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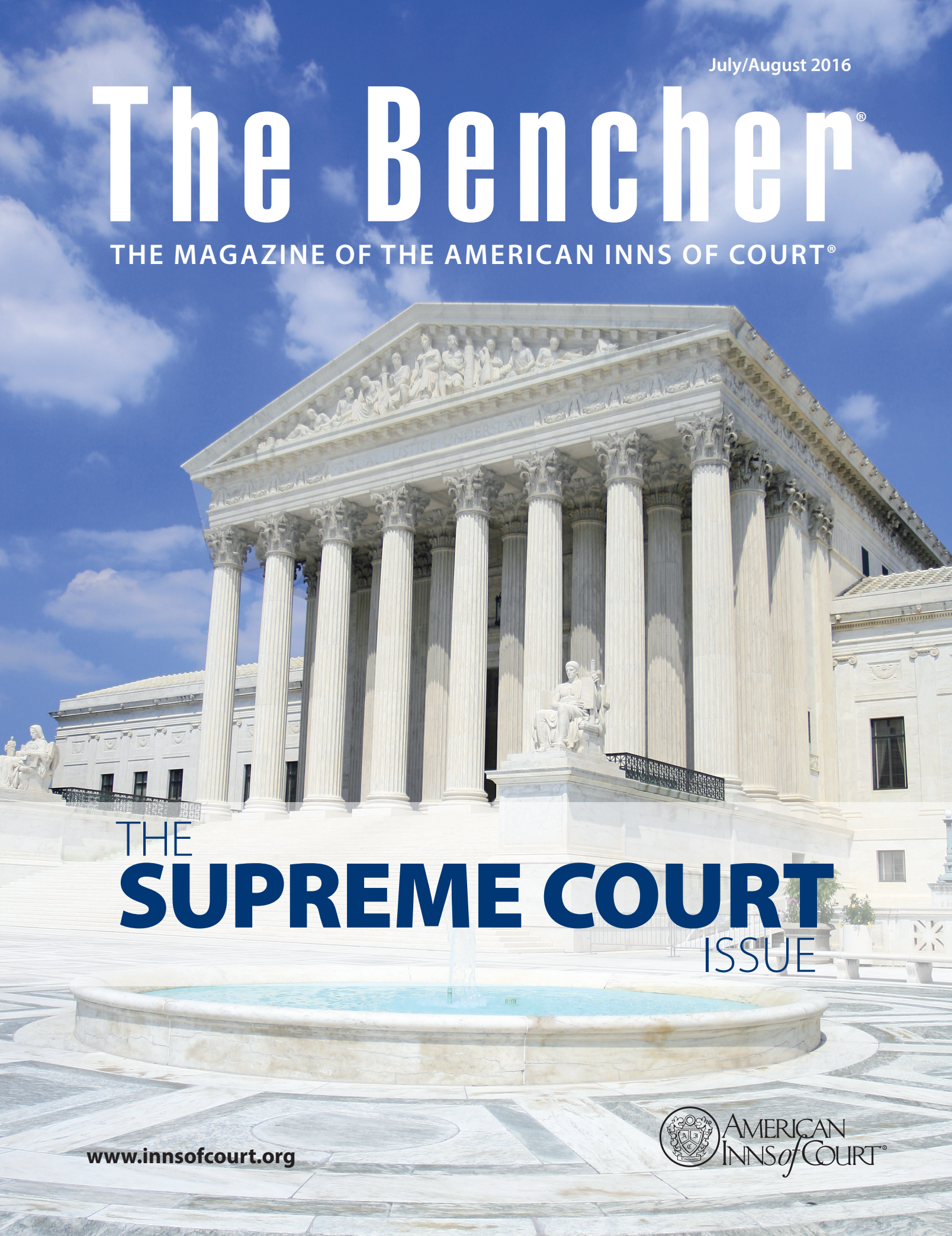
The Bencher®

THE MAGAZINE OF THE AMERICAN INNS OF COURT®



THE SUPREME COURT ISSUE

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American Inns of Court®

FROM THE PRESIDENT

Chief Judge Carl E. Stewart

Established pursuant to Article III of the U.S. Constitution in 1789, the Supreme Court of the United States remains a complex and significant part of our judicial system. The current court, comprised of eight justices, has addressed numerous critical issues that span the broad spectrum of American life: the doctrine of judicial review, First Amendment decisions involving both speech and religion, economic policy, education in public and private schools, voting rights, Fourth Amendment search and seizure, and issues impacting the rights of criminal defendants and the scope of federal criminal statutes, among others. With the words "Equal Justice Under Law" inscribed above the main entrance of the Supreme Court building, the ultimate responsibilities of the court are to ensure that all who are impacted by its decisions receive the promise of equal justice and to serve as a guardian and interpreter of the Constitution.

Although only a handful of lawyers regularly practice before the Supreme Court annually, we are all affected by what results from their participation at the highest level of our judicial system. Their oral advocacy before the court, for instance, has played a critical role in the making of the rule of law. It allows for the process of dialogue, which brings clarity to matters in the record, facts, claims being asserted, and the scope of the decision to be rendered. It similarly enhances the opportunity for the exercise of legal professionalism and civility before the court.

PHOTO CREDIT: KevinKennedy.com

Chief Judge Carl E. Stewart, president of the American Inns of Court, speaks during the 2015 Celebration of Excellence held at the Supreme Court of the United States.

These functions have shaped the administration and purpose of the American Inns of Court. It was Chief Justice Warren E. Burger who, noticing a lack of civility and professionalism in our profession, was spurred to action and co-founded the American Inns of Courts. Moreover, in honor of the tremendous impact that the Supreme Court has had on the American Inns of Court, several of our Inns have taken the names of various Supreme Court justices. Among them are three highlighted in this issue of *The Bencher*—the Sandra Day O'Connor Inn, in Phoenix, Arizona, and the Anthony M. Kennedy Inn in Sacramento, California both established in 1988; and the Ruth Bader Ginsburg Inn, established in 1995 in Oklahoma City, Oklahoma. Others include the Earl Warren Inn, established in 1996 in Oakland, California and the Warren E. Burger Inn, established in 1989 in St. Paul, Minnesota.

Throughout the 35-year history of the American Inns of Court, the Supreme Court justices have continued to support our efforts to inspire a legal profession and judiciary dedicated to professionalism, ethics, civility, and excellence. Because of their graciousness and our historic connection, the chief justice or one of the associate justices annually hosts our fall Celebration of Excellence at the court. We appreciate this high honor that they bestow upon our organization.

In this edition of *The Bencher*, you will read articles that address the Supreme Court's influence on the American Inns of Court, a discussion of the process by which the court determines which cases it will hear, and the unique experience of practicing before the Supreme Court. These articles provide a poignant illustration that the American Inns of Court continue to promote the legal excellence, professionalism, and civility that we have seen displayed in our highest court since its inception. ◆

At the Pittsburgh Leadership Summit are, from left to right, Ernest Barrens, American Inns of Court Director of Chapter Relations for the Northeast; Kristin M. Schuler, Esq.; Adam M. Fried, Esq.; Judge Clair E. Dickinson; Mary Kate Coleman, Esq.; Jonathon W. Kunkel, Esq.; and Kristen C. Weidus, Esq.

