois – our mascot was Chief Illiniwek. These symbols of my youth have now been taken from me, and I miss them. But they were hurtful to others, and I understand why they were retired. Individuals have the right of free speech. You are free, I am free, if I want to, to fly a Confederate or a swastika or a Redskin flag on my lawn. But public institutions have public responsibilities. States and universities and other public entities have a duty to respect all people and avoid symbols that are undeniably hurtful to large segments of society. That's not political. It's just mutual human respect.

The College has it right. We should avoid politics. Let's concentrate instead on things that make us happy to be in the boat together.

* *

I think we have a great issue for you. We introduce you to your new President, **Rodney** (and Judy) **Acke**r. We honor a Past President, **Phil Tone**, recounting his experience as a member of the Greatest Generation as a tank commander in World War II. We recall meeting Dr. Anthony Fauci in 2016 in Philadelphia and point out how his warnings to us then about the future have come to pass in this COVID age.

Things are different under COVID, of course. But as a case in point, former Acting Solicitor General Ian Gershengorn offers a unique perspective into the way our Supreme Court now handles cases in this new world. Ian had argued a case pre-COVID that ended with a 4-4 deadlock and a need for re-argument; then the same issue arose in a new case and Ian argued that case, this time by phone. Same issue, very different experience.

This issue includes a – well, what is it? A history? An homage? A spotlight? – whatever, **Katie Recker**, incoming Regent for Region 13, offers up a superbly written piece on three remarkable women – our first three women Fellows. And more. **Rocky Pozza** offers a history of the College's efforts to promote and protect Judicial Independence. **Kevin Regan** offers a tribute to his mentor. And more.

I hope you enjoy reading this issue as much as I enjoyed helping to put it together. And I look forward to a time when we can get back in a boat and spend a day fishing together. Stay well.

Bob Byman ■



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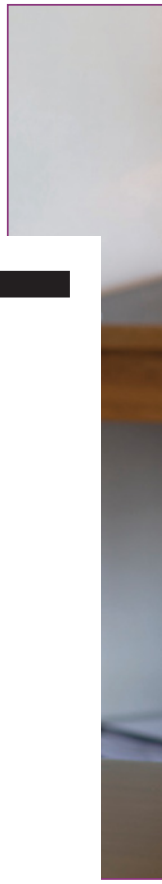

PRESIDENT'S REPORT – DOUGLAS R. YOUNG

Editor's Note: Doug Young's full Report of Terry and his year as our President will be posted on the College website, and we urge that you read the complete version; what follows is a slightly abridged version.

This year, as we celebrate the 70th anniversary of the American College of Trial Lawyers, we also acknowledge the Honorable Emil Gumpert, the Chancellor-Founder of the College, his commitment to the administration of justice, and the improvement of trial practice. Chancellor Gumpert was an accomplished trial lawyer and judge. I believe that if he were alive today, Chancellor Gumpert would be proud of how the fellowship he envisioned has evolved, and how it has responded to the issues presented by this challenging and consequential year.

The theme of my Report to you is "*Gratitude.*" I have been grateful and inspired observing the work of the Fellows in the face of the pandemic, economic uncertainties, the incomprehensible killings of George Floyd and others, and the social unrest that these events have inspired, that have challenged faith in institutions and affected the ways in which people interact. We could not have imagined these things at the Vancouver meeting in September 2019. Yet the College has maintained its Mission unabated in the face of these issues and events – a tribute to the strength of our fellowship and our commitment to preserving the administration of justice and the Rule of Law.

Terry and I are grateful to have made this journey – truly a tale of two different years – with all of you. You helped immensely as we began the usual College year in which Presidents and spouses travel widely, meet talented and engaging people, and carry the College banner and influence. Between September and March we enjoyed approximately 20 trips throughout the continent (including two to Canada), and we were anticipating many more, of course. But then, in the space of a single week, we literally went

from this.

To this.

Terry and I wish that events had evolved differently, but we dearly appreciate the support shown by so many of you as the College successfully turned moments of disappointment into opportunities to complete its Mission in unique and different ways. As John Wooden said, "Things work out best for those who make the best of how things work out."

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First and foremost is my gratitude is Terry. I have been honored and moved by her support and myriad contributions, all of which she offered unselfishly, with enthusiasm, and with the purpose of making the College experience better for those participating in it. She has never faltered in her support and efforts to see opportunity wherever she could. I am deeply in her debt. And I love her more than ever (if that is even possible).

The Executive Committee has functioned collegially, and always by consensus. How lucky the College is to have Rodney and Judy Acker as the President and First Lady for the coming year and to have the continued dedication and service of Mike and Brett O'Donnell, Susan Harriman, and Bill and Pat Murphy. We are also grateful for our good friends Jeff and Carol Leon. We will miss retiring Regents Paul Hickey (Region 4), Dan Reidy (Region 8), and Bob Welsh (Region 13), even as we welcome their successors, Dan Folluo, Jeff Stone, and Katie Recker. We lost two giants this year – Michael R. Mone of Massachusetts (President 1999-2000, memorialized in the Summer 2020 issue of the *Journal)* and Gene W. Lafitte, Sr. of Louisiana (President 1994-1995, memorialized in this issue). Both contributed actively long after their presidential years. Their commitment and example are reminders of the trust our colleagues permit us to fulfill.

Supporting all of us throughout the year has been the National Office Staff, which, beginning with the unexpected labor unrest in Vancouver, has pivoted with every surprising development to make things work. Dennis Maggi (Executive Director), Amy Mrugalski (Board/Executive Administrator), Suzanne Alsnauer (Senior Meetings and Conference Manager), Geri Frankenstein (Sr. Manager, Membership), Eliza Gano (Communications Manager, recently departed for a new career), Katrina Goddard (Meetings and Conference Coordinator), and Cheryl Castillo (Office Administrator) represent the ideal administrative team: well-led, loyal, and dedicated to ensuring every day that the College's substantive missions continue unabated.

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Among the milestones of the year was the creation of the Thurgood Marshall Equality and Justice Award (the award name pending formal approval from the Marshall family), and the decision to award it posthumously to Congressman John Lewis. Regents Joe Caldwell and Rick Deane led an outstanding Task Force that worked collegially and with dispatch to create the criteria for the award and to identify its first recipient. As Joe and Rick explained:

> "Recurring issues of race and inequality are again at the forefront of our public discourse. Both the U.S. and Canada have long grappled with these issues through much our history. Now, the tragic deaths of George Floyd and too many others have again put a spotlight on injustices that continue to plague our pursuit of equality and justice for all. . . . As a preliminary step, the College wishes to recognize champions who have fought for equality and justice and against racism in keeping with standards for such an award to be established by the College."

The award, to be given "from time to time to an individual who has, with vision, courage, and fortitude, stood steadfast in the passionate and effective pursuit of equal justice under the law," will be a meaningful response to the events of the current year and also a regular reminder of the College's commitment to equality and justice in every facet of our societies.

Another significant development this year was the creation, literally within hours after the pandemic was officially acknowledged, of the Task Force on Advocacy in the 21st Century.

The Task Force has been ably chaired by Regent John Day and has resulted in eight comprehensive "Interim Guidelines" on issues pertaining to the conduct of judicial proceedings (including trials and appellate arguments) and regarding important constitutional and other protections to be considered when considering the reopening of criminal courts during the pandemic. These papers, prepared by distinguished Fellows and Judicial Fellows from both the U.S. and Canada, are posted on the College website and have been widely distributed to the Fellows and courts throughout both countries. The work of this Task Force is immensely important to the administration of justice, one of the primary prongs of the College Mission, and represents an example of how the College can mobilize quickly and responsibly in response to unexpected needs.

As the Chief Justice of the Michigan Supreme Court recently asked, "Why is our system of justice held together with the threads of 20th century technology and 19th century processes?" Through the Task Force, the College is among the groups at the head of the curve in evaluating these issues and will be continuing its important work into 2021 and likely beyond, as what are now "interim" guidelines are refined in the light of experience over time.

One of the featured issues of the Leadership Workshop that followed the Annual Meeting in Vancouver was Judicial Independence. Judicial Independence was selected as a focus of the Workshop, in anticipation of the pressures expected in the upcoming election year and in light of the 2019 White Paper entitled *The Need to Promote and Defend Fair and Impartial Courts*. Within the first few months of the New Year, the College found it necessary to issue two official public statements in support of Judicial Independence: The first, in February 2020, addressed the President's public statements criticizing Federal Judge Amy Berman Jackson and one of the jurors in the case against Roger Stone:

> "The American College of Trial Lawyers believes that the President has the right to disagree with a judicial opinion and to seek legal means to overturn it on appeal; but *ad hominem* and disparaging personal attacks on an individual judge are an affront to the fundamental principle of judicial independence that cannot be ignored. The College also believes that no President should interfere in a pending judicial proceeding, take actions or make statements that could reasonably be viewed as intimidating a judge or belittle any judge for his/her decision on sentencing. It is vital that all branches of our government respect the integrity of the judicial process."

The second, issued in March 2020, addressed public remarks by Senate Minority Leader Chuck Schumer that publicly called out Supreme Court Justices Neil Gorsuch and Brett Kavanaugh by name and suggested repercussions if they did not vote a certain way on a matter pending before the Court. The College stated:

> "While the First Amendment protects the free speech of all American citizens, when a prominent and leading member of the legislative branch personally demeans individual members of the judiciary by name and in so doing appears to threaten them if they do not vote a certain way on a particular issue, the criticisms threaten the balance among our branches of government and particularly the independence of the judiciary. . . . [N]o public official should interfere in a pending judicial proceeding, take actions or make statements that could reasonably be viewed as intimidating a judge or belittle any judge for his/her decision."

State Committees in Alaska and Arizona have also issued statements in support of the judiciary. In Alaska, a statement was issued after the Governor, in response to a ruling of the State Supreme Court with which he disagreed, vetoed part of the budget enacted by the legislature to fund the Alaska court system; in Arizona, a statement was issued after the Governor publicly criticized a federal district ▷

judge on a personal level in response to an opinion he did not like.

The overall effort in support of Judicial Independence has been advanced by a new General Committee led by Fellows John ("Buddy") Wester and Kent Thomson. Recognizing that public statements in support of judicial independence are important but not sufficient, the Committee has facilitated the College's joint effort with the National Association of Women Judges (NAWJ) to develop a public education pilot project through which College Fellows will make public presentations using NAWJ's Informed Voters Project (IVP) appropriately modified to highlight the importance of judicial independence. This project represents an important and very impressive opportunity for the College to engage in public education that will lead to greater confidence in our judiciaries and the Rule of Law generally. A subcommittee, including Fellow Virginia Nelson and former Regent Kathleen Trafford, working with IVP leadership, refined the pilot project and developed a 50-slide PowerPoint deck, now posted on the College website, which includes animations and a video for Fellows who will be making the presentations. Although the pandemic resulted in a pause in the initial schedule, the program is ready to be rolled out in 2021 and will initially target ten states (California, Florida, Iowa, Kansas, New York, North Carolina, Ohio, Pennsylvania, Texas, and Washington).

Our diversity and mentoring efforts – as important or more so today than ever – continue to evolve. Almost every State and Province Committee has at least one diversity liaison who, under the leadership of Regents Joe Caldwell and Rick Deane, have helped those Committees identify qualified candidates for Fellowship in places where the College might not otherwise have looked. Their efforts have shown promise, as reflected in the gathering of self-identified diverse inductees depicted below at a reception in Tucson:

And, under the direction of Regent Caldwell and Fellows Tom Heiden and Joe Crawford, and the Teaching of Advocacy Committee, two unique programs for diverse trial lawyers have been organized in Chicago, Illinois. First, the *Diversity in the Courtroom Program* is designed and dedicated to "helping to develop the next generation of diverse and inclusive trial advocates." Tom Heiden explains:

> "Our society is diverse. Our courtrooms are diverse – judges, jurors, court personnel, and witnesses. The trial lawyers should mirror the diversity in our society and in our courtrooms.

. . . The emergence of a broader group of talented diverse trial lawyers will benefit clients and our system of justice in general. ACTL's Diversity in the Courtroom Trial Advocacy Program will work to bring even more talented advocates of excellence into our courtrooms."

Second, the *In-House Corporate Litigation Attorney Program* will "strive to equip and assist those in-house lawyers in tasks essential to the performance of their job, such as selecting diverse trial counsel, managing trial theme development, and guiding trial and settlement strategies."

These programs had to be postponed in light of the pandemic, but will be rescheduled in 2021, as soon as possible.

Paralleling these efforts is the Boot Camp Trial Training Programs Committee, led by Fellow Paul Sandler. The pandemic has had its impact, but the Committee has persevered nonetheless. It has presented some programs via virtual formats recently and has approximately six programs scheduled or in the works for the remainder of this year and early 2021. It has established a new project, entitled "Trial Talks," through which Fellows describe their real-life courtroom experiences. After these programs have been presented, written outlines of the presentations will be posted to a new "Boot Camp Trial Library," containing books, articles, and Power-Point presentations relating to trial practice generally. The Library also envisions development of a book that includes stories by Fellows about "lessons learned" in the practice of trial advocacy.

Other College teaching and outreach efforts have included:

- through the efforts of Fellow Sylvia Walbolt and Regent Sandra Forbes, the website postings of videos of effective trial examinations, including by women advocates, which may be especially useful for younger women lawyers who do not have mentors to assist them

- the National Moot Court Competition in New York City

- the Gale Cup, which Terry and I were honored to attend in Toronto.

Unfortunately, both the National Trial Competition and the Sopinka Cup were affected by Covid-19 disruptions.

A related effort has been the very successful *Civility Initiative* created by members of the Teaching of Trial and Appellate Advocacy Committee and by the Legal Ethics and Professionalism Committee, led by Fellows Joe Crawford and Don McKinney. They developed a seminar using videos filmed in 2019 at the Annual Meeting in Vancouver and at the Leadership Workshop in California. The initial presentation, conducted at Temple University's Beasley School of Law in Philadelphia before an audience of approximately 150 lawyers, included the Honorable C. Darnell Jones of the federal district court in Pennsylvania and Fellows Linda Hoffa, Michael Turner, John McShea, and Joe Crawford. A video featuring Fellow Beatrice O'Donnell – described as "powerful and full of humility" – was spontaneously applauded. The videos that are part of this overall Initiative are posted on the College website, and are both educational and inspirational. The Initiative is proving to be a great success and, like so many efforts in the current era, will continue in a virtual format in the coming months.

The Access to Justice Committee, under the enthusiastic and very effective leadership of Fellows Mark Suprenant, Randy Block, and Ed Harnden, has welcomed 16 Distinguished Pro Bono Fellows since its program began. Its mission is "to encourage and facilitate the provision of pro bono legal services by individual College Fellows to persons who are unable to afford counsel . . . ." As such, it is a tangible example of how one of the fundamental prongs of our Mission Statement – "access to justice, and fair and just representation of all parties to legal proceedings" – is met every day. The Committee is anticipating the presentation of a joint symposium in Canada with The Advocates' Society in 2021 either in person (when travel between Canada and the United States can be easily accommodated) or on an appropriate "virtual" platform. ▷

On the recommendation of the Emil Gumpert Committee and consideration and approval by the Board of Regents, the College selected the Tulane Law School Women's Prison Project as the 2020 recipient of the Emil Gumpert Award. The Award, which will be officially conferred at the Annual Meeting, comes with a Foundation-funded $100,000 grant, and is the highest award conferred by the College, recognizing programs whose principal purpose is to maintain and improve the administration of justice. The Women's Prison Project is a first-of-its-kind collaboration between Tulane's Domestic Violence and Criminal Justice clinics and focuses on providing legal representation to domestic violence survivors charged or imprisoned after killing an abuser or for having committed crimes under an abuser's coercion or duress.

The *Journal* (under the guidance of Editor and Past President Bob Byman) and the *eBulletin* (shepherded by Eliza Gano, the Communications Committee and the editorial eye of Fellow Patricia Lowry) have been essential vehicles for communicating the work of the College.

Near to my heart personally has been the work of the Special Problems in the Administration of Justice (U.S.) Committee in support of disabled veterans. In 2017, multiple attorneys, including Fellows John Chandler, Stephen Raber, and Elizabeth Tanis filed consolidated briefs in the U.S. Court of Appeals for the Federal Circuit addressing assertions by veterans that the failure to timely adjudicate their administrative appeals of disability claims was a denial of due process. On August 4, oral argument in the last of the cases pending was heard in the Federal Circuit on behalf of the widow of deceased Air Force veteran Wayne Mote, who served in classified special operations in Vietnam where he was exposed to Agent Orange. After developing coronary artery disease and lung cancer, Mr. Mote filed a claim based upon his Agent Orange exposure in 2010, which was denied in 2012. After his death, his widow took over the case, but made no meaningful progress on appeal until she joined the ACTL group of veterans. Mrs. Mote and other veterans represented by the ACTL team prevailed in the Federal Circuit, convincing the court to adopt a new standard (proposed by the ACTL team) that takes into consideration the interests of the affected veterans; but on remand to the Veterans Court her petition was denied again. The current appeal argues that the Veterans Court failed to apply the new standard and erred by failing to find that unreasonable delays in the appeal process violated Mrs. Mote's right to due process.

Outlining all that has been accomplished this year is a daunting task, and I risk omitting accomplishments that should be acknowledged. In addition to the achievements described above, consider:

- The Access to Justice Committee and Legal Services Committee presented, on very short notice, a comment objecting to a proposed amendment by DHS and DOJ to immigration regulations governing credible fear asylum determinations, which could permit judges to deny without hearing applications of disadvantaged persons.

- In coordination with other national organizations and the Federal Public and Community Defenders, the College has been helping to identify attorneys and other professionals to assist with preparation of compassionate release motions for prisoners most at risk for Covid-19.

- The Federal Civil Procedure Committee, under the direction of Chair Fred Buck, prepared a letter to congressional leaders encouraging enactment of legislation tolling applicable statutes of limitations in federal question cases.

- The Federal Criminal Procedure Committee, through the leadership of Chair Bill Keane and Vice-Chair Sharon McCarthy, is in the process of publishing a White Paper entitled "*Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations.*" When the paper was originally published, the practice of conducting internal corporate investigations was still emerging, an outgrowth in the mid-2000s of the option-backdating crisis that hit the technology industry especially hard. Internal corporate

investigations are now a well-recognized and busy practice specialty, conducted by counsel for public and non-public companies, big and small, covering any number of issues that impact business integrity. The 2020 version, with the benefit of 12 years of experience and hindsight, provides updates and further recommended best practices and includes new sections on cross-border investigations and joint or common interest agreements.

- The College is in the midst of an important "Fellow Engagement" process under the direction of the Executive Committee in an effort to evaluate what motivates Fellows to participate in College activities and projects. The results of this process, which is being led by an outside consulting firm, will be a topic at the Leadership Workshop this Fall, and will be an ongoing project for 2021.

- The U.S. Foundation, now led by Past President Joan Lukey following the very generous and successful leadership of Former Regent Chuck Dick, employs the new tagline "Because Justice Can't Wait," which recognizes the unique and evolving demands of this moment in which disadvantaged are bearing the heaviest burdens. Some of the work of the Foundation, which distributed grants in excess of $500,000 in fiscal year 2020, is highlighted in this edition of the *Journal*. The Canadian Foundation continues to expand its monetary corpus and hopes to be able to begin distributing grants soon.

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The bottom line is that the College is in good shape in every way. Its values are embodied and rooted in strong traditions that have allowed it to endure and even thrive in these unprecedented times. Its Fellows have shown courage, commitment, and resilience and have proven that the systems of justice they support and defend are – in real life – as much a matter of narrative and example as they are precept and principle. I have been deeply honored to serve as President of the College this year, and hope that history will record that, in the end, the year was one for which we can be proud as well as grateful.

At the College's 50th anniversary celebration in 2020, the Honorable Griffin Bell, Past College President (and former Judge of the U.S. Court of Appeals for the Fifth Circuit and the seventy-second Attorney General of the United States), observed:

> "We are privileged to be trial lawyers, but, as such we are also trustees of the justice system. We have been faithful to that trust and I am confident we will continue to be."

Those words are as true today, upon the occasion of the College's 70th anniversary, as they were then. This year has provided unique challenges. While more remain or are on the horizon, we have not succumbed to what some have called the "paltriness of aim" that would have had us concentrating on the miniscule and overlooking the monumental. Thank you for your support and your encouragement. It has been a deep honor to serve as your President this year, and Terry and I hope that the coming years will bring us together in person again.

Many of you know how much I like music, and if you were in Vancouver, you will remember that some of the Canadian songwriters and poets are among my favorites. This includes Ian Tyson (of Ian and Sylvia), whose song "Friends of Mine" captures how I feel about our fellowship as this amazing year comes to a close:

> "These friends of mine, we shared some good times together,
>
> Days of sunshine, days of rain.
>
> . . .
>
> And by all those roads my friend, we've traveled down
>
> I'm a better man for just the knowin' of you."

It is true.

– Doug ■

2020–2021 PRESIDENT: RODNEY ACKER

Rodney Acker had never met an actual, honest-to-goodness lawyer until his first day of law school. Oh, there was the job he had as a railroad switchman and met an engineer who had *graduated* from law school, but that guy had never sat for the bar exam and certainly hadn't practiced. Not only had Rodney no lawyers as role models, he wasn't – and to this day still isn't – all that sure why he decided to go to law school in the first place. Most likely what attracted him to the idea was what he mistakenly thought was the predictability and certainty of the law, and what he correctly thought was the opportunity to help people.

As things turned out, it was a good thing, that decision. At the 2020 Annual Meeting, Rodney will become the 70th President of the American College of Trial Lawyers, capping – well, no, not capping, but extending – a career of distinction.

Rodney was inducted into the College at the Spring Meeting in Boca Raton in 1997. In 1998, Rodney and Judy Acker attended the Annual Meeting in London / Rome. They had never been to Europe before. When they entered their room in Rome, they looked up at the ornate gilding of their raised ceiling, a little reminiscent of the Sistine Chapel. As they fell on the bed to gaze at the grandeur, Rodney asked Judy "What is a boy from Jacksonville and a girl from Snyder doing in a place like this?" Trick question. They had earned it.

That job as a switchman was only one of seventeen different part-time jobs Rodney had held before he settled in as a lawyer. He worked as a truck driver, a bartender, a meter reader, and, for

a brief stint, our personal favorite, as one of the guys at Six Flags who ran the Caddo War Canoe Attraction, dressed as a member of the Caddo Tribe that was native in what became Texas, giving a spiel as the paying customers themselves paddled the boat. [*The undoubtedly politically incorrect ride was discontinued in 1982.]* The experience of so many different jobs gave Rodney the skill to connect and communicate with people from many walks of life, making him so effective before juries.

Rodney was indeed a boy from Jacksonville. Born and raised in the town, about 120 miles southeast of Dallas, in 1950 Jacksonville was the largest town in Cherokee County, boasted a population of 8,550, and was self-proclaimed as the "Tomato Capital of the World."

Rodney's grandfather, Poppa Skinny, had a farm in Dialville, an unincorporated area about ten miles south of Jacksonville. Rodney spent a lot of time on the farm, as Poppa Skinny taught him about the stars and planets. To this day, Rodney loves science, especially astronomy, nature, and the outdoors. Rodney played football and ran track in the Jacksonville Tomato Bowl. Indeed, Rodney holds its record in the 660-yard dash, which he can say with some confidence will never be broken, not because of his flashing speed, but because the 660-yard dash was replaced with the 600-meter dash, so Rodney's race is no longer run. Rodney's American football career ended when the family moved to Dallas while Rodney was in high school, where he encountered a school with 2,700 students and a defensive line that averaged Mack truck. And Rodney eventually graduated high school at 6' 1," 121 pounds, so do the math – football was not a good option at his new school.

Rodney went on to the University of Texas at Arlington, where he switched majors from engineering to accounting to, eventually, business. He did play football in college – soccer, that is. And as Rodney began his senior year, a fraternity brother gave Rodney and his roommate the phone numbers of two visiting co-eds, one of whom was from Texas Tech. The frat brother explained that he had carefully assigned the Texas Tech co-ed to the roomie, and the other to Rodney, based upon age, height, and other carefully selected demographics – but his roommate accidentally called the wrong woman, leaving Rodney with the Texas Tech consolation prize.

As things turned out, it was a good thing, that accident. By mistake, Rodney went out with Judy Bruyere. Rodney and Judy were married on September 2, 1972 and have just celebrated forty-eight years together.

Rodney chose Texas Tech University School of Law after extensive research convinced him that it was the best school he could afford. And, of course, more importantly, it was home for Judy.

While Rodney had grown up in East Texas, Judy was a West Texas girl from the metropolis of Snyder, county seat of Scurry County, about 240 miles west of Dallas. Ranching and farming had been the primary economic backbone ▷

A typical Friday night sell-out at the Jacksonville Tomato Bowl, home of the Fight' N Indians

of Snyder through the first half of the twentieth century; the 1940 census reported a population of 3,815. But in 1948, oil was discovered in the Canyon Reef area north of town. Snyder became a boomtown, and the population jumped to a whopping 12,000 by the 1950 census. Judy was, to Rodney, a big-city girl.

Judy had earned her undergraduate degree at Texas Tech in Lubbock, about eighty miles north of Snyder. While Rodney attended law school, Judy returned for her master's degree in psychology.

Rodney excelled at law school. He graduated with honors, was on the Law Review and was Order of the Coif. After graduation, the Ackers moved to Arlington. Judy commuted east to her Dallas County job as a therapist for emotionally disturbed preschool children, while Rodney commuted west to clerk for Judge Eldon B. Mahon in the Fort Worth Federal District Court. Judge Mahon was appointed in 1972 after four years as U.S. Attorney for the Northern District of Texas, and would serve on the Court for twenty-five years, eventually having the courthouse named for him. Rodney's time as Judge Mahon's clerk strongly influenced his decision to become a litigator. At the end of his clerkship, on Judge Mahon's advice, Rodney joined Kendrick, Kendrick & Bradley and was originally assigned to Eldridge Goins, a lawyer Judge Mahon believed could teach Rodney to be a trial lawyer.

When you meet Rodney and Judy and ask about their children, they will tell you yes, yes, they have some. They will not offer any detail. When you pump for more, they will quietly reveal that there are three girls and a boy. That's it. They dole out answers like a deponent coached to remember nothing. If you press further and ask, "What do they do?" you might get a response like "Well, one does a little theater-type stuff, one is in design, one in advertising, one in law." "A little theater type stuff?" Amy, their oldest, has appeared in more than fifty movies and TV series, including seventy episodes of *Angel*," sixty-five episodes in *Person of Interest*, and twenty-nine episodes of *Gifted.* Amy does a little theater-type stuff like Lebron James does a little sports-type stuff.

Amy and her husband, James Carpinello, also an actor (his most recent movie was *Midway*), have a son and a daughter.

Rodney and Judy's second daughter, Shelley Acker, is a high-end interior designer. She and her husband, Eduardo Barraza, a movie cinematographer, have two daughters. Shelley and Amy are back door neighbors, with abutting properties in their Southern California town; and Rodney and Judy have recently finished their "vacation" house in a third adjoining property.

Their third daughter, Rachel, lives a few miles away with her husband Rob Kalman; Rachel and Rob are both in the advertising business.

So, you would think Rodney and Judy would spend a lot of time in California, in literal spitting distance from four grandchildren. And you would be a pandemic shy of right. They've been pretty much stuck in Dallas for the quarantine, but that, hopefully, will change soon. And

Right: Eldon B. Mahon Courthouse, Fort Worth, TX
Far Right: Joy Day, leading the Bymans, Ackers & Hickeys in song

Dallas isn't without its charms, one of which is their son Sam, his wife Whitney, and their two children, the younger of whom made his debut in July 2020. Sam is a lawyer, practicing with Fellow **Dick Sayles** in the Bradley firm; Sam was recently recognized by Super Lawyers as a "Texas Rising Star."

As things turned out, it's been a whole bunch of good things, those kids and grandkids.

Though they first saw Europe in 1998, as the years passed, their passports passed through all sorts of places – such as Africa – in the years that followed.

In November 1976, Rodney's firm merged into Jenkens & Gilchrist, where Rodney stayed until January 2007, when he moved to Fulbright & Jaworski, now Norton Rose Fulbright. Goins didn't stay with Jenkens after the merger, and Rodney's mentor became Fellow **John Gilliam**, working on and trying many cases together. John was the son of a small-town Texas lawyer; he pitched for Baylor and went on to UT Law. John was originally Rodney's boss, then his partner, always his mentor and friend. Maybe the best description of John was from a state court judge who John succeeded as President of the Patrick Higginbotham Inn of Court: "the finest gentleman lawyer in Dallas." John's contribution was not just how to try cases, but how to treat people. And how to treat young lawyers. When Rodney was just ankle deep into his legal learning curve, John and Rodney tried a case in bankruptcy court, and John assigned Rodney to cross an adverse witness. Rodney thought he had a great gotcha question for the witness, but in their preparation the night before, John counseled against asking it. Nevertheless, the cross went so well that Rodney was just sure he could ask the question and get the answer he wanted. "I looked down at John," Rodney recollects. "He immediately knew what I was thinking and shook his head no. I was a brash three-year lawyer and asked it anyway. You know the result. I got my head handed to me." Despite Rodney's hubris, they won the case. "John never said a word, never chastised me, and it never affected our relationship. He knew I had learned the one question too many lesson and that was enough for him." John and Rodney remain very close.

Rodney describes his practice as general trial work. Although his present practice is 80% securities related, he has had more trials involving banks, oil & gas or real estate than securities. Currently, he represents parties in an alleged billion dollar *qui tam case.* His most interesting case? In 1995, Rodney had a three-week jury trial involving claims amounting to two hundred million dollars. Thirty-one days before the trial date, Rodney's opponents amended their witness list, adding 231 new names. The judge refused to reopen discovery to allow depositions of the new witnesses, and a trial by ambush proceeded. Rodney and his team won, but that wasn't really what made the case memorable – what Rodney recalls most is that he had to fit that experience into a total of eleven trials that single year – three jury trials and eight arbitrations.

Over a long and fruitful career, Rodney's trial work includes the defense of issuers, underwriters, and officers in class action cases; the representation of investment bankers, brokerage firms, and brokers in trials and arbitrations; a gas plant accounting case; an oil & gas royalty matter; defending NASCAR against Sherman and Robinson-Patman Act claims; lender liability and collections claims; and the general defense of companies, officers and directors in securities litigation and customer-broker disputes.

One of Rodney's top priorities has always been helping young lawyers develop, mentoring them both on their courtroom skills and on the importance of maintaining the integrity of the legal profession. His interest in mentoring carried over to the College when Rodney joined the National Trial Competition Committee in 2002. He served on the committee for seven years before becoming its chair in 2010 and then its Regent Liaison for the following four years. His years on the NTC led to long lasting friendships for Rodney and Judy and enriched their ACTL experience. Whenever he meets new inductees, Rodney tells them that joining a College committee is the best way to get involved and make great friends.

