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John W. Reed, *Editor*

AN INTRODUCTION TO NEVIS AND ITS LEGAL SYSTEM†

Mark A.G. Brantley*

By choosing Nevis for this convention, you have made and are making a contribution to our economy and our sustenance as a small island state, which we appreciate. To welcome you, I will offer a brief introduction to Nevis and its legal system.

HISTORY

The history of Nevis is a colorful one. First seen by Europeans in 1493, on Columbus's second attempt to reach the East Indies by traveling west, the island was at that time inhabited by the Carib Indians, or so we're told. The island was finally settled by the British in 1628, four years after they had settled St. Kitts. Sugar became the dominant cash crop for the island, as it was for most of the region, and with sugar cultivation came the enslaved African peoples brought to labor on the plantations. So successful was the sugar economy in Nevis that she became widely known as "Queen of the Caribes" and was once more valuable to the British crown than the entire state of New York. The eventual decline in the profitability of cane sugar coupled with the consequences of various natural disasters resulted in the economic abandonment of the island of Nevis.

The people on the island then turned to subsistence farming and fishing to eke out a living. Our biggest export during this period, culminating in a veritable explosion in the 1950s and 1960s, was people. Since then, Nevis has slowly rebuilt its economy so that we have now become net importers of labor; and the once vast movement that we saw to North America, Canada, and the United Kingdom has slowed to a trickle.

The island was the birthplace of Alexander Hamilton, who contributed much to the early history of the United States of America and its constitutional and fiscal development. It was also the place where the famous English naval admiral Horatio Nelson took his bride; he married a local woman named Fanny Nisbet. Many others of Nevisian parentage have made their marks in American and world society. These include people as diverse as Louis Farrakhan of the Nation of Islam and the actress Cicely Tyson.

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†Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Nevis, Charlestown, Nevis, West Indies, March 12, 2001.

*Daniel, Brantley & Associates, Charlestown, Nevis, West Indies.

POPULATION AND RELIGION

Nevis is an island of thirty-six square miles and a constituent of the independent Federation of St. Christopher, better known as St. Kitts, and Nevis. The population is roughly 12,000 people, principally persons of African descent. Most Nevisians are of the Christian religion, with most denominations of that religion being represented. Recent economic success on the island has seen the importation of labor from Guyana, our neighbor in South America, and from as far away as the Middle East and Pakistan, which has led to other religions such as Islam and Hinduism popping up on the island's religious landscape. These, however, are still a small minority.

THE ECONOMY

The economy of Nevis is based principally on tourism and financial services. These are the two engines that drive our economy and account for the bulk of foreign exchange earnings for the island. A growing private sector has been augmented by government spending on some large infrastructure projects over the past few years. These include a new deep-water seaport, an extension of the Newcastle airport, construction of a new airport terminal at Newcastle, the expansion and realignment of the island's main road, and the construction of schools and various government buildings. Such public sector spending has had spin-offs in important sectors of the private economy such as construction.

Later, I will say a few more words about the financial services field, which is of special interest to me. In the area of tourism, Nevis has rapidly become the playground of the rich and famous. We regularly host the likes of Oprah Winfrey, Michael Douglas, Sarah Jessica Parker, George Bush, Sr., Harry Belafonte, Senator John McCain—and now Daniel Kelly and the International Society of Barristers.

THE LEGAL SYSTEM

The Constitution

The basis of all laws is the St. Christopher-Nevis constitution of 1983, by which the islands of St. Kitts and Nevis jointly became independent from Great Britain. The constitution sets out the structure of the parliamentary system of government and entrenches a wide-ranging bill of rights not too dissimilar to the United States Constitution. The constitution also sets out an important standard of legality by requiring that all laws passed by the legislature have to be measured against the constitution and can be struck down

either in whole or in part for failure to comply with the standards established by the constitution. Our constitution, then, is the fountainhead from which laws flow and against which laws are measured for their legitimacy. There is a system of statutory law passed by the parliament, coupled with subsidiary legislation or regulations usually made by the responsible minister. There also is a system generally referred to as common law inherited from our historical connection with England and still applied in our courts; judicial precedent still applies in Nevis as it does in England and the rest of the Commonwealth.

The Executive

There is a prime minister of the Federation of St. Kitts and Nevis and a premier of Nevis. The premier of Nevis is charged with the day-to-day running of the island but has no authority in the areas of international representation and defense, which fall within the purview of the prime minister. The titular head of state is Her Majesty Queen Elizabeth II, in accordance with constitutional monarchy based on the Westminster model. Her Majesty is represented locally by a governor general, and there is a deputy governor general for the island of Nevis. The governor general and his deputy have certain largely ceremonial functions, such as receiving foreign dignitaries and diplomats and appointing certain members of parliament on the advice of the prime minister and the leader of the opposition. There is also the important ceremonial function of assenting to laws passed by the legislature in order to bring them into law.

The Legislature

Nevis has its own assembly in addition to the federal parliament on St. Kitts. There are five elected seats and three nominated seats in the Nevis assembly. The legislature meets to enact local legislation called ordinances. This is done under constitutional authority, which gives the assembly exclusive lawmaking powers in certain areas. Indeed, the constitution provides that the federal parliament on St. Kitts cannot enact laws in those stated areas unless the Nevis Island administration has consented and the law recites that fact.

The Judiciary

St. Kitts and Nevis are members of the Organization of Eastern Caribbean States, or OECS. Member states share a common court system, referred to as the Eastern Caribbean Supreme Court. The court is headquartered in St. Lucia and comprises a high court and court of appeal. One, and sometimes two, high court judges are usually resident in each territory making up the

court. The resident puisne judge for St. Kitts and Nevis resides in St. Kitts but convenes court in Nevis at least twice each year. Matters of urgency that arise can and are routinely heard in St. Kitts before the same judge. There is much agitation by the local bar in Nevis to get a judge resident on Nevis, but that has not yet occurred.

Appeals from the high court are heard by the court of appeal, which is an itinerant court. The court convenes in St. Kitts to hear appeals from St. Kitts and Nevis twice each year. Again, urgent appeals can be heard in other jurisdictions where the court might be sitting, or in St. Lucia where the court is headquartered. There are four judges on the court of appeal and they generally rotate their duties while allowing senior high court judges to act as court of appeal judges from time to time.

The final court of appeal is the Privy Council in England, which is a constitutionally entrenched court. There is, however, a move afoot in the Caribbean region to do away with this court and to replace it with a Caribbean court of justice. The Federation of St. Kitts and Nevis has already signed on to this initiative, largely on the ground that our independence from Great Britain can be complete only once all vestiges of the colonial power are removed. A second important factor is the need to develop a truly Caribbean jurisprudence. The matter is far from being a fait accompli, however, and faces stiff opposition from some quarters—mostly from the bar associations—in the region.

The high court is a court of first instance and hears civil and criminal matters. There are also magistrates courts which are courts of summary civil and criminal jurisdiction. Most small claims are dealt with in magistrates court. The magistrates court for St. Kitts and Nevis is divided into three districts. District C is the Nevis district, and the magistrate for District C sits in Charlestown. Appeals from the magistrates court go directly to the court of appeal.

Members of the judiciary are independent and are appointed by a judicial legal services commission made up of individuals appointed by consensus of the OECS governments. Appointments are until retirement, which is set at sixty-five years, or until death or infirmity of mind. Gross misconduct could also be a reason for removal, but I am not aware of any judge ever being removed on that score.

Lawyers

There are presently about seventy lawyers practicing in St. Kitts and Nevis. All can practice in both islands, but most choose to maintain a practice in one or the other of the two islands. Most of the older lawyers are English trained, but the younger ones are trained in the Caribbean, which has had legal training available since 1970. Unlike England, the profession here

is fused, but we still adhere to the old language so that we are styled barristers-at-law and solicitors.

THE FINANCIAL SERVICES SECTOR

I mention this sector in closing because it is the area that has seen the most dynamic development in Nevis. The sector commenced in Nevis in 1984 with the passage of the Nevis Business Corporation Ordinance. This ordinance has allowed the formation of international business companies that are wholly tax-free; they pay only a minimal registration fee and an annual renewal fee of about US$200.

In 1994 the Nevis assembly passed the Nevis International Exempt Trust Ordinance, which allows the establishment of international trusts in Nevis and affords tremendous protection for assets settled on such trusts. This device has proven very popular in protecting assets from predatory litigation. Trusts settled under this ordinance are exempt from any form of taxation except a registration and renewal fee, which at present stands at about US$200 per annum.

In 1995 the assembly passed the Nevis Limited Liability Company Ordinance. This was done in response to certain I.R.S. rulings which suggested that if such a company was structured correctly, monies could be allowed to flow through from the entity level to the individual so that taxation would occur only once and not twice as happens with the normal corporate structure. The enactment of that legislation demonstrates the flexibility and responsiveness of the Nevis assembly in facilitating investors; we will respond to rulings of your tax authorities, even though those rulings do not apply to us. A Nevis limited liability company, like the international corporation and trust, faces minimal organizational and annual fees, and can have a single member and can be managed by individuals who are not members.

In 1996 the Nevis Offshore Banking Ordinance was passed. This allows for offshore banking within Nevis and seeks to regulate it, but to date only one offshore bank has been licensed. The government has not aggressively marketed that side of the business, as the potential pitfalls of offshore banking are well known.

There are presently over 21,000 entities registered in Nevis, and the financial services sector is a thriving industry. The rich countries of the world have taken note of the success of this industry not only in Nevis but also in other Caribbean nations such as the Cayman Islands, the Bahamas, and Bermuda. Under the guise of protecting the world from money laundering, the OECD (Organization for Economic Cooperation and Development) and the FATF (Financial Action Task Force)—both of which are arms of the rich

industrialized nations—have published blacklists and threatened sanctions against these small islands unless we throw open our books and desist from offering tax breaks, a practice which the OECD brands as harmful competition. Interestingly, OECD members such as Switzerland and Luxembourg, which offer services comparable to those being offered in the Caribbean region, mysteriously have not appeared on any of these blacklists. Even more interestingly, the statistics suggest that more money is laundered through individual financial capitals of the world, such as New York City, than in the entire Caribbean region combined. The recent news stories about the Bank of New York and its alleged dealings with Russian mob money readily spring to mind. Yet the United States of America has not shown up on any blacklists. These inconsistencies have led many of the Caribbean states to question the true motives behind the attempts to criminalize the financial services industry in the Caribbean.

Two other points are important to the perspective of the Caribbean nations on the issue. First, we did not create the need or demand for the services we offer. The demand exists because of the high taxes and predatory litigation in other jurisdictions such as the United States. Individuals who want to protect hard-earned assets seek services such as the ones we provide. Secondly, unlike many of the industrialized countries and many of the rich countries, the Caribbean nations do not have a significant natural resource base. Our resources are essentially the sun, sea, and sand that you've come to enjoy, and our people. It rankles us when we try to use the acumen of our people to develop a service business, the demand for which results from the policies of the rich countries, and then have the rich countries tell us that we are doing something terrible. In sum, the Caribbean region is taking very seriously the attempt to shut down our financial services business. The battle lines have been drawn, and we all need to seek a sensible solution.

CONCLUSION

In concluding, I would like to reiterate my welcome. We are delighted to have you visit our island, and I am grateful for the opportunity to have been of some assistance to you.

THE HISTORY AND GOALS OF THE INTERNATIONAL SOCIETY OF BARRISTERS†

William H. Erickson*

John Alan Appleman was the founder and, at the time of his death on July 14, 1982, an Emeritus Fellow of the International Society of Barristers. John Appleman was a trial lawyer's trial lawyer and sought to create an association that would include only the most qualified and talented of trial lawyers. He consulted and relied on the advice and counsel of Craig Spangenberg of Cleveland, John Gordon Gearin of Portland, Oregon, and Murray Sams of Miami in preparing the policies and bylaws of the Society. The Articles of Association and Bylaws were executed on August 2, 1965. The first officers were Craig Spangenberg, President, John Gearin, Vice-President, and Murray Sams, Scribe.

In creating the Society, John Appleman sought to establish standards for membership that were more definitive than the standards of the International Academy of Trial Lawyers, the American College of Trial Lawyers, the Federation of Insurance Counsel, and the American Trial Lawyers Association. He made every effort, in formulating bylaws, to limit the fellowship to those qualified trial advocates who were prepared to accept the responsibility of working for the advancement of advocacy as a specialized skill.

In his article, *The Origin of the International Society of Barristers*, Appleman said that the Society should be involved in:

> 1. Setting up standards for the recognition of a specialty in advocacy, similar to those established for medical specialists, so that the public would not have to flounder in seeking skilled help or be vulnerable to solicitation by ambulance chasers;
> 2. Ironing out areas of conflict, or potential conflict, between counsel for plaintiffs and defendants;
> 3. Examining proposed plans for compensation without fault and informing the Bar, and possibly the public, of their merits and demerits;

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†A summary of this article was delivered as an address at the Annual Convention of the International Society of Barristers, Four Seasons Resort Nevis, Charlestown, Nevis, West Indies, March 12, 2001. The article is an outgrowth and expansion of Justice Erickson's earlier article, *Has the Time Come for Standards to Improve the Art of Advocacy?*, 21 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 297 (1986). [Ed.]

*Retired Justice and former Chief Justice of the Colorado Supreme Court; President, International Society of Barristers, 1971.