Third Circuit Leadership Summits

American Inns of Court leaders and members from Pennsylvania, New Jersey, Delaware, and Ohio, attended American Inns of Court Leadership Summits held in Wilmington, Delaware on April 1, 2016; Philadelphia, Pennsylvania on April 29, 2016 and Pittsburgh, Pennsylvania on May 6, 2016. Approximately 50 Inn members registered for these summits. Chapter Relations Directors Ernest Barrens and Christina Hartle facilitated the summits in their respective regions.

The summit format was revised this year to be more interactive. After a continental breakfast, attendees introduced themselves to each other and told the group what they wished to take away from the day. During the course of the day, attendees were instructed on best practices and exchanged information about their respective Inn practices. Attendees broke into small groups to review fact patterns about fictional Inns at various stages of their development and discussed problems the Inns were having. After brainstorming, the small groups then reported back to the larger group with their ideas on how to resolve the various issues.

Other topics covered included technology and resources that the national organization can provide. A networking lunch was held during which attendees were able to get to know each other better. American Inns of Court Board of Trustees members Judge Kent A. Jordan, Mary Kate Coleman, Esquire; Anthony B. Haller, Esquire; and Ryan C. Cicoski, Esquire, were on hand at the various locations to greet the attendees and update them on American Inns of Court recent developments. Leadership Summits were also held in Atlanta, Georgia; Austin, Texas; Boston, Massachusetts; Concord, California; Denver, Colorado; Detroit, Michigan; Irvine, California; New York City, New York; Kansas City, Kansas; Orlando, Florida; and Washington, DC.◆

Barbara Jordan American Inn of Court

The Barbara Jordan American Inn of Court was recently chartered in Austin, Texas. On hand for the April 14, 2016 presentation of the Inn's charter were, from left to right, Justice Jeffrey S. Boyd, Inn counselor; Frank A. King, Esq., Inn president; Chief Judge Carl E. Stewart, president of the American Inns of Court; Dirk M. Jordan, Esq., American Inns of Court Board of Trustees; and Judge Lee Yeakel, American Inns of Court Board of Trustees and president of the Lee Yeakel IP American Inn of Court also of Austin, Texas.

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COVER PHOTO CREDITS: Front: ©iStockphoto.com/Olga Bogatyrenko. Back: ©iStockphoto.com/Brian Larson.

Temple American Inn of Court

The Temple American Inn of Court in Philadelphia, Pennsylvania, continued its successful mentoring program during the 2015–2016 Inn year. Through the program, the Temple Inn matched Pupils with Barristers and Masters based on each Pupil's preferred practice areas and career goals. Pupils with wide areas of interests were matched with multiple mentors, and the committee members also facilitated additional mentoring relationships throughout the year based on feedback from the Pupils. The Temple Inn began its mentoring program in 2013, and every Pupil (14 in all) participated in the program this year.

Committee co-chairs Susan M. Verbonitz, Esquire, and Hank Delacato, Esquire, recruited former Pupil and Associate member Joseph McNelis to serve as a liaison between the Pupils and the mentors. "Joe is closer to their age and experience, and has a good feel for what the Pupils wish to get from their mentorships," said Delacato. The committee prepared Pupil-Mentor pairings in September so both sides were able to benefit from the experience throughout the Inn's 2015–2016 schedule. Temple Inn President Brian J. McCormick, Jr., Esquire, describes the program as "an integral part of the Inn experience and one that we are very proud of."

Mentors invited Pupils to coffee and lunch to discuss networking and job hunting, allowed Pupils to attend court appearances, and some pairs

Pupils and mentors from the Temple American Inn of Court's 2015–2016 Mentoring Program, taken November 18, 2015 at St. John Chrysostom Albanian Orthodox Church at a program entitled, "A Holy Mess: The Collision of Religious Freedom, Civil Liberties and Separation of Church and State in the Birthplace of America."

even attended social events together. When asked to provide feedback on their experience, one Pupil described her mentor as, "fabulous—incredibly down-to-earth and approachable. We met for breakfast and talked for over an hour. It was so helpful to hear about her career path, including what it was like to be one of the first female partners" at her firm. Another discussed how his mentor took him to a Temple University basketball game, "where we got the chance to get to know one another outside of a traditional professional setting, which was a great change of pace."

After receiving a positive reaction from both mentors and Pupils, the Temple Inn hopes to continue the mentoring program in the coming years in order to help new classes of young lawyers transition to their first years of practice. ◆

Earl E. O'Connor American Inn of Court

The Earl E. O'Connor American Inn of Court in Prairie Village, Kansas, hosted a prom for special needs kids in the Kansas City Area on April 8th. More than 200 were in attendance, which included the kids, their siblings, parents, teachers, and members of the Inn. It was the 12th year the O'Connor Inn has hosted the event. Outreach Chair, James R. Shetlar, Esquire, his committee, and other volunteers from the Inn were on hand to make the event successful. There was pizza, cookies, soft drinks, a DJ, decorations, a caricature artist, a magician, and lots of fun. ◆

O'Connor Inn members Judge T. Kelly Ryan, left, and Judge J. Charles Droege, right, ran the limbo competition.

Joint meeting attendees included, in the front row, from left to right, Judge Thomas L. Ambro, Rodney Inn; Judge Mary F. Walwrath, Delaware Bankruptcy Inn; Chief Judge Carl E. Stewart; Justice Randy J. Holland, Holland Inn; Judge Kent A. Jordan, Rodney Inn; Justice James T. Vaughn, Jr., Terry-Carey Inn; and Judge Andrea L. Rocanelli, Rodney Inn. In the back row, from left to right, are Charles Slanina, Esquire, Rodney Inn; Justice Henry DuPont Ridgely, Ret., Herrmann Inn; Matthew R. Fogg, Esquire, Holland Inn; Kevin F. Brady, Esquire, Herrmann Inn; Luke W. Mette, Esquire, Carpenter-Walsh Inn; and Richard K. Herrmann, Esquire, Herrmann Inn.

Annual Delaware Joint Meeting Held

Delaware's seven American Inns of Court meet annually in a well-anticipated and well-attended evening event. Participating Inns include the Richard S. Rodney Inn, Terry Carey Inn, Melson Arsht Inn, Delaware Bankruptcy Inn, Carpenter Walsh Delaware Pro Bono Inn, Richard K. Herrmann Technology Inn, and Randy J. Holland Delaware Workers' Compensation Inn. The event was held at the Chase Center in Wilmington and was organized by a joint committee of representatives from each Inn. Chief Judge Carl E. Stewart, president of the American Inns of Court, was this year's distinguished speaker. ◆

Harry V. Booth Judge Henry A. Politz American Inn of Court

At the joint meeting, from left to right, are David H. Nelson, Esq., president-elect, Fudickar Inn; Chief Judge Carl E. Stewart, president, American Inns of Court; and Lawrence W. Pettiette, Jr., Esq., president, Booth Politz Inn.