Rodney was elected a Regent of the College in 2011. He was elected Secretary in 2017, served as Treasurer in 2018-19, and is finishing his term as President-Elect.

Rodney has had many mentors over his life. Poppa Skinny, Judge Mahon, Eldridge Goins, John Gilliam. In a letter he wrote to his son, when Sam graduated from law school, Rodney said, "Practicing law is hard and demanding and it can be a wonderful and fulfilling career. You will meet incredible people along the way: some lawyers you work for and with, some on the opposing side, some clients, some witnesses. Hard fought, fair competition with respect for your opponent can create some of the strongest bonds." Pandemic aside, mentoring was going to be Rodney's focus in his year as our President. But like any great trial lawyer or combat soldier, plans change when the shooting starts. As the virus began to ravage, Rodney shifted his focus to addressing the challenges trial lawyers will face in the new normal. And then George Floyd was murdered on viral video. Rodney now believes that he must focus – we must all focus – on making our world, and specifically our system of justice, one which weeds out and eradicates racial injustice.

As it turned out, Rodney turned out pretty well.

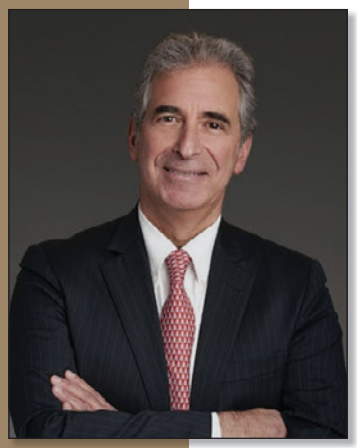
There are rare individuals who can do the job of College President without a partner, but in general, being President is a team sport. Judy is the perfect partner for this work, and they will be great team. Everyone likes Rodney, but everyone loves Judy.

You will too. We all look forward to Rodney and Judy's year as our leaders.

Robert L. Byman
Chicago, Illinois

AWARDS & HONORS

Catharine Biggs Arrowood of Raleigh, North Carolina was honored by the North Carolina Bar Association Litigation Section with The Advocate's Award, which recognizes members who are the "superstars" of the Bar. Arrowood was the second woman and first to receive the award virtually via Zoom presentation, on June 19, 2020. Inducted into the College in 2004, she has served as the North Carolina State Committee Chair.



James I. Glasser of New Haven, Connecticut, has been selected to receive the 2020 American Inns of Court Professionalism Award for the Second Circuit. Glasser serves as the Connecticut State Committee Vice Chair and has been a Fellow since 2011.

C. Mark Holt of Raleigh, North Carolina was installed as president of the North Carolina Bar Association at its first virtual annual meeting on June 26, 2020 and will also serve as President of the North Carolina Bar Foundation. Holt is Immediate Past Chair of the North Carolina State Committee. He was inducted into the College in 2009.

"*JUST SO DAMNED GOOD* — NO QUESTION ABOUT IT": THE FIRST THREE WOMEN FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS

The first Fellows of the American College of Trial Lawyers gathered in the spring of 1950, at the home of famed Los Angeles chief deputy DA turned Hollywood lawyer **Grant Cooper**. The founders, led by **Emil Gumpert**, wanted to create an organization that would include only the very best trial lawyers in the country who "shared a concern for the dignity and honor of the profession that occupied their lives."[1] The very best, that is, as long as you were male.

While Phyllis Cooper, Grant Cooper's wife and law partner, received one of the original eleven certificates of Fellowship, her honor was bestowed as a gesture. The founders considered admitting women to be "out of the question."[2] Indeed, in the early days of the College, women could not participate at all in College meetings, even as spouses of Fellows. Twenty years after its founding, College leaders debated the wisdom of even allowing wives to attend College induction banquets. Some of the founders thought that the presence of wives would be a distraction while others countered that the wives' presence would complement a "spirit of brotherhood."[3] Finally, in 1971, the College allowed women to attend the College's black-tie banquet for the first time at the annual meeting in London. The accommodation was, however, considered a "one-time exception."[4] That mindset would soon change.

In the early sixties, years before the College even considered whether to let wives attend the Fellows' induction dinner, three women whose aptitude and intellect would merit consideration by law firms who had only ever hired – or even interviewed – male candidates were navigating law schools with nearly all-male classes that did not allow women to stay in the dormitories. **Amalya Kearse** was the only black woman in her law school class of 1962 at the University of Michigan Law School. **Sylvia Walbolt** was the only woman in her law school class of 1963 at the University of Florida Levin College of Law, and **Joan Hall** was one of seven women who graduated in the class of 1965 from Yale Law School. All three persisted and became giants in the profession. They also became the first three women Fellows of the American College of Trial Lawyers.

AMALYA LYLE KEARSE

While the College was wrestling with whether to allow wives to attend induction banquets, Amalya Kearse was breaking barriers on Wall Street. Recognized today as one of the most influential judges in the country, she built her reputation on complex commercial and antitrust litigation. That reputation was a distinguished one, leading Orville Schell, a senior partner at Hughes Hubbard &



Reed, to comment in a 1979 New York Times piece: "'Her partners . . . have nothing but praise for her talents . . .. She became a partner here not because she is a woman, not because she is a black, but because she is *just so damned good*— no question about it.'"[5]

Few firms that interviewed Kearse during her third year in law school employed women lawyers. Many would not hire a woman to be a litigator, which Judge Kearse aspired to be. She ended up joining Hughes Hubbard & Reed because the firm had women associates and because she was told "one of them, if she had stayed, would have become a partner."[6] Kearse did just that: she stayed and became a partner – the first female African American partner in a Wall Street law firm – in 1969. In a profile in the New York Times in 1970, Judge Kearse remembered wanting to become a lawyer "as far back as elementary school."[7] As a sign of the times, the profile was published in the fashion section of the paper.[8]

Kearse's first trial was an automobile accident case. She represented a plaintiff suing for $419.70 and readily admits that her fervent preparation far exceeded the case's dollar value. Judge Kearse described the culture at Hughes Hubbard & Reed as one designed to give frequent opportunities for trial experience to young associates. As her workload increased, her clients included corporations with complex matters that would demand a senior partner at the helm, but there were smaller, less complicated cases that got her into the courtroom on a regular basis and allowed her to develop her trial skills while still an associate.

Much of Kearse's trial and appellate experience involved cases with slightly higher stakes. She worked on trials for high-profile clients such as Ford Motor Company, and, according to Fellow **George Davidson**, a former colleague at Hughes Hubbard & Reed, "never looked flustered or not in control." Kearse's private career culminated in a successful argument before the Supreme Court in *Broadcast Music Inc. v. Columbia Broadcasting System*.[9] In that seminal decision, the Court held that blanket music licensure did not constitute per se price fixing and remanded the case to the Second Circuit to use a reasonableness standard when considering blanket licenses rather than presume any fixed price is a violation of the Sherman Act.[10]

The end of the College's ban on wives at meetings coincided with its initial consideration of Kearse as a candidate for Fellowship. In 1974, Past President **Leon Silverman** proposed her to the New ▷

York State Committee Chair for consideration. At the time Kearse had been practicing law for only eleven years and was thus ineligible for membership. That same year, College President **Robert Clare** informed the Fellowship of a "Change in Annual Meeting – August – Hawaii": wives would now be invited to attend the College's annual dinner. [11]

Five years later, in August 1979, after "handling a variety of antitrust, banking, commercial and product liability cases" and successfully arguing in the Supreme Court, [12] Kearse was inducted as the first woman Fellow among 3,300 Fellows.[13]

Two months after her induction, President Jimmy Carter appointed Kearse to the Second Circuit. At the time, few minorities and even fewer women had been nominated to the federal bench and nominations had historically depended on a Senator's endorsement. Her appointment was the product of President Carter's goal to diversify the judiciary with candidates chosen on the basis of merit. By executive order, he established the non-partisan U.S. Circuit Judge Nominating Commission which was divided into separate nominating panels for each court of appeals.[14] Future College President Griffin Bell, who served as Carter's Attorney General at the time, helped to further Carter's goal of identifying qualified women and minority judicial candidates. President Carter nominated more women to circuit courts than all prior presidents combined.[15]

Judge Kearse would go on to pen numerous influential opinions. In 1980, she wrote the majority opinion in *United States v. Taborda*,[16] holding that warrantless police use of a high-powered telescope to observe activity inside of an apartment was an unreasonable search under the Fourth Amendment. She wrote a precursor to the *Batson* decision, *McCray v. Abrams*, which held that "the Sixth Amendment's guarantee of trial by an impartial jury . . . forbids the exercise of [peremptory] challenges to excuse jurors solely on the basis of their racial affiliation."[17] She dissented from the Second Circuit's opinion in *State of N.Y. v. Sullivan*,[18] writing that President Bush's gag order on federally funded clinics that prohibited them from distributing abortion information violated a woman's constitutionally protected right to choose. Most recently, Judge Kearse dissented from the majority in *United States v. Blaszczak*,[19] an opinion that expanded the scope of federal criminal liability for insider trading. She opined that pre-decisional regulatory information in the hands of the government does not constitute "property" or a "thing of value" for purposes of federal fraud statutes. Her dissenting opinion will no doubt influence courts for years to come.[20]

SYLVIA H. WALBOLT

Nominated by Fellow **Chesterfield Smith** in 1981, Sylvia Walbolt became the second woman Fellow of the College. Smith, a past President of the ABA, represented the Florida phosphate industry which was the single largest user of electric power in the state. Walbolt, who represented Florida Power, was always butting heads with him. Nevertheless, Smith nominated her, a woman in a competitor firm, without even talking to any of Walbolt's law partners who were Fellows. She had been the first female and the twelfth lawyer to join the firm now known as Carlton Fields. The firm had historically interviewed the number one man in the class at the University of Florida Law School. In 1963, Walbolt was the number one. The weekend of her interview, she was asked if she would round out a Saturday morning foursome tennis match with the senior partners. Having played competitive tennis for most of her life, she readily agreed. When one of the partners "hit a dinky little lob over to the woman" Walbolt said she "just smoked it right back [and] that was the end of any dinky little lobs."[21] Her team defeated their opponents 6-love, 6-love. The firm extended her a position thinking that if she could play tennis with the men, she could practice law with them.[22] As a young lawyer, Walbolt cannot recall feeling that she was being discriminated against by her male colleagues and says that the clients for whom she worked "wanted good legal advice and didn't particularly care what gender was giving them the good legal advice."[23]

The biggest problem she encountered in her early days of practice was the fact that the din-

ing clubs did not allow women, even as guests.[24] When client meetings spanned the lunch hour, the men would leave and go to lunch at the club while Walbolt "went to her office and had a sandwich."[25] This overt sexism did not change her belief that her gender had no impact on her case assignments, her ability to develop business or participate in firm management, or to receive equal compensation or promotions.[26] Indeed, she went on to chair the firm for eight years.

The program for Walbolt's College induction included a "wives' luncheon." Her husband, Dan Walbolt, recognizing his role as spouse, said, "I'm gonna go!" Walbolt laughed it off, but Dan did in fact go to the wives' luncheon. Martha Bell, Griffin Bell's wife, grabbed him as he walked in and introduced him to the 300 or so women present. The room erupted with an ovation to welcome him.

Walbolt says that the most wonderful experience of her entire legal career was participating in the College's Anglo-American Exchange (now the U.S.-UK Exchange) in 1999 and 2000. Historically, only College Past Presidents (all of whom were men) had participated in the Exchange. When she first got the call to join the Exchange, it was from then-President **Ozzie Ayscue**, who told her "there's no way I'm going over there with 5 white men . . . I want some diversity and would you be willing to do this?"[27] She was paired with Justice Clarence Thomas – whom she described as "a very charming person with a huge laugh" – to give a presentation on devolution at the 1999 session. The next year, she gave a presentation on technology in the courtroom with Judge Sam Pointer and Past President **Andrew Coats**.[28]

Walbolt's passion for pro bono advocacy was ingrained in her and other young lawyers by her mentor, Fellow **Reece Smith**, who believed pro bono legal service to be an integral part of the practice of law. Walbolt has carried that torch. Believing that the power of the most influential trial lawyers in the country should be advocating for wider access to justice, she pushed for the formation of the College's Access to Justice Committee. She was the first chairperson of that Committee and remains an active member to this day. Walbolt described a death row inmate whom she has represented since 2009 as one of her most rewarding pro bono clients. While this case often produces frustrating results in the courtroom, her client graciously appreciates Walbolt's efforts as she persists in trying to bring about what she believes to be justice.

Walbolt acknowledges that the proliferation of mediation as a means to resolve cases has changed the practice of trial advocacy. Lawyers are not in the courtroom nearly as much as they once were. To make up for that, she pushes young trial and appellate lawyers to take on pro bono work to get into the courtroom and hone their skills. In addition to all the good that it can do for clients and society, pro bono work provides young lawyers valuable trial experience, gets them in front of judges, and inevitably furthers their careers.

JOAN HALL

Joan Hall was inducted into the College in 1982. Upon induction, she received a plaque that read "as a Fellow of the College, these Letters being their testimonial that *he* possesses the necessary experience, skill and integrity to qualify for this Fellowship." She photocopied it, circled the offending pronoun in red with the note "how long, oh Lord, how long," and sent it to then-President **Alston Jennings**, with whom she was friends from the ABA Litigation Section.[29] Jennings sent her a new plaque using the correct pronoun. Both plaques now hang on her office wall.[30]

Hall started working in her small town in Nebraska when she was 12 years old. She played the organ at weddings and funerals, taught piano, wrote for a daily newspaper, and worked as a secretary and a salesclerk in a dry goods store.[31] She graduated from high school at the top of her class – of sixteen students. In 1962, after working for a few years as a college graduate, Hall and her husband at the time attended Yale Law School together. In law school, she was "so engrossed . . . in doing the work and just putting one foot ahead of the other, you know, that I didn't pay much attention to what anybody thought about my being there."[32]

Hall was hired at Jenner & Block after law school. Her experience there was heavily influenced by partner Sam Block, whom Hall described as a "lovely, warm, wonderful man. And he loved teaching young lawyers."[33] She "was the Firm's first pregnant lawyer. And Sam was a little perplexed about that, and he went home and talked to his wife Jean about it. And she said it was fine."[34] Block's book of business included Chicago conglomerate Northwest Industries, which Hall worked for as a young litigator. She also tried two murder cases with the late Cook County Circuit Judge John Crown, who also "loved training young lawyers, and really didn't care about anything except trying pro bono cases."[35] Those cases provided Hall with early exposure to trial advocacy as well as a "stunning revelation that people didn't always tell the truth when they took the stand."[36]

While Hall said that she "never really paid attention" to gender disparity in the courtroom, even when she was preparing to argue before the United States Supreme Court, some things were hard to ignore. When she was a young lawyer, she was not allowed to eat in one of the dining rooms of the Chicago Club even though she became one of its first female members in 1984.[37] One day, she decided things were going to be different. She notified the manager that she "was going to integrate the room" and proceeded to dine there with a female client.[38] Hall recounts that there were "no reactions… when we ate in the Grill Room."[39] From then on, women dining in the Grill Room was not an issue.

Hall stated that she "never" felt that a judge treated her inappropriately, "never walked into any situation expecting to be treated differently, and . . . never was aware of any client complaining" that a woman was doing their legal work. She felt that "if [she] did a really good job that everything would work out."[40] But she nonetheless recognized a responsibility to help other women attorneys and reached back down the corporate ladder after achieving her own success. In the mid-1970s, Hall became the chair of the hiring committee at Jenner & Block and started hiring 50% women.[41] She organized women's lunches, which became known as the Women's Forum, where she frequently discussed business development strategy for young women lawyers. She felt it was her responsibility to see that women succeeded at Jenner & Block and believed that a large part of helping them to succeed was teaching them to generate their own business.[42]

Hall was also active in the American Bar Association. In 1982, the same year she was inducted into the College, Hall became the first woman to chair the ABA's Litigation Section. She valued her work in that position because she knew that "other sections of the American Bar Association … operated on sort of an old boy network kind of a thing. In contrast, the Litigation Section moving forward was based almost entirely on your willingness to work and turn out work product . . . ."[43]

According to Hall, some of her most satisfying work has been done on behalf of the Young Women's Leadership Charter School, an all-girls public charter school for grades seven through twelve.[44] Recognizing that young minority women, especially those economically disadvantaged, do better in single-sex classrooms, Hall has tirelessly fund raised to support the school and has mentored many students over the years. The school's graduation rate is 95%. Oprah Winfrey took note of Hall's accomplishments at the school and invited her to participate in developing a similar school in Johannesburg, South Africa.

While each of the first three women Fellows was destined to succeed in the law, there were also advocates for diversity working on each of their behalf. President Carter's reformation of the judiciary through his merit-based appointment committees under the U.S. Circuit Judge Nominating Commission led to drastic change in the composition of the federal bench and Amalya Kearse's judgeship. Other advocates include Past President Leon Silverman, who first nominated Amalya Kearse in 1974, Fellow Chesterfield Smith for his nomination of Sylvia Walbolt and work to support women lawyers in the profession, Sam Block for Joan Hall, and the countless unnamed judges, colleagues and clients who

treated these women with the same respect they treated men, and supported them in various and important ways. These first three women Fellows' careers are a testament to the importance of advocates for diversity in our profession.

Mentoring young lawyers is of the utmost importance if we are to maintain a profession that adheres to the highest standards of ethics, professionalism, and inclusion. As we look forward as the American College of Trial Lawyers, we must ask ourselves how to better support each other and how best to help the next generation of attorneys. When the right opportunities are afforded young lawyers with potential, regardless of race, gender, or class, it allows them to prove that they are "*just so damned good*— no question about it."

Katie Recker
Philadelphia, Pennsylvania

EDITOR'S NOTE: Katie's article notes that Phyllis Cooper was technically our first woman Fellow, but the bestowal of her certificate in 1950 was a "gesture." Indeed, Phyllis' status as a Fellow ***had*** to be honorary, largely because she did not meet the admission qualifications – she had graduated from law school in 1938, so she did not meet the fifteen-year requirement. But, boy, was she otherwise qualified. As an undergrad at USC, Phyllis was on their National Championship debate team and was elected Vice President of the student body; she graduated *magna cum laude,* and Phi Beta Kappa. She and Grant practiced law together, and she was a real, honest to goodness trial lawyer.

When Katie first submitted this article, she commented to me that none, not one, of these remarkable people who were our first three "real" women Fellows felt that they had encountered sexism in their careers. Maybe so, but, come on. If you lived and worked during the past seventy years, even part of those years, you know that sexism was everywhere. It may be a bit better now, but it still exists. Either these women were lucky enough to be the only three people on Earth who did not encounter it, or they were the three strongest people on Earth, who refused to acknowledge it. And we are stronger because of them.

The Google dictionary defines "Fellow" as "1. a man or boy; 2. a person in the same position, involved in the same activity, or otherwise associated with another." The latter definition has the nicer ring.

Endnotes

1 Marion A. Ellis and Howard E. Covington, Jr., *Sages of their Craft: The First Fifty Years of the American College of Trial Lawyers*, at 10 (2000 American College of Trial Lawyers).
2 *Id.* at 19.
3 *Id.* at 113.
4 *Id.* at 106.
5 Tom Goldstein, *City Lawyer and Connecticut Judge Joining Circuit Court*, The New York Times, June 25, 1979 (emphasis added).
6 Trailblazer Event at Fordham University School of Law by Just The Beginning – A Pipeline Organization, *Interview of Hon. Amalya Kearse by Hon. Denny Chin and Hon. Raymond Lohier* (Sept. 16, 2016).
7 Virginia Lee Warren, *Three Women Lawyers in Major League of the Legal Profession*, The New York Times, June 22, 1970.
8 See *id.*
9 441 U.S. 1 (1979).
10 *Id.*
11 *Sages of Their Craft*, at 112 n.29.
12 U.S. Court of Appeals for the Second Circuit, *The Judges of the Second Circuit,* Cornell University Press (April 15, 2014).
13 *Sages of Their Craft*, at 114.
14 Mark Joseph Stern, *Carter's Quiet Revolution*, Slate, July 14, 2019 (available at https://slate.com/news-and-politics/2019/07/jimmy-carter-diversity-judges-donald-trump-court-nominees.html).
15 Michelle Goodwin and Mariah Lindsey, *American Courts and the Sex Blind Spot: Legitimacy and Representation*, 87 Fordham L. Rev. 2337, 2354 (2019) (citing *The Higher Education of the Nation's Black Women Judges*, 16 J. Blacks Higher Educ., Summer 1997, at 108).
16 635 F.2d 131 (2d Cir. 1980).
17 750 F.2d 1113, 1131 (2d Cir. 1984).
18 889 F.2d 401 (2d Cir. 1989).
19 No. 18-2811, 2019 WL 7289753 (2d Cir. Dec. 30, 2019).
20 Judge Kearse is, among her many accomplishments, a top-rated bridge player. She is a World Life Master, a seven-time national champion, and she has written several books about the game.
21 Transcript of Trail Blazers Interview of Sylvia Walbolt at 33 (*available at* https://stacks.stanford.edu/file/druid:kt328qk9282/kt328qk9282_WalboltS_Transcript.pdf).
22 *Id.*
23 *Id.*
24 *Id.* at 38.
25 *Id.* at 38-39.
26 *Id.* at 53.
27 *Id.* at 47.
28 *Id.* at 45.
29 Joan M. Hall, *Reflections on Women Lawyers: Personal experiences and history,* The Catalyst Vol. 11, No. 1, Sept. 2005 (*available at* https://www.isba.org/sites/default/files/sections/newsletter/%20September%202005_10.pdf).
30 Transcript of Mar. 6, 2013 J. Hall Trail Blazers Interview, at 6 (*available at* https://stacks.stanford.edu/file/druid:rv894kf4669/rv894kf4669_HallJ_Transcript.pdf).
31 Transcript of Feb. 27, 2013 J. Hall Trail Blazers Interview, at 6 (*available at* https://stacks.stanford.edu/file/druid:rv894kf4669/rv894kf4669_HallJ_Transcript.pdf).
32 *Id.* at 19.
33 *Id.* at 27.
34 *Id.* at 31.
35 *Id.* at 32.
36 *Id.*
37 Mar. 6 Hall Trailblazers Tr., at 1-3.
38 *Id.* at 2.
39 *Id.* at 3.
40 *Id.* at 50.
41 *Id.* at 40.
42 *Id.* at 46-47.
43 Mar. 6 Hall Trailblazers Tr. at 5.
44 *Id.* at 14. ■


COVID-19

WE WERE WARNED

At our 2016 Annual Meeting in Philadelphia, Dr. Anthony Fauci - the Director of the National Institute of Allergy and Infectious Disease (NIAID) of the National Institutes of Health (NIH) – spoke to us about the then-current pandemic Zika virus. Dr. Fauci has been at NIH for over fifty years and has led NIAID since 1984. Dr. Fauci has been described by many as one of the most trusted medical figures in the United States and a leading expert on infectious disease.

But frightening as Zika was at that time, Dr. Fauci warned us about the future. He warned that while Zika had unique and devastating effects – i.e., newborns with microcephaly (small and distorted heads) born to infected mothers – Zika was simply "Yet Another Arbovirus Threat." He warned that Congress and public officials need to do a much better job of recognizing that Arboviruses and other infectious diseases have always been with us and are here to stay. The public should expect outbreaks and the associated urgent need to promptly fund medical research to find vaccines and cures for outbreaks of "emerging and reemerging" infectious diseases. Otherwise, Fauci warned, communities and entire nations will continue to be overwhelmed with the sudden personal tragedies and expenses that come with these emerging and reemerging infections. "We need to be aware that these [viruses] have always happened," and inevitably will happen again and preparations must be made to deal with them.

UNDERSTANDING THE TERMS

Okay, let's take a moment to get the terms right. Arbovirus refers to a group of viral infections transmitted to humans by insects called arthropods, such as mosquitoes and ticks. Zika is an arbovirus borne by a particular mosquito – Aedes aegypti – that thrives in wet and warm regions of the globe (say, Florida). Infected persons themselves generally do not exhibit serious symptoms. But an asymptomatic infected male can pass the virus through his sperm; and an asymptomatic infected pregnant mother can unwittingly transmit the disease to her fetus. It is the baby who is born with serious defects who pays the price. Other arbovirus diseases include yellow fever, West Nile virus, and dengue.

COVID-19 originates from a large family of zoonotic viruses that are transmitted from mammals, such as bats, to humans. Other zoonotic viruses include Severe Acute Respiratory Syndrome (SARS) and Middle-East Respiratory Syndrome (MERS). COVID-19 is a "novel" coronavirus because it is new. As we all have now come to know, COVID-19 is a highly complex and transmissible respiratory (and perhaps cardiovascular) disease that spreads rapidly without regard to boundaries, latitude, region, or climate. Aerosols and droplets from infected persons linger in the air or on surfaces in the immediate environment, even on objects used by or on an infected person (e.g. a stethoscope or thermometer). Both the old and the young can be asymptomatic or have relatively mild symptoms (fever or chills); both young and old can become severely ill, damaged, or die. The virus even bears an eerie likeness to a submerged mine – a hidden threat that can literally blow us out of the water. But our knowledge of COVID-19 is hardly complete. Infectious disease investigators are still in the process of learning about COVID-19, following the scientific evidence as it develops and applying their collective knowledge to respond to this new pandemic.

The scientific community uses the word "epidemic" when there is an increase, often sudden, in the number of cases of a disease above what is normally expected in the population in that area. "Outbreak" carries the same definition, but is often used for a more limited geographic area. The difference between an epidemic and a pandemic is that a pandemic has a passport, it is an epidemic that travels. An epidemic is local; a pandemic is multi-country. The difference between epidemic and endemic? Endemics are a constant presence in a particular location: Malaria is endemic to Africa; ice is endemic to Antarctica. An epidemic is actively spreading; new cases of the disease substantially exceed what is expected to the point of being out of control, such as "the opioid epidemic." An epidemic is often localized to an endemic region, but the number of those infected in that region is significantly higher than normal.

When COVID-19 was limited to Wuhan, China, it was an epidemic. Its geographical spread quickly turned it into a pandemic.

And Dr. Fauci warned us to expect future pandemics. But it wasn't simply Dr. Fauci who warned us. In her review of Dr. Fauci's presentation that appeared in the Spring 2017 Issue of the *Journal*, Fellow **Carol Elder** Bruce wrote:

> In a farewell interview with PBS's Charlie Rose right before the January 20 [2017] presidential inauguration, outgoing National Security Advisor Susan Rice listed "a pandemic flu" as a "major concern," and one of her "biggest nightmares" that keeps her up at night. Notably, Rice felt that this threat is second only to a catastrophic attack on the homeland or on American personnel abroad with WMDs, weapons of mass destruction. Consistent with Fauci's message to Fellows, Ambassador Rice said, "The threat of an [infectious disease outbreak is] is not new, but it is persistent and the risk remains." When Rose asked how serious she sees this threat, Rice said, "I think it's a real risk. It's a fact. It will happen . . . because now our world is that much more interconnected through trade, through commerce, through air connectivity. One of the things that this administration has done . . . was to work with countries around the world to put in place . . . much improved global health infrastructure so they can detect and surveil disease, they can contain it before it spreads. We have called this the global health security agenda and we got fifty countries or so that are actively part of this. And that's the kind of long-term effort that we're going to need to build and sustain around the world to diminish the risk of pandemic, but we're not going to eliminate it. . . . That means that the United States has to lead. We have to rally other countries to work with us."

If only. Lead? Italy has pretty much solved its problem; but Americans are banned from travelling there because we have not yet solved ours.

Appointed as Director of the NIAID in 1984, the U.S. public first met Dr. Fauci on TV in the 1980s when he was the "fierce opponent" of the "mysterious and terrifying plague" of HIV/AIDS, and for which he received the Presidential Medal of Freedom some twenty-five years later in 2008, when President George W. Bush bestowed it to him for his "determined and aggressive efforts to help others live longer and healthier lives." Over the years, Dr. Fauci has battled many other infectious diseases and outbreaks – like the various annual strains of influenza, which wreak havoc on the economy but usually do not have dangerous symptoms for anyone other than the elderly and infants. He also has tackled infectious disease outbreaks that have had devastating, disabling, or even deadly consequences, such as Dengue Fever, E. coli, West Nile disease, cholera, Japanese encephalitis, tuberculosis, malaria, hepatitis, Lyme disease, and Ebola.

Though the 2016 Zika outbreak was thought to have originated in South America, the disease could be transmitted by local mosquitoes who bite persons infected on their travels in the Americas and then bite other persons who may never have travelled outside the U.S., exponentially increasing the number of afflicted persons. Zika is not potentially fatal to the infected person – perhaps it is much worse. When a pregnant woman becomes infected, the virus leads to "serious congenital abnormalities" in the newborn, including microcephaly, where the brain is impeded in its development in utero or is destroyed and the skull doesn't form correctly, leaving the head very small and distorted.

FUNDING, PREPARATION & SOCIETY'S RESPONSE

The issue, Dr. Fauci implored us, is "how we as a society respond to a threat" that is not only to the Americas but also to the globe, because this is not the first, nor will it be the last infectious disease threat of its kind. The Zika outbreak in 2016 was simply a recent and frightening new manifestation of a disease that was discovered in 1947 in the Zika Forest of Uganda.

When Dr. Fauci spoke with us in 2016, there was no vaccine for Zika. Three years later – just seven months ago – researchers from the University of Adelaide in South Australia announced the good news that they had developed a vaccine in pre-clinical models of the disease. They are advancing the vaccine to being ready for Phase 1 human clinical trials. But, even with a vaccine, Zika has not been eradicated; it will probably occur in the U.S. again. According to the Pan American Health Organization (PAHO), there were 3,323 cases in Brazil in 2019; 829 in Peru, and 27 in Bolivia. Other services report that there were twenty cases in Florida in 2019; Texas had reported cases, and the state maintains websites with warnings. Polio, measles, tuberculosis, diphtheria, and pertussis (whooping cough) are all diseases for which there are effective vaccines; yet there continue to be outbreaks of all of these maladies. Borba, et. al., "*The Re-Emergence and Persistence of Vaccine Preventable Diseases,*" An. Acad. Bras. Ciênc. (Aug. 25, 2015). We can predict that Zika will be back. And Zika is just one form of infectious, potentially pandemic, disease.