4. Stopping the encroachment by insurance companies upon the functions of independent advocates through the use of home office counsel;
5. Examining health hazards and accident risks and working, as an organization, to improve the public safety;
6. Encouraging the entry of younger lawyers into the field of advocacy;
7. Exchanging ideas concerning trial skills.[1]

COMMITMENT TO EXCELLENCE IN ADVOCACY

As the Society founder, John Appleman set a deliberate course to avoid inviting Fellows who could qualify only because of the abilities of their "friends" or their designation as "convention lawyers"—those who never lost a lawsuit once they were away from home. Retired generals at the trial bar, "has beens" who were never real advocates, and lawyers qualified only by their war stories were targets for exclusion by the bylaws. The bylaws required at least ten years of active practice, specialization in advocacy with more than fifty percent of the lawyer's professional income coming from the representation of litigants involved in controverted causes, an "av" rating by Martindale-Hubbell, and other significant qualifications to establish the prospective Fellow's background and ability at the trial bar.[2]

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[1]Appleman, *The Origin of the International Society of Barristers*, INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY, Oct. 1974 (vol. 9, no. 4), at 8.

[2]*Id*. at 12. The objectives of the Society were specifically set forth:

1. To honor the great advocates of this era in our legal profession;
2. To encourage, by example and otherwise, the entry of younger lawyers into the speciality of advocacy;
3. To assist advocates in the perfection of the techniques of advocacy;
4. To encourage the continuation of advocacy under the adversary system;
5. To encourage the retention of trial by jury in litigated matters and to resist its usurpation by lay arbitrators and government tribunals which fail to guarantee the basic rights of citizens;
6. To help bring about a recognition by the Bar and by the public of advocacy as a distinct speciality, with the creation of proper standards as a condition precedent to the granting of recognition to one purporting to possess special skills in such speciality;
7. To abolish any animosity between counsel representing plaintiffs and defendants, and to produce recognition that all trial lawyers are advocates fully representing the rights of all clients;
8. To encourage the maintenance of amicable relationships between counsel in their personal and professional relationships;
9. To encourage and to demand the full discharge of the ethical relationships owing by all concerned in litigation—whether parties, witnesses, counsel, insurance companies, or the courts—with an insistence upon the handling of litigated cases by independent counsel owing primary alligiance to their clients, and opposing the corporate representation of individuals;
10. To take such other steps as shall be necessary for the protection of the rights of citizens, the independence of the judiciary, and the stature of the Bar.

Craig Spangenberg's *John Alan Appleman: In Memoriam*, 17 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 371 (1982), emphasized John's years of teaching advocacy and his many contributions to the development of law, including "his finest and ultimate work," APPLEMAN ON PREPARATION AND TRIAL (1967).

John practiced in Champaign County, Illinois, where he tried both plaintiff and defense cases. He was Dean of the International Academy of Trial Lawyers and President of the Federation of Insurance Counsel. His annual Professional Trial Lawyers Seminar always sold out even though the tuition was $1,000. His book *Successful Jury Trials*, published in 1950, is a classic but unfortunately out of print. Mayo L. Coiner, in 1966, published an 896-page treatise that Appleman wrote on *Preparation and Trial* to assist those attending his trial practice seminars. Coiner credits Appleman with the authorship of forty-eight treatises and more than one hundred law review articles. His best-known treatise is *Insurance Law and Practice*, which John wrote after serving for many years as the head of the legal department for State Farm Insurance Company. The last edition was a joint effort of John and his daughter, Jean, and was published by West in 1981.[3]

THE COLLEGE OF HARD KNOCKS

Most of us who were admitted in the early years of the Society earned our spurs at the trial bar in the '50s and '60s by accumulating scar tissue. Most trial lawyers will confess that they have lost cases they should have won—and will also remember with great pride cases they won that they should have lost. All of us could tell more war stories about our losses and the embarrassments suffered in learning how to try lawsuits than we could about our great victories. In our early years at the trial bar, our clients and the adversary system paid the price for our learning experience.

In the 1950s when a lawyer was admitted to practice in the federal courts on a routine motion, he was immediately assigned a criminal case to defend as part of his "dues" for admission. The federal public defender did not exist at that time, and the "college of hard knocks" provided the basic education on how to try a case. All criminal trials involving indigent defendants were assigned to the attorneys admitted to practice in the federal courts. Since the representation was uncompensated, newly admitted lawyers were the immediate targets for appointment, most being assigned a criminal case to defend on the same day they were admitted. The federal courts of appeal also assigned cases to their newly admitted lawyers, again with appellate experience as the only compensation.

No trial lawyer would dispute that the old system of training by actual experience in the courtroom often resulted in poor representation for a number of unfortunate litigants. Chief Justice Burger presided over the commit-

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[3]In 1996, Erick Mills Holmes updated the text prepared by Appleman. HOLMES' APPLEMAN ON INSURANCE LAW AND PRACTICE (1996).

tee that formulated the first edition of the *American Bar Association Standards for Criminal Justice: The Prosecution Function and the Defense Function*. The standards were prepared to eliminate a number of misconceptions that were tied to the trial of criminal cases. The defense lawyer was deemed by many to be nothing but the alter ego of the accused, prepared to offer perjured testimony or to take any other steps necessary to obtain a not guilty verdict. The standards clearly established that the trained defense lawyer was captain of the defense ship. He was to make all decisions regarding the defense, except that the accused had to determine whether he would testify, plead guilty, or waive a jury trial.[4] The standards set out concepts and rules to guide the prosecutor and defense lawyer that are accepted today as the ground rules for advocacy in the trial of a criminal case.

A "tripod of justice" metaphor was employed by Chief Justice Burger to emphasize that the adversary system requires competent advocates if it is to function properly. It is necessary to have a competent and well-trained prosecutor, an equally capable defense lawyer, and a competent trial judge to preside over an adversarial proceeding to ensure that the truth-finding process is carried out. The tripod metaphor focused on the fact that if any one of the legs of the tripod was weak, the adversary system—the tripod—would inevitably collapse, and justice would not be the product of the trial.[5] Of course, the tripod concept is equally applicable to a civil trial. Effective, competent trial advocates are as essential in civil trials as in criminal trials if truth is to be found and justice is to be the final product. Today it is difficult for a young lawyer to obtain courtroom experience. Unless he has an opportunity to serve in the district attorney's office or as a public defender, his experience may be limited to serving in the second chair with a more experienced lawyer in his firm before he assumes responsibility for his first trial.

THE BARRISTERS' PRINCIPAL SERVANTS: APPLEMAN, CARRIGAN, BRAGG, REED

The Barristers Society has been well served by its successive administrators and editors. Jean Appleman played an important role in the early development of the Society when her father's health failed him. She received her

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[4]Nix v. Whiteside, 475 U.S. 1957 (1985). *See also* Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 DENVER L.J. 75 (1981); People v. Schultheis, 638 P.2d 8 (Colo. 1981); Grady, *Nix v. Whiteside: Client Perjury and the Criminal Justice System: The Defendant's Position*, 23 AM. CRIM. L. REV. 1 (1985); Appel and McGrance, *Nix v. Whiteside: Client Perjury and the Criminal Justice System: The State's Position*, 23 AM. CRIM. L. REV. 19 (1985).

[5]Erickson, *The History Behind the Tripod of Justice*, INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY, April 1974 (vol. 9, no. 2), at 13, 64 MILITARY L. REV. 789 (1974).

bachelor of arts and juris doctor degrees from the University of Illinois, graduating as a member of the Order of the Coif and as valedictorian of her law school class. Mayo Coiner, as one of John Appleman's publishers, agreed, at John's request, to prepare the first volume of the Barristers *Quarterly* for publication. After the first volume, he resigned, and the publication of the *Quarterly* and the administrative tasks were assumed by Jean Appleman, who served as Administrative Secretary from 1966 to 1973 (volumes one through eight of the *Quarterly*).

Jean Appleman decided to return to full-time private practice in 1974, and it became necessary to appoint a new Administrative Director and Editor of the journal. I recommended Jim R. Carrigan of Boulder, Colorado, who was actively involved in the affairs of the Society and who was the first Colorado state court administrator and a successful trial lawyer. Jim's background for the position also included service on the faculties of the law schools at NYU and the Universities of Colorado, Denver, and Washington. He accepted the appointment as both the Administrative Director and journal Editor when Jean Appleman retired. He served with distinction in both of those roles from 1974-1976, and for several years his law office was the office of the Society. He entered into a contract with a Boulder, Colorado, printing company to publish the *Quarterly*; and it is still printed there twenty-seven years later. Jim's service was limited to his serving as Editor of the journal after he was appointed a justice of the Colorado Supreme Court. He served as Editor until 1979, when he was appointed to serve as a judge of the United States District Court for the District of Colorado. His service as Editor covered volume nine through issue three of volume fourteen. Jim was also responsible for the incorporation of the International Society of Barristers, Inc. in Colorado on November 6, 1975. Colorado was selected as the site for incorporation because of the role Jim played in handling the business of the Society during a critical period.

Jim Carrigan also had been a member of the American Bar Association Joint Committee for the Effective Administration of Justice that was directed to provide trial judges with opportunities and means to obtain knowledge of the skills that would enhance the quality and efficiency of justice in the state courts. Justice Tom C. Clark inspired and chaired the effort by the committee to present lectures and group discussions to improve the techniques and skills of trial judges. In 1964, the National College of State Trial Judges (now the National Judicial College) was founded at the University of Colorado. The faculty was composed of leading state trial judges and two trial lawyers, Donald Lay of Omaha (later chief judge of the eighth circuit) and Jim Carrigan. Sessions of the College were held also at the University of Pennsylvania and University of North Carolina. Justice Clark appeared on the yearly programs and provided the leadership that enabled the College to

flourish. The National Judicial College established its permanent home at the University of Nevada, where it has its own buildings and continues its efforts to train and educate sitting trial judges.

It was through the experience Jim Carrigan and Ernest Friesen had in establishing the National Judicial College that the National Institute for Trial Advocacy (NITA) came into being. History demonstrated that many lawyers gained their courtroom talent through trial and error at the expense of unhappy and damaged clients. Friesen and Carrigan concluded that trial lawyers could be trained just as the College trained trial judges. The proposal was presented to Justice Clark, who endorsed the concept and caused the American College of Trial Lawyers to contribute $20,000 to survey the courses and training provided in our nation's law schools. An American Bar Association task force followed the survey and concluded, after extensive study, that nearly all of the trial practice programs in the law schools were inadequate. As a result, the American College of Trial Lawyers, the American Bar Association, and the Association of Trial Lawyers of America each pledged $35,000 a year for three years to fund the start of NITA. The first session was held in 1972 at the University of Colorado. One hundred young lawyers were exposed to day and night training, six days a week, for four weeks. Many of our members served on the faculty. Today, NITA conducts one hundred seminars a year and the success of the program is recognized nationwide. The International Society of Barristers has provided financial assistance to NITA from the early years and continues to make a yearly contribution to NITA.

The Barristers also stand out for their contributions and co-sponsorships of the National College for District Attorneys and the National College for Public Defenders and Defense Lawyers at the Bates College of Law (University of Houston). Just after NITA took on the obligation of training lawyers to try civil cases, the University of Houston assumed responsibility for training prosecutors and defense lawyers.

Jim Carrigan was responsible for developing the NITA "practice and critique" format used in teaching trial advocacy. The NITA procedure begins with the presentation of a lecture or demonstration of a particular trial skill, followed by a mock trial conducted by students. Each student's performance is critiqued, and an oral dissection of the student's performance then occurs, often aided by a videotape review of that performance. Less commonly recognized in discussion of this method is that training is conducted through use of written problem materials: trial-ready case files and short problem exercises employing multiple fact patterns.[6]

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[6]Before NITA there was no nationally recognized, coherent methodology for teaching trial advocacy. Geraghty, *Foreword: Teaching Trial Advocacy in the 90s and Beyond*, 66 NOTRE DAME L. REV. 687 (1991).

In 1976, Douglas E. Bragg of Denver, a Fellow of the Society, succeeded Carrigan as Administrative Director and served generously for five years. Doug is an active trial lawyer and in 1981 asked to be relieved of his administrative duties, although he still serves as our resident agent.

Finding a highly qualified editor and administrator after Jim Carrigan became a federal judge was a formidable task. The Michigan/Notre Dame football game in Ann Arbor, Michigan, in 1979 caused the late Joel Boyden, who was an Academic All American at Michigan, and Douglas Hillman, an active Barrister and former President, a Michigan graduate and now a senior federal district judge in Michigan, to meet for the game with that Notre Dame Irishman, Jim R. Carrigan. Notre Dame won the football game, but the Barristers won even more. The real purpose of the trip to Ann Arbor was to convince John Wesley Reed to take on the duties of Editor of the *Quarterly.* Jim, Doug, and Joel were united in their effort, and were assisted by John's wife "Dot," in causing him to reluctantly agree to serve as Editor of the *Quarterly*. He was responsible for the publication of volume 14 number 4 through volume 16 number 1 before he finally acceded to the Society's request that he assume also the Society's administrative duties. In 1981 John became our Administrative Secretary and he serves in that same capacity today. Every member of the Society is in full agreement that the Barristers Society has gained stature and recognition as a result of the efforts of John Reed as our Administrative Secretary.