St. Patrick's Day found members of the Harry V. Booth Judge Henry A. Politz American Inn of Court in Shreveport, and Judge Fred J. Fudickar, Jr. American Inn of Court in Monroe, Louisiana, having a joint meeting and enjoying a presentation on cyber law. Chief Judge Carl E. Stewart, president of the American Inns of Court, encouraged the Inns to continue with the mentoring of young associates. ◆

Wray Ladine American Inn of Court

During the 2015–2016 Inn year, the Wray Ladine American Inn of Court permanently moved to a new location, the Prospect Theater Project, in Modesto, California. The theater setting allows teams to better stage their programs and theater director, Jack Souza, has been instrumental in helping pupillage groups develop creative programs.

Also this year, the Ladine Inn finally beat the Judge Conseulo M. Callahan Inn of Stockton, California, in their annual trivia challenge. As a result, the Callahan Inn had to take possession of the famous 1960s *Blacks' Law Dictionary* and engrave the Ladine Inn's win. The Ladine Inn is hoping to build on this success next season as the game moves from Modesto to Stockton.

Additionally, the Ladine Inn has begun a process to display its awards and achievements in the Stanislaus County Courthouse as a result of a movement started by Judge Linda A. McFadden, Inn president, to dedicate an area of the courthouse to the Inn's achievements.

The Ladine Inn continues to maintain its membership base, around 80 members, as more senior members leave the Inn and are replaced by more junior members.

The Inn has become a great mentoring source for newer lawyers who started solo law practices during the recent recession. These solo lawyers have the opportunity to interact with more experienced judges and attorneys to learn and get ideas they can then apply to their practices. ◆

Gerald T. Bennett Cooperative Learning American Inn of Court

The Gerald T. Bennett Cooperative Learning American Inn of Court and the James C. Adkins, Jr. American Inn of Court, located in Gainesville, Florida, recently sponsored the second annual "The AmazeInn Race". Modeled after the popular CBS television show, *The Amazing Race,* the event grouped teams of attorneys, law students, and members of the judiciary as they "raced" around downtown Gainesville competing in a series of challenges. The challenges included eating beef tongue at a local restaurant, passing a citizenship test on the steps of the Federal Courthouse, completing a Crossfit style physical challenge, learning and performing a Capoeira dance, and playing and singing a song at a piano bar. The event raised funds and toys for underprivileged children in Alachua County and concluded with a social event where team members shared their experiences. ◆

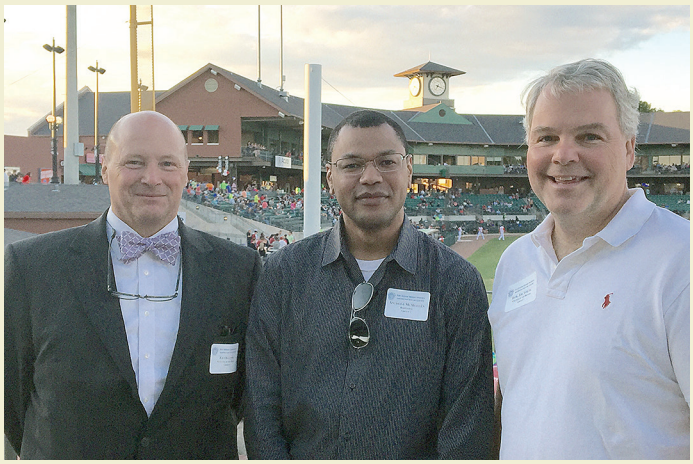
Most of the teams dressed up in some way. The winning team made custom shirts as a play on the "Tinder" dating app. From left to right are Amanda R. Singh, Adkins Inn; Kim Marshall, Bennett Inn; James Kirkconnell, Bennett Inn; A. Daniel Vazquez, Esq., Adkins Inn; and Judge Monica J. Brasington, Bennett Inn immediate past president, who presented awards at the end of the race.

Tampa Bay American Inn of Court

The Tampa Bay American Inn of Court in Tampa, Florida, announces Hillsborough Circuit Court Judge Caroline Tesche Arkin as the winner of the 2016 Abraham Lincoln Award, an annual award given by the Inn to a member who best exemplifies the Inn's goals in promoting legal excellence, civility, professionalism, and ethics in the practice of law. Judge Tesche Arkin joined the Tampa Bay Inn in 2012. She served as the Inn's program chair in 2012–2013 and was instrumental in the Inn attaining platinum status in the American Inns of Court Achieving Excellence program. She went on to serve as Inn president in 2013–2014 and took the lead role in the Inn's hosting of the 2016 Justice Games.

Judge Tesche Arkin has had a distinguished legal career as a state attorney, federal prosecutor, public defender, and attorney in private practice. In addition to making an indelible mark with the Inn, Judge Tesche Arkin has served in numerous other professional and community organizations. ◆

Judge Christopher C. Nash, Tampa Bay American Inn of Court president, left, and Judge Caroline J. Tesche Arkin.



Henry Woods Inn members, from left to right, are Edward T. Oglesby, Esq., Inn board member; Professor Anthony McMullen; and Judge Joe J. Volpe, Inn treasurer.

Henry Woods American Inn of Court

Jeffrey Alan Bell

The Henry Woods American Inn of Court in Little Rock, Arkansas, has established the Jeff Bell Memorial Award, which was recently presented to the first recipient, Professor Anthony McMullen. Jeffrey Alan Bell, a long-time member of the Henry Woods Inn of Court, passed away in December 2014 and the Inn established the award in his memory to assist those in public service with their membership dues.

Bell earned his J.D. from the University of Arkansas in 1977 and quickly realized that his real passion in life was in serving the people of Arkansas. He first worked for the Arkansas Attorney General, but was later recruited by the University of Arkansas General Counsel's Office, where he served for almost 20 years.

A member of the Woods Inn from its inception, Bell held numerous officer positions, including that of president. He was the kind of lawyer every lawyer aspires to be—fiercely smart, caring, and dedicated to his profession.

He was widely respected by colleagues and loved for his wit, humor, and constant concern and interest he took in their lives.

This past fall, the Inn presented the first award to Professor Anthony McMullen who teaches at the University of Central Arkansas and is a Barrister member of the Woods Inn. McMullen graduated from the University of Arkansas Law School in 2004 and served several years as a judicial clerk with the Arkansas Court of Appeals. He began his teaching career at Arkansas Tech University before becoming a professor with the University of Central Arkansas. McMullen is also an adjunct professor with the University of Arkansas at Little Rock William H. Bowen School of Law.

While Jeff's presence is sorely missed, Inn members are pleased to be able to further his legacy by establishing this award. ◆

Thomas S. Forkin Family Law AIC

The Thomas S. Forkin Family Law American Inn of Court of Cherry Hill, New Jersey, and the Nicholas Cipriani American Inn of Court of Philadelphia, held a joint meeting on January 19, 2016 in Pennsauken, New Jersey. The Inns held a "book club" discussion on the book *The Divorce Papers*, by Susan Rieger. *The Divorce Papers* is an epistolary novel—the entire novel is written as documents only, i.e. emails, correspondence, letters, pleadings, statutes, case law, etc. and follows a young criminal attorney who has been assigned a high-conflict divorce case in the fictional state of Narragansett.