But funding and preparation to combat these predictable future problems is insufficient. Dr. Fauci told us in 2016 that medical professionals and laboratory researchers will continue to be "demoralized" when they have to repeatedly stop work as their coffers are emptied and they have to scramble to find funds to support their efforts to find vaccines, run clinical trials and development treatment protocols. Dr. Fauci pointed to the $1.9 billion February 2016 special emergency appropriation that President Obama sought from Congress to find a cure for Zika – that Congress never passed. Why not? Dr. Fauci noted that the bill failed in part due to political jockeying over the insertion of a rider in the bill to

defund Planned Parenthood (which, of course, bears a rather tenuous relationship to Zika, except that those who actually use Planned Parenthood aren't likely to suffer the effects of Zika). To fight Zika without that appropriation, the NIAID was forced to divert funds that had been earmarked for research to address other terrible diseases, such as malaria, tuberculosis, and influenza. Then, when that money ran out, NIAID had to ask the Secretary of Health and Human Services (HHS) to allow diversion of money designated for the eradication of Ebola ("not a really good idea," Fauci observed, "because Ebola has not completely gone away"). Then, when that too was too little, NIAID was forced to return to the Secretary of HHS to persuade her to use "her 'one percent transfer authority' to move money from cancer, heart disease, diabetes, and mental health, so we could develop the [Zika] vaccine."

Funding something as important as disease control by whack-a-mole is not particularly sensible. Dr. Fauci proposed that in order to better anticipate and manage infectious disease outbreaks and pandemics, the U.S. should replicate how we, as a nation, deal with the inevitable occurrences of powerful hurricanes and other natural disasters. We don't create a new agency or debate new appropriation bills every time a hurricane ravishes us; we can predict hurricanes, so we have established and funded FEMA, so the infrastructure to deal with the aftermath of a natural disaster is already in place before disaster strikes.

Dr. Fauci urged that a FEMA-type entity should be constructed and funded to anticipate and manage the emergency response needs and associated costs with emerging or re-emerging infectious outbreaks.

Dr. Fauci told us that the only way to control the 2016 Zika outbreak until a vaccine could be developed is mosquito abatement, by cleaning up standing water and the use of insecticides. But Dr. Fauci noted that the "population intuitively reacts against spraying anything," and that government officials are "having a tough time trying to convince people that we really do need to do some spraying."

Sound eerily familiar? The scientists told us then what was the best course to prevent disease; but the public was a tough sell. Now, the scientists tell us that wearing masks is critical; but the public – and even our leaders – are a tough sell.

THE FACTS

When he spoke to us in 2016, Dr. Fauci estimated there were about 700 pregnant women already infected with Zika in the U.S. Out of that group, only eighteen babies had been born with birth defects, although Fauci said we will see "many, many more babies born with birth defects in the months to come." One birth defect was too many, but those numbers pale against today's COVID numbers [At the date of this writing (July 14) 3,364,000 cases, 135,615 deaths]. Yet even in the context of Zika, in retrospect a problem far less pervasive than COVID, Dr. Fauci sounded a clear alarm: Without an emergency public health fund akin to the emergency FEMA fund, "every time we're faced with this challenge, we're going to be . . . robbing Peter to pay Paul. When it comes to the public health of our nation, that is a very bad idea."

We were warned. And the scramble we are witnessing now as we try to deal with COVID-19 is only made worse by our collective failure to heed the warning.

The College does not take political stands. We avoid politics because we so value our collegiality that we expressly choose to attempt to avoid disputes over issues on which individual Fellows may have fundamental disagreement.

But the College does not ignore facts.

It is a fact that on March 6, 2020 President Trump described COVID as "an unforeseen problem" that "came out of nowhere;" on March 11, he said, "We're having to fix a problem that, four weeks ago, nobody ever thought would be a problem;" on March 14, he said "It's something that nobody expected." https://www.cnn.com/2020/03/15/politics/fact-check-trump-coronavirus-nobody-predicted/index.html. And Senate Majority Leader Mitch McConnell agrees with the President, stating "clearly, the Obama administration did not leave any kind of game plan for something like this." https://www.pbs.org/newshour/nation/obama-team-left-pandemic-playbook-for-trump-administration-officials-confirm.

But the fact is that the Obama Administration *did* leave a playbook – and a warning. The National Security Council created a sixty-nine-page document titled "Playbook for Early Response to High-Consequence Emerging Infectious Disease Threats and Biological Incidents" in 2016 with the goal of assisting leaders "in coordinating a complex U.S. Government response to a high-consequence emerging disease threat anywhere in the world." In addition to the NSC pandemic playbook, similar documents were created by the Department of Health and Human Services and the Centers for Disease Control and Prevention.

Frankly, it doesn't much matter today whether the Trump Administration was warned or not. Those 135,000 COVID victims are dead either way. What matters is how many more have to die – from this disease and from the next one and the one after that.

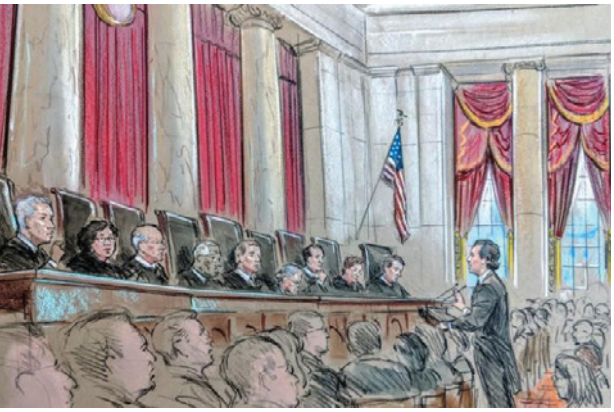
We have been warned.

Carol Elder Bruce
Washington, D.C.

Robert L. Byman
Chicago, Illinois

EDITOR'S NOTE: In the six weeks since this article was written, the U.S. death toll, on August 22, has climbed to over 175,000. ■

SUPREME COURT ORAL ARGUMENT IN THE PANDEMIC – ONE ADVOCATE'S EXPERIENCE



THE PANDEMIC AND THE COURT

On March 16, 2020, we got the announcement confirming that the Supreme Court, like the rest of the country, was not immune from the effects of the coronavirus. The Court announced that "in keeping with public health precautions recommended in response to COVID-19," the Court would be postponing the arguments scheduled for the March sitting – postponement of the April sitting followed shortly thereafter. The March announcement was in style and substance typical of the Court: The Court invoked both history and tradition to justify its decision, taking pains to note that the "postponement of argument sessions in light of public health concerns is not unprecedented." In particular, the Court noted that it had "postponed scheduled arguments for October 1918 in response to the Spanish flu epidemic" and had also "shortened its argument calendars in August 1793 and August 1798 in response to yellow fever outbreaks." Both originalists and living constitutionalists could comfortably embrace the postponement.

The question then became, "What next?" For the Court, this was a tricky decision. Six of the nine Justices are over sixty-five years old, and all of the Justices are in age groups that are particularly vulnerable to the virus. As long as the virus raged around us, an in-person oral argument based on plexiglass and social distancing was just not in the cards. At the same time, postponing argument for the twenty remaining cases until the fall had to be a deeply unattractive option for the Court. In recent years, as government in Washington, D.C. has become increasingly dysfunctional, the Court has prided itself on being the Branch that worked, maintaining collegiality and productivity even as partisan divisions and government shutdowns have at times left the other Branches paralyzed.

For me, the Court's conundrum was anything but academic. I had an argument that was scheduled for the April 2020 sitting, and we were particularly eager for a hearing. Last Term, I had argued *Sharp v. Murphy*, which presented the question whether the Creek Indian reservation in Oklahoma had been disestablished in the years leading up to Oklahoma's statehood in 1907. Justice Gorsuch was recused from the case, and on the last day of the Term the Court left the case undecided and ordered that it be set for re-argument in the 2019-2020 Term. Then, instead of hearing re-argument in *Murphy*, the Court granted certiorari in *McGirt v. Oklahoma*, a case that presented no recusal issues for any of the Justices. I now represent Mr. McGirt (an inmate in Oklahoma). We all wanted to get the issue resolved, and with a reply brief due April 7 and an oral argument set for April 21, we were raring to go. Then came the coronavirus.

The Court kept up its reputation as the Branch that works. It scheduled a full "May sitting" and set ten cases for oral argument (an additional ten cases were postponed until the fall). The Court proposed to conduct those arguments by telephone, and it permitted those arguments to be broadcast in real time over the Internet and on outlets such as C-Span.

For the Court, livestreaming of oral arguments was a big step. The status quo was a much more limited form of public access. Members of the public who wanted to see or hear an argument live had to wait in line and hope for one of the few limited oral argument tickets. Things were a little bit better – but only a little bit – for members of the bar, who likewise had to wait in line but could at least take advantage of a section of the Court reserved for bar members. Transcripts were made available the afternoon of argument, and audio recordings generally were posted on the Friday after the oral argument. Livestreaming the May arguments would thus be a major step for the Court.

To be sure, in the scheme of things, it was a modest step. Many appellate courts long ago adopted practices designed to make oral arguments available in real time. The Ninth Circuit, for example, regularly livestreams videos of oral argument, and many state courts do as well – I argued a case ▷

in the Indiana Supreme Court for FanDuel and DraftKings that was broadcast in video over the Internet. Still, progress is progress. As one reporter said to me dryly when he was interviewing me about the telephonic arguments, "I am pleased that the Court finally made it to the nineteenth century."

The first question that came to mind in the wake of the Court's announcement was "Why not video?" After all, one of the few benign effects of the coronavirus has been the wider acceptance of platforms like Zoom, and many of the lower courts have embraced the technology. Yet the Court resisted. Why? The Court did not say, but I assume the answer lies in the Court's strong opposition to cameras in the Courtroom. Despite the efforts of the media and Congress, the Court has long resisted calls for cameras. In 1996, Justice Souter testified about his own experience with cameras in the Courtroom when he was on the New Hampshire Supreme Court, observing that the prospect of arguments being selectively presented on the evening news had affected his own questioning at argument. Capturing what I can only assume was (and is) the sentiment of his colleagues, he told Congress that the case against cameras in the Courtroom is so strong, that "I can tell you the day you see a camera come into our courtroom, it's going to roll over my dead body." Powerful stuff. In the end, the Court must have believed that livestreaming video in the pandemic would let the genie out of the bottle, and that the Court would then be hard-pressed to deny video access when (and if) the Court returned to its usual schedule. So audio alone would have to suffice.

That of course begged additional questions. How would a telephonic argument work? Supreme Court arguments are notoriously (and gloriously) free-flowing and contentious affairs, characterized by rapid-fire questions, frequent interruptions by the Justices of the advocates and each other, and a premium on carefully honed bullet-point answers. How would any of that translate to a telephonic argument? And how much would be lost by the absence of verbal cues – the Justices' nods, smiles, grimaces, and body movements that advocates try to read as they navigate the shoals of oral argument.

In the end, the Court sacrificed tradition for order. Each Justice would get a fixed time to question the advocate, in order of seniority, starting with the Chief Justice. For my argument, which was scheduled to last for fifteen minutes when it was live, each Justice would get 2.5 minutes for questioning. And so, armed with that knowledge, we advocates set off to prepare for Supreme Court oral argument in the age of the coronavirus.

THE FOURTH CIRCUIT

As it happened, my first experience with oral argument in the coronavirus world was not at the Supreme Court, but in the U.S. Court of Appeals for the Fourth Circuit. I represented the Recording Industry Association of America and its member record companies on appeal in connection with a copyright infringement case the record companies had brought against a pirate website. Argument had been set for March 19 in Richmond, and as late as March 12 the Court had indicated that the argument would proceed as scheduled. But it was not to be. By the afternoon of Friday, March 13, the Court had postponed the argument – I received the news while driving back to D.C. with my oldest son, whom I had picked up from college that morning because his school had ended live classes for the semester. Eventually, the Fourth Circuit rescheduled my argument for April 24.

This was to be a video argument – basically a Zoom meeting with more formality, no whimsical backgrounds, and a clock ticking ominously in the lower right corner of the screen. Six boxes in all, with the three judges across the top, and opposing counsel, me, and the aforementioned clock along the bottom. This being the Fourth Circuit, I would of course dress for the occasion – the only time I have worn a suit and tie since the shut-down orders were first issued in March.

The preparation for argument was surprisingly ordinary. I made the decision early on that I would not try to replicate the courtroom ex-

perience by standing and using a podium. Six weeks of Zoom meetings had left me entirely comfortable conducting substantive discussions while sitting at my desk and staring at boxes on my computer. And using a desk – actually an old kitchen table that serves as my desk in the pandemic – allowed me to spread out my materials and access notes, cases, and briefs in a more orderly fashion. There were practice sessions to ease the transition. Through the auspices of the Clerk's Office, we conducted a brief run-through to make sure our computers were working and to iron out any technological wrinkles. And I did a substantive moot – the cornerstone of my preparations for every argument – in a manner that sought to mimic the argument: On Zoom, sitting at my desk, no restrictions on questions. Clients both near and far could attend on the same terms as everyone else. Win-win.

I also made plans to take advantage of one benefit of the remote setting: the ability to consult the team during argument. On the morning of argument, I set up a Zoom chat on my iPad with my team. I knew I would have time for rebuttal, and the chat allowed me to get live reactions from the team during my opponent's argument about points to make and themes to drive home.

The argument itself was largely uneventful, which is high praise and just what the Fourth Circuit was no doubt hoping for when it decided to hold the video arguments in the first place.

The biggest excitement for me came on the morning of argument, as I narrowly avoided disaster with the dreaded "live mic." Shortly before argument was to begin, opposing counsel and I were let into the virtual antechamber, and we were awaiting the arrival of the judges. We exchanged pleasantries – it turned out that many years ago he had briefly clerked for my mom, a former State Court Judge in Massachusetts. We started discussing Massachusetts, and I ran through my continuing connections to the state: my sisters and parents live there; I return every Thanksgiving and run a Turkey Trot on Thanksgiving morning in Concord; my first summer job was at Walden Pond, etc. I then got a message from one of my partners on the Zoom chat saying, "This is all very interesting, but you should know that the entire country is listening to the details of your Turkey Trot!" Yikes! I got off easy, but it is a good reminder of the potential perils of the live mic.

Once the argument started, it was largely smooth sailing. To be sure, it was not without technical mishap. When I was done with my argument and opposing counsel took his turn at the virtual podium, he reported that he had lost video contact and could no longer see me or any of the judges. But that was quickly fixed, and the argument continued along smoothly. Questioning of attorneys was consistent with prior Fourth Circuit arguments I had been involved in – the main difference was that the judges had been told to raise their hand and say "Counsel, I have a question," a useful formality that made me feel less like an advocate and more like a professor calling on particular perceptive students.

And, of course, one major change at the end: No handshake from the judges. As Chief Judge Gregory put it, "We have to suspend our tradition of coming down from the bench and greeting counsel but know that in the virtual world we do it heartily." A fitting end to the morning.

THE SUPREME COURT

I moved quickly from my Fourth Circuit argument to prep for my Supreme Court argument, now less than two weeks away. Ironically, my first challenge was a technological one. Because the Fourth Circuit argument was by video, my firm-issued laptop was up to the task. But for the Supreme Court argument, I needed a standard phone, which was a problem. We haven't quite cut the cord at home, but we don't use our landline – ever. And the speaker phone we found in the closet was fifteen years old and well past its prime (if it ever had a prime). Thank goodness for Staples, which had in stock old-time speakerphones, perfect for the occasion. (If anyone is in the market for a slightly used speaker phone, let me know!)

The next big change was the moot. Again, the key was using the moot to mimic the Court's ▷

structure for the real argument. So, I did the moot without video, and we tried to simulate the unusual questioning structure. So, unlike the hour-long free-for-all that usually marks my moot courts, we adopted a more orderly approach. The questioners went in order, and I asked a colleague to act as the Chief Justice, keeping questioners to their allotted 2.5 minutes and cutting off both advocate and questioner when the timing for questioning expired (though, to be sure, we still went for sixty minutes or more).

As argument approached, I turned to the logistics of the argument. And here, the Clerk of the Court and the folks in the Clerk's office deserve tremendous credit. We did a walk-through with Scott Harris and Denise McNerney from the Court, and they could not have been more helpful. We tested sound quality, walked through the elaborate procedure for admitting advocates into the "virtual courtroom," and discussed back-up plans to address any dropped calls. With that behind us, we could focus on the argument itself.

On the day of argument, some things were the same. I kept by basic pre-argument breakfast: a muffin and a Diet Coke. It does not have the blessing of the AMA or the USDA, and it is not even the basis of a good diet book, but it does the job – a little something in the stomach and a shot of caffeine to keep the energy up.

Other things were quite different. Dress code for example. I have previously done my Supreme Court arguments in a dark gray suit or, during my time in the Solicitor General's office, in a morning coat. Now I can say I have argued in jeans and a T-shirt. I know others opted to replicate their traditional argument experience by dressing more formally or going to the office, but to me the remote format provided an opportunity to take the stress level down a notch or two, allowing me to dress more casually and to do the argument from the comfort of my own home.

My opening, as well, was a more relaxed affair. For most arguments, as the weeks of prep become days or even hours, I spend an increasing percentage of the time honing and memorizing my opening, especially since the Court frowns on – indeed the Guide to Counsel expressly warns against – reading one's opening. Here, I knew I would have two minutes to start without questions from the bench, but there was no need to memorize – one touch, a hum of the printer, and my opening was ready to go.

One last element of my pre-game ritual also changed a bit. At live arguments, when the five-minute buzzer goes off signaling that the Justices will shortly appear, and when my heart is beating fastest, I use that moment to look around at the bench, the red velvet robes, and the marble courtroom and friezes of the Supreme Court, take a deep breath, and say to myself: "It is pretty awesome that I get to do this for a living." It is a reminder that Supreme Court oral argument is not a test to be passed, but rather an opportunity to be savored. Looking at my old dining room table in my makeshift-office-guest-bedroom inspired entirely different thoughts: "This is a really weird way to do a Supreme Court oral argument."

The argument itself went off without a hiccup, at least from a technological perspective. The save of the day went to my wife. In addition to juggling her own work at the Federal Trade Commission and listening to my argument on C-Span, she headed off a potential embarrassment. For reasons known only to him, my sixteen-year-old decided to do his laundry that morning – miracles never cease – and our washer and dryer are located right below the room in which I was doing my argument. I am sure the Justices, the press corps, and the rest of the country would have enjoyed hearing the rattling and banging of our washing machines broadcast live in real time, but I was just as happy to learn that my wife had leapt into action and persuaded my son that his laundry could wait an hour or two.

I did my two-minute opening, took questions from each of the nine Justices, listened carefully to the arguments of the other three oralists, then gave the sharpest rebuttal I could muster in the two minutes I was allotted. I then hung up the phone and went downstairs

for lunch with the family. All in all, an entirely enjoyable experience.

So, what did I think of the argument? I think it is a mixed bag. There was plenty of good.

First, it was substantially longer than a typical Supreme Court argument. As noted, I was originally scheduled to have fifteen minutes total for my argument, including rebuttal. In the usual case, the Chief Justice polices the timing rigorously. (Not, perhaps, as rigorously as his predecessor. Chief Justice Rehnquist routinely cut off counsel mid-sentence once the red light went on. Chief Justice Roberts usually allows advocates to finish their sentence, and lucky advocates might even get a sentence or two more.) The Court's practice for such "15 minute" arguments in the telephone age was to permit a two-minute uninterrupted introduction, followed by questioning by each Justice in what appeared to be 2.5-minute blocks. Petitioner's counsel was also given a short rebuttal – two minutes in my case – that was unaffected by the length of the opening argument. So, my fifteen-minute argument ended up being more like twenty-seven to thirty minutes. Compared to the usual format, it was downright leisurely! As an advocate accustomed to trying to condense a complex argument into a ten-minute block, the extra time was a gift.

Second, we got to hear from each Justice. Much has been made of Justice Thomas's questioning, and he was clearly the Justice most affected by the new format. But he was not the only one. Each Justice was assured his or her 2.5 minutes of questioning (and more like 3.5 minutes for an undivided argument) so every voice was heard and every perspective aired.

That said, the emergence of Justice Thomas as active presence at oral argument was one of the highlights of the new format. The change was dramatic. During the May sitting, Justice Thomas asked sixty-three questions. Prior to May, his last question had been in in March 2019; prior to that he asked a question in February 2016; and prior to that he hadn't asked a question in ten years, since February 2006. Why the change? I don't have unique insight, but Justice Thomas has always said that he finds the constant interruptions of Justices and advocates to be unproductive; by limiting interruptions, the telephonic arguments were more conducive to the kind of orderly back and forth that Justice Thomas has long suggested he would find more helpful. It is also possible that Justice Thomas – as I suspect was true for most of the Justices – recognized that the national broadcast provided the Court with an opportunity to demonstrate for the public how the Court looks when it is functioning at its best. Whatever the reason, it was good for the country to hear from him, because he is an important voice on the Court.

Third, from my perspective as an advocate, the opportunity for longer answers and a more sustained discussion with each Justice without interruption – or without interruption by someone other than the questioning Justice – was terrific. There is a comfort in knowing that you might actually have sixty seconds or more to answer a complicated question, rather than knowing that you may get out just a few sentences before the argument heads off in a different direction. To be sure, there are also downsides. Sixty seconds (indeed even thirty or fifteen seconds) can seem like an eternity if you don't have a good answer. But my experience was a positive one, and I enjoyed (for example) actually getting to my third or fourth bullet point in answering a question.

Of course, that was not always the case. At times, the one-on-one questioning sessions prompted a Justice to channel his or her inner trial lawyer, effectively cross-examining the advocate. "Isn't is true that X? Yes, your honor. And isn't it also true that Y? Yes. And would that be a strange outcome? Yes. And Congress would not have wanted that, right? No, Your Honor." Perry Mason could not have done it better!

Fourth, despite the format, it still felt a bit like a group conversation. I had worried that, with the new format, it would feel like nine separate conversations. But that was not my experience. The Justices continued perhaps to a surprising extent to pick up on each other's questioning or hypos. Many times a Justice would start with "I'd like to go back to the Chief's hypo" or "I'd ▷

like to pick up on Justice Kagan's point." So that aspect of "real argument" remained. Likewise, it was not uncommon for a Justice's first question following the abrupt end to the prior discussion to be "Please finish your answer to Justice's So-and-so's question."

Finally – and in some ways most important – the best part about the argument was that clients and others could listen to the argument in real time, without the expense of coming to D.C. and without being subject to the vagaries of the public access line and the limited seating in the Courtroom. Consider my case. It was of paramount interest to the Creek Nation in Oklahoma, other tribes in Oklahoma, and perhaps others in Oklahoma and across the Nation. If the argument were live, only a handful of the interested would have been able to attend, and only at significant expense. To be sure, they could listen to the argument when the audio came online – the Friday after the argument. That is a poor substitute at best, akin to being able to watch my beloved Red Sox on tape delay three or four days after a play-off victory. Instead, everyone could listen live – clients, interested parties, my parents (they are very proud!), and the press.

Of course, it was not all to the good. The downsides?

Well, I suppose I would be remiss if I did not discuss the Flush Heard Round the World. In the middle of argument in a case during the first week of argument (*Barr v. American Association of Political Consultants*), someone evidently forgot to hit the mute button and the sound of a flushing toilet was broadcast across the Nation. Of course, the flush – not the substance of the case – was the headline on all of the news channels. I can assure you that many more people heard about the flush than can tell you what the underlying case was about. And that is not a good thing. I have no inside information, but I can only imagine that it drove the Justices crazy to have a substantive oral argument and then see all of the press coverage devoted to the flush.

Turning back to the advocate's perspective, there were a few downsides to the remote format.

First, the pomp and circumstance – indeed the majesty – of argument at the Court was missing. As much as I love my makeshift office, it is a poor (very very poor) substitute for the Court. For an appellate advocate, there is nothing quite like entering the Supreme Court courtroom for an oral argument.

Second, notwithstanding my comments above, the argument lacked the full measure of the spontaneity and cross-Justice interaction that characterize traditional Supreme Court arguments. One of the times argument can be most valuable is when a Justice makes a point that causes another Justice to jump in. The Justices generally don't discuss the cases with one another prior to argument, so argument is the first time a Justice will learn how his or her colleagues is approaching the case. There are times as an advocate when you can feel the direction of argument shift as the Justices react to each other's questions and refine hypos and arguments. That sort of interaction was missing.

Third, the biggest "issue" from my perspective was the use of large blocks of time for speeches. In the usual argument, questions from sympathetic Justices are less common, and opportunities for long speeches less common still. For one thing, the questioning is often led by Justices who are skeptical of the advocate and are interested in probing the limits of the argument or revealing its flaws. For another, the advocate is not likely to get very far into the response to a softball question before he or she is cut off. In the audio argument, however, because every Justice can ask questions of every advocate, there is an incentive for a sympathetic Justice to ask a short sympathetic question designed to prompt a two-minute speech.

Consider Justice Thomas's sole question to Paul Clement in the contraceptives case (*Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*): "Mr. Clement, I'd like you to have an opportunity to comment on the questionable standing of the states in this case, as well as the proliferation

of nationwide injunctions, such as the one in this case." Or consider Justice Alito's question to the Solicitor General of Oklahoma in *McGirt*: "Mr. Gershengorn has a section of his brief that's labeled The Sky Is Not Falling, and his argument is that you and the federal government are exaggerating the effect of this decision, that it won't have such a major impact either in the criminal or in the civil area. Is he right in that?" In each instance, the advocate recognized the softball and spoke for more than two minutes, uninterrupted.

The flip side is a lengthy speech by the Justice. Consider Justice Ginsburg's question in the contraceptive case, where she talked eloquently for nearly five minutes straight (from her hospital bed!). Or Justice Gorsuch's questions in *McGirt*, where he said to the Oklahoma Solicitor General "Counsel, I have four questions. I'm going to tick them off as fast as I can, and you can choose which ones you want to respond to in the time you have" – he then listed the questions in a way that better framed Mr. McGirt's position than anything I had said that morning.

There is of course nothing wrong with these questions, and they are a natural result of the format – when given 2.5 minutes of time, a Justice with firm views on an issue has every right and incentive to use that time to advance that side of the case. Moreover, there are benefits, especially with the live broadcast. Those questions and answers may offer a perfect opportunity for listeners to hear about the core arguments in a case. But I wonder whether that aspect of argument benefits the Justices themselves, since the responses tend to be a reprise of the briefs, rather than an effort to defend weaknesses, test limits, or allay concerns, which I take (at least in the ideal world) to be the point of the oral argument.

CONCLUSION

So, where does all that leave us? I think overall the telephonic arguments were a success, and the Court was well-served by its decision to proceed. If I were to offer any advice to the Court, it would be this. No one yet knows whether the Justices and advocates will return to the Courtroom starting in October. But whatever the fall looks like, we are all better served by the Court's continuing to livestream all of its arguments. It is a huge benefit to clients, the press, the public, and the court. Coronavirus or not, it is well worth making a part of the Court's evolving oral argument tradition.

Ian Heath Gershengorn[1]
Washington, D.C.

EDITOR'S NOTE: Ian's first, in-person argument ended with a 4-4 tie, Justice Gorsuch not voting; the second, telephonic argument ended with a ruling for Ian's client in a 5-4 decision, Justice Gorsuch writing for the majority. Sometimes, phoning it in is a good thing . . .

1 Ian Gershengorn is currently Chair of the Appellate and Supreme Court practice at Jenner & Block LLP. Prior to rejoining Jenner in September 2017, he served in the Office of the Solicitor General at the US Department of Justice, first as Principal Deputy Solicitor General and then as Acting Solicitor General of the United States, a position he held from June 2016 until the end of the Obama administration in January 2017. His telephonic argument in *McGirt v. Oklahoma* was his 16th oral argument in the Supreme Court. ■

WHO SHALL LEAD THE DEFENSE? — A HISTORY OF THE COLLEGE'S EFFORTS TO PRESERVE JUDICIAL INDEPENDENCE AND THE RULE OF LAW

The College's Mission Statement proudly asserts that we will maintain and seek to improve the administration of justice. To that end, "The College strongly supports the independence of the judiciary . . .."

In 2005, mindful of the Mission Statement and faced with increasing threats to the judiciary, then **President Jimmy Morris** created the Ad Hoc Committee on Judicial Independence. Chaired by **Bob Byman**, the Committee drafted a White Paper, *Judicial Independence: A Cornerstone of Democracy Which Must Be Defended*. Adopted in 2006 by the Board of Regents, it established as the official position of the College that "it is the policy of the American College of Trial Lawyers to undertake to address in an appropriate manner threats to judicial independence wherever they manifest themselves."

Shortly after its adoption, at the 2006 Leadership Workshop in Colorado Springs, then **President David Beck** spoke eloquently on the College's commitment to judicial independence and the rule of law. In attendance was **Matt Peterson**, the incoming Alaska Committee State Chair. David Beck's words and the White Paper had great impact on Matt. Matt resolved to become engaged on the issue. More about Matt later.

Shortly after the original White Paper was issued in 2006, then **President Mike Cooper** created the Ad Hoc Committee on Judicial Compensation. Also Chaired by **Bob Byman**, the Committee prepared and, in 2007, the Board of Regents adopted *Judicial Compensation: Our Federal Judges Must Be Fairly Paid*. That second White Paper made the point that "if our judiciary is to maintain its independence and serve its critical constitutional function, judges must be fairly compensated in order to attract and retain the very best candidates."

A third White Paper - *The American College of Trial Lawyers White Paper on Judicial Elections* – completed the trilogy in 2011. Principally written by the Judiciary Committee (chaired by **Former Regent Jim Schaller**) but with important assistance from the Jury Committee (chaired by **Terry Tottenham**) and the Special Problems in The Administration of Justice (U.S.) Committee (chaired ▷

by **Dan Buckley**), the Board of Regents adopted as its official position that

> The "appearance of impartiality" is critical to judicial independence. Nothing erodes public confidence in the judiciary more than the belief that justice is "bought and paid for" by particular lawyers, parties or interest groups. *The College holds in the highest esteem elected judges who perform their duties day in and day out with integrity, courage and conviction, and without permitting the fact of judicial elections to exert any influence over their decisions.* The College believes that contested judicial elections, including retention elections, create an unacceptable risk that improper and deleterious influences of money and politics will be brought to bear upon the selection and retention of judges. The College therefore opposes contested elections of judges in all instances.

The Sandra Day O'Connor Jurist Award was established in 2007 to recognize a judge in the United States or Canada, whether or not a Fellow of the College, who has demonstrated exemplary judicial independence in the performance of his or her duties, especially difficult or even dangerous circumstances. The award is not annual – it is given only when a judge rises to the high aspiration of the honor. It has been awarded only three times: Hon. George W. Greer (2008; the presiding judge in the emotionally and politically charged case in which Terri Schiavo's husband sought to take his vegetative-state wife off of life support), **Hon. Sam Sparks** (2010; a Judicial Fellow who presided over a politically sensitive case that forced ICE to release scores of minor immigrants from detention) and Hon. Barbara J. Pariente (2018; a former Florida Supreme Court Chief Justice who was vigorously opposed in a retention election because of her rulings in politically charged cases).