John has distinguished himself professionally during his service to the Barristers. He still teaches as the Thomas M. Cooley Professor Emeritus at the University of Michigan Law School and has been a visiting professor at Harvard, Yale, Chicago, NYU, and San Diego. He is a nationally recognized authority on the law of evidence. He was Dean of the University of Colorado Law School from 1964 to 1968, and Dean of Wayne State University Law School from 1987 to 1992, after which an endowed scholarship was created at Wayne State in his honor, funded largely by gifts from the Barristers Society and its Fellows. He is the author of articles on evidence, advocacy, and professionalism. He also was Director of Michigan's Institute of Continuing Legal Education from 1968 to 1973 and, in 1983, he received the Harrison Tweed Award for excellence in continuing legal education. In 1985 the American College of Trial Lawyers conferred on him its Samuel E. Gates Award for his contributions to the training of advocates. John also brings to the Society a wide background of law practice that preceded his entry into academia.

John has screened the nominations for fellowship in the Barristers and obtained the necessary evaluations from the judges before whom the nominees have practiced. His wife Dot also plays a role in the Society and assists at our

annual meetings. The Society's offices are maintained without cost at the University of Michigan because of, and thanks to, John Reed's presence there.

THE SOCIETY'S GOALS AND PURPOSES

Our former president Craig Spangenberg gave an eloquent welcoming address to new Fellows that reflects the goals and purposes of the Society extremely well:[7]

> I have no special standing in this group which entitles me to make the Welcoming Address. We have no rank or privilege here. We are all one. But it has happened over the years that I have become the last survivor of the original founders, and I can speak with sure knowledge about the ideals and the hopes of those charter members and the early classes of new members who joined with us in an experiment to see whether a different kind of law society could take root and survive. I speak to you also on behalf of all the succeeding Fellows who joined our cause to make the Barristers grow and flower into a unique institution far beyond the cautious dream of those early members.
>
> In one sense, I welcome you. In another sense—a more important sense—I give you your legacy.
>
> The purpose of this ceremony is to impress upon you the significance of your entering into this honorable company. We expect you to take pride—rightful pride—in your selection for admission, but to realize as well the obligations and responsibilities that come with the honor.
>
> Your essential quest in every working hour of your professional life is the quest for justice. The cry of all humanity from the most distant caverns of time has been the cry for justice, the striving for freedom of the individual, based on individual rights—rights so essentially valid that they are endowed by the mere fact of birth as a human being on this planet Earth. And those rights which all humanity eternally seeks are not simply words, whether chiselled on clay tablets five thousand years ago, or written on papyrus or paper, or flashed now on a computer screen. Rights can exist only if they are both recognized and then enforced. We, as trial lawyers in our culture, are essential to the process of both recognition and enforcement.

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[7]A printed copy of this address, titled "The Company of the Noblest" is given to each new Fellow at the time of his formal induction.

We have inherited the greatest creation of Anglo-Norman law, the superlative common law jury system, where members of the community of the governed become part of the government itself when they take their seats in the jury box. And that jury from the community defines those concepts which the law expresses as "reasonable" or "ordinary": reasonable conduct, ordinary care, prudent foresight, defective product, consumer expectation, fair and just compensation—all those abstract concepts which are continuously shaped and reshaped in an ever-changing culture and technology. Thus the law molds society but, in turn, society itself molds the law.

Into that interlocking process there came, centuries ago, the idea of the attorney, the advocate, the skilled champion of the unskilled client's case. At first the inarticulate client could have this assistance only with the permission of the trial judge, who could arbitrarily grant it or deny it. The absolute right of every party litigant to have the assistance of a trial lawyer to speak for him, to question witnesses, to argue facts to the jury and law to the court, was first guaranteed to the English citizen in the Statute of Westminster II, in the year 1285. Whenever you enter a courtroom, you are clothed in a mantle of tradition now seven hundred years old.

Your right to wear that mantle, your admission to the bar, makes you all Princes of Privilege in our society. The state not only grants you the exclusive license to practice advocacy in the courts but also gives you the work place and the work tools for your craft. It furnishes the courthouse and courtrooms, the judges, the jurors, the jury rooms, the bailiffs, the law clerks, the record clerks, and the reporters; and then it enforces your judgments. The state provides all those benefits so that you may function in the pursuit of justice. In turn, the community has the right to demand that you advance your client's cause not only with the most skilled advocacy you can achieve, but also with absolute honor, unswerving integrity, and unflinching adherence to the highest standards of our profession.

You are not merchants in a market place, concealing flaws, cutting quality, or inflating prices to enhance the bottom line of personal profit. You are not in commerce, dealing and bargaining over merchandise. You have chosen instead to follow a professional calling concerned with the most precious of all human values.

The case is not your case, it is the client's case. But the morality of your professional conduct and the honor of your speech cannot be controlled by the client. They are your very own. No matter how

worthy the result you seek for your client, your integrity must be as sparkling and as indestructible as a polished diamond. And your word must be pure gold. Anything less defames a glorious profession, corrodes a precious heritage, and sullies justice itself.

You have been selected for membership because we believe your reputation for honor and integrity demonstrates the independence of spirit of the true professional who places first his duty to humanity, who places second his duty to the court, who places third his duty to the client—and then at last his own self-interest.

It has never been a criterion for membership that you must first win an enormous case. All of us believe so much in the jury system that, if the case was that good and that big, we believe it *should* have been won. So why brag about that? The headline hunters will never be found listed in our Roster, no matter their self-promotion or media notoriety.

What we do seek is such consistency in preparation and presentation that the lawyer does not lose the case he really should have won. The true test of the great trial lawyer is not the number of his trophies but whether he ever threw a case away by relying on reputation and a silver tongue instead of the drudgery of preparation. The question is whether, when evaluating the risks of settlement or trial, he truly puts the client's interest and welfare untouchably beyond his own.

We do insist on one quality from each of you—that within this Fellowship you hone and polish your sense of collegiality. All of you belong to other legal associations, and many of those associations are narrow and partisan in limited fields of specialty. When the Society of Barristers was created, long years ago, the bar was becoming increasingly splintered and segregated into specialties and sub-specialties, with growing divisiveness and antagonism and bigotry. Your founders believed that the trial bar is a unit, that all trial skills are interchangeable, and that a lawyer outstanding in one narrow field of specialty can readily master any other field he might choose. You are many, but the many are but one. You are all equals in the wide and limitless range of trial and appellate advocacy, pledged to defend forever the sacrosanct right to trial by adversary process in our democracy.

And now a word about our meetings. They are not divided into sectionals or regionals. There is one annual meeting, not too long, not too short, where we gather to renew old friendships and make new friends. More than any other association you may know, we

care for each other and each other's families. We all know the harrowing pressures of your daily work, where there are so many long and frustrating hours, where you so often feel utterly alone and friendless, besieged by the judge, by opposing counsel, and all too often by your own client, who may think if he can fool you he can fool the court. And in the very nature of the adversary system, with close questions of law and fact, you must sometimes taste the bitterness of a defeat that will ache in your bones forever. The only things we can forget are the victories.

Here, we offer you a retreat, a haven, a safe place to bind up your wounds, a place to heal, a place where you will find compassion without asking for it. You can open yourselves to new and lasting friendships with a select company of trial lawyers who have climbed the same rocky, thorny, soul-bruising trail before you.

You will never have to explain what you are, because your selection for membership has proved it. You will never be badgered for political support, because we have no politics. You will never see a campaign poster, because no one ever seeks office or runs for office. You will find that every new member you meet, year after year, will be, like you, a battered and bloody soldier fresh from the battlefield. The Society of Barristers does not exist to pin medals on retired generals.

You are here because your talent is exceptional. You have proved it.

You are honorable. You have proved it.

You have maintained for so many years those high standards we cherish that we know you cannot fail your profession or yourselves. You have proved it.

You are here not to further your own career, but to celebrate it.

You have joined a company of the keepers of the flame of justice. But the brightest flame will die without fresh fuel. We count on you to feed that flame. Our older members represent what the International Society of Barristers has been—and what it is today. You new Fellows embody all our hopes for what it will be when we are gone.

Link arms with each other, hold hands with us, in preserving those ideals which have so long withstood the ultimate test—the test of time itself. Make those ideals a shining beacon light for all of humanity in this troubled world to see.

You have found a home, a safe home, in this enduring, warm fellowship. We welcome you to the company of the noblest members of our profession.

Today, the International Society of Barristers is recognized worldwide. As Craig Spangenberg said, "The adage has it that a chain is no stronger than its weakest link. The Society has no weak links."[8] Unfortunately, there are weak links at the trial bar, and we need to provide a means for securing more competent trial lawyers to handle an ever-burgeoning caseload in our American courts.

John Appleman's seminars on advocacy were designed to aid in the search for truth in our adversary system. He was a lifelong proponent of the non-flamboyant school of advocacy. He believed and taught that a lawyer should quietly present the facts marshaled and integrated in such a way that only one rational conclusion could be reached. He believed that once such a presentation was made, a lawyer could trust the jury to reach that conclusion.[9]

COMPLAINTS DIRECTED AT THE TRIAL BAR

The competency of our advocates has been much debated and was brought into a new era by Chief Justice Warren Burger. In 1973, Chief Justice Burger, in his Sonnett Lecture at Fordham Law School, emphasized the failure of the trial advocate in achieving justice through the adversary process. He was highly critical of the trial bar and stated that we could learn much from the English system of justice. As he put it, the English barrister is a highly trained and specialized advocate capable of furnishing the talent necessary to make the adversary system work. He acknowledged that our most skilled advocates are every bit as good as the best English barristers, but he charged that the average American trial practitioners do not measure up to their English colleagues. The Chief Justice also asserted that the English trial judges were in most instances superior to ours because the English bench was selected from only the most skilled of the barristers: recognized "Queen's Counsel" barristers who had taken "the silk."[10]

Unfortunately, criticism of the profession and of our adversary system as a means of resolving disputes grew during the tumultuous 'seventies. Derek Bok, president of Harvard University and former dean of its law school, described the American legal system as "grossly inequitable and inefficient" and called for fundamental changes in how lawyers practice and how they

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[8]Spangenberg, *The President's Message*, INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY, Oct. 1966 (vol.1, no. 4), at 3.
[9]Spangenberg, *John Alan Appleman: In Memoriam*, 17 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 371 (1982).
[10]Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 FORDHAM L. REV. 227 (1973).

are trained.[11] In his report, Bok stated that there are too many lawyers; that services are not available for low- and middle-income groups; that the legal profession is attracting too many of the nation's most talented young people; and that the legal system has become too complex and too costly. But apart from NITA and, more recently, the American Inns of Court, very little has been done to improve mentoring and trial practice skills.

The litigation explosion and an ever-increasing number of lawyers heightened criticism of the entire profession.[12] The number of licensed lawyers in the United States in 1999 was 1,022,000 and 350,500 were members of the American Bar Association. In 1999 our law schools graduated 39,000 students whose inability to venture into the courtroom without additional training is recognized by both judges and trial lawyers.[13]

The academic credentials of today's law school graduates reflect that they are intellectually brighter and better educated than their predecessors. Generally, the young lawyer has taken courses in evidence and procedure, has passed the bar, and has had some exposure to trial practice, either by observing trials during the time that he was in law school or through a law school course that may have been patterned after the programs offered by NITA. He has been exposed to brief writing during his freshman year in preparing for a moot court argument, and he may have heard a few war stories from his law professors. He also may have been exposed to a short course in trial practice. His training has probably helped prevent the transition from law school to courtroom from being a total disaster. Yet, unfortunately, today's law school graduates are not better qualified to try a lawsuit than were the law graduates in earlier years. If the young lawyer is employed by a district attorney, by a large law firm, or by a public defender's office, he may have the benefit of participating in several trials with more experienced advocates. The path to the top of the trial bar still requires the experience that is tied to years of trial work in a number of different courts.

As members of the International Society of Barristers, we have a great responsibility to help improve the courtroom skills of trial lawyers and to maintain the integrity of the adversary system as a means of achieving justice. Of course, the key question is: What can be done to improve the competency of trial and appellate advocates?

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[11]Bok, *A Flawed System*, HARVARD MAGAZINE, May-June 1983, at 38; *Critical Times at Harvard*, TIME, Nov. 18, 1985, at 87 (emphasizing faculty dissension and the critical legal studies advocates who contend that the American legal system and its supposedly disinterested rules are prime instruments of social injustice). *But see* Ball, *Right Diagnosis, Wrong Cure: A Law Professor's Answer to Bok*, BAR LEADER, Jan.-Feb. 1984; Levin, *Notes from the Dean*, AMICUS, Fall-Winter 1983.

[12]Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 227 (1970).

[13]Watkiss, *The Litigation Explosion and the Trial Lawyer's Changing Role*, Address delivered at the 1983 International Academy of Trial Lawyers Annual Convention; *Chief Justice Burger Proposes First Steps Toward Certification of Trial Advocacy Specialists*, 60 A.B.A.J. 171 (1974).

CONTINUING LEGAL EDUCATION

The National Institute for Trial Advocacy, which Jim Carrigan has nurtured, has been given financial support by the Society, the American College of Trial Lawyers, the American Bar Association, and others.[14] In my view, continuing legal education programs must be supported and expanded as a means of achieving more uniform competence at the trial bar.