Author Susan Rieger was an invited guest and joined in the discussion and provided insight as to the fiction statutes and caselaw that she drafted. Also discussed were the main character's trials and tribulations as a young, female associate and her interactions with the client, her supervising attorney, and other attorneys in her firm.

The Divorce Papers is Susan Rieger's first novel. She has previously taught at Yale and Columbia and resides in New York with her husband. ◆

At the joint meeting, from left to right, are Peter J. Banfe, Jr., Esq., Forkin Inn; Shira Katz-Scanlon, Esq., Forkin Inn; Nicole T. Donoian-Pody, Esq., Forkin Inn; Lisa M. Shapson, Esq., Cipriani Inn; Susan Reiger, author and speaker; Judge Marie E. Lihotz, Forkin Inn judicial counselor; James A. Rocco III, Esq., Cipriani Inn president; and Judge John L. Call, Forkin Inn president.

Johnson County Family Law American Inn of Court

The Johnson County Family Law American Inn of Court in Olathe, Kansas, used the 2015–2016 year to elevate the public's perception of our justice system by giving back to the local community. Last year the Inn collected professional clothing to donate to job seekers in need. When the board members met to plan the 2015–2016 Inn year, they decided giving back to the community would be a focus point throughout the entire Inn year.

The Inn selected local charitable organizations that directly impact families in Johnson County, Kansas. Each month the Inn met, a different local charity was chosen to be the benefactor of donated items from Inn members. Inn members provided coloring books, snacks and games to the Johnson County Courthouse's new Help Center; provided non-perishable food donations to Harvester's, a regional food bank; collected books for The Family Conservancy's "Talk, Read, Play" project; gathered and donated much-needed items to The Sunflower House, a non-residential child's advocacy and abuse prevention center; and collected colorful and fun bandages for Noah's Bandage Project.

The attorneys and judges of the Inn showed what it means to positively impact the community in which they practice and to advance the profession. ◆

Katherine S. Clevenger, Esq., of the Johnson County Family Law Inn helps with the collection of bandages for Noah's Bandage Project as part of the Inn's year-long outreach efforts.

American Inns of Court Hosts Luncheon

Members of family law-focused American Inns of Court, and other Inn members who specialize in family law, came together at a luncheon sponsored by the American Inns of Court at the recent annual conference of the Association of Family and Conciliation Courts in Seattle, Washington. Among the attendees, there was discussion about how to get more family law attorneys to join Inns, whether there might be the opportunity to start more family law specialty Inns, and how to build an ongoing dialog among the 23 Inns in the family law Inn alliance. ◆

Those attending the luncheon are, from left to right, sitting, Joryn Jenkins, Esq.; Ronald Nelson, Esq.; and Judge Christina Dunn Gyllenborg. In the middle row, David W. Akridge; Regina Mandl, Esq.; Judge Erica Schoenig; Judge Gretchen Taylor; Susan Gallagher, Esq.; Stacey Hudon, Esq.; and Ashlyn Yarnell, Esq. In the back row, Eric Weiss; Jonathan Verk; Larry Swall, Esq.; Neil Foth, Esq.; Judge Raymond McNeal; Julia Chase, Esq.; Robert Merlin, Esq.; Judge Keven O'Grady; and Judge Robert Wonnell.

In the photo are, left, Jonathan W. Kunkel, Esq., president, James S. Bowman Inn and right, Karen Durkin, Esq., president, Hon. William W. Lipsitt Inn with students at Widener University Commonwealth Law School in Harrisburg, Pennsylvania.

Honorable William W. Lipsitt American Inn of Court

On Tuesday, March 22, 2016 the Honorable William W. Lipsitt American Inn of Court and James S. Bowman American Inn of Court in Harrisburg, Pennsylvania, held an information session for students interested in becoming members of either Inn at Widener University Commonwealth Law School. This was the first such event for either Inn. Students enjoyed lunch while representatives from each Inn discussed the American Inns of Court, the focus of their respective Inns, and the benefits of Inn membership. Students were invited to submit a letter of interest and résumé for consideration to the Inn of their choice.

The Lipsitt Inn was founded five years ago and focuses on general litigation. The Bowman Inn was founded 22 years ago and focuses on the practice of state administrative law. ◆

Richard Linn American Inn of Court

The Richard Linn American Inn of Court in Chicago, Illinois, held its Tenth Annual Dinner black tie fete on May 7, 2016.

More than 230 members and guests gathered to honor the first decade of programs and mentoring fostered among the intellectual property community in Chicago. As described by members and judges on a commemorative video shown at the outset of the evening's program, the Linn Inn has brought together the bench, the bar, and the schools in Chicago as envisioned by the goals of the American Inns of Court movement.

The Linn Inn was pleased to present Luiz Miranda from the University of Miami School of Law with the seventh Mark T. Banner Scholarship for his dedication to a career in intellectual property, demonstrated professionalism, ethics and civility in the profession, academic achievement, leadership, writing and communication skills, and diversity.

Justice Anne M. Burke from the Illinois Supreme Court gave the keynote speech on the history of the court aptly titled, "Inside the Supreme Court."

Executive Director Olivia T. Luk, Esquire, presented outgoing Inn president Julie A. Katz, Esquire, with the Holderman Gavel for her service as well as a tiara for "Chicago IP Royalty" symbolizing her family's longstanding commitment in the community. ◆

Luiz Miranda, center, accepting the Richard Linn Inn's Mark T. Banner Scholarship Award for $5,000 with his proud father Paulo Cesar DeMiranda, left, and Judge Richard Linn, right.

Robert W. Calvert American Inn of Court

The Robert W. Calvert American Inn of Court in Austin, Texas has completed its third year of participating in "Mentoring a Student" (MAS) at Travis High School. MAS is a unique mentoring program that brings Inn members together with students from Travis High School, which has a student population that is 96% minority and 85% economically disadvantaged.

Inn members met once a month with approximately 30 students who are in a Principles of Law/Criminal Justice Class. Discussion topics included: Driven to Distraction—the physical and legal effects of multi-tasking; Smile You Are on Candid Camera—can and should the police be video-taped; Now That You are 18—an overview of basic law covering apartment leases, voting, credit, and drinking laws.

The highlight of the year is a mock trial on dating violence. The mock trial was held at the Heman Marion Sweatt Travis County Courthouse before middle and high schools students with Judge Orlinda L. Naranjo presiding. Prior to the trial, Inn members met with the students to prepare them for their roles as witnesses and lawyers and the handling of evidence.

Judge Raul A. Gonzalez, Anthony Chase, and Judge Orlinda L. Naranjo with students from Travis High School who participated in the mock trial held in Austin, Texas.

The program was a great success as evidenced by the participation and enthusiasm of the members and students. Robert, one of the students, said, "I got the experience of a lifetime! What I learned has opened doors for me and will prepare me for my future legal career." Anthony Chase, the instructor for the Criminal Law class stated, "Thanks to the MAS Program, my students became more engaged in my classroom and became more enthusiastic about pursuing a possible legal career."