Guided by the Mission Statement, White Papers, and the O'Connor Award, the College has consistently endeavored to respond whenever there was an attack on judicial independence:

- May 2014 – then **President Bob Byman**, responding to criticism of the Chief Justice of the Canadian Supreme Court by the Canadian Prime Minister, called the criticism unfounded and "expressed the College's full and unqualified support."
- January 2015 - Alabama Fellows responded by public statement to Alabama Supreme Court Chief Justice Roy Moore's attacks on a decision regarding the state marriage act by U.S. District Court Judge Callie Granade.
- June 2016 – then **President Mike Smith** issued a public statement against political attacks on judges coming from all sources: "Political attacks on judges pose a threat to judicial independence." Mike urged that all citizens, who are the true beneficiaries of judicial independence, oppose any such attacks.
- February 2017 – then **President Bart Dalton** issued a statement condemning criticism of **U.S. District Court Judge James L. Robart** by President Trump, calling him a "so called judge," stating "The College considers such attacks as a direct assault on

QUIPS & QUOTES

Because it is the weakest of the three, the judicial branch has the greatest need to be defended. But who is to provide the defense? Not the judiciary itself, because it is by design not a political entity; its power to enforce its decrees and protect its independence are limited. The other two branches, its potential antagonists, cannot always be counted on for that defense.

Judicial Independence: A Cornerstone of Democracy Which Must Be Defended

judicial independence, the backbone of our constitutional democracy . . .."

- December 2017 – The North Carolina Fellows issued a strong and thoughtful public statement in opposition to a State Senate Bill which proposed to have most state judges run for election every two years.

- March 2018 – When the appointment of John Norris to the Federal Court of Canada was challenged because he had, during his long and distinguished career as a defense lawyer, represented people accused of serious crimes, the College issued a public statement opposing the criticism as "unjustified and entirely misplaced."

- November 2018 — In a rare departure from historical tradition, Chief Justice Roberts rebuked President Trump for criticizing an opinion of "an Obama judge," by stating that America does not have "Obama judges or Trump judges, Bush judges or Clinton judges." Then **President Jeff Leon** issued a public statement in support of the Chief, stating that the President's remark was ". . . a direct assault on judicial independence, the backbone of our constitutional democracy."

In November 2017, **Sam Franklin**, the College's 67th President, attended the Washington Fellows Dinner and met Judge Robart, a Judicial Fellow. Judge Robart shared with Sam his heartfelt appreciation for the College's public support, which meant so much to him and to his family. The Judge told Sam that the College's support stood in stark contrast to the hundreds of threatening communications he had received, many of which were serious enough for the U.S. Marshalls to make personal follow-up with the senders.

Sam determined to have the College re-address judicial independence with a new and updated white paper and a continuing commitment to standing up against attacks on our judiciary. It was time to move the College to a new more comprehensive approach in the ongoing battle and defense of judicial independence.

In March 2018, Sam created the Task Force on Judicial Independence to review and update the College's 2006 White Paper and to evaluate other actions the College might take to defend judicial independence. Chaired by **Former Regent Kathleen Trafford** and **Vice Chair John Wester**, the Task Force addressed the changing norms of civil behavior, social media, the increasingly acerbic tone of judicial criticism, rapidly spreading negative comment creating a lack of opportunity to provide context and reasoned discussion, harsh judicial elections, increasing politization of the judiciary, and the historic reluctance of judges to speak out – all issues that present new, serious challenges to judicial independence. The Board of Regents adopted the Task Force's Report in March 2019 – *The Need To Promote And Defend Fair And Impartial Courts – A Sequel To Judicial Independence - A Cornerstone of Democracy Which Must Be Defended.*

The 2019 Task Force White Paper makes the point that it is not enough for lawyers and judges to talk among themselves about the importance of judicial independence. Fellows and Province and State Committees need to engage. Judges themselves needed to become involved.

The Task Force recommended the creation of a standing College committee devoted to judicial independence. Chaired by John Wester and **Vice Chair Kent Thomson**, the Judicial Independence Committee's mission is to monitor developments; coordinate, publicize, and track the College's prompt response to threats and attacks on the judiciary; promote the College's support of fair and impartial courts at the state, province, and federal level; and to recommend initiatives to engage the College and Fellows in educating the public. The Committee collaborates with the Judiciary Committee and the Province and State Committees.

Guided now by its newest White Paper, the College, through the Judicial Independence Committee, has continued to respond whenever there is an attack on judicial independence:

- Furious over an Alaska Supreme Court decision on abortion rights, Governor Mike ▷

Dunleavy retaliated in 2019 with a partial veto of the judicial system budget. All of the Alaska Fellows and the Committee mobilized to respond with an immediate public statement: "The concept of judicial independence, that judges should decide cases, faithful to the law, without 'fear or favor' and free from political or external pressures, remains one of the cornerstones of our political and legal systems. . . . Attacks on our judiciary are nothing less than attacks on these values. As officers of the court, we feel a responsibility to call out such attacks whenever we see them."

- In 2019 Arizona Governor Doug Ducey chastised U.S. District Court Judge Neil Wake's decision in a school funding case with a personal aside that "Judge Wake . . . thinks . . . he's God." The Arizona Fellows issued an immediate public statement: "Governor Ducey has every right to disagree with Judge Wake's decision. The Governor, however, should not move beyond respectful disagreement into baseless character attacks on a respected federal judge. . . . Governor Ducey's comments casting aspersions on Judge Wake threaten judicial independence and have no place in political discourse."

- In February 2020, President Trump tweeted disparagingly about U.S. District Court Judge Amy Berman Jackson's sentencing of Roger Stone. Within forty-eight hours, the Committee drafted a statement for **President Doug Young**: "The President's remarks have stirred many individuals to attack Judge Jackson. That is the predictable and dangerous consequence of statements from the Executive Branch that disparage a judge in personal terms. Such attacks present a threat to the principle of judicial independence enshrined in our Constitution and a bedrock of our democracy. . . . [T]he President has the right to disagree with a judicial opinion and to seek legal means to overturn it on appeal; but *ad hominem* and disparaging personal attacks on an individual judge are an affront to the fundamental principle of judicial independence that cannot be ignored."

- In March 2020, Senate Minority Leader Charles Schumer, speaking at a public rally, called out Justices Neil Gorsuch and Brett Kavanaugh, declaring, "I want to tell you, Gorsuch. I want to tell you, Kavanaugh. You have released the whirlwind, and you will pay the price." Chief Justice Roberts responded. "Justices know that criticism comes with the territory, but threatening statements of this sort from the highest levels of government are not only inappropriate, but also dangerous. All members of the court will continue to do their job, without fear or favor, from whatever quarter." In support of the Chief, President Young likewise responded: "While the First Amendment protects the free speech rights of all American citizens, when a prominent and leading member of the legislative branch personally demeans individual members of the judiciary by name . . . the criticisms threaten the balance among our branches of government and in particular the independence of the judiciary. . . . [N]o public official should interfere in a pending judicial proceeding, take actions or make statements that could reasonably be viewed as intimidating to a judge, or belittle any judge for his/her decision. It is vital that all branches of our government respect the integrity of the judicial process."

Where Do We Go From Here?

At the 2019 Spring Meeting in LaQuinta, California, the Honorable Tani Gorre Cantil-Sakauye, Chief Justice of The California Supreme Court, spoke about imminent threats to judicial independence. The Chief strongly urged Fellows, who "are some of the best spokespersons for the need for an independent judiciary . . . to address issues the judiciary cannot respond to." Addressing media involvement, the Chief Justice pointed out that, too often, the media identifies judges based on a political party or aligns a judge's opinions with a view of a political party. The public focuses on this alignment rather than the rule of law and comes to believe the judge is not independent.

Retired **Judge Howard Matz**, a member of the Judicial Independence Committee, echoes the importance of the Chief's observation. Howard believes that a critical corrosive threat to judicial independence is the growing view that judges are simply politicians, aligned with a particular President or party, and that their decisions are predictable based on that alignment. The media too often preface the judge's name with the name of the President under whom the judge was appointed or with a label, such as conservative or liberal. There could be rare times when this is appropriate, but it creates and embeds a view in the public mind that the judge is not independent, but rather aligned and simply a mouthpiece for a political view.

One of the Committee's goals is to remind the public that the judiciary is faithful to the Constitution and laws, not to voting blocs, political parties, special interest groups, media, or tweet pressure.

Historically, judges have felt restrained from commenting on attacks. The Committee is working on recommendations that address the right of judicial leaders to respond to attacks and explain the nature of their rulings. Well underway is a Committee "Bench Brief" to encourage judges to speak out on the role of the judiciary and the integral nature of judicial independence.

Province and State Committees, and individual Fellows are on the "front line" and act as the early warning system. Speed is essential, otherwise the opportunity to respond is quickly lost. The Judicial Independence Committee's "Rapid Response Team" is ready to assist in developing a public statement and secure review by the College.

The Committee is moving forward in a collaborative education effort with the National Association of Women Judges – Public Education Collaboration for Fair and Impartial Courts. A Memorandum of Understanding containing the purpose and goals of this pilot project has been executed. Although delayed due to Covid-19, programming, training, refined timelines, and customized documents are being prepared in advance of live presentations. This proactive educational outreach to the public has as its goal, conducting public education presentations each year in fifteen different states on Law Day, Constitution Day, and at juror assembly orientation meetings.

Opportunity exists for Province and State Committees as well as individual Fellows to interact with bar associations, law schools, colleges and other local groups in a wide variety of ways, including civics education, coordination of responses to attacks, seminars and more. Appointments to bar committees and commissions relating to the judiciary are important. For example, in June 2020, **Fellow Peter Griffin** of Toronto, former Ontario Province Chair, was re-appointed as one of three members to the influential Canadian Judicial Compensation and Benefits Committee (Quadrennial Commission).

Workshops, roundtables, and symposiums provide opportunities to bolster judicial independence. In November 2019, **Judicial Fellow Paul L. Friedman** spoke to a packed ceremonial courtroom of the U.S. District Court for the District of Columbia on threats to judicial independence and the rule of law. Judge Friedman told the gathering that while criticism of judges is understandable, incivility and political scorn has escalated to unacceptable levels in recent years. Journalists and other politicians, who increasingly identify judges by the president who appointed them, should be criticized. He received a sustained and enthusiastic standing ovation.

"QUIPS & QUOTES"

The judiciary's principal defense must then come from its intended beneficiaries, the people. As a practical matter, lawyers, both individually and through the organized bar, must take the lead in that defense.

Judicial Independence: A Cornerstone of Democracy Which Must Be Defended

The College will be partnering with the Bolch Judicial Institute of Duke Law School to host a Judicial Independence Roundtable at the law school. The symposium, initially scheduled for April 2020 with President Young slotted as lead-off speaker, will be rescheduled and is expected to draw many judges, Fellows, media representatives and others.

The Committee has a number of other possibilities in consideration. Participation in media conferences might assist in the long journey necessary to educate the media on this critical issue. Establishment of a recognition for thoughtful, balanced media presentations that address or respect the importance of judicial independence could also ▷

QUIPS & QUOTES

> [T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive . . . holds the sword . . . The legislature . . . commands the purse . . . The judiciary, on the contrary, . . . may truly be said to have neither FORCE nor WILL, but merely judgement . . . [I]t proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from . . . either of the other departments . . . [t]he complete independence of the courts of justice is peculiarly essential . . .
>
> *Hamilton, Federalist Paper No. 78*

be impactful. Work at journalism schools may help educate future journalists. The National Trial Competition would be a fertile setting for a presentation by an active or retired judge, or a Committee member to the hundreds of law students, competition judges, coaches and others assembled.

The recent proceedings focused on Michael Flynn in Judge Emmet Sullivan's court brought significant negative public commentary about Judge Sullivan. An amicus brief in support of the District Court was submitted by retired or former federal judges in the Circuit Court of Appeals for the District of Columbia. Although not an official project of the Judicial Independence Committee, Committee members **Nancy Gertner** (Massachusetts), **Howard Matz** (California), and **T. John Ward** (Texas) were signatories and took on significant roles in drafting the brief and leading the effort to secure other signatories.

The written word offers almost limitless opportunities to engage. In April 2020, The Advocates Society issued a paper entitled *Judicial Independence – Defending An Honoured Principle In A New Age*. Honorary Fellow, **The Right Honourable Chief Justice Beverly McLachlin**, was quoted: "As a judge, my duty was to apply the law and call the case the way I saw it. . . . Sometimes a judge must make unpopular decisions that may go against her deepest preferences. That is why judges enjoy judicial independence."

Op-eds and letters to publications are a tremendous opportunity to educate politicians, media, and citizenry. An example is an op-ed by Committee Chair John Wester published in the *Charlotte Observer*. While addressing the refusal of the U.S. Senate leadership to consider the nomination of Judge Merrick Garland, John discussed judicial independence, writing that, "the media questions presuppose that federal judges are pawns of the President who appoints them. Yet, this notion runs contrary to the Framers' vision for our nation's judiciary aims. . . . The judiciary must stand apart. Our democracy calls on our judges to obey no government official, no politician, no political party, no platform; their service demands allegiance to the Constitution and the rule of law."

Judicial decisions on controversial topics create a storm of criticism, much of which is an outright attack on the judge and judicial independence. Local recall and impeachment campaigns are becoming more frequent. Fellows, State, and Province Committees can weigh in and provide powerful and thoughtful written statements.

Civics education directed to judicial independence is essential at high schools, colleges, universities, law schools and perhaps even grade schools. Continuing education of the politicians and media is critical. Task Force Chair Kathleen Trafford has prepared a comprehensive power point which she has used in civics classes and presentations. Every professional program involving a Fellow can include a piece on judicial independence.

The College opposes judicial elections, but they remain a fact of life – hundreds, if not thousands of them occur every year. In thirty-nine states, elections decide who will serve on the bench at some level. We can oppose elections in theory, but in practice we must deal with them in the fight to safeguard judicial independence. There are early signals of campaigns, including intense fundraising, that will attack the fundamentals of an independent judiciary.

But it is not just judicial elections that can threaten judicial independence; merit selection procedures have their own potential for concern. We have witnessed the increasing aggressiveness of the nomination process for judicial positions. According to the Brennan Center for Justice, special interest groups have spent millions of dollars in support and opposition to the nominations of judges Gorsuch, Kavanaugh and Garland to the Supreme Court, without much if any transparency into the people who are funding these staggering sums. Attack ads, denigrating sitting judges, are becoming common both in elections and nominations of judges. Fellows who see these attacks must bring them to the attention of their State Committees, and State Committees must be ready to respond.

Other opportunities to fight for judicial independence are plentiful. Almost any type of law or governmental related presentation at a national, regional or local level can be a forum for messaging. An annual meeting of the bar, or a holiday party with members of the judiciary and bar, can be an appropriate time to present a succinct and powerful message of gratitude and support for judicial independence. The College website links to the White Papers and press releases, providing ample material on any aspect of judicial independence.

And individual Fellows can make a difference. Recall Matt Peterson and the inspiration he experienced during College leadership training. Matt returned to Alaska and joined his state bar Committee on Fair and Impartial Courts, serving for over a decade. During that period, the Alaska legislature, in a move to politicize and assert more control over the courts, attempted to unwind the carefully crafted Alaska constitutional provisions controlling the process for judicial appointments.

Matt undertook extensive historical research on the period leading up to Alaska statehood in 1959. From the Alaska Constitutional Convention of 1955, he found significant history, including expert opinions supporting the judicial selection provisions. Like the fine trial lawyer he is, digging deeply, he located two of the last surviving delegates of the 1955 Constitutional Convention. In 2012, Matt arranged and conducted oral histories with each, utilizing a court reporter to preserve the testimony of the elderly delegates. Armed with his extensive research and the significant evidence from the delegates, Matt testified authoritatively before the legislature demonstrating that the delegates and Convention had devoted serious attention to judicial selection and that it would not be appropriate to disturb the Constitution. Ultimately, to his and the relief of others, the attempt to unwind the Constitution died. One Fellow's powerful work mattered.

The College occupies a special place in the constant battle to preserve the independence of the judiciary. Borrowing Churchill's revered words, this is a battle in which we shall fight with vigor, in which we shall go on to the end and from which we shall never surrender. Much has been accomplished; much more must be accomplished. And if our army of thousands of Fellows becomes fully engaged in the defense of judicial independence, historians will record, to borrow other revered words, this was and is their finest hour.

Clarence L. Pozza, Jr.
Detroit, Michigan ■

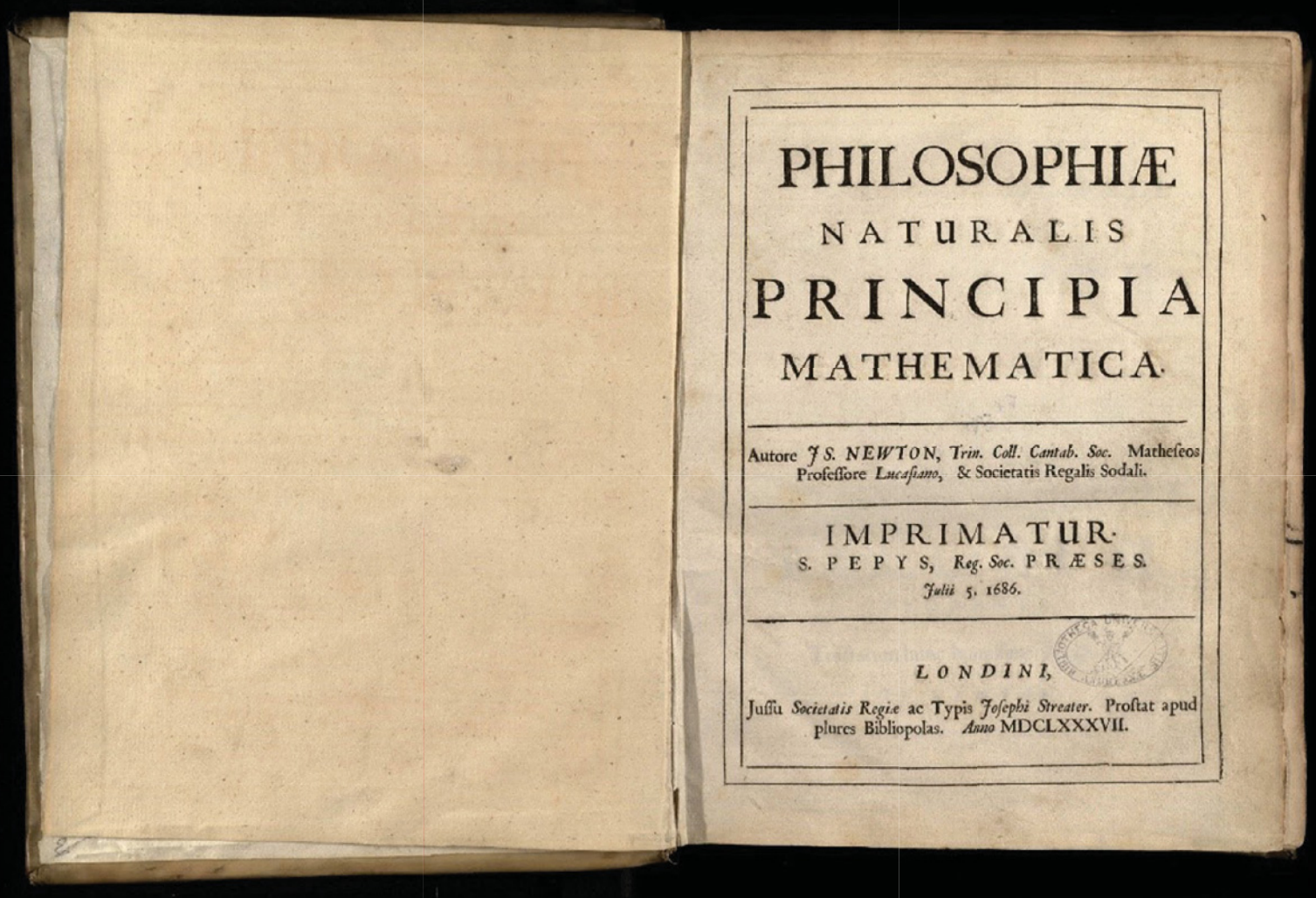
QUIPS & QUOTES

What do we stand for, if we do not stand for judges, juries, the judicial system, the rule of law and the independence of the judiciary, in essence democracy and freedom.

Douglas R. Young, 69th President of The College

THE MECHANICS OF ADVOCACY

I went to an undergraduate school with a required math, science, and engineering core curriculum. I was a reluctant engineer. But I nevertheless found the laws of classical mechanics very interesting – they just made good sense - though I confess the mathematics underlying them often confounded me. As a bit of a trip down memory lane, a distant memory of some 50 years, and as a way to glimpse genius at work, I picked up and began to read the wellspring of classical mechanics, Sir Isaac Newton's *The Principia*. I. Newton, translation by A. Motte, *The Principia*, Prometheus Books (1995).



PHILOSOPHIÆ
NATURALIS
PRINCIPIA
MATHEMATICA.

Autore *J S. NEWTON, Trin. Coll. Cantab. Soc.* Matheſeos Profeſſore *Lucaſiano*, & Societatis Regalis Sodali.

IMPRIMATUR.
S. PEPYS, *Reg. Soc.* PRÆSES.
Julii 5. 1686.

LONDINI,
Juſſu *Societatis Regiæ* ac Typis *Joſephi Streater*. Proſtat apud plures Bibliopolas. *Anno* MDCLXXXVII.

As I reviewed Newton's three universal laws of motion, I was struck by their broader application by analogy to matters of effective persuasion, the goal of trial advocates. Lawyers are taught to reason by analogy. They routinely reason from accepted similarities between two systems to support a conclusion that some further similarity exists. And they generally are quite good at it.

As it turns out, the laws governing motion in our physical environment also are a helpful analog to rules of persuasion and seem to accurately describe important human responses to our attempts at advocacy. There are lessons from Newton's laws framed over four hundred years ago that we can tease out and apply as modern day trial lawyers. They are good reminders for us of what works and what doesn't. As advocates, we ignore those lessons at our peril.

Let's start with a bit of background on Newton's principal work. In 1687, Newton published *Philosophiae Naturalis Principia Mathematica*, his investigation into gravitational and planetary motion. In order to describe gravitation and other diverse phenomena, he had to invent calculus. Then Newton used calculus to define the famous laws of motion known to us today as the classical mechanics.

There are three laws of motion in Newtonian space.

- The first is the law of uniform motion. An object at rest will stay at rest unless acted upon by a force. An object that is in motion will not change its velocity unless a force acts upon it. A rock sitting still on the ground will remain there unless some force moves it. A rock rolling down a hill will continue to roll until friction or another object stops it.

- The second is the law of conservation of momentum. The change of momentum of a body is proportional to the force acting on the body, and happens along the straight line on which that force acts. This law is summarized in the useful equation F=ma (force is equal to mass times acceleration). You'll find it easier to push an empty shopping cart through the grocery store than a full one.

- The third is the law of action and reaction. When one body exerts a force on a second body, the second body simultaneously exerts a force equal in magnitude and opposite in direction on the first body. When you push down on the ground with your foot, the ground is pushing back with the same exact amount of force in the opposite direction.

THE FIRST LAW OF MOTION

Let's start with Newton's First Law, the concept that bodies at rest stay at rest and bodies in motion stay in motion unless acted upon. Every time we size up a judge by learning something about her background, her likes and dislikes, her history of rulings on a particular subject, we acknowledge this law. Every time we voir dire a jury to learn about their values, attitudes, beliefs, and life experiences, we acknowledge this law. We recognize that a person's prejudices, predispositions, and proclivities likely will predict their future decisions.

Why do we do this? Because we understand that people walk around with their own set of biases that order their thinking on virtually every experience they encounter in life. Daniel Kahneman, a Nobel Laureate in Economics, referred to these biases as "judgment heuristics" in his book *Thinking, Fast and Slow*. D. Kahneman, *Thinking Fast and Slow*, Farrar, Straus and Giroux (2011). Our biases provide us with a worldview, a frame of reference, a paradigm from which to operate. These biases allow us to intuitively react in short order to stimuli in the environment. They allow us to make quick judgments about things without ▷

having to dwell on them and engage in the hard work of slower, more analytical thought.

Kahneman describes two systems of thought. System 1 thinking operates automatically, quickly, and with little effort, and is our intuitive, bias-driven system. Imagine driving a car on an empty road. System 2 thinking is conscious, slower, and effortful, and is our analytical system. Imagine driving in heavy traffic while following a complex set of directions to reach your destination. We first resort to our biases to make decisions (the quicker, easier path), and resort to the analytical method only if forced to (the slower, harder path). We're a bit lazy and prefer the effortless path in our thinking, the path driven by our biases.

If a person who will decide our client's case is a "body at rest" on an issue we care about – that is to say that their paradigm of how the world works is contrary to the view we want them to adopt - our work as advocates becomes much more difficult. We have to move them to action. If that person is a "body in motion" on an issue, already traveling along a particular path of thought that is driven by their personal biases, it is much easier to keep them rolling along that path than moving them on to a different path. We simply reinforce personal biases that favor our case, and do what we can to ensure they are thought leaders on our jury. But when we must attempt to re-channel a person's thinking when their biases disfavor our case, we face a much bigger challenge. We must cause the person to reflect upon the bias operating against our case and literally come to a new state of mind. This is a heavy lift.

Examples abound, but just a few will illustrate the point. A court clerk once observed to me during a recess in a criminal trial: "Honey, they don't show up on the third floor of this courthouse in an orange jumpsuit if they didn't do something wrong." She wouldn't be your first choice as a juror if you were a public defender. A juror who has been mistreated by an insurance company in the past and harbors the view that insurance companies are unfair to insureds will be more difficult to convince that an insurer properly refused to pay on a claim. A judge who has expressed the belief that drug dealers are in large part responsible for the deterioration of our inner cities will be more difficult to convince that a defendant convicted of narcotics distribution should be shown leniency. The simple fact is that a good argument made to the wrong audience is a losing argument.

We often are not able to deselect all problematic jurors. And we're even more limited in determining our judge. But there is a big benefit to knowing where the biases lie so we can circumnavigate them. There is benefit to knowing the mental position of rest or path of mental motion of our audience so we can tailor arguments to best appeal to them. Our case theme and theory, voir dire questions, opening statements and closing arguments – even our witness examinations – will benefit from the observation of Newton's First Law. How might we do this?

Aim always to be the honest guide. Let the judge and jury know you know they may have pre-conceived notions about your case and deal with them head on. This necessarily starts in a jury trial with direct questions seeking candid responses from the venire about their potential biases relating to your client's case. Be open about bad facts and ask how they might react to them.

Let your audience know your position and the thought path you will take them on in your opening. Announce your theme and case theory clearly so there is no mystery where you'll be going. Tell it in story form so it is memorable and vivid. And reassure them you'll provide the salient facts to back up your story. If you're going to move jurors from their position of rest, you've got to have the force of facts to do that. Bring home those facts in your examinations, of course, and be prepared to summarize how you delivered on your promise in closing argument. These steps respect Newton's First Law.

THE SECOND LAW OF MOTION

Newton's Second Law is the notion that a change of momentum of a body (the product of its mass and velocity) is proportional to the

force acting on the body. We see the application of this law of motion commonly at play in our legal context in the way cases are pleaded and tried.

Litigators seem to delight in pleading as many alternative bases for recovery and as many affirmative defenses as they can conjure. Perhaps this is a hold-over from law school when we received points on final exams for issue spotting. Perhaps it's simply a well-grounded fear that at the inception of a case, we aren't yet sure what the best pathway to a successful recovery or defense might be. We might sensibly plead in the alternative to avoid missing a promising claim or defense. Sometimes, our alternative theories of recovery or affirmative defenses are even legally or factually inconsistent.

While a "kitchen sink" approach at the pleading stage may result in some unnecessary motion practice or discovery, there is nothing legally wrong with pleading in the alternative – particularly at an early stage of a case – so long as we have a good faith basis for doing so. We err, however, in trying a case in the alternative. A judge may be more facile than a jury in holding competing theories of a case in mind while preserving the ability to decide. But whether the decision maker is a judge or a jury, an advocate still makes the decision more difficult by offering competing theories and themes of the case.

The grocery cart is a useful metaphor for what happens to some lawyers as they prepare and try their cases with too many theories, facts, witnesses, and documents. When we load up the grocery cart with lots of alternative legal theories and the facts necessary to prove those theories, we make it harder to push that cart down the aisle toward a verdict. In Newton's terms, we've just added unnecessary mass that, in turn, will require more force to accelerate. We assume too big of a workload.

What are the consequences for our clients? We potentially increase the cost and duration of litigation. We don't focus on the important theme and theory of the case that give us the best chance to prevail. We dilute our main message with too many peripheral points and facts. And we risk contradictions in our case that are avoided by a more focused presentation.

One of NITA's grand masters of trial advocacy instruction, Irving Younger, used to tell a story that illustrated this point perfectly. Younger related the story of the farmer whose neighbor's goat got into his cabbage patch and ate many of his cabbages. The farmer sued the neighbor for his losses. The neighbor responded by raising every available defense in his opening:

> "You had no cabbages.
>
> If you had any cabbages, they were not eaten.
>
> If your cabbages were eaten, it was not by a goat.
>
> If your cabbages were eaten by a goat, it wasn't my goat.
>
> And if it was my goat, he was insane."

J. McElhaney, "That's a Good One: Effective Trial Lawyers Know How to Tell a Good Story," *Litigation*, April 1, 2011.

To abide by Newton's Second law, we need to unload the grocery cart of marginal claims or defenses, conflicting legal or factual theories, weak or repetitive witnesses, and less important documents as we present our case. When we fight on every front, rather than picking the high ground of our case, we take on too heavy a burden. Better to pick our points of clash where our case is strongest and put our efforts there.

THE THIRD LAW OF MOTION

The Third Law, the concept that for every action on a body, there is an equal and opposite reaction, comes into play for advocates in the way we frame our arguments. Accomplished barrister Keith Evans described the principle well in his book on common sense rules of advocacy: "You push, and they'll push back." K. Evans, *Common Sense Rules of Advocacy for Lawyers*, TheCapitolNet, Inc. (2004). When we tell a judge or juror what they *must* think or do, we invite the opposite reaction – "Really, well we'll see about that." When we demand or direct, in-

stead of request or invite, we risk push back. The walls go up, the arms are crossed over the chest, the hearer digs in.

If we don't want the "body" to equally react to our pushing, we need to find a way as advocates to say: "I think we're going in the same direction on this…"; "Let me suggest this to you…"; "Perhaps you've already thought of this, but…"; "Let me pause for a moment so we can study this exhibit, if you'd like to do so…"; and "Here's the special verdict form you'll fill out, and I'd like to suggest what the evidence shows the answers should be." But there is more to it than simply using language that invites rather than directs.

Use of the story form offers a powerful way for us to avoid the pushback that comes from our pushing. Henri Nouwen said a good story: "… confronts but does not oppress; … inspires but does not manipulate. The story invites us to an encounter, a dialog, a mutual sharing." HJ.M Nouwen, *The Living Reminder,* HarperOne (1977). This is both a wise observation and sound neuroscience.