In some states courses are offered to teach the practitioner about the nuances and anachronisms and idiosyncracies of practice in the courts of those states. The differences between state and federal practice are becoming less significant. Most states pattern their rules of civil and criminal procedure at both the trial and appellate levels after the federal procedural rules, and most law schools equip their graduates with basic knowledge of the Federal Rules of Evidence. The widespread adoption of the federal rules by the state courts has helped bring about greater uniformity of practice.

SPECIAL CREDENTIALS FOR TRIAL LAWYERS

Another major area for study is the somewhat controversial one of requiring special qualifications for registration to practice in the federal courts and in the state courts. Chief Justice Burger's Sonnett Lecture rightly pointed out the weaknesses in our system of preparing new law graduates for trial practice. His remarks resulted in the creation of the Clare Committee in the second circuit in 1974. The Clare Report recommended that a three-member admissions panel consider applicants for admission to practice before the federal district court and that the panel determine whether the applicants had completed law school or continuing legal education courses in evidence, civil procedure, including federal practice and procedure, professional responsibility, and trial advocacy. In addition, an applicant would be required to assist in the preparation of four trials or to observe six trials, half of them in the federal courts.[15] The Clare Committee recommendations provoked much commentary but did not produce any tangible results and have never been implemented.[16]

Later, the Judicial Conference of the United States appointed the Devitt Committee, which recommended many of the improvements suggested by the Clare Committee and also proposed that applicants for admission to fed-

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[14]McAuliff, *Trial Advocacy: Improving the Quality of Legal Services Through Continuing Education Courses*, 30 J. LEGAL EDUC. 536 (1980); Brown, *Teaching Advocacy the N.I.T.A. Way*, 63 A.B.A.J. 1220 (1977); *The Pursuit of Excellence in Advocacy*, National Institute for Trial Advocacy (1985).

[15]*Final Report of the Advisory Committee on Proposed Rules of Admission to Practice*, 67 F.R.D. 159 (1974).

[16]Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 60 (1979).

eral practice be required to pass a competency examination and be subject to peer review procedures.[17] The Judicial Conference of the United States unanimously approved the Devitt Committee Report, which:

> 1. Recommended to the American Bar Association that it consider amending its law school accreditation standards to require all law schools to provide courses in trial advocacy, taught by instructors having litigation experience and including student participation in actual or simulated trials, and that the Bench and Bar be encouraged to support the law schools in achieving the goal of providing quality trial advocacy training to all students who want it;
> 2. Recommended creation of a special committee of the Conference to oversee and monitor, on a pilot basis, an examination on federal practice subjects, a trial experience requirement, and a peer review procedure, in a selected number of district courts that indicated a desire to cooperate in any or all of the above programs; and
> 3. Recommended to the district courts generally that they adopt student practice rules, support continuing legal education programs in trial advocacy and federal practice subjects, and encourage practicing lawyers to attend.

A collaborative effort of various and diverse segments of the trial bar identified as the "American Civil Trial Bar Roundtable" released a report on September 8, 2000, that addresses issues of key interest to our Society. The report recognizes that the civil justice system and civil trial practitioners have been subjected to study and criticism for two decades, and that some of the criticism has come out of politically expedient debate, not an effort to review or reform our justice system. A national survey by the American Bar Association in February of 1999 reflected that eighty percent of Americans believe that, in spite of its problems, the American justice system is the best in the world. As the Roundtable stated:

> Tasteless advertising has no doubt contributed to a growing disrespect for trial practitioners. Also, the perceptions that the legal practice has evolved from a "noble profession" to a mere "business enterprise" have probably played a major role in eroding the public's perception of lawyers and the legal system. The perception that attorneys' fees and firm income have too often become com-

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[17] *See Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts*, 83 F.R.D. 215 (1979).

> modity items for negotiation among lawyers and clients and considered more important than service is another reason for the decline in respect for lawyers in general and trial practitioners in particular. Finally, the perception of a lack of civility of lawyers toward one another leading to "win at any cost" tactics and hardball ultimatums have reduced the public's esteem of lawyers, including trial lawyers, and the trial practice.

The Roundtable recommended not only that the organized bar improve the quality of advocacy in the trial courts but also that education of the public and the media on the standard of professional conduct followed by lawyers be made a high priority.

The federal district court in Colorado proposed several criteria for admission of attorneys to its Registry of Attorneys. Each applicant for admission to the registry would be required to accumulate "trial credits" and be sponsored by two other qualifying attorneys who certified the applicant's competency. Satisfaction of the "trial credit" requirement would be based on accumulating "points" through participation as counsel or co-counsel in federal trials. The Colorado Bar Association conducted a comprehensive survey of Colorado lawyers regarding the proposed criteria. Only twenty-nine percent of those responding favored the criteria.

Judge Richard Matsch, the retiring chief judge of the United States District Court for the District of Colorado, was instrumental in creating the "Faculty of Federal Advocates," which includes more than 500 lawyers and works toward the development and improvement of trial advocacy in the federal courts of Colorado.

Despite setbacks, I believe that some means of establishing satisfaction of minimum standards of competency for trial attorneys is essential if Chief Justice Burger's concept of the tripod of justice is to remain viable.

PEER REVIEW

Another important step to be considered is the need for a system of peer review among trial practitioners. Both the Devitt and Clare Committee reports recommended that some kind of peer review system be created to monitor the effectiveness of trial attorneys and to take appropriate action to maintain minimum standards of competence.

The most comprehensive scheme for peer review was formulated by the American Law Institute and the American Bar Association jointly.[18] The

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[18]American Law Institute/American Bar Association Committee on Continuing Professional Education, *A Model for Peer Review System* (discussion draft Apr. 15, 1980).

proposed model would provide for third-party complaints of attorney incompetence to be made to a peer review board, which would be able to take appropriate remedial steps or refer the complaints to other disciplinary authorities when warranted. The ALI-ABA committee also recommended that there be a voluntary program for practitioners to obtain evaluation of their work from other trial lawyers.

One problem with such a peer review system is that the marginally competent attorney, who can most benefit from peer criticism, is not likely to take the process seriously unless the peer committee has the power to impose disciplinary sanctions. If disciplinary sanctions, such as remedial course work in advocacy, are to be imposed or recommended by the peer review committee, a new "grievance procedure" for lawyer incompetency will have to be created. To be effective, the peer review boards will necessarily require some authority to order offending attorneys to attend courses in trial or appellate advocacy. The risk exists that peer review could be abused since even the most competent attorneys sometimes make errors in hotly contested trials. However, it appears that some peer review system will be proposed in the future as an indispensable means for maintaining minimum standards of competency at the trial and appellate bars.[19]

MODERN ADVOCACY

It is no surprise that the modern art of advocacy includes techniques and procedures that were unheard of fifty years ago. Today it is routine to videotape the testimony of out-of-state or other witnesses who may be unavailable at the time of trial. Judicial experiments have gone so far as to require the videotaping of all witnesses to insure that the trial will be completed without interruption.[20] Other innovations include the jury profile system, which utilizes the presentation of argument and, in some instances, evidence before a mock jury selected from the same area that comprises the selection base for the real jury.[21] Audio-visual and other demonstrative aids are being used to assist the advocate in the presentation of a complex case. In addition, the computer has not only enabled trial counsel to maintain precise and well-indexed records of a trial, but also has provided new techniques and methods for presenting evidence to a jury. A laptop computer can also be invalu-

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[19]Maddi, *Improving Trial Advocacy: The Views of Trial Attorneys*, 1981 AM. B. FOUND. RES. J. 1049.
[20]American Bar Association Action Commission to Reduce Court Costs and Delay (1983).
[21]Hanley, *The Last Thirty Days*, 10 LITIGATION, Winter 1984, at 8; *see generally Theme Issue: Litigation Today*, 71 A.B.A.J 48 (1985).
[22]*See* Tredennick, WINNING WITH COMPUTERS, TRIAL PRACTICE IN THE 21ST CENTURY, vol. 1 (1991), vol. 2 (1993).

able in revising instructions.[22]

Appellate advocacy has also undergone some change. For example, some of the same audio-visual aids are used. In most instances, however, the pattern for a good oral argument before the appellate court is no different than it was in the time of Daniel Webster. The Supreme Court Historical Reports point out that the language used by Webster in the *Dartmouth College Case*[23] and in *Gibbons v. Ogden*[24] found its way into the opinions written by Chief Justice Marshall.[25] Today, the appellate advocate should have the same goal. Too often we find that the advocate attempts to overwhelm the appellate court with stirring jury argument or underwhelm the court by simply reading his brief aloud.[26] A good advocate tailors his argument in the appellate court, as well as his presentation in the trial court, to persuade the court, or the jury, that his case demands relief.[27]

Unscrupulous lawyers ignore licensing requirements by conducting their practice over the Internet. When the out-of-state Internet practitioner is required to make an appearance in a state where he has no license, he appears or attempts to appear pro hoc vice. One courageous Internet practitioner attempted to avoid licensing requirements by claiming that he limited his out-of-state practice to the federal court, but he gave up the ploy when the disciplinary authorities intervened. Colorado, like a majority of states, has adopted nearly all of the American Bar Association Model Rules of Professional Conduct. Colorado Rules of Professional Conduct 5.5 prohibits the unauthorized practice of law in Colorado by unlicensed lawyers and provides sanctions for out-of-state practitioners who ignore the rule. Colorado Rules of Professional Conduct 8.3, to maintain the integrity of the profession, also imposes a duty on lawyers who have knowledge of a violation of the code that raises a substantial question as to another lawyer's honesty or trustworthiness to report the misconduct to the appropriate disciplinary authorities. We should all endeavor to police our own ranks by filing disciplinary complaints against the Internet practitioner who ignores the state's licensing requirements.

In addition, the *Wall Street Journal* has suggested that Internet website advertising is nationwide, cheaper than most other types of advertising, and hardest to police. A lawyer in state *X* impinges on the citizens of state *Y* with

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[23]Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).
[24]Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
[25]Finely, *Constitutional Orator: Daniel Webster Packed 'em In*, 1979 YEARBOOK, S. CT. HIST. SOC. 70.
[26]Erickson, *Effective Appellate Advocacy*, 7 COLO. LAW. 1549 (1978); John W. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895 (1940); Bright, *The Ten Commandments of Oral Argument*, 67 A.B.A.J. 1136 (1981).
[27]*Appellate Litigation Skills Training: The Role of the Law Schools*, Appellate Judges Conference Judicial Administration Division, A.B.A. (June 1985).

unprofessional false advertising. Disciplinary experts recognize a regulatory vacuum and recommend national licensing or new standards for lawyers advertising on the Internet. Thomas Byerley, a lawyer discipline official in Michigan, said that "technology is 'a world ahead of our ethics rules.'"[28]

Robert Macrate's report to the American Bar Association recommended changes in law school curricula not only to improve the competency of law school graduates for admission to the bar, but also to prepare them to participate in the legal profession.[29] The accreditation standards for law schools are being reviewed to include many of the recommendations in the Macrate report. One hopes that the law schools will assist the profession by emphasizing good versus bad professional conduct.

The American Inns of Court, an outgrowth of Chief Justice Burger's criticisms, has Inns in every state that are endeavoring to rejuvenate the concept that civility and integrity are vital elements of the legal profession. The Inns are also taking part in the effort to train young trial lawyers.[30]

In this climate of problems but also of hopeful developments, the Fellows of the International Society of Barristers must not only continue to maintain their own integrity, competency, and professionalism but also strive to improve the standards of the trial bar.

CONCLUSION

Our common law adversary method for resolving legal disputes depends upon qualified advocates to present evidence and argument to a judge or jury to make the search for truth reliable. The Society has qualifications for fellowship that require high levels of professional competence in the courtroom, and a goal of the Society has been to make the search for the truth in our adversary system reliable. Unfortunately, many trial advocates have cast aside the concepts of professionalism and civility in litigation and are following the Rambo, take-no-prisoners approach in litigation. Television has done much to create a new image of the trial lawyer. Mentoring of young trial lawyers has been limited in the large law firms by the demand for billable hours. Many young lawyers who have observed the success of television lawyers and have seen the absence of civility in the courtroom try to emulate what they have seen. Unfortunately, the complaints that were highlighted by

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[28]Schmitt, *Lowering the Bar, Lawyers Flood the Web, But Many Ads Fail To Tell Whole Truth*, WALL STREET JOURNAL, Jan. 15, 2001, at A1.
[29]ABA, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).
[30]THE AMERICAN INNS OF COURT: RECLAIMING A NOBLE PROFESSION (P. Pixton ed. 1997).