Given the program's overwhelming success this year, the Calvert Inn and American Board of Trial Advocates Austin Chapter are awarding a $500 college scholarship to a graduating MAS senior in Chase's class. ◆

First District Appellate American Inn of Court

On February 4, 2016, the First District Appellate American Inn of Court in Tallahassee, Florida presented a unique and informative program about the Florida Constitution Revision Commission. Team leader, Judge Bradford Thomas, narrated the event and panelists included Peter M. Dunbar, Esquire; Professor Jon L. Mills; Professor Talbot "Sandy" D'Alemberte, Robert L. Nabors, Esquire; and Professor Mary Adkins. The well-known and esteemed panelists provided their insight as prior members of the revision commission and/or avid researchers and enthusiasts of the Florida Constitution. The event was held at the First District Court of Appeal in Tallahassee.

The program focused on Florida's unique Constitution Revision Commission; how it came about, what it does, and how one can apply to be on the 2017–2018 Revision Commission. The Constitution Revision Commission is a group of 37 people who review and recommend changes to Florida's Constitution. Every 20 years the commission is appointed to examine the state constitution, hold public hearings throughout the state, and recommend changes to the constitution for voter consideration. The panelists not only spoke about their experience, but answered questions from the program presenters and from the audience.

The presentation was unique and Inn members' response during the program was very engaging. To be in a room full of such brilliance captivated most members, and many questions were asked because of the wealth of knowledge before the group. ◆

ETHICS COLUMN

Francis G.X. Pileggi, Esquire

Court Disqualifies Firm Based on Representation of Affiliated Subsidiary

This ethics column provides highlights of a recent decision in which the court disqualified a law firm based on a conflict of interest that arose in connection with the law firm's representation of two subsidiaries. In the case styled *Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430 (W.D. Wash. April 22, 2016), the court was presented with a motion to disqualify the law firm representing Premera ("Law Firm") based on the concurrent representation by the Law Firm of an affiliate of the plaintiff, Atlantic, in a separate and unrelated matter. In this insurance coverage dispute, Atlantic sought a declaration that it had no duty to defend Premera under the policy issued by Atlantic regarding an underlying class action suit filed against Premera.

Atlantic's corporate structure is key to understanding the court's decision. Atlantic is a wholly-owned subsidiary of OneBeacon Insurance Group ("Parent"). Homeland Insurance Company of New York ("Homeland") is also a wholly-owned subsidiary of Parent. Both Atlantic and Homeland share the same mailing address and principle place of business as Parent. Both subsidiaries also share claims-handling services that are managed by the same claims unit personnel.

In July 2015, Parent received a claim on a policy issued by Homeland to AAM, Inc. Law Firm was hired to represent Homeland in a coverage dispute with AAM. In December 2015, Atlantic initiated the instant litigation against Premera, seeking a declaratory judgment that it had no duty to defend Premera under the policy that was issued to it by Atlantic. Law Firm had been representing Premera in the underlying litigation and entered its appearance on behalf of Premera in the declaratory judgment action.

In-house counsel for Atlantic notified Law Firm that there was a conflict of interest because Law Firm represented Atlantic's sister subsidiary, Homeland, in the AAM matter. Thus, Atlantic took the position that there was a conflict of interest because Atlantic and Homeland, as subsidiaries of Parent, consider themselves one client. They did not consent to the Law Firm being adverse to them in the instant case. The Law Firm refused to withdraw and a motion to disqualify was filed. Law Firm's position was that Atlantic and Homeland are two distinct corporations and should not be considered one client for purposes of an analysis of conflicts of interest. The court disagreed with that position.

After this issue arose, the Law Firm withdrew its representation of Homeland and argued that the appropriate analysis at that point was based on the rule that applies to conflicts with former clients. The court applied Rule 1.7 of the State of Washington's Rules of Professional Conduct, which applies to conflicts with current clients. The representation of Homeland was concurrent with the representation adverse to Atlantic. The Law Firm's subsequent termination of representation of Homeland did not make the rule for former clients applicable. Sometimes referred to as the "hot potato" rule, the policy supporting the avoidance of conflicts would be subverted if firing one client, after a conflict arose, would allow the more lenient Rule 1.9 to apply.

The more stringent rule relating to current conflicts, Rule 1.7, provides that unless certain requirements are met, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client would be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client or a third person or by a personal interest of the lawyer."

Rule 1.9 applies to the duties of a lawyer to former clients and provides that: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Comment 3 to Rule 1.9 provides that "matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

Rule 1.7 is less forgiving than Rule 1.9 and disqualifies an attorney from concurrently representing two

Continued on the next page.

Ethics *continued from page 11.*

clients with adverse interests, even if the matters are wholly unrelated. The court reasoned that the two subsidiaries involved in this matter should be treated as one client for purposes of a conflicts analysis. They share the same mailing address and principle place of business. Both entities are structured so that their claims-handling services are managed by the same personnel. The same employees handle all insurance coverage litigation commenced by or against Atlantic and Homeland. The same claims attorney involved in this instant matter with Premera was also the claims attorney handling the AAM matter with Homeland.

The court was not persuaded by the Law Firm's argument that it was not aware of the relationship between Atlantic and Homeland, and was previously adverse to Atlantic. The court explained that attorneys are responsible for knowing the relationship between or among related corporate clients, and the duty is imposed on the attorney—not the client—to be familiar with the affiliates and related companies of a client. Even though the Law Firm did not consider itself as having an attorney-client relationship with the other subsidiary, the court instructed that the existence of an attorney-client relationship is determined based on the reasonable understanding of the client, not the view of the attorney. Even though the Law Firm did not know that Atlantic and Homeland were both subsidiaries of the Parent, the court found that they should have known.

The court was mindful that disqualification of counsel is a drastic measure as it impacts a client's right to choose counsel and can be disruptive to the litigation process, especially as in this case where the attorney-client relationship spanned nearly two decades.

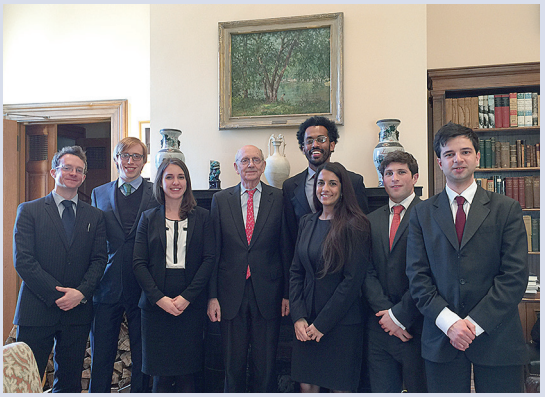
The court reasoned that one of the policies behind the rule was to avoid an "appearance of an impropriety" and the termination of one client to avoid the application of Rule 1.7 was contrary to that policy. The court added that some cases have found that, even if there is no strict contractual attorney-client relationship that would support an application of Rule 1.7, "fiduciary obligations and professional responsibilities may warrant disqualification of counsel in appropriate cases…." *See Unified Sewage Agency of Washington County, Or. v. Jelco Inc.*, 646 F.2d 1339, 1345 n.4 (9th Cir. 1981). ◆

Francis G.X. Pileggi, Esquire, is the member-in-charge of the Wilmington, Delaware, office of Eckert Seamans Cherin & Mellott, LLC. He summarizes the key corporate and commercial decisions of Delaware Courts at www.delawarelitigation.com.