Stories appeal to our "right brain" thinking – the part of our brain that is intuitive and that joins things together – in a way that relating a series of facts to the listener and showing their interactions simply can't. There really isn't anything personal about facts. But there is something very personal about how facts are chosen and grouped together into a story. A well-told story doesn't ask the listener to say: "Yes, that's true" or "No, that's false." Rather, the story asks the listener to come to his or her own conclusion: "Yes, that's how the world works; that makes sense." H. Kushner, *Nine Essential Things I've Learned About Life,* Anchor Books (2015). Stories operate on cause and effect, and on the motivations of the characters to act as they do. Judges and jurors are able to project themselves into the story. They bring to the story their own emotions. They fill in the elements of the story that may be missing in a way that is satisfying to them. And stories act upon the reward centers of the brain to make the hearer feel better just for the listening. J. Gottschall, *The Storytelling Animal: How Stories Make Us Human*, Houghton Mifflin Harcourt Publishing Co. (2012).

In a trial setting, storytelling tends to work best when the story line is kept simple, when the cast of characters is limited to essential players, and when the documents the judge and jury are asked to read and digest are held to a manageable number. Newton preferred the case that required the smallest number of assumptions because he thought it was usually correct: "… Nature is pleased with simplicity." We do better as advocates when we follow this rule of parsimony. When our story lacks a clear theme, or is cluttered with unnecessary facts, we introduce unnecessary complexity into our case, and risk losing our audience.

We live in a world of the tweet (a maximum of 280 characters, with the average more like thirty-three), the local news one-minute story, and the *USA Today* journalistic paragraph. Hemingway's short, idea-dense sentences seem to have given way to the incomplete sentence and to dumbed-down content. Our audiences seem to have shorter attention spans; perhaps due to our greater distractibility as we're constantly bombarded by stimuli. All the more reason to keep our advocacy simple and to the point.

When we tell a good story that is uncluttered, faithful to the facts, and makes sense of those facts within the legal structure of a case, our jurors are engaged by it. They move with us but are not pushed by us. When we do this, we observe Newton's Third Law.

TAKE-AWAYS FROM SIR ISAAC

Newton's laws of motion offer helpful reminders of how best to persuade. Our clients will be well served when we:

- Know our audience and craft our arguments accordingly;
- Choose a legally and factually consistent case theme and theory that plays to the strength of our case; and
- Lead our audience, rather than pushing them.

Don G. Rushing
La Jolla, California

WAR STORIES FROM FELLOWS:
THE LITTLE COURT ON SESAME STREET

Like many parents, I enjoyed watching Sesame Street with my children. I thought some of the skits were brilliant, and were clearly meant more for the parents than the kids. Little did I know that more than 30 years later I would be incorporating one of my favorites into a final address to the jury.

My client's entire farming operation had been consumed in a huge blaze. The insurer refused to pay, claiming that the client had intentionally started the fire to collect the insurance proceeds. In all fire loss cases where arson is alleged, one of the key factors an insurer relies upon is evidence of an accelerant - gasoline, kerosene or some other substance to help start and spread the fire. Even the slightest trace of accelerant can be usually be detected through forensic testing. But there was no evidence found in this case, so I was shocked to hear the investigator's testimony – let's call him Mr. Smith – "Yes, there was an accelerant, but by the time we tested for it, it had dissipated."

Bert and Ernie immediately came to mind.

Members of the jury, you are no doubt familiar with the popular children's show, Sesame Street, which I enjoyed watching with my children. In one of my favorite skits, Ernie shows Bert a blank canvas. "How do you like my painting?" asks Ernie. "What painting?" says Bert, "that's just a blank canvas." "No, no it's not," Ernie rejoins. "It's a cow eating grass." "Where's the grass?" asks Bert. "The cow ate it," replies Ernie. "Where's the cow?" asks Bert. "Well, after he ate the grass, he went home," replies Ernie.

Members of the jury, welcome to Sesame Street, where Mr. Smith apparently resides.

At this point the jury was laughing; I believe the judge was laughing; but defence counsel was not laughing. Guess whose client won the case.

Alfred M. Kwinter
Toronto, Ontario

Do you have a war story to share? We all have them, so we publish only the ones that make a little fun of ourselves or, like this one, draw a genuine smile. If you have one of those, send it to me at bymanrobert@gmail.com.

MEANINGFUL MENTOR – DICK LAKE

During the 1960s and 1970s, Hank Stram, head coach of the Kansas City Chiefs, was known as "The Mentor." His players affectionately gave him that name because he was a great teacher who genuinely cared about them. He coached the Chiefs in the very first Super Bowl and coached them to victory in Super Bowl IV. He is in the NFL Hall of Fame, as are many of the players he mentored.

In Holton, Kansas, a small-town north of the State Capital Topeka, there is a true to life Atticus Finch who, for over five decades, has served as an extraordinary mentor to the legal profession, J. Richard Lake. Dick Lake has mentored many successful trial lawyers in the state of Kansas, three of whom have become Fellows of the American College of Trial Lawyers. All of Lake's former interns remember him most fondly and know that the lessons they learned as law students while interning for Lake helped shape their successful litigation careers.

Holton, Kansas is a very special place. Established in 1856 by a group of free-staters from Milwaukee, Holton boasted a population, according to the 1857 census, of 291; in 1858, Holton became the County Seat of what was then named Calhoun County in honor of South Carolina pro-slavery Senator John C. Calhoun. The County was renamed Jackson County in 1859, and by 1860 the population had soared to 1,936. By the 2010 census, Holton was home to 3,329. There are beautiful farms with a lovely rolling hills landscape. There are many senior citizens in the community, as well as a Native American reservation. The people are friendly and hardworking. It is a community where people don't have to lock their doors and there are no strangers.

In the late 1970s, the United States Department of Justice offered a grant to the Kansas County and District Attorneys Association which allowed smaller County Attorney's offices to take on interns for the summer preceding their senior year of law school. The program allowed the students, who were not paid for their work, to receive two hours of class credit.

Depending on the county, each intern would be exposed to different levels of courtroom experience. In Jackson County, under Dick Lake as the Jackson County Attorney, the experience was

exceptional. Lake took the internships seriously, giving each intern the greatest possible opportunity to gain courtroom experience.

The Jackson County Courthouse was a beautiful old building constructed in 1921, configured like many other courthouses in the Midwest. The courtroom was on the third floor. There was no elevator. The bathroom was in the basement, as the old plumbing needed gravity to work at its best. The sheriff's office was right across the street. There were beautiful oak benches and tables inside the courtroom. Across the street was the quintessential local diner where you could get the county's best chicken fried steak and biscuits and gravy.

The judge's court reporter was also his fishing buddy and commanded a strong presence. The sheriff was well-respected and balanced skillful law enforcement techniques with compassionate law enforcement for his fellow citizens. Lake, a former Naval officer, had moved from Topeka to take the part-time position of County Attorney with a private practice on the side.

Lake allowed his interns, under a special permit program through the Kansas Supreme Court, to try all County matters during the summer of their internship. It was a wonderful opportunity for a young law student to cut his teeth in the courtroom, and it allowed Lake to concentrate on his private practice and hopefully make some money. ▷

All of Lake's interns went to nearby Washburn Law School, the "Harvard of the Midwest," located in Topeka.

Lake's first intern was **Paul Morrison**. After the solid courtroom experience Morrison got from Lake, he went on to become the elected District Attorney of Johnson County, Kansas and, later, the Attorney General for the State of Kansas. Morrison is known throughout Kansas as a top-notch trial attorney. In 2002, he successfully prosecuted the longest death penalty case in Kansas history (six weeks), securing the conviction of a serial killer who kidnapped and murdered at least eight women in Kansas and Missouri, stuffing bodies into barrels. As a prosecutor and as a criminal defense attorney, Paul has tried well over 150 jury trials. Morrison was inducted as a Fellow of the College in 2006.

Lake's second intern was **Kevin Regan**, who was inducted as a Fellow in 2010, and who was a year behind Morrison in law school. While Morrison interned for Lake in 1979, Regan was a law clerk at a local law firm and worked for an attorney who tried a case against Dick Lake during the summer of Paul Morrison's internship. Regan noticed the courtroom experience Morrison was getting and close relationship between Lake and Morrison. Regan applied for the internship the following summer. On Regan's first day, in May 1980, Lake greeted him and asked, "How would you like to try a murder case this summer?" Regan immediately replied "I'm in." Dick pushed the file across the desk and said ,"Get ready, you will be in the first chair this August!" The case involved interesting issues involving ballistics, blood spatter, *Miranda* warnings, gunshot residue, and forensic pathology. Regan crammed on all of those subjects throughout the summer as he and Lake had frequent lunches and Lake steered him through the complexities. Regan and Lake tried the case together in August against a highly respected local defense attorney who had been appointed to handle the case, an elder statesman of the local bar and a true gentleman by the name of Marlon White. The jury convicted the defendant as charged with second degree murder.

Tom Erker was a year behind Regan at Washburn; the two played on the school rugby team together. Regan recommended Erker for the next year's internship. During his summer, Lake let Erker try multiple bench trials and an arson jury trial first chair, which involved challenging scientific evidentiary issues that Lake helped Erker navigate. Tom Erker became one of Kansas' finest criminal defense attorneys. He became Chairman of the local bar association; he was appointed to handle the most heinous homicide case in Johnson County history, because the local judges wanted the finest representation available for this defendant. Paying forward the mentoring he received from Lake, Erker went on to teach many younger attorneys how to practice law and try cases.

It became the norm that Lake's current intern would recommend the following year's candidate for the job. Erker recommended F**rank Caro**, who was a year behind Erker at Washburn. Erker and Caro were east coast transplants: Erker was from Long Island and Caro was from the Boston area. Their accents stuck out like a sore thumb in the middle of Kansas.

Caro recalls that "Dick taught me about being a lawyer, criminal prosecutor and our roles as counselors. He introduced me to the town and the many facets of the community. Dick was known and trusted by everyone and I admired that respect and knew it had to be earned." Caro was able to try an aggravated assault on a police officer felony jury trial that summer. He handled the case from the initial charging decision all the way to the Kansas Court of Appeals argument. Caro recalls that Lake was always there to guide him, but Lake let Caro make all the decisions and mistakes in order to learn from them. Caro was allowed to brief and appear before the Kansas Court of Appeals while

still in law school, with special permission from the Court. The extra money Caro earned from handling the appeal allowed him to save and purchase an engagement ring for his wife, Melanie, also an attorney.

Frank Caro never returned to Boston. He is now a well-respected partner with the national law firm Polsinelli, specializing in civil litigation.

The internship program was eventually discontinued. The last intern to be mentored by Dick Lake was **Tom Warner**. Warner, a Wichita native, is one of the top civil practitioners in the state of Kansas; he is past President of the Kansas Trial Lawyers Association. Warner recently won a major case in the Kansas Supreme Court where statutory caps for non-economic damages in major civil cases were found to be unconstitutional – a major victory for the plaintiff's bar as well as for families of injured parties throughout the state of Kansas. Warner was inducted as a Fellow of the College in 2019.

Dick Lake's interns have ended up scattered throughout the Midwest, from Wichita, Kansas to Kansas City, Missouri. Three of them have been inducted into the American College of Trial Lawyers. When a coach has a player inducted into the Hall of Fame, it's probably just good luck. But when he has three inducted, it's probably the coach. Dick Lake is one hell of a coach.

It is no coincidence that the lessons that Lake passed along to these lawyers as youngsters followed them for many decades. Dick Lake truly is the Atticus Finch of Holton, Kansas. He is close friends with the judges, prosecutors, the public defenders, and courthouse staff. He handles many of their estates and family legal affairs. People smile when they see him in the Courthouse Square. He taught all of his interns to respect the law, love God, love your families, respect others, and make the world a better place. Your handshake on a legal matter is as binding as the written word. Always be on time. Always be respectful of others. Always be diligent in your dealings. Always do the right thing, even when no one is watching.

Lake has continued to help teach trial advocacy at Washburn Law School. He has mentored more lawyers than he can remember. He, too, was mentored by some of the great lawyers of his generation and believes it is important to give back to his community.

Lake wasn't above putting the interns to work on his farm. Lake had several of the interns up to his farm for a hay bailing party up in Holton. All of the guys were given a pair of gloves to pick up several fields' worth of hay and throw it onto the hay truck. Over 500 bales were strapped on the truck that day. When the truck was loaded, it was time to drive the truck back. One of the volunteers, who later on became the District Court Judge, drove the truck too fast over a ravine in the hay field and spilled all the hay from the truck. You can guess who had to put the hay back on the truck, before supper was served. No one ever responded again to an invitation to one of Lake's hay parties!

All of the attorneys that had the good fortune to intern for Dick Lake have their own fond memories of their time with him in Holton. The common thread shared by all is that they were, at a very young age, instilled with a once in a lifetime opportunity and that the experiences they received under Dick Lake's mentorship inspired them to undertake careers in trial work.

All join cheerfully and loudly with gratitude to their mentor!

Kevin E.J. Regan
Kansas City, Missouri ■

FLORIDA

Judicial Fellow Skip Dalton of Orlando, Florida, has been working with **Judicial Fellow Barbara Lynn** of Dallas, Texas, in the Eastern District of Texas and Bob Conrad on developing protocol to reinstitute jury trials in the Middle District of Florida. The state of Florida was tentatively looking to call a jury for trial commencing July 27. Judge Lynn has provided a handbook of her experience which is most helpful. Similar protocols have been developed with Conrad and the Task Force on Advocacy in the 21st Century.

PUERTO RICO

The Hon. Gustavo Gelpi, Chief Judge U.S. District Court for Puerto Rico, designated Puerto Rico State Committee Chair **Enrique Mendoza-Mendez** to participate in the Merit Panel to select the final five candidates to be considered by the U.S. District Judges to occupy a vacancy to the position of U.S. Magistrate Judge in Puerto Rico. This was made possible by the commitment made by Judge Gelpi when then **President Jeff Leon** and **Regent Marty Murphy** joined the Puerto Rico Fellows in May 2019 on a protocolary visit aimed at having the Court acknowledge the College's space in the Puerto Rico legal community.

Fellows have been involved in providing a comprehensive (free) webinar on the "Families First Coronavirus Response Act." Fellows have volunteered for podcasts on the "Families First Coronavirus Response Act" and the law related to remote work common during the lockdowns due to the pandemic.

Fellow **Ruben Nigaglioni** had a distinguished participation as consultant in the legislative process of developing the recently enacted new Civil Code in Puerto Rico (prior Civil Code was from 1930).

Fellow **Eugene Hestres-Velez** has lectured on the effects of the recent U.S. Supreme Court Opinion in *Ramos v. Louisiana* ruling that a unanimous verdict is required for felony conviction. Puerto Rico was still one of the jurisdictions left that did not require such a unanimous verdict. The Puerto Rico Constitution established verdicts by a majority rule of at least nine of twelve jurors.

TASK FORCE ON ADVOCACY IN THE 21ST CENTURY

The Task Force has issued "Interim Guidelines" on the use of remote video in conducting appellate arguments, nonjury trials, remote hearings, depositions and examinations, and the mastery of "Zoom-type" advocacy generally. It has also issued "Interim Guidelines" covering issues to be considered when preparing for and conducting civil jury trials during the pandemic and a general-but-comprehensive paper identifying constitutional protections implicated by the reopening of criminal courts in the face of the pandemic. These papers are posted on the College website. This fifteen-person Task Force, featuring jurists and lawyers from the U.S. and Canada, has conducted its work quickly and will continue its efforts into 2021. It expects to refine the "Interim Guidelines" in light of evolving real-world experience over time, and will be looking at such issues as the general evolution of advocacy in our courts post-pandemic and the viability of the twelve-person jury, following a recent article by Fifth Circuit Judge Pat Higginbotham, Chief Judge Lee Rosenthal of the Southern District of Texas and Professor Steve Gensler.

TEACHING OF TRIAL AND APPELLATE ADVOCACY

Sylvia Walbolt, member the Teaching of Trial and Appellate Advocacy Committee and **Regent Sandra**

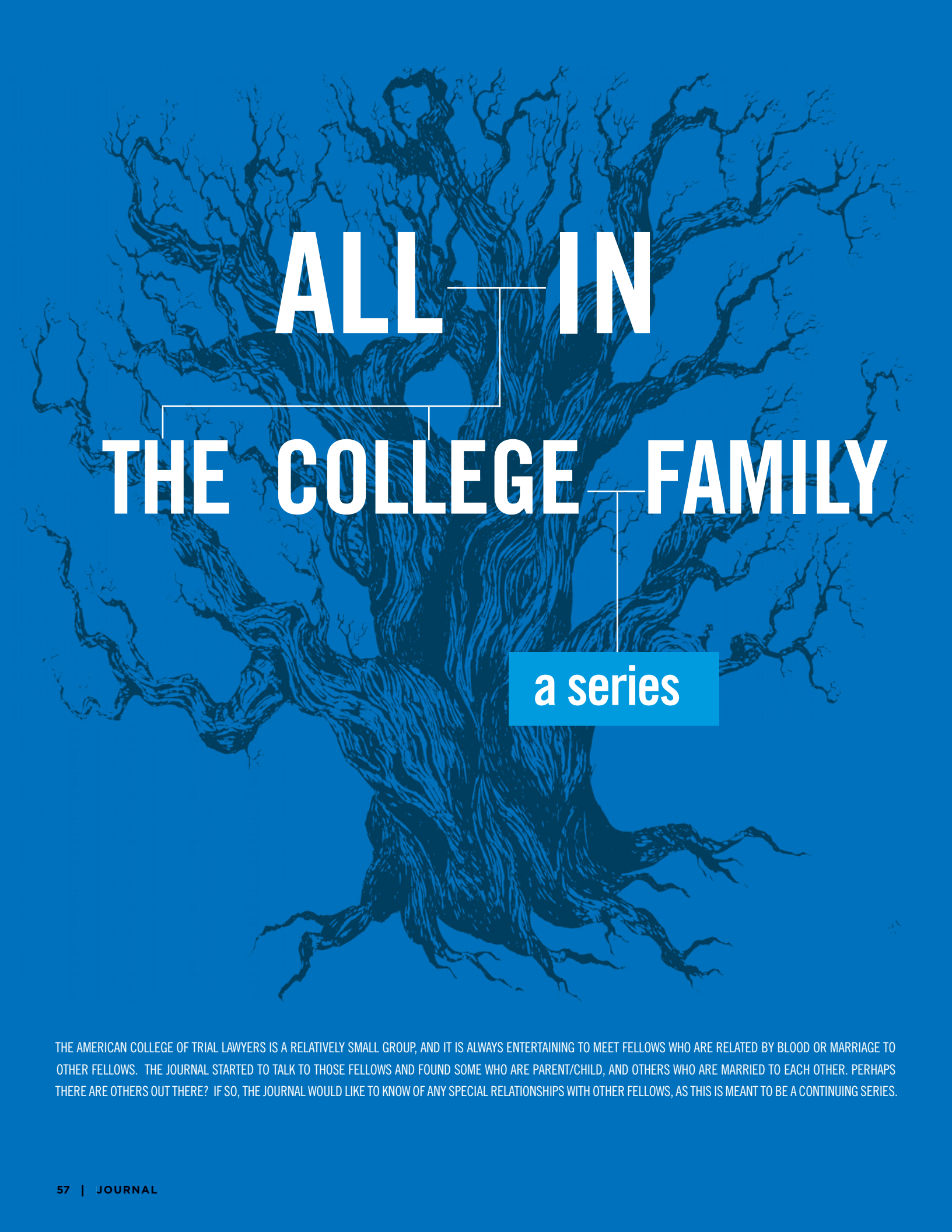
Forbes have, in conjunction with the Advocates' Society in Canada, arranged for videos to be made of several short but effective demonstrations of trial examinations of fact and expert witnesses by different lawyers, including women lawyers. As such, they can be especially useful for young women trial lawyers who may not have female role models to help them develop their trial skills. They can then be used by State and Province Committees as part of their trial training programs for public interest lawyers and young trial lawyers. The videos also can be used by law firms as part of their trial training programs. The committee believes there are multiple ways in which the video demonstrations can be integrated into trial training programs. As just one example, (courtesy of **Former Regent Dennis Suplee**) they could be presented all the way through, with the moderator asking for questions and comments from the audience. Then they would be presented again, on a stop/start basis, to allow the moderator and other panel participants to comment on what the lawyer was doing and why, what other alternative methods might have been used, and to answer any questions that exercise might evoke. The Committee welcomes feedback on the videos and other suggestions for their use as trial training devices by Fellows.

SOUTH CAROLINA

The South Carolina Fellows are planning to present a CLE for young lawyers on Ethics, Civility, and Professionalism on November 5, 2020. This program was previously scheduled for this past May but was postponed due to the pandemic. Speakers in the CLE will include several Fellows, including the current and past Chairs of the South Carolina State Committee, and the Honorable Margaret Seymour, U.S. District Judge for the District of South Carolina. Fellows are also organizing a program for lawyers and judges in the Spring of 2021 on attacks on the independence of the judiciary and the American civil justice system, featuring 2019 Vancouver Meeting speaker Suzanne Spaulding and Judicial Independence Committee Chair **Buddy Wester** as keynote speakers.

"If everyone is moving forward together, then success takes care of itself."

– Henry Ford



ALL IN THE COLLEGE FAMILY

a series

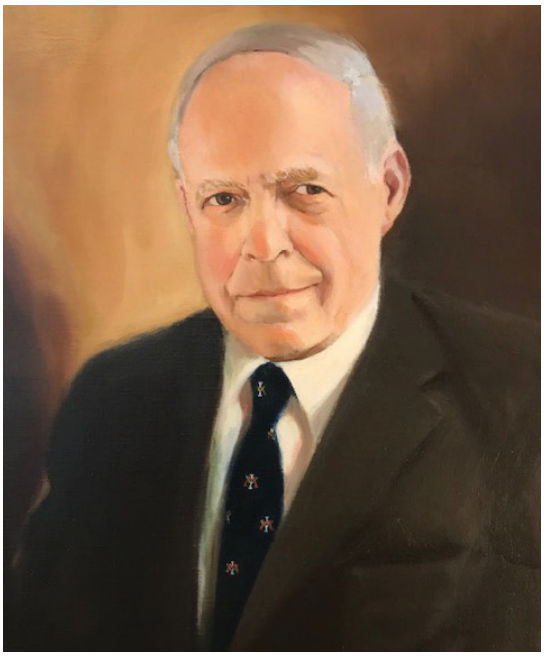
THE AMERICAN COLLEGE OF TRIAL LAWYERS IS A RELATIVELY SMALL GROUP, AND IT IS ALWAYS ENTERTAINING TO MEET FELLOWS WHO ARE RELATED BY BLOOD OR MARRIAGE TO OTHER FELLOWS. THE JOURNAL STARTED TO TALK TO THOSE FELLOWS AND FOUND SOME WHO ARE PARENT/CHILD, AND OTHERS WHO ARE MARRIED TO EACH OTHER. PERHAPS THERE ARE OTHERS OUT THERE? IF SO, THE JOURNAL WOULD LIKE TO KNOW OF ANY SPECIAL RELATIONSHIPS WITH OTHER FELLOWS, AS THIS IS MEANT TO BE A CONTINUING SERIES.

THE THOMAS FAMILY

C. J. Steuart Thomas III ('09) had known about the American College of Trial Lawyers long before he was invited to become a Fellow. When invited to join, Steuart was, like so many, thrilled – and not entirely sure that he deserved the invitation. But the law is in Steuart's genes. He is a direct descendent of United States Supreme Court Chief Justice John Marshall on his mother's side, about four greats back. Can you imagine the pressure young Steuart must have felt in law school when he was first asked to read and understand *Marbury against Madison*? He admits that he was slow to raise his hand when questions arose about interpretation of his ancestor's landmark case.

Steuart completed law school (Washington & Lee University) in 1986. He admits that while he knew he wanted to go to law school, he was slow to sign up for the LSAT after his undergraduate history studies. His wife-to-be, Marie, was concerned that he would not go to the LSAT preparation course, so she signed up and took it with him. They both took the LSAT later that summer, and both got the same score. Marie never did go to law school, but one imagines that she must have been helpful when Steuart needed to debate any current issues.

Steuart had been raised in Staunton, Virginia (population 24,922); he began his practice in Alexandria, about 150 miles northeast of Staunton, with the firm of Boothe, Prichard, & Dudley (now McGuire Woods). But he and Marie (they married after his second year of law school) had started a family, and home finally called when it came to raising his own family and the practice of law. Steuart returned to Staunton to join his father's firm, now named TimberlakeSmith. TimberlakeSmith is a trial lawyer's dream. Its founder, **Wayt B. Timberlake, Jr.**, became a Fellow of the College in 1959. Richard W. Smith became a Fellow in 1973. Steuart's father, **Cal [Colin J. S. Thomas, Jr. (Cal)** ('82)], Wayt Timberlake's son-in-law, became a Fellow in 1982. A fourth member of the firm, **P. Donald Moses**, became a member in 1993. When Steuart became a Fellow, he joined his father and grandfather as a third-generation member. Obviously, there is something in the water in Staunton, Virginia – or at least in the water cooler at TimberlakeSmith.



Cal, who claims that he is just a country lawyer, was persuaded to join Wayt Timberlake and Richard Smith based on a promise of trying cases sooner than most of his fellow law graduates. He handled the defense of a death case before a jury just a few months after law school, and it resulted in a verdict of $4,000 against his client. In those days Virginia had a $15,000 cap on wrongful death lawsuits. Insurers and other lawyers were happy to let those cases go to trial.

For Cal, trial was often by ambush. There was no discovery, no experts on anything as there are today, and no knowledge of what might be presented by your opponent. It was not unusual to have two trials in one week. Once a judge scheduled three jury trials for Cal in the same week. He laughs and says that just one of those trials would take three to four days today. Early on Cal tried whatever came in – he defended alleged murderers and rapists, and he had a single major drug case. When he defended the drug case Virginia's laws were draconian. The crime involved was smoking marijuana in a public restaurant, but it potentially subjected the smoker to many years in prison. Cal recalls that following the bench trial, the very wise judge took the case under advisement. It remains under advisement now almost fifty years later.

Another memorable case for Cal and Wayt Timberlake involved the defense of Billy S. Billy caught his wife *in flagrante delicto*. He proceeded to shoot the offender eleven times, which required reloading his revolver. Following that, he took his wife to a nearby area and ran her over a barbed wire fence until she was nearly cut in two. When subsequently brought to trial, Virginia law then precluded the wife from testifying against the husband. In the absence of available witnesses, the prosecution attempted to sidestep the marital witness prohibition by presenting the sheriff, who claimed that he had told Billy that his wife had told him (sheriff) what happened. He testified that when he related the statement to Billy, Billy responded that "if that is what she said, that's okay." That alleged confession was allowed over strenuous objection. Billy received a sentence of five years. His parents declined an appeal as the legal fees quoted by Cal were estimated to be possibly as high as $500.

Cal recalls that one of his most rewarding cases involved the representation of John A., a graduate of the United States Military Academy, who had chosen to live in a log cabin in a sparsely populated area of the Shenandoah Valley. To get to his home, John had to cross a substantial river. John, a college math teacher, designed and single handedly built a bridge. Since it was the only bridge across the river for a long distance, three other landowners asked to use the bridge and of-

fered to share upkeep and maintenance if they could use it. Everything was done on a handshake. Over time, the other users refused to help with repairs or costs. When the bridge collapsed in a large flood, John A. was left to rebuild it on his own. After he completed the bridge the same people who had refused to help now claimed a right to use the newly repaired bridge. They filed a suit. Cal defended John long after the money for legal fees had run out. His final payment was in the form of a handwritten letter which Cal retains today. It reads in part, "Carole and I were shocked time again by the less than good faith tactics of some of our adversaries and often wondered if your refusal to engage in such behavior would prejudice our fight. You were dead right and they were dead wrong. Thus, the law, as espoused and glorified by Holmes, and practiced by you, was the winner. For restoring our faith in the virtues of a much-maligned system, again, thanks a million."

Cal, now mostly retired, advises that his final years of active practice were some of his best. A long-time friend, **Joseph M. Spivey, III** ('81) retired to nearby Lexington, Virginia, after a long career at Hunton & Williams, now Hunton Andrews Kurth. Spivey's wife had called Cal urging him to involve Joe in some of his cases (to get him out of the house). With permission of his firm and understanding clients, Cal and Joe together worked nine cases. They prevailed in eight. He says that those years working with Joe Spivey might be some of the best years of his practice.

Cal says that Wayt Timberlake was the most outstanding lawyer that he has ever seen in all his years of practice. He was a wonderful trial lawyer but not always a ready mentor. Not every case they tried together was easy on either man. In contrast, Cal says that Steuart needs no help. Only occasionally does he offer a small bit of advice. Having learned from his father-in-law, Cal fairly early on attempted to pass on what he had been taught by Wayt, the man he considered to be the best. Cal was an early member of NITA. He has taught trial practice at numerous law schools. He helped to start the National Trial Advocacy College at the University of Virginia Law School and taught at that course for thirty-eight years.

Steuart always knew that he would become a lawyer. Cal always told him that he loved what he did, and he had heard the same from his grandfather, Wayt. Steuart primarily handles medical malpractice defense. Like his grandfather and father, he loves what he does. He leads TimberlakeSmith's Medical Malpractice and Healthcare Law Section representing hospitals, medical facilities, and healthcare providers in state and federal court, and before administrative and regulatory boards and committees. In addition to being a trial lawyer, the teaching role has rubbed off on him as well. He is currently an adjunct professor at his alma mater, Washington & Lee University, where he teaches trial practice. He was the 2018 President of the Virginia Bar Association.

When Steuart started at Boothe Prichard & Dudley, he was mentored by **Fred Alexander**, another Fellow of the College ('83). Fred was one of the best. After Steuart left that firm and returned to Stuanton, he and Fred would still discuss his cases and the issues before trials. Between Fred and his father, Steuart received a lot of good advice.

Steuart feels the best and most intense part of any trial is when the jury comes in and the judge asks if there is a verdict. The time that elapses while the foreman passes a note to the judge is exquisite bliss. That, says Steuart, and cross-examination are the best. Steuart proudly says that he has few boring days.

Over the years, Steuart has handled many interesting cases, including a baby-switching case in Virginia that received a lot of notoriety at the time. He loves his work and especially enjoys mentoring younger lawyers. None of Steuart's five children have become lawyers, although he and Marie still hope that one may still choose the law. Marie has two brothers and a father who were lawyers.

Steuart loves the outdoors and fly fishing. He fishes rivers and streams in the mountains of western Virginia whenever he can. He bonefishes in the Bahamas with a group of nine other fly fishermen, and he has salmon fished in Alaska. He prefers to wade rather than float – it's a little more exercise, and he likes being out on the water on his own. Following long trials, he is all wound up, but one day of fishing and he is well again. Must be something in that water too.

Carey E. Matovich
Billings, Montana ■

HEROES AMONG US
PHILIP W. TONE

It has become a regular Journal feature to tell the stories of the heroes among us, the stories of Fellows who wore the uniform, who fought and bled to keep us all safe. This is one of those stories. If you have one, please share it with us . . .