Chief Justice Burger have been exacerbated by lawyer advertising, permitted as commercial speech by *Bates v. Arizona State Bar*[31] and its progeny.[32]

The extent of lawyer advertising has progressed to unforeseen heights. The *Wall Street Journal* reflects the scope of lawyer advertising in the year 2001:

> When it comes to advertising a law firm, the options used to be limited. For years stately letterheads had to say it all. Then came sober print ads, and as things began to loosen up, late-night TV spiels.
>
> Today a firm's options include digital special effects.
>
> For the San Francisco corporate law firm Brobeck, Phleger & Harrison, one key decision was whether to go with a scene of lemmings diving off a cliff—handicapped by their lack of counsel from the firm—or a giant hand in the sky that brings miraculous assistance.
>
> The 950-lawyer firm's $3.5 million campaign, scheduled to launch on CNN on Monday, is believed to be the first nationwide TV advertising ever tried by a major corporate law firm. At a time when most of the public still associates lawyer TV ads with sleazy soliciting by personal-injury specialists, Brobeck's campaign is a bit of a gamble. But its pitch is just the latest and boldest example of how once-staid corporate law firms are trying to sell themselves at a time when a glut of lawyers and sophisticated clients has made the law business more competitive than ever.
>
> "We're letting a little air in," says Burkey Belser whose Washington, D.C., ad firm, Greenfield/Belser Ltd., has worked with more than 200 law firms over the past several years. Not that long ago, he says, the idea of big-time lawyers advertising would have been "laughable," and a "smear on the profession."
>
> Today, taking advice from their clients, a growing number of firms are adopting Madison Avenue-style techniques, seeking to "brand" them in the marketplace, just like makers of corn flakes or toothpaste. Instead of dull ads in legal journals, they are bankrolling image campaigns and developing their own corporate logos, nurtured through glossy ads in tech and personal-finance magazines, radio ads and airport kiosks.[33]

Unfortunately, advertising as commercial speech has blemished the stan-

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[31]433 U.S. 350 (1977).

[32]Florida Bar v. Went for It, Inc., 515 U.S. 618 (1995); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). *See Commercial Speech*, in 1 W. ERICKSON & B.J. GEORGE, UNITED STATES SUPREME COURT CASES AND COMMENTS 5A033(2) (a) (2000).

[33]Schmitt, *Lawyers Try In-Your-Face Pitches*, WALL STREET JOURNAL, Jan. 12, 2001, at B1.

dards of professionalism that were hallmarks of our profession. Broad improvement in advocacy and professional standards must be a goal of the Society. Hopefully, professional standards will be imposed that will protect our courtrooms from being flooded with incompetent lawyers who obtained their clients through cut-rate advertising The adversary system depends upon effective advocacy to make the truth-finding process work. As Fellows of the International Society of Barristers, we have the obligation to support changes that will improve the advocacy skills of all lawyers. The adversary system requires no less.

CIVIL RIGHTS—PAST, PRESENT AND FUTURE†

Fred D. Gray*

Every Sunday beginning in January, I have traveled to Durham, North Carolina, where I have been designated the Charles Hamilton Houston Professor at North Carolina Central University's School of Law, to teach a course by the same title as my speech here today. Let me share with you what I wrote in my syllabus to that course:

> The central theme of the course is to examine the role of law in creating, maintaining, and providing for civil rights and the elimination of racial injustices in all aspects of American life, including but not limited to voting, administration of justice, education, housing, and employment. This will give the students an opportunity to critically examine the role of law in eliminating racial injustices in the United States. It will also seek to give students an opportunity to understand the reasons for and the necessity of the rule of law in obtaining civil rights.

I will talk to you today about a few of the lessons that I have tried to convey to those students and about a few of my personal experiences as lawyer for Dr. King, Rosa Parks, and many others in the civil rights field during the course of a practice spanning a term of about forty-five years.

Historical Perspective

This is a critical time in the history of the United States, because we have just inaugurated a new president and we face many controversial issues in the field of civil rights. In order to understand where we are today, we need to take a historical view of civil rights and see how the field has developed in the United States.

The basic documents upon which the laws of America rest are the Magna Carta, the Declaration of Rights and Grievances, the Declaration of Independence, and the United States Constitution, including its amendments. The foundation of law as set forth in those documents deals with the

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rights of white Englishmen and white Americans. "We the people" of the preamble to the Constitution did not include persons who looked like me. The drafters of the Magna Carta, the Declaration of Rights and Grievances, the Declaration of Independence, and the Constitution of the United States were not concerned about the rights of blacks. It became necessary to adopt amendments to the United States Constitution and pass additional laws in order to provide African Americans with any rights. In December of 1865, the thirteenth amendment to the Constitution abolished slavery. In July of 1868, the fourteenth amendment to United States Constitution made African Americans citizens of the United States and extended protection to them through the due process and equal protection clauses. Parenthetically, you know what has happened to the due process and equal protection clauses of the fourteenth amendment; even though they were passed primarily for the purpose of protecting the rights of African Americans, they now protect everybody's rights. Then early in 1870, the fifteenth amendment to the Constitution prohibited denial of voting rights on the basis of race. The thirteenth, fourteenth, and fifteenth amendments to the Constitution are the amendments to which I have devoted my forty-five years of practice, for the purpose of seeing that all persons who are truly American citizens have the rights they are supposed to have; I have used these amendments in trying to break down the walls of segregation.

The wrongs to be corrected are deeply entrenched. They started when the first slaves landed in Jamestown, Virginia, in 1619. African Americans are the only ethnic group in the United States that came to America without their consent. They were brought as slaves.

Segregation in education began when free common schooling was wretchedly poor for whites and nonexistent for blacks. Even when some schools became available to blacks, those schools were inferior to the ones available to whites. Interestingly, some people think that only the South had segregation laws, but the first school desegregation case occurred not in Alabama or Mississippi but in Boston. In a case argued by Charles Sumner on behalf of Sarah Roberts, the Massachusetts Supreme Court in 1850 held that Boston could segregate children based on race.[1]

Then there was the Dred Scott decision in 1857, where the Chief Justice of the United States Supreme Court held that a Negro whose ancestors were sold as slaves could not become a member of the community and thus could not file a suit in a federal court because he was not a citizen.[2] That case is probably most famously known as in effect holding that a Negro had no

[1]Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850).
[2]Scott v. San[d]ford, 60 U.S. (19 How.) 393 (1857).

rights that a white man was obligated to respect. On the heels of that decision, in 1861 to 1865, Congress passed laws specifically providing for the segregation of schools in the District of Columbia. In light of this background, it wasn't a surprise when in 1896 the Supreme Court declared the doctrine of "separate but equal" in the field of transportation,[3] a doctrine that has plagued us ever since.

PERSONAL HISTORY AND THE BIRTH OF THE CIVIL RIGHTS MOVEMENT

Let me tell you a little bit about how I got involved in this whole business. I did not start out wanting to be a lawyer. I did not even know any lawyers. I was preparing for a nice, safe position that black folks could have in the late 1940s: I was going to be a preacher and a teacher. My mother had packed me up and sent me to Nashville to one of our church schools so I could learn how to preach and travel all over the country with one of our old pioneer preachers, raising funds for the school and recruiting students. When I finished that training in 1948, I went back home to go to college at Alabama State, the historically black school in Montgomery. I lived on the west side of town, and Alabama State was on the east side of town, so I used bus transportation at least twice a day, and sometimes as often as six times a day. And I saw so many of our people being mistreated on the buses.

Those experiences on the buses awakened me. It suddenly struck home that everything in Montgomery at that time was segregated based on race, and if a person of color had a claim against a white person, there was nobody who would even handle the case. So I decided that, in addition to saving folks' *souls*, I needed to give them some earthly help. I made a secret pledge to become a lawyer.

I couldn't go to law school at the University of Alabama then because of my race. Alabama, like most of the southern states, had a plan that would allow it to meet the requirement of providing equal educational facilities for blacks while still keeping the races separate: Alabama would help pay tuition, room, and board for blacks who went to school somewhere else. That's how I happened to get my law degree at Case Western in Cleveland, with the help of the state of Alabama. But I expanded my secret pledge; I would become a lawyer, return to Alabama, pass the bar exam, and destroy everything segregated I could find.

As I look back on it now, I wonder how in the world a boy who at that time was about nineteen years of age could have thought of such a plan. I hadn't even told my mother that I had applied to law school. When I received

[3]Plessy v. Ferguson, 163 U.S. 537 (1896).

the acceptance letter, I gave it to her during dinner one evening. She read it and said, "Well, Mr. Smarty, now that you've been accepted, where are you going to get the money?" Then she went out and helped get the money.

So I was privileged enough to go to Case Western, but I always had the intention of returning to Alabama. I did have enough sense to stop by Columbus and take the Ohio bar exam just in case, but six weeks later I took the Alabama bar exam. The Alabama examiners in 1954 assumed that one little black boy from the ghettos of Montgomery wouldn't rock the boat and couldn't hurt anything, and I passed the bar the first time around.[4]

Less than six months later, I represented a fifteen-year-old girl named Claudette Colvin. Most of you don't know of Claudette Colvin, but nine months before Rosa Parks was arrested, Claudette Colvin was arrested under very similar circumstances. She got on the bus in downtown Montgomery, and on the way home was asked to give up her seat to a white man. She refused, and they dragged Claudette off the bus. Everyone knows about Rosa Parks and about Martin Luther King, but no one knows about Claudette Colvin. She still lives, in the Bronx.

Throughout the civil rights movement there were hundreds of individuals such as Claudette, people who took stands and made sacrifices, but whose names never appear in print and whose pictures never appear on television. They are the ones who laid the foundation and who gave us the moral courage. If there had been no Claudette Colvin, for example, we might not have been prepared to mount the bus boycott after Mrs. Parks was arrested. We have to remember the thousands of people who have suffered and even died.

A lot of events happened in Montgomery in a short period of time. Let me give you a quick chronology: On September 7, 1954, Fred Gray, then twenty-three years of age, was admitted to the practice of law in Alabama; on October 30, 1954, Martin Luther King, Jr., was installed as pastor of Dexter Avenue Baptist Church; on March 2, 1955, Claudette Colvin was arrested for refusing to give up her bus seat. Another lady, Mary Louise Smith, was arrested in October of 1955; on November 5, 1955, just twenty-six days before Rosa Parks was arrested, Frank M. Johnson became a judge of the United States District Court for the Middle District of Alabama. I want to pause here for a moment because I think the appointment of Judge Johnson was very important. Judge Johnson was one of those rare judges who was ready and willing to put his life on the line to do what he understood to be right under the Constitution, not just in the bus case but in many cases that arose in Alabama. On December 1, Rosa Parks was arrested; on December

[4]More detail about all of this is revealed in my autobiography, BUS RIDE TO JUSTICE: CHANGING THE SYSTEM BY THE SYSTEM (1995).

5, she was tried and convicted; the bus boycott started; we filed the case of *Browder v. Gayle*, in which the district court ruled the bus segregation unconstitutional; and some five or six months later the Supreme Court affirmed that decision.[5] And the civil rights movement was born. Frankly, I think the Lord had something to do with bringing the individuals and events together in Montgomery at that time; the coalescence went beyond chance or coincidence. A pebble cast in the segregated waters of Montgomery, Alabama, created a human rights tidal wave that changed America and eventually washed up onto the shores of such faraway places as the Bahamas, China, South Africa, the Soviet Union, and even Great Britain.

In this brief overview of history, I need to mention one more chapter—the infamous Tuskegee Syphilis Study. By the early 1970s I had tried hundreds of cases against discrimination by cities and counties in Alabama and by the state itself; and in many of those cases the federal government was right there on our side. Then I woke up one day in 1972 and learned that in my own county of Macon, the federal government had financed a forty-year program in which it had used six hundred twenty-three African American men, some of whom had syphilis and some of whom did not, to study the course and effects of untreated syphilis—without the knowledge or consent of the men involved. So I had to file a suit against the United States government. In addition to getting a fair settlement (for those days), the survivors eventually got an apology from the President of the United States. In 1997, President Clinton admitted that our country did a grievous injustice to the men in the study and apologized, in person, to the survivors. Those survivors had decided that what they wanted was a permanent memorial in Tuskegee acknowledging not only their contributions but the contributions others have made in the field of civil rights, so when the spokesman for the survivors introduced the President on May 16, 1997, he announced the formation of the Tuskegee Human and Civil Rights Multicultural Center. When fully developed, the Center will show the contributions of all the ethnic groups in our area that have assisted in bringing about human and civil rights; in the next year or so, visitors to Tuskegee will be able to see all of that at one place.

THE PRESENT

You might be wondering what all of this means to us here today. We have made a tremendous amount of progress, and I would not try to tell you that we have not. But notwithstanding our progress, in recent years we have seen an increase in racism, expressed in many ways, including the burning of

[5]Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), *aff'd per curiam*, 352 U.S. 903 (1956).

churches. We have seen a change in the United States Supreme Court, which for more than a quarter of a century had been a pioneer in the rights of minorities and women; the Court is now reversing itself on some important constitutional principles. We have seen similar changes in the federal district courts and courts of appeal across the nation. In recent months we have seen assaults upon affirmative action and other programs that have effectuated or protected the constitutional rights of individuals and made our country a great country. We have witnessed the resurgence of hate groups. And many old wrongs remain unredressed. For example, in 1963 I filed cases that involved desegregating 104 of the 119 school systems in Alabama; about forty or fifty of those cases are still active today. My sons, who were just little boys when I filed those suits, are now going into court trying to get people to do what they should have done long ago.

The struggle has not ended. Racial discrimination in the United States has not ended. We do not have a level playing field. There is no such thing as a race-neutral society in America. The consequences of three hundred fifty years of slavery, segregation, and discrimination have not disappeared in the last forty years. We still, unfortunately, live in a racist society, and if we're not careful, it's going to get worse before it gets better.

THE FUTURE

If the lives and work of Dr. King and Mrs. Parks are to mean anything, the struggle for equal justice under the law, particularly for women and minorities, must continue. We face a real challenge on whether the gains we have obtained will continue or will be lost, and more remains to be achieved. If we lose, it will mean that Dr. King and others who have given their lives in the cause of human and civil rights have died in vain. If we lose, the nation loses.