British Judicial Assistants Visit Washington, DC

Each spring, British judicial assistants from the Supreme Court of the United Kingdom visit the Washington, DC area as part of a week-long program arranged by the American Inns of Court. The judicial assistants are equivalent to law clerks in the Supreme Court of the United States.

The judicial assistants' week included being hosted by Associate Justice Stephen G. Breyer for two days at the Supreme Court of the United States. Judge Thomas L. Ambro joined the judicial assistants as they met with preeminent leaders of the American bench and bar, as well as participated in briefings provided by the Supreme Court Institute Moot program at Georgetown University Law Center. Other activities included a reception in their honor at the Army and Navy Club, tour of Capitol Hill and the Pentagon. The judicial assistants were also hosted for a day by the Temple American Inn of Court in Philadelphia, Pennsylvania. ◆



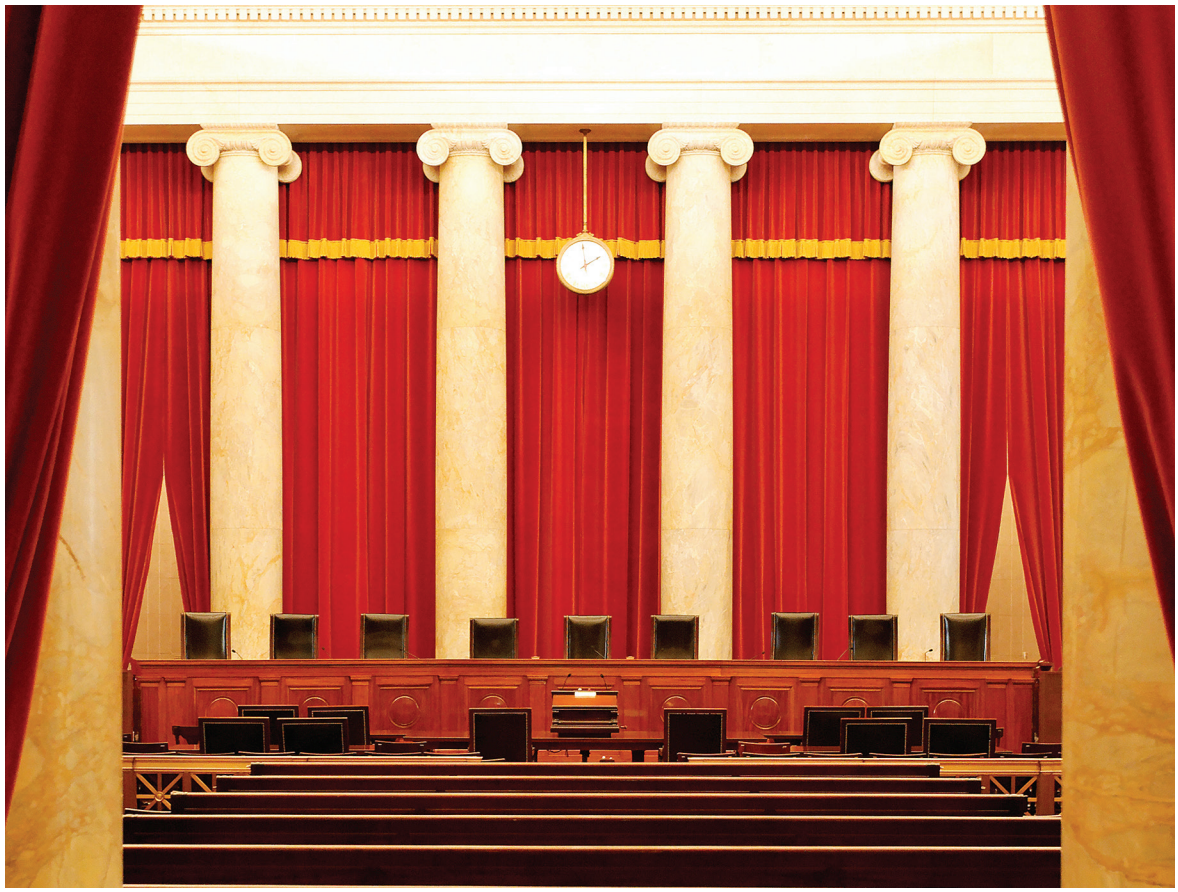
The British judicial assistants visit with Justice Stephen G. Breyer in his chambers. In the photo, from left to right, are Tom Wood, Emmanuel Sheppard, Jessica Jones, Justice Stephen G. Breyer, Admas Habteslasie, Ayesha Christie, Jacob Turner, and Kabir Bhalla.

Craig S. Barnard American Inn of Court

The Craig S Barnard American Inn of Court in West Palm Beach, Florida, has honored Judge John L. Phillips with its Jurist of the Year Award for 2015–2016. Phillips is not only a former president of the Inn, but also a founding member of the Susan Greenberg Family Law American Inn of Court, started in 2014 and also in West Palm Beach.

Phillips has dedicated his life to conflict resolution and mentoring others. He has been a Palm Beach County judge for 30 years, serving in the family court division for 20 of those years. Phillips spearheaded court technology efforts, pushing for a paperless court system, and modernizing the speed at which domestic violence petitions can be ruled upon. In June 2015, he was honored by Justice R. Fred Lewis of the Florida Supreme Court on behalf of the Florida Justice Teaching Institute for dedication in teaching. He will be retiring as a judge this fall. We have been lucky to have him. ◆

Judge John L. Phillips, left, receives the Craig S. Barnard Inn's Jurist of the Year from Judge Lisa S. Small, Barnard Inn president.



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Practicing Before the Supreme Court

BY KANNON K. SHANMUGAM, ESQUIRE

It feels like it was just yesterday, but it was actually December 8, 2004. I was appearing before the Supreme Court of the United States for the first time, as a 32-year-old attorney in the Solicitor General's office. I was petrified—in fact, I was probably too young to realize just how petrified I should have been. And my fear must have shown, because my supervisor leaned over shortly before I went up to the podium and said, "If you're going to throw up, throw up on opposing counsel, not on me."

Thankfully, I got through the argument without throwing up—on anyone. And although I never would have dreamed of it when I was in law school, appearing before the Supreme Court has since become an important part of my practice. I have had the privilege of arguing before the Supreme Court 18 times since that initial appearance. While the membership of the court has changed in the intervening years—only four of the justices who decided my first case are still serving—the experience of practicing before the court remains largely the same.

When I talk about my practice, I'm often asked two questions. The first is, "What attracted you to Supreme Court practice?" I usually say that I was attracted to the intellectual challenge of the types

of cases that the Supreme Court hears—cases that present difficult questions of constitutional or statutory law, cases that almost by definition have caused judges on lower courts to reach different conclusions. When I was a kid, I enjoyed solving puzzles. Supreme Court litigation is the ultimate exercise in puzzle-solving.