Phil Tone was a Federal Judge, sitting on both the District and Court of Appeals. He was the College's thirty-eighth President, in 1988-89. And he was a hero, a paradigm of his, the greatest generation.

The Battle of Aachen, lasting nearly three weeks in October 1944, was one of the largest and bloodiest urban battles fought by U.S. forces in World War II. Aachen, the historic capital of Charlemagne's Holy Roman Empire, had no particular military significance. But it had enormous psychological value as the first major city on German soil to be captured by the Allies. The Germans defended fiercely, and the Allies suffered more than 5,000 casualties, one of them Phil. The main assault on the town was led by General Charles H. Corlett's XIX Corps' 30th Infantry Division, to which Phil's 743rd Tank Battalion was attached. Phil was a Second Lieutenant, a tank commander, and was "slightly" wounded by shrapnel. He was one of the lucky ones, but a hero, nonetheless.

Phil Tone graduated from Maine Township High School in Park Ridge, Illinois in 1940. An all-conference fullback, Phil earned a scholarship to play football at the University of Iowa for legendary coach Eddie Anderson.

Eddie Anderson played for Knute Rockne at Notre Dame from 1918 to 1921. As a senior, Anderson was team captain and a consensus first team All-American. In Anderson's last three years, the Irish record was 28–1; their only loss was to the Iowa Hawkeyes. After Notre Dame, Anderson became

a player/coach for the Chicago Cardinals (now the Arizona Cardinals). In 1925, Anderson enrolled at Rush Medical College in Chicago, and while attending med school, he coached football and basketball at DePaul University. After becoming a doctor, Anderson took two jobs – head football coach at Holy Cross, and head of the Eye, Ear, Nose & Throat clinic at Boston Veterans Hospital. In 1939, Anderson returned to his home state of Iowa and coached the Hawkeyes to a 6-1-1 record and Nile Kinnick to a Heisman Trophy, while practicing medicine part-time at the University of Iowa Hospital.

Phil played for Anderson for two years, until a knee injury forced him out.

With the threat of war in 1940, Phil entered the Army ROTC program and accelerated his classwork so that he could graduate before he was called up for active duty. By the summer of 1943, he had received his undergraduate degree and was able to squeeze in one semester of law school. He had met and fallen in love with Gretchen Altfillisch, who was President of Kappa Kappa Gamma sorority and who would graduate Phi Beta Kappa. But their lives together would have to be put on hold. Just shy of Phil's twentieth birthday, the call to service came.

Like so many who returned from war, Phil never talked much about his experiences. But his letters to Gretchen were regular and provide what little detail we have. Phil's son, Jeff, relates that Gretchen kept all of Phil's letters, indexing them and placing them in a scrapbook entitled "Snaps and Scraps: My Life in the United States Army."

On July 2, 1943, Phil reported to Fort Riley, Kansas. Phil complained about the boredom of training, including KP duty and "sit[ting], or occasionally l[ying], in the hot Kansas sun all day waiting to fire ten or twelve rounds of ammunition." At the same time, he was concerned whether he would be commissioned as an officer: "I entertain honest doubts as ▷

to whether we will ever be commissioned. All we hear on every hand is that there are too many officers." But a few weeks into his month-long stay at Fort Riley, he received the "break" he was hoping for and was assigned to the tank corps. Phil was sent to Fort Knox, Kentucky for Armored Officer Candidate School.

Prior to World War I, the U.S. military exclusively obtained its officers from its three military academies at West Point (Army), Annapolis (Navy, Marines) and New London (Coast Guard). The First World War's demand for officers vastly outstripped the ability of the academies to supply officers, so the National Defense Act of 1916 created the Reserve Officers Training Corp (ROTC), allowing colleges and universities to train officers. With the Second World War, that too proved inadequate. The War Department initially envisioned it would need an Army of some 4,000,000 and an officer corps of more than 300,000 (it turned out that estimate was off by half). To get the anticipated numbers, General George C. Marshall ordered the creation of Officer Candidate Schools. As tank warfare's importance grew, the Army assigned Fort Knox to produce Armor officers. Between 1941 and 1945, Fort Knox produced 11,349 armor officers, one of them 2nd Lt. Phillip W. Tone, on December 11, 1943. He was not yet twenty-one.

Phil's description of his training to Gretchen suggested that it was easy, mundane. "For seventeen weeks we have an endless routine of formations every hour of every day and evening." But anyone who has ever trained at Fort Knox knows the meaning of misery, agony and heartbreak. There is a route in the base where trainees sometime march in full combat gear and sometimes run at double-time in tees and combat boots for PT. Either way, at some point the trainees encounter a hill that appears to be about a 20° grade (the highest pitch you can get on a health club treadmill is usually a bit less than 10°, although NordicTrack has just announced a pricey new model line that can do 40°); it is misery running up the hill, and troops have aptly named it "Misery." But as you crest Misery and hope for the luxury of flat ground, you see looming ahead, after a short, slightly downward slope, an even higher, even longer, even steeper hill, this one about 30° - Agony. Finally, you crest Agony. You are looking just ahead of your boots; you are too exhausted to raise your head. But you see that you are finally headed downhill. Your spirits rise, as does your head . . . and then you see, after about 300 meters of downgrade, there it is, Heartbreak, a quarter mile of 45° grade. There is no "easy" training at Fort Knox.

Phil was anxious to do his part. His fear was not that he would be thrown into combat; it was that he might not be. He lamented to Gretchen, "I'm beginning to wonder whether my chances of seeing any combat aren't becoming slimmer and slimmer. There are only a little over two armored divisions overseas now, the first, second and part of the third. There are at least fifteen in this country, many of them well trained and ready to go. The fourth was organized in April of 1941. They're still sitting down in Texas." He began to question his choice of tanks. "If I had stayed in the infantry this never would have happened to me. Everybody I hear of there is ready to go. . . . I believe that being a tank officer is safer than being a

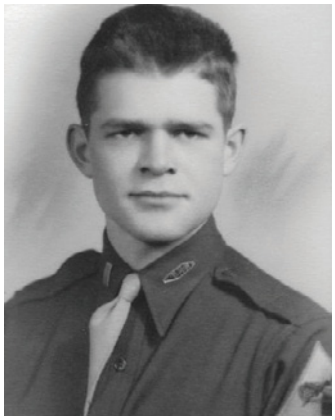
lawyer." With a naivete perhaps not unusual in someone so young, Phil told Gretchen that "if I ever get into combat, I'll feel like a gold brick, it will be such a pleasure."

Phil speculated that he would soon be leaving Fort Knox and said "there's one God forsaken mudhole they can't send me to – Camp Campbell, Kentucky. I'll gladly go anywhere else." Two weeks later, he was assigned to the 48th Tank Battalion, 14th Armored Division at – you guessed it – Camp Campbell. Phil's frustration at not being in the action continued. "It's extremely unlikely I'll go overseas with this outfit," because there were so many "overstrength" officers in his division, and it was not allowed to take any overstrength personnel overseas.

But then, on July 7, all leaves were cancelled with no explanation. On July 11, the division learned that it would be going "somewhere in the east soon." By August 1 he was at Fort Meade, Maryland, where he spent ten days before being transported to New York City, to board a ship for England in mid-August as part of an "excess officers company." His letter to Gretchen regarding the passage says that it was "a pleasant voyage," although, Jeff recalls, family lore has it that he got terribly seasick. The ship landed in England on August 26, 1944.

From that point forward, Phil's letters to Gretchen, like all war theater correspondence, were censored to ensure that enemy spies could not get details about troop locations. Phil could not disclose his location; he could only say he was "somewhere in England" or in France, Belgium, Holland, or Germany, as things progressed. But Phil and Gretchen had developed their own secret code. Before he shipped out, Phil gave Gretchen a chart that had a column for "Points of Origin," listing cities all over the world. Each city had a book associated with it. For example, London was *You Can't Go Home Again* by Thomas Wolfe. He then included a grid with generic last names on the vertical axis and generic first names on the horizontal axis, with last names stretching from east to west and first names stretching from north to south. The scale was twenty-five miles between names. So, if a letter to Gretchen innocently mentioned that Phil was reading You Can't Go Home Again, and that he had run into "Ike Caldwell," Gretchen could figure he was twenty-five miles from London.

Phil was "somewhere in France" by September 11. Jeff believes he landed in Normandy, on Omaha Beach, the scene of fierce fighting on D-Day; Phil's landing, presumably, was less harrowing. But Omaha Beach seems likely, given that over 600,000 troops were landed there in the 100 days following D-Day.



Phil lived in pup tents and foxholes while he moved closer and closer to the front lines. He wrote to Gretchen that "I can remember that when I was small, I was thrilled with a tent someone gave me. I insisted on sleeping in it with a soft bed just a few yards away inside the house. What was I thinking of?" He was never one for camping after the War.

By October, he was "somewhere in Belgium" and warned Gretchen that "pretty soon it will be impossible for me to write at all frequently. Don't worry. I'll be all right." A few days later he was "somewhere in Holland" bivouacked in a Dutch apple orchard and living in a fox hole. "The mud here is the same as it was in Belgium and France. No matter where one is, there's always mud." He said that "the Germans fly over a lot during the night, but they haven't bothered us." He was using German shampoo, had money changed into German marks, and was smoking German cigars.

He wrote Gretchen on October 13 that he had "finally made it," receiving his assignment as a replacement officer to command a tank in Company C of the 743rd Tank Battalion, an independent medium tank battalion with M4 Sherman tanks that fought in Europe from D-Day through V-E Day. Shortly after D-Day, the 743rd was attached to the 30th Infantry Division for the duration of the war.

The Battle of Aachen officially lasted from October 2 through October 21; Phil joined the 743rd on October 13, smack in the middle of the twenty-day engagement. We don't know for sure, but it's more than a fair assumption that Phil got command of his tank only because its former commander had become a casualty. It's equally likely that the tank itself had seen action

and was in need of repairs. But we don't know for sure, because Phil never said. Phil's letter to Gretchen on October 13 simply ended by saying there was "nothing much to say except that I love you. I'll be all right. Tell the folks I won't have time to write anymore." Many days later, when he wrote to tell Gretchen that Aachen had fallen, he told her "Don't let anyone tell you the war over here is over, or near over, Darling. It's going to be a long cold, winter."

We know from army records that Phil was wounded by enemy shrapnel on October 24 in an engagement in Würselen, Germany, about a mile north of Aachen, three days after the formal surrender of the City. Phil's Army Separation Qualification Record cryptically generalizes his time with the 743rd Battalion: "Served as medium tank commander in combat zones, European Theatre. Directed preparations for tank advance, … Ordered advance or other tactical movement in company with other tanks in the group following briefing and radio contact while in movement. Weapons ordered aimed and fired against enemy and his position, in support of infantry and other unit advances."

His letters to Gretchen revealed no details. Perhaps he wanted to spare her from them; perhaps he was sensitive to censorship rules. He simply wrote "[i]t's pretty hard to find anything to write about, Darling; and there's very little that has happened that I could tell you about if I wanted to." Later in life he told Jeff and his other two children only snippets. Jeff recalls: "He described how overmatched the Sherman tank was compared to the German Tiger tank with its 88 mm armor-piercing guns. He told of having to use the Sherman tank's better maneuverability to evade direct engagement with Tiger tanks. He also described harrowing experiences when the loader in his tank would misload the tank's gun and it fell to Phil, as the tank commander, to exit the tank in the middle of combat to resolve the problem from the outside." That must have been fun . . .

By the end of October, Phil was in an army field hospital "somewhere in Holland," sick with what has variously been described as pneumonia, acute bronchitis, or a parasitic infection. Though Phil's letters had consistently been upbeat and optimistic, this time, in a rare display of unease in anticipation of returning to the front, Phil told Gretchen that "I sometimes think that you should try to put me and our hopes for the future in the back of your head and try to live for the present as if you had never known me. . . . This thing will drag out for a very long time to come." Of course, Gretchen never entertained, not for a moment, forgetting about Phil.

Phil described listening to the "German propaganda station" on the radio, which "had our whole Pacific fleet wiped out in the recent naval battle." Phil remained in the field hospital for only a few days and was released back to the front. Less than a week later, he was back in another hospital, further to the rear, in France. He anticipated returning to his unit at some point but in the meantime, "[t]he miracle of sheets and a soft bed still stuns me. It's the sort of thing one dreams of over here." He was still pessimistic about an early end to the war, saying that he was convinced that "the only way to treat this war in one's mind is to resign oneself to the fact that it will last indefinitely." A few days later he was at a different hospital, feeling worse, still in France, still farther back, "after experiencing a long and grueling train ride." He said "[t]he last time I saw this vicinity I was much younger it seems to me. My heart was young and gay. But a little over a month's time has brought many changes."

On Thanksgiving Day, he was in a hospital in England, where he said that "I'd like to be in Chicago today, but England is a much more pleasant place than many I've seen lately." Phil was reunited with his old coach Eddie Anderson, who had taken a leave of absence from his coaching duties at Iowa to join the U.S. Army Medical Corp. and was serving as a doctor at the hospital where Phil was a patient. Anderson visited Phil often, they shared meals, and they discussed the Ohio State-Michigan football game that had been broadcast overseas.

By early February 1945, Phil was back in the states. He was still only twenty-one years old. He had not recovered from his illness, and he was sent to a hospital at Fort Sheridan. He received a weekend pass to marry Gretchen on

March 10, 1945, in Decorah, Iowa. They had a weekend honeymoon in La Crosse, Wisconsin, after which he returned to the hospital. Phil was finally released from the hospital in early April; he and Gretchen returned to Fort Knox, where Phil trained to be shipped overseas to the Pacific theater for the invasion of Japan. But the War ended without the need for an invasion. Phil was discharged in May 1946. He remained in the Reserves until 1957.

In 1946, Phil returned to the University of Iowa, where he became Editor in Chief of the Law Review, graduating in 1948 with highest honors. He clerked for Supreme Court Justice Riley Rutledge, succeeding John Paul Stevens, later Justice Stevens, in that role. Following his clerkship, Phil spent a year as an associate at Covington & Burling in Washington, D.C. He was persuaded by his friend John Paul Stevens to return to Chicago to join what is now Jenner & Block, where he became a partner in 1956. I worked for, and was mentored by, Phil, my first two years after I graduated from law school in 1970. In 1972, President Nixon appointed Phil a District Judge of the United States District Court for the Northern District of Illinois. In 1974, President Nixon elevated him to the Seventh Circuit, where he served until 1980. He returned to Jenner & Block and practiced until his retirement in 1997. Shortly after leaving the bench, he served as Special Counsel for a Senate investigation into dealings between Libyan officials and Billy Carter, brother of then-President Jimmy Carter.

In 1989, when Phil was President of the College, he was also General Counsel of the U.S. Golf Association. And he was trying cases. We tried a two-week jury trial together in Columbus Georgia in the Spring. As I was trying to keep up with my trial preparation, Phil did his too – while studying the Rules of Golf in his spare time, because his position with the USGA required that he be an official at the Masters, scheduled just after our trial was to end. Phil was always prepared, for whatever he was asked to do.

Phil passed away in 2001 from complications of Alzheimer's disease. Gretchen passed in 2015 at the age of 92. Phil and Gretchen raised three children, Michael, Jeffrey and Susan, all of whom became accomplished lawyers. Their many grandchildren and great-grandchildren are likely all successful as well, but I mention only one – Jeff's daughter, Hope Tone-O'Keefe, a 2018 Notre Dame Law grad who is now an associate at Phil's old firm, Jenner & Block. Eddie Anderson, class of 1921, would be proud.

Phil Tone was an exceptional lawyer and judge. He was an exceptional human being.

He was my hero. Maybe yours too.

Robert L. Byman
Chicago, Illinois

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SIDEBAR – Tanks For The Memories

The Sherman tank, officially the "M4 General Sherman," was the principal battle tank used by the United States and its Allies in World War II. The M4 was first deployed in North Africa in 1942, then Western Europe and throughout the Pacific theater. A total of 49,324 Sherman tanks were produced in eleven U.S. plants between 1942 and 1946.

The M4's design emphasized speed and mobility, compromising on firepower and survivability by limiting the thickness of its armor and the size of its main gun. The M4's main armament was a short-barreled, low-velocity 75-mm gun, and its armor thickness ranged from 12 to 75 mm (0.5 to 3 inches). The tank had a maximum speed of 38 to 46 km (24 to 29 miles) per hour and a range of 160 to 240 km (100 to 150 miles), depending on the series (M4 to M4A3E2). The M4 carried a crew of five—commander, gunner, loader, driver, and codriver/hull gunner. The vehicle weighed about 33 tons, depending on the series. A typical power plant was a 425-horsepower gasoline engine.

While the M4 initially outclassed the existing German and Italian tanks in Africa, the Germans quickly reengineered and built new generations of tanks, the Panther, Tiger, and King Tiger, each of which thoroughly eclipsed the M4.

The German Panzerkampfwagen V (Panther) tank was superior to the American M4 Sherman in almost every respect. Its wide steel tracks gave it excellent cross-country performance and reduced ground pressure. It had a superior main gun and frontal armor. Its 75-mm high-velocity gun could easily penetrate a Sherman's hull or

German Panzerkampfwagen V (Panther)

American M4 General Sherman

turret at most battlefield distances, while the Panther's frontal armor was 100-mm thick and sloped to deflect the M4's low velocity shots.

The Sherman's designers opted for a low-velocity gun because they felt it would last longer than a high-velocity one; they failed to realize that few Shermans would last long enough in combat against high velocity guns to wear out their barrels. Later versions of the M4 did have an upgraded high-velocity gun, but those did not reach front-line units until late November 1944, five months after the Normandy invasion.

The Sherman did have some advantages. Its thinner armor made it lighter and more maneuverable on solid ground, an important advantage in the cold, hilly terrain and small villages of Western Europe. And the Sherman's turret had a much quicker rotation rate than the Panther's, usually allowing American crews to get off the first shot in combat. The Sherman also enjoyed greater reliability than the Panther, which was more prone to breakdowns and mechanical difficulties. And while no Sherman could stand up to a Panther one-to-one, the Allies had the priceless advantage of supporting airpower, plentiful reserves, superb logistics, and an overwhelming superiority of numbers – only 6,000 Panthers were manufactured during the entire War. With its speed and ability, the Sherman could outflank the enemy armor, leaving many of them to face American tank destroyers and aircraft. With air superiority, American logistics overwhelmed the Axis. Sherman replacement parts were always in abundance and retrieval crews pored over the battlefields, often while the firing was still going on, to make immediate repairs, while the Germans were forced to abandon their damaged Panthers where they stopped.

But sitting in a tank, especially a Sherman tank, was not a safe ride. Notorious for their flammability, Sherman M4's were nicknamed "Ronsons," because of the then popular cigarette lighter with the slogan "lights every time." Shermans avoided tank to tank battles with German tanks for good reason. Panthers and Tigers killed eleven Shermans for every Panther or Tiger killed by a Sherman. The Sherman tank's primary role was infantry support, spearheading attacks, and bolstering defensive positions, all while trying to avoid contact with German tanks.

The Tiger tanks had significantly greater firepower, accuracy, and armor, and grossly outclassed the Shermans. The Tiger II had a 600-horsepower engine and a maximum speed of 23 miles an hour, with a cruising range of 105 miles. It carried an 88-mm cannon which could hit an M4 from well beyond the M4's range. And even if the M4 could get into range before the Tiger saw it, the M4's low velocity 75-mm shells literally bounced off the Tiger's 1.58 - 7.09 inches of armor. But while the German tanks outclassed their American counterparts, only 489 entered service, because production was constantly disrupted by Anglo-American bombing raids and shortages of raw materials.

German Tiger II

JUSTICE FOR THE WRONGFULLY CONVICTED

All lawyers are called to use their God given talents and abilities to seek justice. That calling is especially compelling when an individual has been wrongfully convicted and imprisoned. The Fellows featured in this article have answered that call in very powerful ways. They are not only wonderful role models for all of us, but also are heroes for those individuals whose freedom was restored after many years of unjust imprisonment, often including time spent on death row. Their work is highlighted with the hope that others in and outside the College will follow in their footsteps whenever a similar call arises.

If you would like to share your experience with Innocence Projects in your state or province, please contact Journal Editorial Board Member and Emil Gumpert Award Committee Chair **Mark C. Surprenant**, mark.surprenant@arlaw.com.

SAMUEL W. SILVER – ANTHONY WRIGHT

Sam Silver, a partner at Schnader Harrison Segal & Lewis LLP, is the President of the Pennsylvania Innocence Project and one of the College's Access to Justice Distinguished Pro Bono Fellows. One of Sam's proudest and happiest professional moments is undoubtedly when a jury returned a "not guilty" verdict for Anthony Wright of the murder charges for which he had previously been unjustly and wrongfully convicted, resulting in Anthony spending twenty-five years of his life behind bars. Anthony was just twenty-two years old and a father of a very young child when he first went to trial in Philadelphia in 1993 for the alleged rape and murder of a seventy-seven-year-old woman. The principal evidence against Anthony was his written confession - which he maintained he had been coerced into signing. After the jury found Anthony guilty on all counts, he was sentenced to life in prison, barely escaping the death penalty by a 7-5 jury vote.

Fortunately for Anthony, the Innocence Project in New York decided to investigate his case. In 2013, it successfully demonstrated through DNA testing that Anthony was not the source of the sperm found in the victim's body, leading to the prosecutor's reluctant agreement to throw out the previous conviction. Nevertheless, and despite the clear DNA evidence, the prosecutor continued to insist that Anthony was the murderer and retried him in 2016. The Innocence Project put together a dedicated and determined trial team for the retrial, which included Sam and other lawyers from his firm. The retrial lasted eleven days. The jury's not guilty verdict came back in less than one hour.

Innocence Project co-founder and trial co-counsel Peter Neufeld says this of Sam: "He led the successful collaboration seamlessly in the one and only retrial in the

thirty-year history of the Innocence Project. Sam's searing cross examinations of the key detectives, brought home in his brilliant and devastating closing argument, set in motion the quick verdict in which the jury went beyond acquittal to pronounce Mr. Wright's actual innocence." Nina Morrison, Senior Litigation Counsel for the Innocence Project and trial co-counsel, added: "Sam didn't get paid a dime for the thousands of hours he spent to set Tony Wright free, but he defended Tony as if he were the CEO of a Fortune 500 company. The Innocence Project had the case for almost a decade before we recruited Sam to head up our retrial team. He brought his trial lawyer's zeal and clear-eyed perspective to everything we did for Tony from that point forward, and it made all the difference in the world."

Anthony himself said: "Sam is a great lawyer but is even a better person. He was amazing in the closing argument. He is one of my guardian angels on earth. I love him to death. He is family to me. Even to this day, Sam is always checking on me and my family to see how we are doing. I will never forget that day when the jury came back in my favor. Sam had tears of joy in his eyes as did I, my family, my friends, and my other lawyers. I owe my life to Sam and to all my lawyers who were there for me and believed in me." Anthony was so proud of his trial team that he had their names tattooed onto his arm after the case was over.

LARRY A. HAMMOND, HOWARD R. CABOT, RANDY PAPETTI – THE ARIZONA JUSTICE PROJECT

No article on justice for the wrongfully convicted and imprisoned would be complete without mention of Larry Hammond. In 1988, he founded the Arizona Justice Project (Project) and served as its president for twenty-two years. Because of Larry's vision, guidance, and leadership, the Project is one of the most respected innocence projects in the country. Larry served as an inspiration and mentor for many lawyers who handled matters for wrongfully convicted and imprisoned individuals. On March 2, 2020, Larry passed away at the age of seventy-four. [An in Memoriam to Larry appears at page 133 of the previous Issue of the *Journal*.] Larry was an ACTL Access to Justice Distinguished Pro Bono Fellow and a founding member of the Osborn Maledon law firm. His passing is mourned by many, but his memory will forever shine brightly in ▷

the hearts of those who passionately continue to do the work he pioneered in Arizona.

One of those deeply inspired by Larry is ACTL Access to Justice Distinguished Pro Bono Fellow and Perkins Coie partner Howard Cabot: "Whenever the topic of wrongful convictions comes up in Arizona, the name Larry Hammond universally comes to mind. For fifty years, Larry has been a voice for the voiceless, standing up for the marginalized and forgotten of the criminal justice system. His influence on the Arizona Justice Project's work and its success is renowned. Over the years, Larry, through the Project, helped free twenty-seven individuals who otherwise would have languished in prison. He represented defendants in numerous high-profile cases. Just one example is Louis Taylor, a young black teenager, sentenced to life imprisonment for the Tucson Pioneer Hotel fire that killed twenty-nine people in 1970. Working under Larry's supervision, the Project hired a team of experts who, using new scientific technology, determined that the fire may not have been due to arson after all. As a consequence, Taylor was released from prison in 2013 after serving over forty-two years."

Howard modestly states that his work for the wrongfully convicted "pales in comparison to Larry's and others." But Howard has been a leader in his own right. Howard represented Abelardo Chaparro in a landmark case which went to the Arizona Supreme Court for its response to a question certified to it by a federal district court. Chaparro had been convicted of first-degree murder in 1996 and sentenced to "life without possibility of parole for twenty-five years." He became eligible for parole after serving twenty-five years of his sentence, even though the Arizona legislature abolished parole in 1993 for people convicted of offenses after 1994. The Arizona Supreme Court held on March 5, 2020: "a sentence imposing 'life without possibility of parole for twenty-five years' means the convicted defendant is eligible for parole after serving twenty-five years' imprisonment despite § 41-1604.09's prohibition of parole for persons convicted of offenses occurring on or after January 1, 1994." The result was not only significant for Howard's client, now granted a parole hearing, but also for approximately five hundred other Arizona inmates sentenced to life "with the possibility of parole" subsequent to January 1, 1994.

A third Fellow actively involved with the Arizona Justice Project is Randy Papetti, a partner at Lewis Roca Rothgerber Christie LLP. Randy is a commercial litigator, who has on a pro bono basis handled high-profile murder and other homicide cases through the Project, which refers on its website to Randy's expertise: "Early in Randy's career, he was asked to help on a case where the defendant had been convicted based on a medical diagnosis known as 'Shaken Baby Syndrome' (SBS). With no experience in the area, Randy dug into the case and studied the science behind the diagnosis, concluding it was unreliable, and eventually securing that individual's relief after serving a lengthy prison sentence…. Recently, Randy's concern about the unreliability of the science in this area led him to write a leading text, *The Forensic Unreliability of the Shaken Baby Syndrome* (Academic Forensic Pathology International 2018), which addresses the medical and scientific complexities and issues surrounding the diagnosis."

ROBERT L. BYMAN - DAVID DOWALIBY

Bob Byman, a partner at Jenner & Block LLP, served as president of the ACTL from 2013-2014. He has represented numerous pro bono clients in both civil and criminal matters, including his representation of individuals wrongfully convicted of murder. One of those clients, David Dowaliby, was found guilty of murder and of concealing a homicide by an Illinois jury in 1990, resulting in a forty-five-year prison sentence. Bob and his law firm volunteered to represent David on appeal following his conviction.

David Dowaliby was convicted of the 1988 murder of his adopted seven-year-old daughter Jaclyn, who disappeared from her south Chicago suburban home in the middle of the night. Jacyln's mother, Cynthia, reported her daughter missing the next morning. Tragically, Jacyln's murdered body was found five days later in some weeds behind an apartment complex parking lot not far from their home. Months later, both David and Cynthia were arrested and charged with first-degree murder and concealing a homicide.

After the State rested its case at trial, the judge entered a directed verdict of not guilty for Cynthia, finding that the evidence against her was legally insufficient as a matter of law; but he let

the case go forward against David because of the additional evidence against David, from an alleged eyewitness suffering from bipolar disorder, who claimed he saw David in an automobile similar to Cynthia's at approximately 2:00 am leaving the scene where Jaclyn's body was later found. Amazingly, this witness testified that it was David at the scene because he could recognize David's nose structure from a distance of seventy-five yards.

In 1991, following Bob's compelling oral argument, the three-judge appellate court panel unanimously overturned the jury verdict without any need for a retrial. The Court determined that the trial judge should have entered a directed verdict of not guilty for David in that the evidence against him was just as legally insufficient as it was against Cynthia. As Bob relates: "There was insufficient evidence because the Dowalibys were innocent. At the time of the appeal, that might have been an open issue and I had to argue the technical failure of proof; but as the case continued to be investigated, it became reasonably clear that the crime was actually committed by Jaclyn's birth father's brother." The Illinois Supreme Court subsequently rejected the appeal by the Cook County State Attorney's Office, thus confirming the Appellate Court and leading to David's freedom. Judge Dom Rizzi, a member of the appellate panel, said the prosecution of David was "a waste of taxpayers' money." Bob describes this landmark appellate proceeding: "When we did the oral argument, it generated enough interest that the appellate court allowed, as I understand it for the first and only time ever, a live television camera feed of the argument. Most Illinois Appellate arguments go twenty to thirty minutes. This one ran over two hours. My oldest son, Jon, was twelve, and he attended; my other two sons, both 8, watched on TV. I thought they would be bored, but they were not." To this day, Jaclyn's actual murderer has never been arrested.

The case received national attention and became the subject of a movie and a book entitled *Gone In The Night* authored by Northwestern University professor David Protess and Chicago legal affairs writer and political consultant Rob Warden. Their personal notes to Bob speak volumes. David writes: "For Bob - Whose brilliance and integrity shined through in this case. You are a genuine hero in this otherwise tragic story." Rob adds: "For Bob - Here's to the best damn pro bono program there ever was, and to the best damn pro bono lawyer in the universe."

During the murder trial, Cynthia was pregnant with her second daughter, Carli. Adding insult to injury, while David's appeal was pending, the prosecutors tried to take custody of Carli, not yet one year old, and her brother, Davey, from Cynthia. Bob relates: "We successfully defended that. In fact, the judge expressly found, after a week-long hearing, that both Cynthia and David – even though David was then appealing his conviction in the murder of his daughter – were 'loving, caring parents.' David won his appeal and was released before Carli's second birthday. That was the last time I saw Carli. We exchange Christmas cards every year, but I hadn't kept up with Dowaliby family matters. But two years ago, Jane and I got an invitation to Carli's wedding, with a note that read: 'You mean so much to our family. Without you, there would be no family. Without you, my father would not be walking me down the aisle.'" David and Cynthia share similar feelings of tremendous appreciation for what Bob did for them. David's note to Bob read: "Thanks for believing in us, and fighting for us, and for winning our ultimate freedom," and Cynthia said: "God Bless you, for everything you've done. Without you we wouldn't be where we are today."

Lawyers such as Bob and the others featured in this article do not handle difficult pro bono cases for recognition or for anything other than the satisfaction and joy that comes from knowing they have done their best for their clients despite the long hours and often challenging circumstances. As Bob best describes: "The day I walked David out of Stateville Prison, my sons jumped into my arms and told me they were proud of me. Biggest fee I have ever earned."