I hope this Society is active in the field of diversity for we are living in a world where a majority of the people are colored peoples, not white. Even if we focus only on the United States, the census reports show that the Asian population and the Hispanic population and even the African American population are increasing. So we need to be concerned about diversity.

We have seen some promising steps taken at various levels. A few years ago President Clinton appointed a race relations commission. On October 30, 1999, the then president of the American Bar Association indicated that one of his major priorities was to increase the involvement of minorities in the American Bar Association. I'm happy to say that in our state of Alabama, which we usually think of as falling at the bottom of the list, white folks, black folks, rich folks, poor folks, educated and uneducated people came together a couple of years ago and elected a governor, Don Siegelman, who

has been working hard to change the image of our state; and to a great degree, he has succeeded.

What can we do on a more personal level to change or to increase diversity? I'm going to tell you two little things that you might be able to do. One is a suggestion that came from one of my children when I was getting ready to make a speech a few years ago. She said, "Daddy, people don't know each other, and when they don't know each other, they are unable really to understand each other. What if everybody would select one person who is not of their own race to be their friend? You would learn about that person's likes, that person's dislikes, even little things such as what they eat and what they don't eat. You'd get a chance to truly know that person." I challenge each of you to do that, and to keep trying if it doesn't work out the first time. After all, you haven't given up on all your friends of your own race just because some people of your own race are not your friends. The other thing I will ask of you is that you look around you in your neighborhood, at your workplace, at your place of worship, and in your social groups. If everybody in those places is of the same race, please at least pause to wonder why it's that way.

Stepping back to the community or national level, I want to submit for your consideration three basic things I think we can do that will help us get to the point where everybody is truly free and truly equal. First, we all have to recognize that we still have a race problem in this country. Even the new President of the United States has said to the Attorney General and to Congress that the practice of race profiling needs to be stopped. We need to acknowledge that we have a race problem, and we need to decide that it's wrong and that we're going to correct it. Secondly, we have to develop some plans for correcting the problem. Some of this will involve work at the local level. I can't tell you what needs to be done or what will work in every community, but I cannot believe that with all of our knowledge and all of our wisdom, we cannot come up with solutions to correct our race problems. Finally, the plans we devise must be executed.

One of the greatest areas of discrimination I have found in this country now is the economic area. You can find black kids and white kids who have gone to the same schools and been taught by the same persons, and you will see that when they go out to get jobs, the white ones usually will get good jobs and the black ones either won't get jobs at all or will get menial ones. You can look at any of the economic census reports and find the tremendous disparity economically between people of color and the majority. As I tell lawyers and law students across the country, this is an area in which the law can and should play a role in righting the wrongs.

Let me leave you with the words of Governor Wilder, the first African American governor of the Commonwealth of Virginia, as he was being

inaugurated a few years ago. He was speaking of young people, but his words apply more broadly. He said:

> I want them to know that oppression can be lifted, that discrimination can be eliminated, that poverty need not be binding, that disability can be overcome, and that the offer of opportunities in a free society carries with it the requirement of hard work, the rejection of drugs and other false highs, and a willingness to work with others, whatever their race or national origin may be.

LAWYERS IN THE NEW WORLD ORDER†

Edward E. Elson*

Delivered almost exactly six months before the September terrorist attacks on the United States of America, Ambassador Elson's reflections on American values have a particular relevance and timeliness in the light of those dreadful events.

It is that very particular season which, in our country, begins every fourth winter but heralds spring, the time of the political beginnings and reassessments that follow the swearing in of a new President. All across the land—in cabinet rooms, board rooms, living rooms, and seminar rooms—it is a time for speculation and evaluation. It is useful for us to do this, for it focuses our attention not only on the variables in our national progress but also on the constants: those enduring ideas and ideals of the American experience which animate our great country and which should inform its foreign policy.

So today, as a way of guiding discussion on the whither of American foreign policy, I may linger a little on the whence. I have reached that part of life when I am often described as "a former." I am a former rector, a former ambassador, a former board chair, and a former trustee. On my passport renewal application, I even thought about entering my occupation as "former." But when I look at the members of President Bush's new cabinet, I take heart. Many of them are former "formers." This "former" thing may be just a phase for me, too.

In the meantime, I note that there are some good things about it. One of these is the perspective that being a "former" brings. The role of an ambassador in particular causes one to reflect inordinately on the nature and the character of the society from which he or she has come. And what I have come to realize from my service in Denmark is a very important and relevant fact. In the eighteenth century, Voltaire said that every man had two countries, his own and France. In the twenty-first century, it is still true that every person has two countries, but today they are his own and the United States of America.

American ambassadors are often called on by businessmen—by Americans seeking to expand their markets, and by those who would sell

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their goods to us. Sometimes even in places where U.S. cultural and military presence is strong, it still is American business which is most visible. Martin Indyk, our ambassador to Israel, told me what happened when he cut the ribbon at the opening of a new McDonald's. A young Israeli in attendance was disappointed to learn that Martin was the ambassador only of the United States, not the ambassador of McDonald's.

Despite this emphasis on business, however, I can assure you that America's greatest export is neither the hamburger nor its technology, it is not airplanes or motion pictures, but its values—its democratic values of self-reliance, equality, dignity, self-governance, strength of purpose, and self-restraint, and its customs of generosity and compassion.

THE POWER AND SCOPE OF AMERICAN VALUES

To our pride, the world now not only recognizes but freely extols that America and its ideal of freedom are the indispensable keystones in world affairs, and that the United States as a nation has assumed the fundamental obligation of strengthening and assuring constitutional democracies and the cause of human rights throughout the world. The ideal of freedom has traveled a long and hard road through history, yet the record shows that that ideal persists and has an explosive power. This ideal is the strongest motive for human action. It fortifies the human will in the face of adversity and terror. The passion for equal rights is the ultimate weapon in the struggle for independence and for human dignity. We live in a free and open society. That is where our strength and greatness lie.

We are a nation that is reaching the height of its power at a time when the old order of things is crumbling and a new world is struggling to accommodate rapid change on many levels. Many of the transformations that have already occurred would have been unimaginable even a decade ago. The United States, through its governmentally articulated foreign policies and the individual actions of its citizens reaching across cyberspace, played the central—indeed, the indispensable—role in this global transition. We are now irretrievably launched into the era of globalization. Democratic ideas and ideals are taking root in the hearts and hard drives of peoples whose access to information is beyond the control of any regime.

To contemplate today's situation is to appreciate the wisdom of America's historic policies which placed an especial value on promoting democratic governance and the dissemination of democratic principles abroad—and to recognize as well the extraordinary importance of continuing those policies.

No nation at any time in world history has been as universally recognized as being as powerful as our country is today. Our military is the mightiest

armed force in human history and our economic and cultural dominance unprecedented. We are the greatest power and the most influential government the world has ever known. But I see a problem. Many of our young have never seen or experienced anything else. Many have come to feel that it is the military and economic power that accounts for our massive influence. What they fail to appreciate is that there are three basic principles of government that have brought us to this moment and truly account for the esteem and veneration the world feels for us. These principles are the freedom of the individual, equal justice under law, and equality of opportunity. We have created the first true meritocracy where individuals are free to pursue their own goals as high as their God-given ability can take them.

It has been said that the United States is the first great nation to be born out of allegiance to an idea, not a tribe. That is the genius and the experience of America. And it accounts for the extraordinary success of American foreign policy—success measured not only by the achievement of announced goals, but by the very articulation of those goals which are themselves the expression of the American experience. It is American ideas and ideals which are and ought to be the chief tools and the chief goals of American foreign policy.

Of America it has also been written, and it is certainly true, that democracy is our common religion. We speak of democratic ideals and governing principles in sacred tones. We have created national myths about our history and our leaders, myths that we believe with religious fervor. These myths bind us together and inform our civic life. In this, we may not be unique. But national myths, however promulgated or indoctrinated, cannot endure when they diverge from the truth as truth is experienced by a nation's people.

The twentieth century saw the creation of great national and international myths which, despite enforcement by huge state-controlled propaganda machines, failed miserably. Those myths collapsed along with the regimes that promulgated them. Why? Because the people of those regimes experienced the falsity of the myths. Their lives showed them that the myths were not true.

In America, we tell the truth. It is a messy business, but it tests our myths and forces us to live up to them. We do not conceal incidents even when they are shameful.

ENGAGEMENT OR ISOLATIONISM

Something more is required of a people who are committed to a democratic society. They must have the courage of their convictions. They must be willing to stand up and be counted. And they must recognize the distinction between self-righteousness and courage.

Moral courage is a rarer commodity than bravery in battle, for it often seems less urgent, less necessary. But it is the one essential, vital quality for those who seek to engage the world and help to bring about change. Indeed, Americans should never have to ask the disturbing question that was put forward by the Russian poet Yevtushenko in his poem, *Babi Yar*: "How will we explain to our children that there were times when acts of decency were considered acts of courage?"

When American foreign policy lives up to our democratic ideas and ideals, it succeeds. A necessary part of this success is that the American people must understand and believe in America's foreign policy; they must perceive that it measures up to our ideas and ideals. Americans, if religious about our civic virtues, are no less pragmatic about their reach. And so, throughout our history, America has followed the dual paradigm of crusade and isolationism.

When the American people are engaged in a crusade, when the relationship between our foreign policy and our democratic ideals is clear, then we are capable of extraordinary sacrifice, achievement, and success. But we cannot assume that the American people will make ineffable sacrifices or even accept lesser burdens without good reason. The record shows that when an unconvincing case is made for a foreign policy goal, or, worse, the goal is seen to diverge from American ideals, then the policy is not successful.

Many now say that American foreign policy is the victim of its own successes, because the demise of a well-perceived adversary at the beginning of the twentieth-first century spells the end of the "crusade" as the explanatory metaphor for American foreign policy.

There certainly is evidence of a growing isolationism. Not too long ago, the proud boast of too many successful congressional candidates was that they had never traveled outside the United States nor even possessed a passport. One hopes that by now they have gotten their passports, and perhaps their travels and experiences in the world have left them more confused than they were. It is a confusing time. What are the threats? Who is the enemy?

We live in a time when an individual can be so rich and powerful that he can declare war on the United States. As you know, we have actually launched cruise missiles at a privately-owned arms base. Is Osama bin Laden the face of the new threat? We propose to spend countless billions on a "shield" to protect us from missiles launched by rogue states or even individuals. But what will protect us from a vial of virus? And should our real worry be that poor economic policies of foreign governments and bad business decisions by foreign investors might cause our markets to crash? We live in a James Bond world and, some would say, the American people may be shaken but not stirred by this realization. What will the policy be that stirs their support?

It is no embarrassment to suggest that one of the keys to the success of activist foreign policy in the past has been the identification of self-interest with altruism. The truth is that our system of democratic government and democratic capitalism works. Americans know and believe this. And it is of this knowledge and belief that the new and inevitable consensus for America's foreign policy will be forged. Americans do not fear the process of globalization. They understand that ideas can no longer be controlled by government. They know that capital will follow ideas. Truth will out and truth commands allegiance.

Governments worldwide, however, have shown a tendency to resist, a slowness to accommodate or even comprehend the tremendous flow of ideas and capital that characterizes our world today. One writer has suggested that keeping up with the pace of change is like running a new 100-yard dash over and over again. It often seems so, but to many nations, competing in the world is still more like a marathon, a long endurance test.

In 1968, the world's elite runners gathered to run one of the most grueling marathons in Olympic history. Because of Mexico City's high altitude, many runners quit the race without finishing. More than an hour after the gold medal winner crossed the finish line, the last spectators were trickling out of the stadium as the lights were turned out. Suddenly, a lone Tanzanian runner entered the coliseum. As he trudged into view, some laughed. But their laughter turned to silence as the exhausted runner, legs wobbling, feet bleeding, slowly covered the last 400 meters. The stadium lights flashed on, and the voices of the remaining spectators rose in unison to cheer him on. Some, seeing deeper into the man's spirit, began to cry. Years later, the runner was asked why he had continued the race. Athletes with far more talent had dropped out, and surely he realized he had no chance for a medal. With quiet dignity, he replied, "I come from a small country. Many people made sacrifices for me to go to Mexico City to run in the marathon. They didn't send me to start the race; they sent me to finish the race."

That simple statement from an honest man sums it all up. Throughout the globe there are many less fortunate than we are. We may not always have the ability to win on a particular day, but we must always strive to finish the race, and we must be committed to helping others finish the race.

Indeed, the argument will and must be made that, as the biggest beneficiary of globalization, the United States also has the most to lose, and so must be willing to pay a disproportionate share, to carry the heaviest burden. This is important because without an enemy who needs no introduction, Americans may not be willing to "pay any price or bear any burden." They are questioning why they should pay even a disproportionately large price in

manpower and dollars for peacekeeping forces or to provide economic cushioning in troubled areas of the world. Americans are becoming increasingly aware, however, and American foreign policy should be sufficiently understandable to demonstrate, that without an engaged and disproportionately generous U.S. involvement, globalization will be a very rocky ride indeed.

A ROLE FOR LAWYERS

Yes, the old order is crumbling, and the change is rapid and confusing. There is a startling and accelerating spread of information across the disintegrating barriers of the old order. It is inevitable that under the best of scenarios, change will occur before the governmental, policy, and legal "software" exists to manage it.