In thinking about that question for this article, however, I've come to realize that my usual answer is incomplete. After all, virtually all litigation presents intellectual challenges of one type or another. Some of the most interesting cases I've handled over the course of my career were not before the Supreme Court, but before lower courts. Supreme Court cases typically have a higher profile, in part because there are so few of them. But it doesn't follow from the fact that Supreme Court cases are more visible that they are necessarily more interesting.

So here's a more complete answer to the question. What attracted me to Supreme Court practice was not just the intellectual challenge; it was a lot of the same things that attracted me to the American Inns of Court. As any reader of this magazine will know, the American Inns of Court are committed to upholding and promoting certain core values in the practice of law: above all, the values of civility, ethics, and professionalism.

The lawyers who regularly practice before the Supreme Court, and the justices who serve on it, are a living testament to those values—and, for that reason, practicing before the court is a particular pleasure. As to the lawyers, it is often said that Supreme Court practice is "genteel." That is somewhat misleading: In my experience, lawyers practicing before the Supreme Court advocate their clients' interests every bit as vigorously as they do in other courts.

At the same time, however, Supreme Court litigation is characterized by the almost complete absence of sharp practices found all too often elsewhere. For the most part, the tone of lawyers in briefs and at oral argument is civil. There is a deep commitment to professionalism and punctilious accuracy. Lawyers routinely agree to requests from opposing counsel on procedural issues such as extensions of time. Lawyers have even been known to share hard-to-find sources with opposing counsel when preparing their briefs.

That commitment to civility and professionalism extends to—or, perhaps more accurately, flows from—the Supreme Court itself. While oral argument at the court can be lively, to put it mildly, it rarely gets personal. Even when lawyers make mistakes, the justices do not go out of their way, as all too many judges nowadays seemingly do, to "benchslap" them in their opinions. And the highest court in the land has the nation's best, and most helpful, clerk's office. It is perhaps no coincidence that the American Inns of Court were founded by a chief justice, or that the justices continue to be so integrally involved in the Inn movement.

In short, practicing before the Supreme Court feels like what legal practice should be, with the justices and lawyers alike playing their appointed roles at the highest level.

In short, practicing before the Supreme Court feels like what legal practice should be, with the justices and lawyers alike playing their appointed roles at the highest level. A couple of years ago, I was representing one side in a complex case involving the intersection of bankruptcy and tax law. As I was listening to my opposing counsel deliver her argument, I remember thinking that, regardless of the ultimate outcome, the legal process was at that moment operating exactly as it should, with the justices using the lawyers to help them to figure out the right answer to a really difficult legal question.

Earlier in this article, I said that I'm often asked two questions when I talk about my practice. The first is what attracted me to practicing before the Supreme Court. The second is, "Does practicing before the Supreme Court ever get old?" The answer to that question is much easier. No, it never gets old. It is certainly a more familiar, and less terrifying, experience now than it was when I was that petrified 32-year-old lawyer. But it remains every bit as exhilarating and challenging as it was for that first oral argument.

Perhaps more important, it is always a privilege to have the opportunity to appear before the Supreme Court—whatever the case and whoever the client. I used to think that was simply because it is an honor to appear before the highest court in the land, and that is certainly true. But as I get older, I have to come to realize that the honor is in playing a part, however small, in the development of the law—and in the promotion of the shared values that the Supreme Court, and the American Inns of Court, hold so dear. ◆

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Improvident Grants

BY WILLIAM R. PETERSON, ESQUIRE

There are four ordinary paths that petitions for writs of certiorari take through the Supreme Court of the United States. The vast majority of the approximately 8,000 petitions for writs of certiorari received each year are denied. Around 80 petitions are granted and, after merits briefing and oral argument, the cases decided in opinions issued by the court. Some petitions present issues that are identical or similar to those in pending cases—these petitions are ordinarily held until the other case is decided and the lower court's judgment then summarily granted, vacated, and remanded ("GVR'd") for reconsideration in light of the Supreme Court's decision. Finally, in response to a small number of petitions, perhaps seven each year, the Supreme Court summarily reverses the judgment of a lower court, ordinarily in a per curiam opinion without argument and without additional briefing.

These four paths all involve the Supreme Court's adjudicatory process working as intended. But sometimes, something goes awry. The Supreme Court will occasionally grant a petition for writ of certiorari, receive merits briefing, perhaps even hear oral argument, and then issue an order dismissing the writ as improvidently granted. The lower court's judgment remains in effect as though the Supreme Court had never granted certiorari at all.

When this occurs—on average, just over one-and-a-half times per term—extraordinary amounts of time and resources go to waste. Lawyers can spend hundreds of hours briefing cases in the Supreme Court and preparing for argument. Similarly,

spending time studying and preparing for argument in a case that ultimately goes unresolved takes up the time and attention of the justices and law clerks that could have been spent on a different case.

Understanding the reasons for these dismissals helps avoid this waste and can provide insight into the types of "vehicle" issues considered by the court before granting certiorari.

Over its 11 terms, the Roberts Court has dismissed 18 writs as improvidently granted. In one additional case, discussed below, the writ was dismissed in part. Most of these dismissals occurred after oral argument; the two exceptions were a dismissal due to a settlement and a dismissal (apparently) due to a state court's answer to a certified question.

Twelve of these dismissals were in the "traditional" form: unsigned, *per curiam* orders with no concurrence, dissent, or explanation. Here is a recent one:

> **PER CURIAM**
> The writ of certiorari is dismissed as improvidently granted.
> *It is so ordered.*

Duncan v. Owens, No. 14-1516 (U.S. Jan. 20, 2016).

These decisions make up part of the Supreme Court's "shadow docket" of non-merits rulings, often procedural decisions that are "ad hoc or unexplained" (William Baude, foreword: "The Supreme Court's Shadow Docket," 9 NYU *Journal of Law & Liberty* 1, 11 [2015]).

Without explanations provided for these dismissals, observers can only speculate as to the court's reasoning. Oral argument often gives a strong clue as to why the writ would be dismissed. In *Madigan v. Levin*, which concerned the Age Discrimination in Employment Act, oral argument revealed that the plaintiff might have been covered by an entirely different law: the Government Employee Rights Act of 1991:

> **JUSTICE BREYER:** [B]ut what are we doing, deciding whether the ADEA applies and in what way to a person to whom it doesn't apply, assuming that GERA is, in fact, a separate statute that you have to sue under, the answer to which I do not know and which has never been argued.
>
> **MR. SCODRO:** Your Honor, there's very little lower court authority on the effect of GERA….
>
> **JUSTICE BREYER:** And so, if there's so little about it, sometime, on occasion, we dismiss a case as improvidently granted, which is not a particularly desirable thing to do. But how could we avoid doing that here?