RONALD S. SAFER -
JULIE REA AND EDDIE BOLDEN

Ron Safer is a founding partner of Riley Safer Holmes & Cancila LLP. After working as a prosecutor with the U.S. Attorney's Office in Chicago from 1989-1999, Ron returned to private practice with an emphasis on pro bono service to individuals wrongfully convicted and imprisoned. He has represented nine individuals over the ▷

years, whose freedom from years of unjust imprisonment was restored because of Ron's work on their behalf (and he is currently representing several others). Here's what happened in two of those cases.

Julie Rea was wrongfully convicted in 2002 for the 1997 stabbing murder of her ten-year-old son. She was sentenced to sixty-five years in prison. Following the conviction, a series of investigative steps led to a confession by Tommy Lynn Sells, who was already in prison in Texas for other murders. Nevertheless, when the Illinois Appellate Court vacated Julie's conviction on other grounds, the prosecutor forged ahead to retry her. The prosecutor refused to accept that the confession was legitimate because Sells had misstated a few facts regarding the murder.

Julie was retried in 2006. Ron served as Julie's lead trial lawyer with assistance from the Bluhm Legal Clinic at the Northwestern University Law School. Following a two-week jury trial, the jury found Julie not guilty. Co-counsel Jeff Urdangen states: "Julie's trial was a profoundly emotional experience. Some cases are etched forever in my storehouse of memories, and Julie's is certainly one of those. In forty years as a defense attorney, I've not had a more deserving client than Julie Rea nor a more accomplished partner than Ron Safer."

Although she forever has the tragic memory of her lost son, Julie could at least now put behind her the nine-year agony of being falsely accused of her son's murder: "Ron was the lead lawyer for my wonderful, hard-working trial team. He and the others on the team were always very gentle and compassionate towards me, but very strong and aggressive in presenting my defense at the trial. Even one of the prosecution's lead detectives on the case said that Ron's closing argument was the most powerful he had ever heard. Ron and Northwestern also gained an uncontested certificate of innocence for me later which further shows how well the truth of my innocence had been established repeatedly. At the end, because of everything Ron and the team did, my faith in the legal system was restored and justice was done for my son and me."

Eddie Bolden was convicted in 1996 of a double murder and an attempted third murder in a failed drug deal. Eddie was sitting in a fast food fish store at the time the 1994 murders were committed on the street outside. He called 911 to summon the police to the scene. A month after the murders, the police put Eddie in a lineup and arranged it so the living drug dealer, who was shot by the assailant, identified Eddie. Despite numerous inconsistencies in the drug dealer's story, (who admitted to drug and weapons crimes that would have landed him in jail for decades, but, after he identified Eddie he was never charged) and a number of witnesses who testified that Eddie was inside the store at the time of the murders, Eddie was convicted and given a life sentence.

Following the conviction, Ron represented Eddie pro bono. Ron and those working with him on the case were able to find additional witnesses who had been inside the restaurant and they testified at the 2015 post-conviction hearing, ordered by an appellate court in 2014, that Eddie was with them inside while the murders took place outside. On the strength of that testimony, the Cook County judge assigned to the post-conviction hearing vacated the conviction and gave Eddie a new trial after twenty-two years spent in jail. The State decided not to retry Eddie and he walked out of jail, innocent and free, on April 19, 2016. In a further happy ending to this story, Eddie now works in Ron's office as a paralegal/clerk and is everyone's favorite employee.

Ron sums up his work as follows: "We are lawyers who make a living with words. We do not perform life-saving surgery or save people from houses on fire. But our law licenses allow us to speak for those who cannot speak for themselves. We can right wrongs. Is there a greater gift than the satisfaction of walking arm-in-arm with your client as he or she leaves prison after serving time, perhaps decades, for a crime they did not commit? And it doesn't take great skill. It takes persistence. You have to be willing to knock your head against the wall long enough and hard enough for it to give. I have not been blessed with genius, but I do have a hard head."

STEPHEN L. BRAGA - MARTIN TANKLEFF AND DAMIEN ECHOLS

Steve Braga is a partner in the Washington, D.C. office of Bracewell LLP. He has served as the presi-

dent of the Mid-Atlantic Innocence Project and is a former professor and director of the clinical programs at the University of Virginia Law School.

Martin Tankleff, a seventeen-year-old high school senior, was convicted in 1990 and sentenced to fifty years to life in prison for the 1988 murders of his parents at their Long Island home. Starting in 1995 and for the next thirteen years, Steve was Marty's lead pro bono counsel on a team consisting of many volunteer lawyers and investigators. Their extensive post-conviction investigation led to the discovery of many witnesses who said that two other men had admitted to the "hit" murders. Marty's conviction had been based on the detectives fabricating a false confession and suppressing exculpatory evidence. All of this was convincingly presented by Steve during his 2007 appellate court argument, leading to the unanimous overturning of the conviction. After spending over seventeen years in prison for crimes he never committed, Marty was a free man on July 22, 2008.

Based on his strong desire "to make sure there's no more Marty Tankleffs," Marty graduated from law school and was admitted to the New York State Bar in February 2020. In addition to working as an associate at the New York law firm of Metcalf & Metcalf, Marty is also an Adjunct Professor at both Georgetown University and the Touro Law Center, teaching a course dealing with wrongful convictions. As Marty states: "Without Steve and his team, I would not be a professor or attorney at law. Steve is an amazing human being first and a great lawyer second." For Steve, "attending Marty's graduation and participating in his hooding ceremony will be one of the great honors of my life. During the thirteen years I represented Marty in the legal odyssey to achieve his freedom and exoneration, his energy, enthusiasm, optimism and intelligence were constant aids to his cause." As a newly admitted lawyer, Marty is now directly involved in representing unjustly imprisoned individuals.

Damien Echols was one of three teenagers, known as the West Memphis Three, wrongfully convicted in 1994 of killing three Cub Scouts in 1993 as part of an alleged Satanic ritual. Damien was sentenced to death. In 2009, at the request of Damien's wife and after much thoughtful consideration, Steve agreed to serve as Damien's pro bono lawyer: "It takes your heart and soul – a man's life is hanging on your work - you have to be able to give everything to the case. But once I met Damien and felt very strongly that he was innocent, I became committed to help. Over the years, new evidence had surfaced that paved the way for a potential new trial. There was DNA evidence from the crime scene that had never been tested [because the technology wasn't available in 1993]. All of that evidence was tested and none of it ended up being tied to the three who were convicted. There were also new witnesses who came forward and further undermined the State's theory."

In 2011, Steve was able to negotiate Damien's and his co-defendants' freedom through the Alford Doctrine: "a sort of no-contest plea in which they acknowledge that the State has enough evidence to convict them, but which also allows them to maintain their innocence." After being falsely imprisoned for nearly nineteen years, with fourteen of those years being spent on death row and in solitary confinement, Damien finally walked out of the Arkansas prison a free man. Damien's story is the subject of the book *Life After Death*. Damien's story is featured in the documentary *West of Memphis* (in which Steve also appears).

MELISSA W. NELSON and GEORGE E. "BUDDY" SCHULZ, JR. - CONVICTION INTEGRITY REVIEW—CLIFFORD WILLIAMS, JR. AND NATHAN MYERS

Melissa Nelson has been the State Attorney for Florida's Fourth Judicial Circuit since January 2017. In that position, she leads over 300 lawyers, staff, and investigators. When she was inducted into the College at the annual meeting in 2016, Melissa was chosen to speak on behalf of the newly inducted Fellows. Buddy Schulz is a partner in the Jacksonville, Florida office of Holland & Knight. He is the chair of his firm's Public and Charitable Service Department and was appointed the first chair of the twenty-three-member Juvenile Justice Advocacy Committee of Florida's Fourth Judicial Circuit. With assistance and guidance from Buddy, Nina Morrison of the Innocence Project in New York, and ACTL Fellows **Henry M. Coxe, III** and **Harry L. Shorstein**, Melissa established Florida's first Conviction Integrity Review (CIR) unit in January 2018. Be- ▷

cause of Melissa's leadership, State Attorneys in other Florida judicial circuits have established similar CIRs.

CIRs or CIUs (Conviction Integrity Units) have been formed in various prosecutors' offices across the country to prevent, identify, and correct wrongful convictions. For example, Fellow **Mark L. Rotert** served as the Director of the Cook County, Illinois State Attorney's CIU from 2017-2019. During his time as Director, Mark made major changes to that office and his leadership led to the release from prison of approximately seventy wrongly convicted individuals. Prosecutors, such as Melissa and Mark, are to be commended for insisting that their offices on their own correct any wrongs which have occurred to individuals unjustly convicted or imprisoned. As emphasized by Melissa: "As prosecutors, we have a continuing, post-conviction ethical obligation to pursue justice when we become aware of material evidence suggesting a conviction is not correct."

Clifford Williams, Jr. and his nephew Hubert Nathan Myers were convicted in 1976 of the first-degree murder of Jeanette Williams (no relation to Clifford) and the attempted murder of Nina Marshall. They spent nearly forty-three years in prison, including four years on death row for Clifford. Their convictions were based on eyewitness misidentification, ineffective assistance of counsel, and official misconduct. After Melissa started her CIR, Williams and Myers became the first individuals freed in 2019 based on an investigation which led Melissa to conclude that her office "no longer has confidence in the integrity of the conviction or the guilt of Clifford Williams, Jr. and Nathan Myers." The Innocence Project of Florida represented Nathan and Buddy Schulz represented Clifford in regard to their successful motions to vacate the 1976 convictions. "The CIR did an incredibly diligent and thorough job untangling an old, complicated case to reveal and correct a clear miscarriage of justice," said Seth Miller, Innocence Project of Florida (IPF) executive director. "The righting of this injustice for Mr. Myers and Mr. Williams is validation of Melissa Nelson's vision for the CIR and Shelley Thibodeau's (Director of the CIR) persistence in finding the truth."

Even after Clifford was released from prison, Buddy and his firm continued to provide much needed assistance to their client. Buddy connected both Clifford and Nathan to Operation New Hope, which helps former inmates adjust to life outside of prison. In addition, Buddy's firm worked with senators and representatives to draft, file, and pass a claims bill for Clifford because he did not qualify under the law for wrongful imprisonment compensation through that legal avenue. The House and Senate unanimously passed a claims bill in the amount of $2,150,000. That claims bill is awaiting the governor's signature. As Buddy indicates: "Thereafter the money will be deposited in an irrevocable trust created by Holland & Knight trust and estate lawyers for Clifford and it will be managed by institutional and individual trustees." Clifford, a deeply religious person despite all that has wrongfully happened to him, said upon passage of the bill in the House: "I thank God for everything he has done in my life, because I couldn't have done it by myself."

The Closing Argument

Ron Safer sums up what this most demanding but highly rewarding work means to him and to all other lawyers who serve the unjustly convicted and imprisoned: "Each case is about an individual and those who love that individual. It is intensely personal to them and to me. They are all now members of my family." Marty Tankleff, previously represented by Steve Braga for crimes he did not commit and now working as a lawyer for those wrongfully imprisoned, adds: "When you work on one of these cases as a lawyer, you get what I describe as the innocence bug. You realize the system has failed someone and you can't walk away until justice is done. The work done by all in this area is very powerful indeed. I know first-hand both as an individual imprisoned and now as a lawyer for those unjustly deprived of their freedom."

Mark C. Surprenant
New Orleans, Louisiana ■

Original hermit and horse design created by Former Regent John S. Siffert

"We know that your attainment of the front ranks of the bar has not been without its costs, and we recognize that our specialty exacts much of those who win its favor. Truly, we are, in Lord Eldon's words, the hermit and the horse."

— from the College Induction Charge

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FOUNDATION UPDATE

A JOURNEY OF A THOUSAND MILES…

Each of us is likely aware of the insightful Chinese proverb of the Dao De Jung ascribed variously to Laozi or Confucius: "A journey of a thousand miles begins with a single step." Perhaps it doesn't jump immediately to mind when thinking about the efforts of the ACTL Foundation. Well, perhaps it should.

When the Foundation Trustees recently met – virtually, of course -- for our last meeting of fiscal year 2020 (a calendar year that we'd all like to see in the rear-view mirror), a small amount of our annual giving limit remained in the coffers. Under our existing protocol, which we promptly voted to change prospectively, any unspent funds would go back into the Foundation's endowment instead of being carried over for grants in the next fiscal year. That didn't strike us as desirable, so we took a look at a few recent grant applications that would otherwise have been considered after July 1.

Honestly, the request by New Orleans-based Dillard University for a grant to support a variety of programs, one of which happened to be its mock trial team, didn't jump out at us immediately. After all, law schools everywhere could use a little help funding their mock trial programs; and the Foundation is regrettably not in a position to help them all.

But, wait: Dillard wasn't seeking support for trial-minded law students. This was an application for a mock trial program at the *undergraduate* level. Now, that was different; but, was that too far removed from the Foundation's mission, i.e., improvement in the quality of trial and appellate advocacy, the ethics of our profession and the administration of justice? Obviously, mock trial programs are designed to improve the quality of trial advocacy over the long haul, and that in turn enhances the administration of justice. But the Trustees mused that dropping down to the undergraduate level might be a step too far, when so many law schools need assistance of the same type and are more proximally tied to our profession.

But, perhaps not if you consider this: Dillard self-identifies as serving an overwhelmingly African American student body. The aspect of the grant application that we considered would support predominantly Black students who need financial assistance to be able to travel to other colleges with similar programs in order to hone their trial advocacy skills, and, just as likely, in order to decide whether a career in the law gen-

erally, and in trial law specifically, is the right choice for each of them. These students are still relatively far removed from the life decision, not just of a profession, but of a specialty within a profession. But, a journey of a thousand miles…

Light bulbs began to illuminate each of those little Hollywood Squares on the Zoom screen. College Past President **Bart Dalton** and I each mentioned the discomfort that we felt in our respective Presidential years in venues where we looked out over seas of white faces, notwithstanding what we believed to be good faith efforts to identify qualified diverse candidates. Without enough Black trial lawyers in a given state or province, there simply cannot be enough qualified Black candidates. (Some of you may recall that it was Bart who invited Massachusetts Chief Justice Margaret H. Marshall (ret.) to speak so eloquently about implicit bias at his leadership meeting in Colorado Springs in 2016. Bart is one of the many College leaders who have walked the walk on the issue of diversity.)

Very quickly, the comments flowed from each of our little Zoom squares: It is a step in the right direction but perhaps a step too late to start grooming Black lawyers to be trial lawyers and potential future FACTLs when they are already in law school. Someone mentioned a study suggesting that nascent career choices may begin as early as middle school. But, each of us knew, whatever the scholars may believe, that the critical professional decision is made by many during their college tenure as to whether graduate school is right for them, and, if so, in what discipline.

Almost every Dillard student who participates in the mock trial program that we voted to support with this small, but meaningful, grant expands the pool of potential future diverse Fellows. And, every diverse Fellow that makes us more reflective of the states and provinces we serve enhances the administration of justice.

Never in our history has there been a more propitious time to take that single step. We hope that each of you who has donated to the Foundation will take some pride in our decision. You should.

Thank you to Emil Gumpert Award Committee Chair **Mark Surprenant** for the nomination and to **Michael Jones** (proud Dillard alumnus) for his letter of support.

Joan A. Lukey
Boston, Massachusetts ■

Heritage of Our College–

John H. Tucker

The mandate of the College's Heritage Committee is, in part, to create and maintain a permanent archival facility to preserve the history of the College by conducting videotaped interviews of Past Presidents and other senior Fellows. The full video interviews will be made available as they are finalized via links on the College's website. As a regular *Journal* feature, we highlight an abridged version of one such interview.

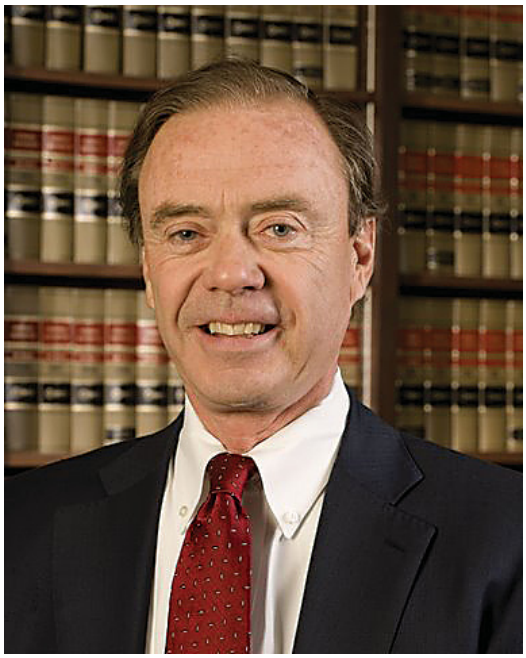
Tulsa is the home of a treasure chest of Bob Dylan artifacts. Tulsa has an additional treasure, **John H. Tucker.** At the 2019 Annual Meeting in Vancouver, British Columbia, the committee interviewed John.

Tucker is a graduate of the University of Oklahoma and the University of Oklahoma Law School. He has been married to his wife, Francis Ann, for fifty-five years. He has two sons, both successful lawyers, good husbands, and good fathers. Tucker has practiced law since 1966, the entire time with Rhodes Hieronymus (now Rhodes Hieronymus Jones Tucker & Gable). It is not likely that he will soon retire, as he has law partners in their late eighties who come regularly to work. He has been surrounded at Rhodes Hieronymus with good friends and good role models.

He has been a Fellow of the College since 1990, serving as Oklahoma State Committee Chair and as a Regent. When he looks back on it, he recalls that it never really seemed as though he was spending a lot of time with the College because he loved so much what he was doing and enjoyed being surrounded by the extraordinary lawyers who he calls role models and mentors.

When asked about his most memorable moment, he responded that it was getting the invitation to become a member of the College. He saw the nomination as a validation of his career.

Like all trial lawyers, he has happy memories and sad memories, but there are some accomplishments that he is very proud of. One of Tucker's proud moments was his work with cochlear implants. Cochlear implants are devices that can sub-



stantially improve hearing from those suffering a hearing loss. Historically, the insurance industry did not pay for these devices until a person reached thirteen years of age. This was universally criticized by those involved in healthcare for those suffering hearing losses. The caregivers informed Tucker that it was vital to babies, toddlers, and young children to have the ability to hear as their brains matured. He was approached about bringing a class action; he agreed to do it on a pro bono basis. The complaint was so well-researched and well-drafted that the defendants did not even bother to file an answer. The insurance industry immediately changed its practice and, today, healthcare providers are able to provide cochlear implants covered by insurance. Tucker received neither headlines nor monetary compensation, but he describes his work on that case as one of the greatest accomplishments of his career.

His pro bono work also included representing women in need of advanced cancer therapies. He became aware that a substantial number of healthcare insurance carriers were not paying for this therapy. He took the case on pro bono and secured a positive result for his clients.

Another special moment was when Tucker successfully represented a chemical company in litigation following a plant explosion. It was truly "bet the company" litigation. Years later he was approached by an employee who reminded him that he basically saved the company and saved hundreds of jobs.

Tucker defines the College's *Code of Pretrial and Trial Conduct* as basically providing an outline for there being a good, fair fight. He describes civility as his "best friend" in litigation practice. He tells the story of a case where prior to his representation, both the client and its previous lawyer had been sanctioned. It did not take long for the trial judge to realize that Tucker was of a different personality. He urges all young lawyers to know the College's *Code of Pretrial and Trial Conduct* and to live it.

Ronald H. McLean
Fargo, North Dakota ■

1930-2020

Tribute to Past President Gene W. Lafitte, Sr.

Gene Lafitte did pretty much everything young. He graduated from high school at the age of 15 and law school at 21. He became a Fellow of the College at the age of 41. Five years later, he was selected as a Regent. He was, at age 53, installed as our 34th President. Gene's partner, FACTL James Brown, captures his essence with the observation that "Gene always had a *young*, creative, artistic mind." At age 89, Gene was too young to leave us. But his time had come, and on Friday, August 7, 2020, Gene W. Lafitte, Sr., died peacefully at home with his loving wife of 65 years, Jackie, by his side.

Born in Shreveport, Louisiana on November 27, 1930, Gene attended Louisiana State University on a journalism scholarship he won for writing an essay for the Shreveport Times about Andrew Jackson. He graduated in 1950, serving as the cadet colonel of the ROTC, and went on to earn his law degree in 1952, serving as Associate Editor of the Law Review and graduating Order of the Coif. But the best thing about 1952 was Jackie – he met Jacquelyn Moeller that year; they were married on April 9, 1955, while Gene was serving in the United States Air Force Judge Advocate Corps.

Upon his discharge in 1956, Gene joined the Lake Charles office of Liskow & Lewis, where he spent the rest of his professional career. Cullen Liskow and Austin Lewis formed the firm in 1935, focusing on the oil and gas and energy industry; the firm now numbers 140 attorneys, with four offices in Louisiana and Texas. Much of that growth was Gene's doing. Gene founded the firm's litigation department, and served for 20 years as the Firm's president and managing partner before being named chairman. Gene loved the people he practiced with; many years ago, he commented: *"To say that the group of men I found at Liskow & Lewis in Lake Charles was extraordinary would be a gross understatement. It was a remarkable collection of fine men and superb lawyers. All were of impeccable character, strong family men, blessed with wonderful senses of humor, and warm and friendly dispositions. The firm members seemed to enjoy each other and were close in their personal relationships. From the very beginning, there was an informality that was quite wonderful."1*

Austin Lewis served as the College's 24th President in 1974-75, and was Treasurer when Gene's nomination to the College was approved in 1972; he presumably recused himself from the discussion. Gene was tapped as a Regent in 1977. He served two terms as Treasurer from 1981-83, as President-Elect in 1983-84, and as President in 1984-85.

The *Journal* – then known as the *Bulletin* – was in its infancy when Gene presided; his predecessor, Gael Mahoney, had started the Bulletin only the previous year. In Issue 3, Gene wrote to the Fellows: "My professional morale has been at a low ebb. I have needed a tonic – some special elixir that would heal my lawyer spirit. The source of my problem is familiar. We are a dignified, noble and proud profession; yet we find ourselves constantly bombarded with criticism, sometimes even from within our own ranks. What we read and hear about ourselves is troubling not because some of it may be justified but because it is repeated

1 I thought of editing Gene's quote to make it less male-centric. But then I recalled that Clarence Darrow never once used the phrase "Ladies and gentlemen of the jury," because Darrow never had a woman on any of his juries. The times were different. They are better now. But they were what they were. Gene was an inclusive person and would surely rephrase his own quote today.

so often and in so many ways that erroneous impressions have been created. The profession is taking it on the chin, and it seems unfair that so much damage can be done by a few renegade or incompetent lawyers." Ah, but take heart, he told us. "But I have found the tonic . . . – this great College of ours. In attending regional and state meetings across the country and in Canada, I have had the privilege of personal contact with many of you. Without doubt, we have succeeded in bringing together, in the words of our bylaws, 'members of the profession who, by reason of their character, personality and ability, will contribute to the accomplishments and good Fellowship of the College.'" Gene loved the College. It loved him back.

When Gene entered a room, your brain just naturally registered "Gentleman." He was indeed a gentle man. A calm, composed man. A dignified, articulate, thoughtful man. He commanded – well, no, he didn't command, he simply *deserved* – respect. If you want to see it for yourself, google "Gene Lafitte Senate Judiciary Committee" and navigate to the C-Span videos of the Senate confirmation hearings on the Scalia nomination in 1986. Past President Bob Fiske was then the Chair of the ABA Federal Judiciary Committee; Gene was a member of the Committee and had led the Scalia investigation. Bob and Gene appeared before the Senate Committee to defend their recommendation that Judge Scalia become Justice Scalia. And certain Senators, notably Ted Kennedy and Howard Metzenbaum, who opposed the nomination, attacked the ABA Committee, its procedures, and most relevant, its representatives. Bob Fiske and Gene Lafitte did the ABA and the College proud, with their calm, composed, dignified responses to hostile questions. Watch it yourself.

A total gentleman, but with steel in his back. When Harvey Wilkerson was nominated for a seat on the Fourth Circuit Court of Appeals by President Reagan in 1983, he was only 39; he had never actually practiced law, having spent two years as a law clerk for Justice Powell, five years as an associate law professor, three years as a newspaper editor, and two years in the Justice Department as a supervisor. An impressive resume, to be sure, but not the typical resume for a judge. We know now that Judge Wilkerson was a wonderful choice; he has served with distinction; but at the time the ABA Committee gave the Judge only a "Qualified" rating, the lowest of the three possible favorable ratings (Exceptionally Qualified, Highly Qualified, Qualified). And Senate opponents of the nomination believed that Judge Wilkerson only got that rating after an improper lobbying process conducted by the Justice Department and Justice Powell himself. But, as the New York Times reported, that argument was blunted when Gene Lafitte testified that, while Justice Powell had indeed contacted him and urged him to recommend Judge Wilkerson, Gene had voted against the recommendation. "No one influenced my position," he testified. No one. Not even a Supreme Court Justice. Not even a fellow Past President of the College. No one swayed Gene Lafitte from a well-formed judgment.

But that doesn't mean Gene was not flexible. James Brown worked with Gene on two notable cases, one at the beginning of James' practice in the 80's, another toward the end of Gene's practice, in 2008. The commonality in the two matters – both cases that Gene handled on appeal after previous counsel had come in second at the trial level – was that in each case, the theories that had been advanced at trial simply were not working. So an appeal that tried to argue that the trial

court got it wrong would not work either. In each case, the team had to come up with entirely new theories. That's where Gene's young, creative and artistic mind came to play. Gene came up with new, young arguments that won both appeals.

We don't say artistic lightly. Gene was a talented artist, who applied the same work ethic to his hobby as he had to his profession. Gene's son David recalls that as he spent less time practicing law, he had the discipline to spend time at his art, going to his studio as if he were going to work.

Between 1890 and 1891, Claude Monet created more than thirty different paintings of the same haystacks in a field near his house at Giverny. As he himself explained in a letter to a friend: "I am working very hard, struggling with a series of different effects, but at this season the sun sets so fast I cannot follow it. . . . The more I continue, the more I see that a great deal of work is necessary in order to succeed in rendering what I seek."

Gene succeeded in rendering Jackie in one try. Gene and Jackie had three children, all of whom followed Gene to the law. Gene W. Lafitte, Jr., was licensed in Louisiana, Texas, California, and D.C. Tragically and unexpectedly, Gene Jr. died at the age of 60 of a brain aneurism. Gene and Jackie's daughter Lyn Nicodemus works as a paralegal with a firm in Covington. David Lafitte practiced law for many years in California before becoming Chief Operating Officer of a major clothing company. Gene and Jackie's grandchildren are Ashlan Coffin, Allie Lafitte, Caty Lafitte, Will Nicodemus, Emily Lafitte and Isabel Nicodemus.

David, the youngest of the three children, recalls that family vacations – usually to Florida – were always memorable because Gene put into them the same work ethic he applied to the law. Each kid

could invite a friend, so each vacation was Gene, Jackie, and six kids with a seven year age gap. Gene worked hard to plan activities like water skiing, and usually had to do the driving. But that was Gene. "No one could out-work my Dad," recalls David.

There is a duck hunting club near Avery Island, where the McIlhenny family makes Tabasco sauce. The Bayou Club has a waiting list that usually take many years before there is an opening. So Gene did what any good lawyer would do to find a way to short cut. There was an accident at the Club that led to a lawsuit that led to Gene negotiating a fee agreement with an expedited membership. Past President Warren Lightfoot was commissioned (at Gene's behest) to do a bas-relief of Paul McIlhenny after his sudden death in 2013; it hangs beneath an American flag in the lodge. Gene's son, David, explains the Club routine: "Wake up call at 4 AM. At five minutes to five, assemble at the American flag. Sing God Bless America. Slug back a shot of bourbon. Have breakfast. On the boats to the blinds at 5:40." While David recounted the morning routine, Bob Fiske, a frequent quest of Gene's, recalls the evenings: "The dinner repartee flew faster than the ducks."

Gene's law firm sent Gene off with these thoughts: "He will truly be remembered for his humility, integrity, and fidelity to the highest ethical standards. He was a gentleman of all gentlemen. Gene will be dearly missed."

Yes, young man, you will be missed.

Robert Byman
Chicago, IL

IN MEMORIAM

Since our last issue, we have learned of the passing of twenty-four Fellows, one Past President Gene Lafitte (whose tribute precedes this) one an Honorary Fellow, another Former Regent Brian O'Neill.

✦

Two thirds – fourteen – of the twenty-three served in the military, three of those in World War II. Four were pilots. Two flew in World War II, one in Korea. One didn't serve in the military, but he earned his flight license at age fifteen and, while he was in college, he owned an airplane but not a car, so he traded plane rides to friends in exchange for the loan of a car for dates. One was an Olympic Gold Medal athlete who went on to become a Federal Judge.

✦

With Covid cases raging across the world, the College appears to have fared well. We don't always know the full medical details, but based upon what we know, the College has lost only one Fellow to the virus – and that Fellow was ninety-five. Wikipedia informs us that the average U.S. life expectancy is 78.9 years; Canadians average 82.3. (The water, or the lifestyle, must be better there.) The average of our departed eighteen is 88.4. So, on average, our Fellows lived long and full lives. But not one of these Fellows was average. They were each, in their own way, exceptional. Take, for example, the first of these alphabetically arranged tributes below. That departed Fellow was a veteran, a public defender, a prosecutor and, perhaps most proudly, father of a daughter who is herself a Fellow and a current State Committee Chair. He did it all; he died way too young; but what a life!

✦

We will miss him. We will miss them all.

✦

We live now in strange times; the recently fallen cannot be properly honored because it is currently unhealthy for the present to congregate for the departed. So, these write-ups are all the more important.

✦

You will note that some of these memoriams are years overdue. We can only honor those we *know have passed, when we know. So, when you learn that a Fellow has passed, we urge you to ensure that the National Office is informed.*

✦

These pieces are necessarily brief. We don't have space to list all surviving family members, so we name only spouses, we count but do not name children and grandchildren. Yet every one of our departed Fellows left scores of family and friends who will miss and remember them. Through those memories, these Fellows live on.

▷

Thomas Duncan Beatty, '93, passed away on April 27, 2020. Tom was born on May 15, 1942, in Detroit, Michigan, and attended twenty-four schools before graduating from high school in Ogden, Utah. He moved to Las Vegas in 1959 to attend Nevada Southern University, now UNLV. He attended law school at Hastings College of the Law, and upon graduation married his wife of fifty-three years, Sharon (Stiles) Beatty. After his discharge from the Army in 1969, Tom and Sharon settled in Las Vegas, where he began his legal career, which included development of a bar review course for new law school graduates; service as a deputy and later Assistant Public Defender in the Public Defender's Office; service as an Assistant District Attorney; and work in his own law practice. Tom served as Chairman of the Commission on Equal Rights of Citizens from 1971-1973; in 1974, Tom was commissioned by the Governor to write a book analyzing Nevada criminal law, comparing Nevada law, rules, and practices with the A.B.A. Standards of Criminal Justice. Tom loved hiking in the mountains, diagram-less crossword puzzles, the UNLV Runnin' Rebels basketball team, and sharing life events with family and friends. He is survived by Sharon, their two daughters and four grandchildren.