This is the reason I am especially pleased to speak to you today, for success is largely up to you and your colleagues at the bar, who are as important as any policymaker or government official. You will determine how successful the existing structures of governance and dispute resolution, private and public, will be in adjusting and facilitating the inevitable and rapid change brought about by globalization.

More than at any other time, the forces of the free market—the marketplace of information as well as that of goods and services—are crossing frontiers independently of political will or military might. They are breaking down barriers and establishing new international communities of perceived common goals and attainable common wealth. And these new pioneers are calling upon their lawyers instead of troops to establish order and protect their interests.

It is my thesis that their lawyers—many of you perhaps—are forging a new world order and articulating and implementing a new foreign policy. You do so with each innovative transaction you structure or each merger you effect or defend. At negotiation sessions, drafting desks, arbitration panels, and tribunals of every sort, you and your colleagues are conceiving and establishing precedents and realities that define and limit the role of policymakers. This will have a profound impact not only internationally but domestically. The effects are transforming the world.

Writers note that if the linchpin of the old word order was the treaty, the key to the new one is the contract, or licensing agreement, or strategic merger or acquisition—in short, the deal. So your role and your importance to the world is greater than ever before.

Today we read and see evidence of "cowboy capitalism," that the new globalist business interests are bringing with them the ways of the "Wild West." In the view of the cowboys, all regulation is interference, and self-restraint is only a lack of vision. These are shocking words but understand-

able when uttered in frustration in the face of an unyielding and archaic set of unnatural and increasingly irrational barriers. And thus the stage is set for the policymaking role you play in anticipating, augmenting, and articulating de facto foreign policy.

You in this room are well aware that economic actors and their governments rely increasingly on you to devise and enforce order. As litigators it is your obligation and your imperative to elucidate and to realize, to flush out the real meaning. This is an extraordinary responsibility because globalization depends, for its continuation, on an environment in which capital can expect rationality, stability, and order.

Lawyers must define and enforce this rationality and order even as they innovate and experiment, negotiate and compromise, litigate and settle. They must exercise the same self-restraint and reflect the same values that are expected of political leaders in a democracy. This a demanding role. It certainly will be an exciting one and, equally surely, a frustrating one at times, for the tensions will be enormous and resilient. Sometimes, to paraphrase Coleridge, having the vision to play such a role requires an economic and even legal "suspension of belief." It calls for an act of faith.

SHAPING THE FUTURE

There is a story told in Mediterranean folklore. Depending on who is telling it, it happened in the Roman era, in the Carpathian mountains, or on the rocky plateaus of Anatolia. A youth was surprised to discover an old man planting a tree that bears no fruit for seventy years. The blunt young man asked, "Why are you planting this tree? Do you expect to live to enjoy its fruit?" The old man responded, "My grandfather planted a tree like this for me. All my life I enjoyed its fruit and the honey the bees make from its blossoms. I am planting this tree for my grandchildren." The planting of a tree is an act of concern for posterity. It is a celebration of life's continuity.

Today's metaphorical trees may be expected to yield fruit more quickly, but the act of planting and nurturing is no less an act of faith and a commitment to the future. It has always been America's mission to encourage and sponsor those who seek a new life—those who choose the future over the present, those who are willing to make sacrifices today to secure a better tomorrow. That is the strength of our people which assures the continued vitality of our land of liberty. It is now clear that America's strength has become the world's safety net.

It is equally clear that globalization also means the democratization of the foreign policy function, not only in its formulation, but in its implementation—and by democratization, I mean its decentralization, the passing of this

role in significant and transformative ways into the hands of private organizations and individuals. This inevitably means that lawyers will become key handlers, and lawyers must now be aware that they will play a historic role and bear a historic responsibility in fashioning the new world order.

Every generation inherits a world it never made, and as it does so, it automatically becomes the trustee of that world for those who come after. In due course, each generation makes its own accounting to its children. Democracy is never a final achievement. It is by nature an ever-changing challenge, a call to untiring effort, to renewed dedication to goals that meet the needs of each generation.

As the years pass, others will judge us and we will surely judge ourselves on the effort we have contributed to building a new world society and the extent to which our ideals and goals have shaped that effort. The future may lie beyond our vision, but it is not completely beyond our control.

We cannot stand idly by and expect our dreams to come true under their own power. The future is not a gift; it is an achievement. History is a relentless master. It has no present but only the past reaching into the future. To try to hold fast is to be swept aside.

Today as we contemplate America's unique mission, I would like to remind you of an epic and allegorical poem *The Building of the Ship*, written by Longfellow at the end of our Civil War, extolling presciently the merits of the monumental adventure our country undertook when our great republic was established. Its last stanza reads:

> In spite of rock and tempest's roar,
> In spite of false lights on the shore,
> Sail on, nor fear to breast the sea!
> Our hearts, our hopes, are all with thee,
> Our hearts, our hopes, our prayers, our tears,
> Our faith triumphant o'er our fears,
> Are all with thee,—are all with thee!

Our crusade must never end. I know that we will be up to the challenge.

THE GLOBALIZATION OF LAW: A CHALLENGE FOR BENCH AND BAR†

Fern M. Smith*

Let me start with a simple parable. Long ago and far away there lived a cat and a mouse. As was their wont, they spent their days with the cat chasing the mouse and the mouse trying to hide from the cat. One day, when the cat went after the mouse and the mouse ran into its little hole, the cat sat in front of the hole thinking about all the time he'd wasted chasing this little mouse. Suddenly, the cat had an idea and began to bark. Nothing happened, so the cat barked again. The mouse thought, "Aha, a dog has come and chased the cat away. I have no reason to fear a dog, so I'll go outside." The mouse left the safety of his home and was promptly eaten by the cat. The moral of the story is that it always helps to speak a second language, and that's what I'd like to discuss with you today.

You as members of the bar, and my colleagues and I as members of the bench need to learn to speak a second language—not literally but figuratively—because the world is indeed a smaller and a different place. Globalization, whatever that means, appears to be the catchword of the moment. The first time I talked about this subject was about a year ago, after I had become director of the Federal Judicial Center. Because the Center is responsible for the orientation and continuing education of all federal judges, I was spending a lot of time thinking about what it is that federal judges need to know now and what they are going to need to know in the near term. Along with science and technology, globalization was the area that really jumped out at me. But I had no idea at that time how far-reaching and complex this subject really is.

You know how it is when you begin to focus on a subject—it suddenly seems as though every time you pick up a paper or a magazine or turn on the news, somebody's talking about it. For example, when I was flying here yesterday, I was reading the *Washington Post* and noticed three front-page articles related to globalization. One is about Bristol-Myers Squibb cutting HIV drug prices in other countries; another is about South Africa's resistance to declaring an AIDS emergency, partially because the government is con-

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cerned about scaring off foreign investment; the third says that in Europe borders are back, and there is talk of new restrictions, because of hoof-and-mouth disease and mad cow disease. Each of those stories has potential legal ramifications because they have potential economic ramifications, not only in the countries directly involved but in this country as well.

About a year ago I started collecting just such bits of information about globalization. I would pull up my file on my desktop and insert new information as it came to me, without reviewing what was already there. Earlier this week, in preparation for my talk today, I asked my secretary to pull up the file and format it so that I could read it. She has been with me since I went on the bench in 1988 and is both one of my staunchest defenders and one of my most honest critics. After she had printed this document, she came in and said to me, "Judge, I'm just curious, are you planning to speak for forty minutes, or for forty days and forty nights?"

I promise I will be selective and keep an eye on my watch, but there are a few things I want to discuss. First and foremost, I want to give you some examples of the kinds of cases suddenly being seen in courts in the United States that are different, in kind and in effect, from cases we have seen in the past. Next, I want to tell you a little bit about what some law firms in the United States are doing and what your foreign counterparts might be interested in doing. Finally, I will talk briefly about some of the new forums and tribunals that you're going to have to get used to dealing with.

JUDICIAL GLOBALIZATION

First, what are we really talking about when we talk about globalization? Is it just old-fashioned international law with an edgier title? I don't think so; I think it's more than that. Twenty years ago, international law was a pretty stuffy subject. It encompassed conflict of law, international business transactions, laws and treaties that regulated governmental relations and commerce between nations, and so forth. Then several years ago a new term, "transnational law," took the old term a little further and swept in private parties as well; it began to refer to all law that regulates action or events transcending national frontiers, whether the action was by nations, or by public or private entities, or by individuals.

The concept of judicial globalization takes all of this a step further. Ann-Marie Slaughter, a professor at Harvard Law School, has described judicial globalization as "a much more diverse and messy process of judicial interaction across, above, and below borders, exchanging ideas and cooperating in cases involving national as much as international law." What you see as a result of this is that judges around the world are becoming much more will-

ing to explore the ideas of looking, talking, and sometimes acting beyond the confines of their own national legal systems. We're responding on a more informal basis to some of these forces of globalization. One of the interesting things is that the judiciary—which, as you know, usually is incredibly stodgy and slow to react—has moved a little bit ahead of the curve, ahead of the legislative and executive bodies, in facing the facts and consequences of globalization.

Let me tell you about some of the cases in different areas of the law. One of the fascinating elements of this trend is how many substantive areas it affects; it has impacted civil, criminal, intellectual property, bankruptcy, human rights.

The first case I want to mention is called *Crosby v. The National Foreign Trade Council*,[1] referred to more commonly by people familiar with it as the Burma Case. That's a case in which the state of Massachusetts apparently confused itself with the San Francisco Board of Supervisors and decided it was in charge of foreign policy. (Anyone from San Francisco will understand what I mean.) To protest the human rights violations that were allegedly occurring in Myanmar (formerly called Burma), Massachusetts passed a law basically prohibiting any state entity from doing business with anyone who did business with Myanmar. An association called the National Foreign Trade Council filed a suit in district court alleging that this was an unconstitutional interference with the power of the federal government to regulate foreign policy. One of the interesting things was the number of people who filed amicus briefs in that case. Briefs came in from the European Union, the country of Japan, and the Association of Southeast Asian Nations, among others. The district court found that Massachusetts indeed had violated the Constitution and held that the law was void. The circuit court affirmed, and the Supreme Court in a unanimous decision agreed with both the district court and the court of appeals.

The next case is a little more difficult. It would seem to be, on first examination, just a common business tort. This case, *Loewen Group v. United States*,[2] stemmed from a suit by a Mississippi funeral home owner against the Loewen Group, a Canadian funeral home conglomerate. The Mississippi funeral home owner, Jeremiah O'Keefe, claimed that Loewen had driven the Mississippi home out of business through bad faith negotiations and antitrust violations. The case was tried before a Mississippi state jury, which awarded O'Keefe $100 million in compensatory damages and $400 million in punitive damages. Loewen was not happy and wanted to appeal, but Mississippi

[1]120 S.Ct. 2288 (2000).
[2]Int'l Centre for Settlement of Investment Disputes, Case No. ARB(AF)/98/3 (pending).

has a bond requirement mandating that an appellant post bond for 125% of the verdict, so Loewen settled the case for $150 million. But then Loewen took its complaint to the NAFTA dispute resolution tribunal, which is called the International Centre for the Settlement of Investment Disputes. The Loewen Group filed the claim against the United States because it is the United States, not the state of Mississippi, that is a party to NAFTA. So now we have an arbitration pending before a tribunal linked to the World Bank questioning whether the amount of a state court jury award to a private party and a state's appeals bond requirement denied a Canadian party fair and equitable treatment under international law and whether the United States, which was not a party to the original lawsuit, is liable for unreasonable expropriation. One of the ironies of this case is that the dispute resolution clause was put into NAFTA (at least this is my understanding) because the United States and Canada were concerned about Mexico coming in and seizing Canadian and American assets. As so often happens, the principle of unintended consequences is making itself felt, and we have United States and Canada entities opposing each other in this.

This kind of scenario, in which the United States becomes involved in international proceedings because of state action affecting private parties, has also been seen in the criminal law area. Two cases that attracted a great deal of attention in Europe but less in the United States involved nationals of Paraguay and Germany who were sentenced to death by courts in Virginia and Arizona. Each defendant applied for relief to the World Court, formally called the International Court of Justice, citing violations of Article 36 of the Vienna Convention on Consular Relations, which gives a foreign national the right to have his or her consulate advised immediately upon detainment. The foreign nationals in these cases were not told of the right to consular assistance, and that was the basis of the appeals. The American government opposed the defendants' applications to the World Court, but acknowledged the importance of respecting international legal mechanisms and referred to instructions that our State Department had recently issued to all of its offices reminding them of their duty to follow this consular notification process. In the Virginia case, the World Court ordered that the execution be stayed until the court could decide the merits. This order went to the United States Supreme Court for implementation, but the Supreme Court declined to order a stay.[3] Madeleine Albright, who was then Secretary of State, had asked the governor of Virginia to delay the execution, but the governor refused. World protest followed all of the executions, and Germany won a World Court decision that the executions of its nationals violated international law.

[3]Breard v. Greene, 523 U.S. 371 (1998) (per curiam).

The last two cases I want to mention involve environmental issues. The first one involves the gasoline additive MTBE, which a lot of people believe causes ground water contamination. The governor of California has ordered that it be phased out of use in California no later than December 31, 2002. Methanex Corporation, which is a Canadian corporation with U.S. facilities, manufactures methanol, which is one of the components used to produce MTBE. Relying on NAFTA, Methanex filed a lawsuit against both California and the United States claiming approximately $970 million in damages for lost sales, again on a theory of expropriation. The United States is now arbitrating that matter before an international tribunal.

Finally, in a case pending in the southern district of New York, plaintiffs from Ecuador and Peru are suing Texaco Oil, alleging that the company was responsible for the contamination of lands and rivers in Ecuador, which resulted in great harm both to Ecuadorians and to their neighbors in Peru. In 1996 the district judge dismissed the case on various grounds, including comity and forum non conveniens. The circuit court reversed and sent the case back for further proceedings.[4] In ruling on Texaco's second motion to dismiss, Judge Rakoff made the following observation: "[T]he notion that a New York jury (which plaintiffs have demanded) applying Ecuadorian law (which likely governs the claims here made) could meaningfully assess what occurred in the Amazonian rainforests of Ecuador … is problematic on its face."[5] Despite that, Judge Rakoff went on to note that there had been a recent military coup in Ecuador and that the U.S. State Department's country report for Ecuador provided evidence that the legal and judicial systems of Ecuador were both inefficient and corrupt. He requested the parties to brief the issue of whether the foreign tribunal requested by Texaco was even capable of impartially adjudicating the case. After that the plaintiffs filed a motion to recuse Judge Rakoff based on a seminar that he had attended. The Second Circuit has recently denied that motion,[6] so the case is still before Judge Rakoff.

One of the things we're seeing in the judicial arena is an increased acceptance of judicial comity. Justice Stephen Breyer recently stated that that includes "the need to help the world's legal systems work together in harmony rather than at cross-purposes." In that same vein Judge Guido Calabresi of the second circuit, interpreting a discovery statute, recently said: "The U.S. statute contemplates international cooperation, and such cooperation presupposes an ongoing dialogue between the adjudicative bodies of the world community."

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[4]Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998).
[5]Jota v. Texaco, Inc., No. 94 Civ. 9266, and Aguinda v. Texaco, Inc., No 93 Civ. 7527 (S.D.N.Y. Jan. 31, 2000) (order of further briefing on motion to dismiss).
[6]*In re* Aguinda and Jota, No. 00-3066 (2d Cir. Feb. 23, 2001).

I think I heard last night that the new bankruptcy law has passed the Senate. Bankruptcy is another area of law that is susceptible to this globalization trend, and also one where judges are more apt to communicate informally with each other. The bankruptcy bar and bench are interesting. They are a fairly closed unit; it's a pretty specialized field. They see each other all the time and work together extremely well. They could serve as leaders, I think, in showing us some of the ways we might handle globalization. When Maxwell Communication Corporation, which is an English holding company with more than four hundred subsidiaries worldwide, ran into financial trouble, it filed for Chapter 11 in the southern district of New York[7] and it also filed insolvency proceedings in the United Kingdom. The judges in both countries hired what might be termed special masters or intermediaries to work together to try to coordinate these two massive insolvency proceedings. They arrived at an agreement and had it memorialized into an order and protocol so that the two tribunals could work together to solve a massive and far-reaching bankruptcy. That is a good example of the kind of multinational proceeding and cooperation we're going to see more and more in the future.

IMPACT ON LAWYERS AND FIRMS

These cases might seem highly unusual to you, and you might be thinking, "That's all well and good, but I don't get cases like those." I would suggest to you that you *will* get cases like those, and you will be increasingly called upon by present clients or future clients to file and/or defend cases that have significant ramifications beyond American borders. You will need to become comfortable with those cases and with not only foreign laws but foreign cultures as a way of protecting your clients and of keeping your place as leaders in legal circles.

One of the substantive areas of transnational litigation that exemplifies all of this is intellectual property. All of you know what has happened to the practice in that field in the last decade; it probably has become the driving force in civil litigation in terms of the dollars involved and amount of court time. One of the things that the Internet and intellectual property and patents have done is essentially wipe out jurisdictional limits as we have known them. There are competing patent laws, copyright laws, and trademark laws all over the world; and as markets for these products expand and new technologies emerge, opportunities for infringement of intellectual property rights will expand and increase correlatively. There will be a coresponding need for coordination

[7]*See In re* Maxwell Communication Corp., 93 F.3d 1036 (2d Cir. 1996).

between nations, or between legal systems, to sort out venues, forums, and competing rights. You will be at the forefront of all of this.

I think American clients are caught in a difficult situation right now. They want to expand and do business on a worldwide basis, and yet they have a strong feeling of vulnerability about going into a foreign jurisdiction where the rule of law may be less than stable, where they don't know the culture, and where they are not sure of the ethics or the standards. They are pulled in two directions.

Cybercrime is a good example of why your clients might feel vulnerable, and it's an area that blends civil and criminal issues. In December of 1999 a New Jersey computer programmer, for example, pleaded guilty to creating the Melissa virus which infected more than 100,000 computers worldwide and caused an estimated $80 million in damages. In February of 2000 several Internet sites—Amazon, CNN, eBay, and Yahoo, to name just a few of them—were effectively shut down by an unknown assailant or group of assailants who had unleashed a wave of cyber-attacks. I don't think it's known yet whether they were domestic or international, but actions such as those are going to affect your clients, and what affects your clients affects you.

Let's focus for a moment on the general commercial lawyers. I don't think they are going to be immune from any of this. There are a growing number of lawsuits similar to the Texaco matter in New York in which foreign groups are suing large corporations for violations of human rights, including civil rights. Corporations are becoming a popular target for a number of reasons. First of all, it's easier to sue corporations than it is to sue governments. Second, their assets are easier to reach. Third, they evoke very little sympathy from juries and even from judges. Fourth, I think a lot of people are now viewing them as acting in concert with corrupt and oppressive governments or quasi-governmental groups. Fifth, and perhaps most important, major corporations have more money than most governments. In fact, fifty-one of the world's largest economies are corporations, or at least they were when I last checked about two weeks ago.

I think the recent Holocaust litigation is a good example of the type in which corporations are pursued for complicity with governments, at least from the plaintiffs' point of view. So far, Swiss banks have paid $1.25 billion and German entities have paid approximately $5.1 billion, including almost a billion dollars from the German government itself. The plaintiffs' attorneys are now focusing on Japanese and Austrian corporate entities, alleging theories of slave labor during World War II. These developments will be interesting to watch because post-war treaties and present diplomatic issues between and among countries will present difficulties. What stands our government and other governments take also will be interesting to see.

In this same area of multinational pursuit of corporations, there have been suits alleging international law violations against Unocal, Total Oil, Shell, and Union Carbide, in addition to Texaco. How those will proceed, if they proceed at all and are not dismissed, is a question that's up for grabs. It's very unclear how far you can apply U.S. law to extraterritorial behavior. But it does seem to me that members of the world community as a whole, both the legal systems and the public, are developing a sense of mutual interdependence and acceptance of the fact that while we may not be our brother's keeper, we are our brother's neighbor. What affects one country and one population will have an effect on us, and these effects will become increasingly immediate and dramatic.

What do we do about that? That is a difficult question to answer. We're going to have to try to develop a set of legally responsive rules that take into account not only the interests of our own communities and country but also the practices and policies of other nations. To a substantial extent, leadership will have to come from the legislative and executive branches; while some judges are sympathetic to the idea of growing judicial comity, we are also a pretty conservative bunch at heart, and few of us will knowingly violate the separation of powers or disregard the role of the other branches of government and their right to establish laws and foreign policy. As all of this evolves, we will all engage in balancing acts, illustrated to some degree in the cases I mentioned earlier.

Often, the law that's applied in transnational litigation in this country is state law, and that complicates things even further because the states are incredibly inconsistent in the way they approach some of these issues. As a result, we are hearing a growing cry for some sort of federalization of international litigation. Some argue that a code of international litigation would place the responsibility for formulating rules within the federal government, eliminate costly forum shopping, and enhance the predictability of transnational litigation. Others, of course, see that kind of federalization as too intrusive. As a federal judge, I shudder at the thought that our jurisdiction is likely to increase, but I have mixed feelings. On one hand, I think these are fascinating, exciting, and challenging cases; on the other, I know how many judicial vacancies we have, and I wonder how we can possibly deal with the level of increase I expect.

And that brings me to this question: What are all of you doing to handle or prepare for this litigation? Are you aware of how other law firms are reacting? I think it's fair to assume that any lawyer successful enough to be in this organization has at least one client with some international aspect—whether it's a foreign client, a domestic client with assets in a foreign country, or a client who buys, sells, or distributes products internationally. It is

likely that the proportion of such clients that you and your partners have will increase dramatically in the next several years. I don't know whether international or global law will be to this decade what intellectual property law was to the last decade, but it is going to be an expanding area of practice. It's one that potentially will involve a lot of money, a lot of challenge, and a lot of competition. It is going to change the way you practice, I think, and if it changes the way you practice, it will change the way courts operate; so I hope that we can work together to manage the changes.

For those of you who prefer direct evidence to circumstantial, I have a few statistics about what is happening with American law firms. The number of U.S. law firms with offices in England has almost doubled in the last twenty years and quadrupled in Belgium and Mexico, increased from one to seven in Australia and Canada, increased from one to seventeen in Singapore, and from two to forty-one in China. The fall of communism in the Soviet bloc had a significant impact on global markets and American legal practice. In 1982 there were no U.S. law firms in the Eastern Bloc. By 1999 twenty-three of the 250 largest American firms had offices in fifty-seven different cities in the former Soviet bloc. Even smaller firms are branching out. A firm in Alaska announced a year and a half ago that its senior partner was going to divide his practice between Juneau and Vladivostok in Russia's far east. Is all of this expansion good? I don't know, but it is exciting.

There is another side to that coin, however, and I suspect that opening an office or merging with a firm in another country requires a great deal of thought and planning. Even within the United States, law firm mergers are difficult. Practice in California is not like practice in New York or the Midwest or the South, and different law firms have very different cultures such that the blending of firms is extremely challenging. Think about taking that difficulty to an international level. The *San Francisco Recorder*, one of San Francisco's legal papers, recently carried an article analyzing both the bitter and the sweet of opening foreign offices. The case study was an office in Germany. One of the lawyers commented that the German market is tough to break into; there's a culture clash between the American and German ways of doing things. If it is that hard when you have two western cultures, consider how much harder it would be to open an office in Southeast Asia or in Africa. Keep in mind, too, that globalization of law is no longer a one way street. For a long time Americans assumed that we would be the ones to export our ideas and our skills. Foreign courts cited our case law; our lawyers and our judges went to other countries and lectured on how to do things. But foreign governments and foreign lawyers now want to be players. Increasingly, we're seeing them reaching out to say that they have something to offer too—they have judges who know what they are doing, they

have ways of doing things that might be helpful, they have smart lawyers who want a piece of the action. They certainly don't want us moving in and taking over their legal systems, although they might want to collaborate with us; and there may be more and more foreign firms coming into the United States. These firms might offer significant competition for a couple of reasons. They do speak a second language (and often a third and a fourth), and they often have a broader understanding of foreign cultures. In the European Union, for example, lawyers have had to know not only their own legal system but the systems of a lot of their neighbors. Therefore, you may be facing competition from some very sophisticated people who want to come into our country and who don't think that a person has to earn a million dollars a year to be successful.

There are some other problems to think about with respect to these lawyers flowing back and forth across the oceans. There has been very little regulation of some important aspects of transnational practice. There is concern among practitioners that the absence of a common ethical framework for international practice will present growing difficulties. There are no common rules for setting fees. There are no common rules for representing multiple clients, protecting client communications, or judging the competency of associated client representation. All of these issues invite at least your careful consideration.

UNFAMILIAR TRIBUNALS

One other change on the legal horizon that I'd like to mention is that you are going to have to deal with a growing body of tribunals with which you've had no experience. We are seeing the increasing use of international arbitration and the growing influence and power of quasi-governmental tribunals, as well as the proliferation of commercial treaties. The growth of arbitration is especially noteworthy. One estimate is that ninety percent of all transnational commercial contracts now include an arbitration clause. As I mentioned earlier, NAFTA provides for direct arbitration between a foreign investor and a member state, and NAFTA also expressly promotes commercial arbitration and has encouraged the development of new arbitration and mediation centers. This is also a growing trend among other countries; countries from Latin America, Eastern Europe, and Asia are all promoting arbitration and the development of arbitral centers—not just because arbitral centers can bring in money but also because they are perceived as a way to level the playing field in response to past American domination. The World Intellectual Property Organization created an arbitration center in Geneva that has specialized rules to address intellectual property issues. The propo-

nents of international arbitration argue that it avoids the costs, delays, and complexities of traditional litigation and that it affords parties protection against having their rights and obligations decided by foreign courts that may lack the judicial independence or infrastructure to resolve disputes effectively. But like all arbitration it also provides very little remedy if you don't like the relief granted, so it can be a two-edged sword.

CONCLUSION

What I have done here is outline some of the changes I have seen and the trends I perceive in this area of globalization. Litigation is changing; lawyers and law firms are changing; tribunals are changing. I would appreciate your comments and input on the issues I have raised. In my role as director of the Federal Judicial Center, I want to see to it that federal judges understand the issues and are prepared to assist you and your clients when these transnational cases arise.