One of Tom's daughters is Fellow **Tammy Beatty Peterson**, currently our Nevada State Committee Chair. Tammy recalled: "When I was five-years-old, he took me to court to watch a jury trial. He patiently explained everyone's roles to me, and as I recall it now it included an erudite explanation of burdens of proof and the role of the jury. Some dads took their kids to the park; mine took me to a murder trial. . . . We will miss him terribly."

Edmund Richard Bodyfelt, '87, passed away peacefully on May 11, 2020, just shy of reaching eighty. Dick and his four brothers were raised on a dairy farm in Tillamook County. Dick attended Oregon State University, graduating with a degree in Forest Engineering. While at Oregon State, he met his future wife, Kathleen. After graduating from OSU, he worked for two years as a safety engineer for an insurance company in California. During that time, he decided to enter law school, but figuring that his narrow engineering degree would not necessarily equip him for law school or a successful career as a lawyer, he decided to broaden his education by literally reading the entire Encyclopedia Britannica. But he only made it through M; so he always asked that he not be posed with any question the answer to which started with N-Z. Dick served as Editor-in-Chief of the U of O Law Review, graduated number one in his class and Order of the Coif. After graduation, Dick and Kathy moved to Portland area where he established a successful defense practice, eventually starting his own firm. Dick's favorite hobby was flying, having received his license at age fifteen. While dating Kathy at OSU, she never knew what kind of car he would arrive in for a date. He owned an airplane but not a car and would take friends for an airplane ride in the afternoon so he could borrow their car for a date in the evening. Dick and his family did a twenty-one-day flying trip across the United States, on "Bodyfelt Airlines," in the summer of 1984. Dick's legal career was cut short when he suffered a major cerebral hemorrhage in 1989, two years after his induction into the College, at the age of forty-nine. Over the next thirty years after the stroke, Dick

had the pleasure of seeing his sons graduate from college and launch their careers and getting to spend time with grandchildren. Dick is survived by Kathy, their two sons, and numerous grandchildren.

Álvaro R. Calderón, Jr., '78, passed on July 16, 2020 at age eighty-eight, having practiced for more than sixty years before his retirement in 2015. Álvaro earned his undergraduate degree from Georgetown in 1952 and his law degree, magna cum laude, from the University of Puerto Rico in 1955. Álvaro was Lead Counsel in the *San Juan Dupont Plaza Hotel Fire* case, Chairman of the Plaintiffs Steering Committee in the *Humberto Vidal Building Gas Explosion* case, and a member of the Steering Committees in the *Castano Tobacco Litigation,* the *Puerto Rico Electric Power Authority, Puerto Rico Water Resources Authority* and *Compulsory Insurance Association* class actions. Álvaro's survivors include his six children, two of whom, María De Lourdes Calderón and María Eugenia Calderón were also his law partners. Álvaro was a Professor of Civil Procedure, Evidence and "Trial Advocacy" at the University of Puerto Rico School of Law. Álvaro was active in the College and served on his State Committee for twenty years, three as Chair. Álvaro's passions outside of law were Navigation and Painting.

Contemplating the sea, swimming it, painting it and – for many years – sailing it, gave him numerous happy experiences with his family and friends. Álvaro agreed to exhibit part of his artistic work in a comprehensive retrospective exhibition at the Museum of the Americas at the Ballajá Barracks in Old San Juan, from August to October 2014. The exhibition, On the Margins of the Law," featured 155 works in various styles and formats (including watercolors, oils, acrylics, and experimental works).

Jeremiah C. Collins, '77, died at his Bethesda, Maryland home on Tuesday, April 21, 2020, at the age of ninety. Born in what he called "the little hamlet" of Newark, New York as the Depression began, Jerry, even to the very last days of his life, liked to say, "I'm a happy guy!" A graduate of Georgetown University and Georgetown Law School, Jerry settled in Washington D.C. after serving as a 2nd Lieutenant in the U.S. Marine Corps. A founding partner of the law firm Williams and Connolly, he loved the practice of law and the courtroom; he taught many years as an adjunct professor at Georgetown Law School. The love of his life was Suze, whom he knew from childhood and to whom he was married for fifty-two years until her death in 2007. Jerry leaves behind four children and eleven grandchildren. Jerry loved to read Tolstoy, Dickens, or other masters; he sketched portraits of interesting faces he discovered in one of three newspapers he read daily; he loved jazz; he loved life.

Warren J. Daheim, ’92, age ninety, passed away suddenly on April 15, 2020, after a day at the office and while taking his daily swim. A magna cum laude graduate of the University of Minnesota School of Law, Bud was the only lawyer in the State of Washington to be inducted into both the American College of Real Estate Lawyers and the American College of Trial Lawyers. Bud’s “out of the box” ideas were legendary, with one memorable trial involving a comparison of eminent domain land valuation to prime cuts of beef, with a life size cow as an illustrative aid. Bud argued that the State wanted prime rib at hamburger prices. The jury agreed and awarded Bud’s client the “prime rib” price for the land – triple what the State had offered. Bud lost his wife of sixty-three years, Betty, in 2017, and is survived by their nine children and many grandchildren and great-grandchildren. A painting of Bud’s argument at the United States Supreme Court hung in his office, inscribed with a dedication from one of his granddaughters it her “her proudest” moment. More recently, Bud proudly watched one of his grandsons make his first opening statement.

John G. Davies, ’87, a Judicial Fellow, died on March 24, 2020 in Pasadena, California. He was ninety. Applying the same command and composure that swept him to a world record at the 1952 Olympics in Helsinki when he was twenty-three, Australian-born Judge Davies presided over the 1993 federal civil rights trial of the four officers accused of beating Rodney King, after they were initially acquitted in 1992 by an all-white state jury, despite a videotape that vividly confirmed the violent beating of Mr. King. When the acquittal was announced, Los Angeles erupted in riots that left scores dead and a billion dollars of property damage. Judge Davies presided in the second trial, before a racially mixed jury, where two officers were acquitted; the other two faced up to ten years in prison. But while Judge Davies described the videotape as “shocking, violent, and painful,” he also cautioned that it was “partial, ambiguous, and incomplete.” Judge Davies defied the federal guidelines and sentenced the convicted officers to thirty months of imprisonment. The Ninth Circuit found that the deviation from the guidelines exceeded his authority, but in 1994 the United States Supreme Court declared that a trial judge’s decision was “due substantial deference” because it was “informed by its vantage point and day-to-day experience in criminal sentencing.” While the relatively lenient sentences were criticized by Mr. King’s supporters, it was generally agreed that the conviction of two officers was the important part, the part that prevented a further round of rioting. One retired federal judge hailed Judge Davies as “the judge who saved L.A.” Judge Davies finished fourth in the 200-meter breaststroke at the 1948 London Olympics.

Representing Australia again in 1952 in Helsinki, he slept twenty hours a day and practiced his experimental butterfly breaststroke for some three

hours daily to win the gold medal. The 6-foot-4 champion was inducted into the International Swimming Hall of Fame in 1984 and the Sport Australia Hall of Fame in 1992. After participating in the London Olympics, he was recruited to Michigan where, supporting himself by washing dishes, he graduated in 1953. He earned his law degree from U.C.L.A. in 1959 and was naturalized as an American citizen in 1960. In 1952, he married Marjorie M. Follinger, who, along with their son, daughter, and three grandchildren, survive him.

Robert R. Eidsmoe, '89, passed away on May 28, 2020, just a few weeks shy of his eighty-ninth birthday. Bob was born on July 6, 1931 in South Dakota, where he lived until 1947 when his family moved to Sioux City, Iowa. Bob attended Morningside College and New York University Law School, graduating with honors in 1955. After law school, Bob joined the U.S. Navy and served on a Navy destroyer in the Pacific Fleet for three years. Bob returned to Sioux City in 1958 to practice law. In 1959, he married Leone Berkenpas; they were married for almost sixty-one years until his death. Bob served as President of the Woodbury County Bar Association in 1987 and practiced law until October 1994, when he retired. Bob and Leone explored five different nations in Africa, and travelled throughout Europe, China, New Zealand, Mexico, Singapore, Bali, and Canada – racking up 10,000 miles by bicycle. Bob canoed and kayaked in western U.S. rivers, including two 14-day trips in the Grand Canyon; he frequently participated in RAGBRAI (the Des Moines Register Great Bike Ride Across Iowa). Bob was a lifetime member of the Sierra Club and was the founder and President of the Northwest Iowa Sierra Club. He was President of the Sioux City Symphony Orchestra Association and was awarded with the title of "Lifetime Director" of its Board of Directors. Bob is survived by Leone, two children and three grandsons.

John A. Emerson, '81, was just shy of his ninety-second birthday when he passed on May 31, 2020, with his wife, Mary, by his side. John enrolled at the University of Kansas in 1946, and upon graduation, he and Mary were wed. John became a naval aviator and flew the P5M Marlin (a seaplane) during the Korean War. After his service in the Navy, he returned to the University of Kansas Law School and completed his degree. John had a wicked sense of humor and enjoyed his friends and colleagues. He loved fishing, hunting, and golf.

John spent many hours in his workshop refinishing and refurbishing furniture. But, most of all, he enjoyed time spent with his family. John is survived by Mary, two children and four grandchildren. Fellow Todd Thompson worked with John for many years and recalls,"I learned an immense amount from John. He was a joy to watch. And it was a pleasure to interview jurors after he completed a trial – that is a class in trial techniques that can't be duplicated in a classroom."

Kenneth Roy Garrett, ’81, was born in his family’s one-room adobe home in Nephi, Utah, about eighty miles south of Salt Lake, on August 20, 1923; he passed at his somewhat larger ranch home in Bicknell, about 120 miles further south, on May 7, 2020. A member of the Greatest Generation, Kenneth enlisted in the United States Air Corps, ultimately attaining the rank of Major as he piloted B-24 and B-26 bombers. After the War, Kenneth attended the University of Utah as a history major and for law school. While attending law school, he met Dorothy (Dotti) Glines at an ice cream parlor adjacent to the Salt Lake Temple; they were married in the Temple on June 29, 1951. Kenneth and Dotti moved to California in 1955. In 1966 he formed his own firm and rose to prominence in the civil trial arena. He was revered by his colleagues and judges, earning the nickname “Honest Abe.” In 1967 Kenneth and Dotti established the Flying K-D Ranch, raising Charolais cattle in Bicknell and Torrey, and farming in Lyman. The Flying part was Kenneth’s Cessna 210 (“Mike”), used to shuttle Kenneth and Dottie between California and Utah. In 1978, Kenneth had a mechanical failure that required a “wheel’s up” landing at John Wayne Airport. In typical Kenneth fashion, he remained calm and collected and landed Mike with absolute precision. Kenneth was preceded in death by Dotti, and survived by his seven children, fourteen grandchildren, and eleven great grandchildren.

Edward P. George Jr., ’88, passed away peacefully in the presence of his family on February 27, 2014 at age eighty-one. Ed was married fifty-four years to the love of his live Patricia (Byrne). A diehard UCLA fan, where he received both his undergraduate and law degrees, Ed swam on the UCLA Varsity Swimming Team and later for the United States Army, where he was a member of Military Olympic Swim & Water Polo Team in Berlin, Germany. He began his legal career in 1960 as a prosecutor for the City of Los Angeles and entered private practice in 1964. Ed was Vice-President of the California State Bar, an elected member of the State Bar Board of Governors and served as a member or Chairman of numerous bar committees. Ed was a member of the Board of Trustees of the Los Angeles County Bar Association, a past President of the Long Beach Bar Association, and a Founding Member of the Long Beach Chapter of the Joseph A. Ball, Clarence S. Hunt American Inn of Court. Ed is survived by Patricia, two daughters, and three grandchildren.

Allan Reinhold Gitter, ’82, died peacefully on May 17, 2020 at his home in Jefferson, North Carolina at the age of eighty-three. Allan was an Eagle Scout and earned sixty-two merit badges on the way. Allan played football and baseball at Washington & Lee University, where he was also President of his fraternity and a John D. Rouse Scholar. After earning his law degree from the University of Michigan, Allan returned to Winston-Salem and joined Womble, Carlisle, Sandridge and Rice. Allan threw himself into his work, becoming a leading insurance defense trial lawyer in North Carolina. Between the years of 1964 and 2009 he was listed as lead attorney on over a thousand cases filed in state and federal courts, many of which were tried to verdict, and as many as

293 reported appellate cases. And while doing that, he found the time to coach in the Pop Warner Tiny Demon football league, finishing his first season with a team ranked third in the country for scholastics and athletics. Allan loved golf, his golf buddies, day trips to Roaring Gap Country Club, collecting golf clubs, and putting in the hallway at home. Allan was predeceased by his first wife, Barbara Hutchins Gitter, and survived by his second wife of thirty-two years, Sandra Case Gitter. He is also survived by his five children, multiple grandchildren, and one great grandson.

Kenneth Nelson Hart, '89, passed away peacefully on December 24, 2014, in Providence, Rhode Island, surrounded by family, eighty-five years after his birth in the same city. Ken graduated in 1951 from Colby College in Waterville, Maine, and was promptly drafted into the United States Marine Corps during the Korean conflict. He left active duty with the rank of sergeant and enrolled in Boston University Law School, where he made Law Review and graduated first in his class in 1957. After graduation, he joined the United States Department of Justice, Antitrust Division, through the newly-created Attorney General's Honors Program. After serving in Justice for four years, Ken joined Donovan, Leisure, Newton & Irvine in New York, becoming a partner in 1968, and eventually becoming managing partner and chairman of the Executive Committee. Ken was involved in many high-profile litigation matters, representing clients including Pfizer, Kodak, American Cyanimid, Penn Central, and Gen. William Westmoreland. Ken was able to combine his innate sense of right and wrong, his knowledge of the law, and his wry sense of humor in the early 1990s, when he was cited for criminal trespass by the U.S. Fish & Wildlife Service at Moonstone Beach, South Kingstown, R.I. Rather than pay the nominal fine, he represented himself before the U.S. District Court in Providence. He won his argument, noting that the Rhode Island Constitution trumped federal law in the management of its seashore and the piping plover. Ken is survived by eight children and fourteen grandchildren.

Harold James Hunter, '95, was eighty-seven when he passed peacefully away on April 24, 2020. Hal graduated from Stanford in 1955, and after two years of naval service returned to study law in 1957, shortly after he married his high school sweetheart, Sally Logan. Sally taught primary school while Hal attended law school. Married for sixty-two years, Sally passed in 2018. Hal is survived by two children and five grandchildren. Hal specialized in medical malpractice defense work. In addition to the College, Hal was a member of the International Academy of Trial Lawyers, serving as its President in 2003. Hal and Sally enjoyed world travel, attending sporting events, theater and wonderful and unique outings, including many memorable times with friends and family in Laguna Beach.

Joseph Andrew Kelly, '76, age ninety-five, passed away on May 15, 2020 from complications due to Covid-19. Joe was predeceased by his son and by the late Anne Sheehan Kelly, and is survived by his daughter and three granddaughters. Joe graduated from La Salle Academy before serving in the Navy as a navigator during World War II. After the War,

he attended Providence College and received his law degree from Northeastern Law School in 1951. Joe served for many years on the Rhode Island Board of Bar Examiners. In Joe's more than sixty-five years of practice, he earned a reputation in the community for his civility, professionalism, mentorship, exceptional trial presence, and storytelling. One of his favorite memories was that he once caddied for Sam Snead.

Don Hall Marmaduke, '88, died peacefully at home with his family in attendance on October 17, 2019. He was ninety-three years old. Don loved the practice of law, all kinds of music, riding gliders, and fly fishing on the Deschutes River in Oregon. Don's passion for the law started early; his grandfather, a retired railroad mail clerk, was a devoted court watcher who encouraged Don to accompany him to the Multnomah County Courthouse, even if watching trials meant playing hooky from school. The V-12 Navy college training program paid Don's tuition at Yale University, where he graduated with honors in mechanical engineering. Although notably "unhandy" with fix-it projects around the house, he had a lifelong fascination with technology. Don was an early adopter of personal computers, flew stunt planes, and loved fast cars (often outfitted with racing tires). He valued craftsmanship and the art of doing something well. He admired the balanced weight of a beautiful pen or steel knife, the complementary flavors of a dish well prepared, the persuasive power of a legal argument effectively presented. After serving on a submarine and a cruiser in the U.S. Navy, Don worked briefly as an engineer at a printing company. Concluding that the company's patent lawyers were having more fun, he decided to go to law school. After graduating from Harvard Law School, Don returned home to Oregon, where he practiced law for many years. Don was one of the cadre of Oregon lawyers who put their legal skills to work in service of the civil rights movement. In 1964, members of the Ku Klux Klan, the Neshoba County Sheriff's Office, and the Philadelphia (Mississippi) Police Department were involved in the abduction and murder of three civil rights workers, James Chaney, Andrew Goodman, and Michael Schwerner. The next year, Don went to Mississippi, where he obtained a federal court injunction giving African Americans the ability to register to vote at the Neshoba County Courthouse. In 1971, Don co-wrote a report calling for the establishment of a statewide legal aid program, which led to the creation of the Oregon Legal Services Corp., the forerunner of today's Legal Aid Services of Oregon. Don is survived by his wife, Carol Cordes Marmaduke; four daughters, two grandsons, and great-grandchildren.

William Homer McCann, '78 passed away on June 11, 2020 at the age of ninety-one, survived by his wife, Eileen Murphy McCann, five children, two step-children, four grandchildren and two step grandchildren. Graduating from the University of Kentucky College of Law in 1952, Bill clerked for the Hon. Bert T. Combs of the Kentucky Court of Appeals before serving three years in the U.S. Army JAG Corps. After active duty, Bill returned to Lexington and joined his father's practice. In 1960, Bill became the first President of the Fund for Perceptually Handicapped Children, Inc. In cooperation with the University of Kentucky

College of Education and the Fayette County Special Education department, the organization piloted the first class in Kentucky for children with disabilities. Bill later served as the Chairman for the Kentucky Association for Children with Learning Disabilities in Louisville. Elected to the Kentucky Legislature in 1970, Bill's most lasting contribution was his continued dedication to improving education. Bill was instrumental in reforming the education system, especially focusing on those with learning disabilities. During his tenure in the legislature, Northern Kentucky University was founded, and the University of Louisville became a state-supported institute of higher learning. Bill served on multiple boards and commissions over the years, including the Lexington YMCA (Board Chairman and Executive Committee), the Lexington-Fayette County Community Health Advisory Council, the Commission on Vocational/Technical Education, the United Cerebral Palsy of Kentucky, and the Lexington Human Rights Commission.

Brian Boru O'Neill, '94, a Former Regent of the College, succumbed to ALS on May 6, 2020. If you are a student of Irish genealogy, you know that Brian Boru was the first King of a united Ireland, circa 1,000 A.D., the founder of the O'Brien dynasty. O'Neill is the oldest traceable family name in Europe. Brian O'Neill was born in Hancock, Michigan, but his father, also named Brian Boru O'Neill, was a career Army officer who moved the family to various postings in post-war Japan and Germany and throughout the U.S. Brian followed the family profession, attending the U.S. Military Academy at West Point and graduating as a Cadet Captain in 1969. After serving as a field artillery officer in Italy and Crete for two years, Brian attended Michigan Law School, where he graduated first in his class and was the Managing Editor of the Law Review. Brian then attended the U.S. Army JAG School and served three years as Assistant to the General Counsel of the Army in Washington, D.C. Brian resigned his commission in 1977 to enter private practice.

Brian's most notable case – which spanned more than 18 years of tireless work – was the representation of more than 40,000 victims of the 1989 Exxon Valdez oil spill. In 1994, after eighty-seven trial days, the jury returned a $5.3 billion verdict. But Brian was proudest of his pro bono practice, where he protected forests, wilderness areas, and wildlife such as wolves, bears, dolphins, eagles, and trout. He preserved places of solitude including Boundary Waters Canoe Area, Voyageurs National Park, and Yellowstone Park. He enjoyed backcountry canoeing, golfing, skiing, scuba diving, camping, and fishing. Brian believed in justice, civil rights, and doing the right thing. In retirement, he led delegations of lawyers to Micronesia to promote the rule of law. Brian was once asked, "Do you have any advice for young lawyers." His answer tells us who he was. "I went to law school to make the world a better place, as did most of my classmates. That was 1971.

There's more of a need now for people trying to make the world a better place than there was thirty years ago. You really do have to watch your soul." Brian is survived by his wife of twenty-nine years, Ruth (Bohan) O'Neill, his five children, and three grandchildren.

John J. Pepper, Q.C., '75, died May 15, 2020, at the age of ninety-two, survived by his wife of sixty-six years, Anita Turcotte, three of his children (a son predeceased him), and ten grand- and great-grandchildren. John attended Loyola College and McGill University, where he earned a Bachelor of Civil Law in 1952; he was called to the Quebec Bar in 1953. He was an accomplished drummer in a band as he worked his way through university, and he could often also be found playing the harmonica. He had a keen interest in politics and a distinguished legal career in private practice, specializing in general civil law and in insurance law. John was also an accomplished businessman, as a partner in a venture that grew from a single site to some forty movie and drive-in theater screens throughout the Province of Quebec. John served on numerous boards, including the Mount Royal Club, the Forest and Stream Club, The Montreal Board of Trade, St-Mary's Hospital, and The Alumni Fund for Loyola College.

Harold F. Reed Jr., '73, passed away peacefully at home in his sleep on May 23, 2020 at the age of ninety-three. A lifelong resident of Beaver, Pennsylvania, Harold was a faithful member of First Presbyterian Church of Beaver, where he served as a Deacon, a Trustee, an Elder, and a Sunday school teacher for over fifty years. He was a past president of the Beaver County Bar Association, Beaver Trust Company, Beaver County Branch of PA Economy League, and Beaver County United Way. Harold was preceded in death by his wife of sixty-two years, Martha Johnston Reed, and survived by his four children and six grandchildren.

Lloyd Douglas Shrader, '90, passed away on March 15, 2020 at the age of eighty-four. Born in Kentucky and raised mostly in Virginia, Doug stayed in Connecticut for his professional life after graduating from Yale College and Yale Law School. While still an undergraduate, Doug married Anne Royall in 1959; they were married sixty years, Anne passing just four months before Doug in December 2019. After clerking for a Connecticut federal judge, Doug practiced law in Connecticut until his retirement in 2010, when he and Anne relocated to Chapel Hill. Doug was a champion of social justice and civil rights. In the early 1960s he moved Anne and their two daughters to Mississippi to help organize voter registration and document human rights abuses. Throughout his life, Doug was active in local, state, and national politics, serving as campaign manager for several Westport First Selectmen and as state campaign manager for presidential candidate Gary Hart. In retirement, he continued his passion by teaching a popular "The Supreme Court in the Twenty-First Century" course at Duke University. Doug loved to tell stories, play golf, and watch the New York Giants. Doug is survived by his daughters, four granddaughters, and three great-grandchildren.

Charles F. Tucker, '83, passed away peacefully on April 30, 2020, at the age of ninety-one, predeceased by his wife of fifty years, Helen Wesson Tucker, in 2004. After graduating from Washington and Lee University in 1952 and from Washington and Lee Law School in 1954, and after three years in the United States Army Judge Advocate General Corps, he practiced law in Norfolk until his retirement in 1998. Following retirement, Charles served as Chancellor of the Episcopal Diocese of Southern Virginia and as a Substitute Judge in the Norfolk and Virginia Beach General District Courts. Charles was happiest with family and friends around the dinner table. A lifelong lover of dogs, Charles was known throughout his

neighborhood for his daily walks with his devoted companion, Scout. Charles is survived by his three children, six grandchildren, and two great grandsons.

Raymond Joseph Turner, '76, passed away peacefully on January 16, 2019. Ray was born in Denver on July 16, 1929. He graduated from high school in 1948 and enrolled in the University of Denver. His education was interrupted when he enlisted in the U.S. Air Force in 1951. After leaving active duty, Ray joined the Colorado Air National Guard and served until 1962, retiring as a Captain in the intelligence service. He returned to DU after active duty to finish his undergraduate degree in 1953 and graduate from the University of Denver College of Law in 1956. Ray was active in the College, serving on a number of Committees and as Chair of the Attorney-Client Relationships Committee in 1994-96. Ray was preceded in death by his wife of fifty-five years, Margaret LaVerne (née Cart) and a son; he is survived by his loving friend and companion Marian Dawn Durst, two children, and seven grandchildren.

The Right Honorable Sir Andrew Peter Leggatt, '96, an Honorary Fellow, passed peacefully at his home at age eighty-nine on February 21, 2020. In a life and career that brought him in touch with Paul McCartney, Ian Fleming, George Plimpton, and many other luminaries, Sir Andrew Leggatt was himself a star, a renowned barrister, a revered judge, and a respected public servant. Sir Andrew was called to the Bar by The Inner Temple in 1954. He was appointed Queen's Counsel in 1972 and served as Chairman of the Bar in 1981-82. He presided as a Judge of the High Court of Justice, Queen's Bench Division, from 1982-90 and as Lord Justice of Appeal from 1990-97. He served as Chief Surveillance Commissioner (responsible for overseeing the conduct of covert surveillance and covert human intelligence sources by public authorities) from 1998-2006.

Sir Andrew came to prominence in the early 1960s during what became known as the "Battle for Bond," when he appeared in the litigation arising out of the script for the film *Thunderball,* in which Ian Fleming was sued for plagiarism of what amounted to his own work. In 1971, Paul McCartney appointed him as his barrister in the case which split up the Beatles. As a judge, Sir Andrew was prone to dry humor (humour, as he would say); a barrister who often appeared before him, Jonathan Gaisman, Q.C., fondly recalls Sir Andrew's caustic wit, noting that the experience of appearing before him was always enjoyable — "despite the abrasions." As a barrister, Sir Andrew was remembered as a superlative cross-examiner; in one criminal case that he prosecuted, after subjecting a defendant to a searing cross-examination, the quaking co-defendant refused to enter the witness box.

Lord Leggatt was proud of his Honorary Fellowship in the College. When he and a colleague, Rt. Hon. The Lord Browne-Wilkinson, were bestowed that honor at the 1996 Annual Meeting in San Diego, Sir Andrew remarked, "The President (Charley Renfrew) asked me to say a word about the meaning of the honorary fellowship to us. I would simply say that to be recognised by those whom we acknowledge as our peers gives pride, honor and pleasure in equal plenitude, especially to those who are trial lawyers no longer. . . . With all that in us lies, we thank you. Sages of your craft, as we are learning to call you, we felicitate you. Unwavering advocates, that we know you will always be, we salute you."

Sir Andrew is survived by his wife of sixty-six years, Lady Gillian (Jill) Newton Leggatt. They have two children, a daughter, Alice, and a son, George.

Sir Andrew was, unusually for someone of his generation, keen on IT. When he became a High Court judge, he taught himself to touch type and was the first High Court judge to use a laptop to take notes in court. He loved Rolls-Royces and Bentleys and owned a succession of them. He loved cricket. He had a great passion for words and literature, particularly Shakespeare. A member of the Queen's English Society, he took delight in what he called the colour and intensity of words, and he discouraged his grandchildren from using bland words such as "interesting." He was even more robust with his own children. To increase his vocabulary, he required that his son George read the *London Times* every day and note five new words and their meanings, reporting to Sir Andrew each evening. The lessons seem to have had some effect. Sir George Leggatt was sworn in as a Justice of the Supreme Court of the United Kingdom on April 20, 2020. Proudly, the announcement was made before Sir Andrew's death.

Dodie Haight

Dodie Haight, Past President Fulton "Bill" Haight's wife of 45 years, passed away peacefully at age 92 on August 1, 2020. Born and raised in Los Angeles, Dodie shared an idyllic and rural childhood with her two sisters in Beverly Hills, where she recalled peeking over the fence to see the horses and buggies on Sunset Boulevard. Dodie was a classmate and roommate of Sandra Day O'Connor's, graduating from Stanford in 1950. After graduation, Dodie worked as a fifth grade teacher in El Rodeo. In 1952, Dodie met and married Bill; and when Bill became managing partner of his firm, Dodie embarked on a new career. Dodie served as the firm's interior designer, famously bringing antiques from England to fill the firm's offices. Decorating the firm's offices inspired her to go on to decorate over 75 homes. She was the firm's hostess extraordinaire at welcome picnics for summer clerks, black tie Christmas dinners, retirement parties and countless client dinners, all of which took place in Bill and Dodie's home.

Dodie was dedicated to her community, serving as President of the Junior League of Los Angeles, President of Las Madrinas, President of Hollygrove Home for Children, and on the boards of the Salvation Army, the Stanford Alumni Association, the United Way, the Volunteer Bureau, the Children's Bureau and Marlborough School. She and Bill funded multiple scholarships at Stanford University, always focused on recipients who were the third, fourth or fifth child in their families in recognition of the financial burden that puts on a family. In 1992, they funded the Hilary Haight Audio Visual Center at Marlborough School in memory of their daughter in the wake of her untimely passing. In 2000, Dodie was honored by the Junior League of Los Angeles with their Spirit of Voluntarism Award and, in 2004, she was honored as Marlborough School's Woman of the Year.

Dodie was predeceased by her daughter Hilary and husband Bill, and survived by her son Fulton (Sonia), daughters Maureen Haight Gee and Talis Haight Smith (Leland), grandchildren Sarah Gee (Micah Barbato), Kyle Gee, Trevor Gee (Caitlin), Austin Smith, Connor Smith, Riordon Smith, and Taylor Smith, and great-grandchildren Ella Barbato, Jack Barbato, and John Gee. ■

UPCOMING EVENTS

Mark your calendar now to attend one of the College's upcoming gatherings.

**Dates listed here were correct at the time of printing. To view the latest up-to-date listings, please visit the 'Events' section on the College website, www.actl.com. **

NATIONAL MEETINGS

2020 ANNUAL MEETING	SEPTEMBER 23-25, 2020	A VIRTUAL EVENT
2021 SPRING MEETING	MARCH 4-7, 2021	GRAND WAILEA, A WALDORF ASTORIA RESORT MAUI, HAWAII

REGIONAL MEETINGS

April 16-18, 2021	**Region 6 Regional Meeting (Arkansas, Louisiana, Mississippi, Texas)**
June 5-7, 2021	**NE Regional Meeting (Atlantic Provinces, Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island)**
July 8-11, 2021	**Northwest Regional Meeting (Alaska, Alberta, British Columbia, Idaho, Montana, Oregon, Washington)**
August 26-29, 2021	**10th Circuit Regional Meeting (Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming)**

STATE / PROVINCE MEETINGS

There were many meetings planned, but the pandemic has required that these meetings be rescheduled to 2021

JOURNAL

American College of Trial Lawyers
1300 Dove Street, Suite 150
Newport Beach, California 92660

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

Hon. Emil Gumpert
Chancellor-Founder
American College of Trial Lawyers

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.