(Transcript of Oral Argument at 21, *Madigan v. Levin*, 134 S. Ct. 2 [2013], No. 12872). Or consider *Vasqez v. United States*, in which the court struggled to identify the clash between the parties' positions:

> **JUSTICE ALITO:** Is it correct that the difference between your position and the government's position is that the government says the focus should be on a rational jury, and you say the focus should be on this particular jury?
>
> **MR. BRINDLEY:** That is one of the important differences. I think—
>
> **JUSTICE ALITO:** Well, that I understand. But beyond that I really don't understand the difference between the two positions.

(Transcript of Oral Argument at 8, *Vasquez v. United States*, 132 S. Ct. 1532 [2012], No. 11-199).

Understanding the reasons for these dismissals helps avoid this waste and can provide insight into the types of "vehicle" issues considered by the court before granting certiorari.

In a few cases, the court provides an explanation for dismissing the writ as improvidently granted. In *Roper v. Weaver*, the explanation came in the court's *per curiam* opinion. 550 U.S. 598, 599 (2007). After a criminal defendant received habeas relief based on a prosecutor's inflammatory closing statement, the state sought certiorari, arguing that the court of appeals misapplied the Anti-Terrorism and Effective Death Penalty Act (AEDPA). *Id.* But, the court explained, the defendant should not have been subject to AEDPA. *Id.* at 601. The habeas petition was filed after AEDPA's enactment only because a district court had erroneously dismissed an earlier habeas petition. *Id.* Noting that two other defendants had received relief for the same inflammatory statements, the majority explained, "[W]e find it appropriate to exercise our discretion to prevent these three virtually identically situated litigants from being treated in a needlessly disparate manner, simply because the district court erroneously dismissed respondent's pre-AEDPA petition." *Id.* at 601-2.

Justice Scalia, joined by Justice Thomas and Justice Alito, dissented. While accepting that the district court erred in dismissing the earlier petition, the dissent noted that this error was unappealed and, in any event, no justification for "leav[ing] the Eighth Circuit's grossly erroneous precedent on the

Continued on the next page.

books." *Id.* at 602-7 (Thomas, J., dissenting). What is most interesting for the purposes of this article is how the dissent explains the majority's decision to dismiss the writ:

> The court seems to be affected by a vague and discomforting feeling that things are different now from what they were when we granted certiorari. They are so only in the respect that we now know, as we did not then, that respondent's earlier petition was wrongfully dismissed. That fact has relevance neither to the law governing this case (as discussed in Part I, supra) nor to any equities that might justify our bringing to naught the parties' briefing and arguments, and the Justices' deliberations, on the question for which this petition was granted.

Id. at 606. The dissent describes the dismissal as "particularly perverse" because "it is *the fault of respondent* that we did not know of the wrongful dismissal earlier." *Id.*

In *Boyer v. Louisiana*, explanation for the dismissal was provided by a concurrence. 133 S. Ct. 1702 (2013). Justice Alito noted that the premise of the question presented was that "a breakdown in Louisiana's system for paying the attorneys representing petitioner…caused most of the lengthy delay between his arrest and trial." *Id.* at 1703 (Alito, J., concurring). He then explained that the writ of certiorari was improvidently granted because the record revealed that this assumption was false. *Id.*

Justice Sotomayor, dissenting, suggested that the court could resolve the abstract legal question—holding that "any delay that results from a state's failure to provide funding for an indigent's defense weighs against the state"—and leave to the state courts on remand the question of whether the funding was actually the cause of any delay. *Id.* at 1707 (Sotomayor, J., dissenting). As in *Roper*, the dissent faulted the respondent for the posture. See *Id.* at 1708 (stating that Louisiana conceded that the delay was due to lack of funding).

Perhaps the most interesting discussion came last term, in *City & County of San Francisco v. Sheehan*, where a petitioner's arguments on the merits stage did not correspond to the arguments in its petition for writ of certiorari. 135 S. Ct. 1765 (2015). Before Petitioner's counsel could speak a sentence at argument, Justice Scalia accused counsel of a "bait-and-switch":

> Your petition…said…this court should resolve whether and how the Americans with Disabilities Act applies to arrests of armed and violent suspects who are disabled….
>
> …This argument is not made in the petition at all…. [Y]ou concede…that Title II does apply even to the arrest of…armed and dangerous suspects….
>
> …[T]here's a technical word for this. It's called bait-and-switch.

(Transcript of Oral Argument at 3-4, *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 [2015], No. 13-1412). And sure enough, the court, in an opinion written by Justice Alito, dismissed this question as improvidently granted. 135 S. Ct. at 1774.

But the case also presented a second question: whether the individual officers should have received qualified immunity. The court resolved this question on the merits and reversed the Ninth Circuit, concluding that any right violated by the officers was not clearly established. *Id.* at 1778.

Justice Scalia, joined by Justice Kagan, dissented and argued both questions should have been dismissed as improvidently granted. *Id.* at 1778-79 (Scalia, J., dissenting). He noted that the court would not have granted certiorari on the second question alone and "would not reward such bait-and-switch tactics by proceeding to decide the independently 'uncertworthy' second question." *Id.* at 1779.

In other cases, a dissent offers some insight into the reasoning behind the dismissal. For example, in *Unite Here Local 355 v. Mulhall*, Justice Breyer's dissent explained that "in considering the briefs and argument, we became aware of two logically antecedent questions that could prevent us from reaching the question of the correct interpretation of § 302." 134 S. Ct. 594, 595 (2013) (Breyer, J., dissenting).

Reviewing cases, the most surprising fact was how frequently—eight times—the prospect of dismissal of the writ was mentioned in dissent from a case that was decided on the merits. For example, in *Kingsley v. Hendrickson*, Justice Alito argued that the court should not have decided the question presented without first deciding a different question:

> Before deciding what a pretrial detainee must show in order to prevail on a due process excessive force claim, we should decide whether a pretrial detainee can bring a Fourth Amendment claim based on the use of excessive force by a detention facility employee. We have not yet decided that question.

135 S. Ct. 2466, 2479 (2015) (Alito, J., dissenting); see also *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1436 (2013) (Ginsburg and Breyer, JJ., dissenting) ("Comcast's forfeiture of the question on which we granted review is reason enough to dismiss the writ as improvidently granted.").

The common thread throughout these cases is the discovery by the court, after the grant of certiorari, of some new issue of fact or law that interferes with the resolution of the question that the court granted certiorari to resolve. The relative rarity with which this occurs indicates the sort of issues the court considers before granting certiorari:

- Does the question presented assume any facts? If so, are those facts supported by the record? *Boyer v. Louisiana*, 133 S. Ct. 1702 (2013).
- Are any legal predicates of the question presented correct? *Madigan v. Levin*, 134 S. Ct. 2 (2013).
- Are there other legal issues that the court should resolve before addressing the question presented? *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2479 (2015) (Alito, J., dissenting).
- Is there a well-developed clash between the parties' positions? *Vasquez v. United States*, 132 S. Ct. 1532 (2012).

A petitioner for certiorari would be well-advised to assure the court that these and similar issues are not present in the case for which certiorari is sought.

Justice Jackson famously described the Supreme Court as "not final because we are infallible" but "infallible only because we are final." The practice of dismissing the writ as improvidently granted reveals that some of the court's decisions are neither infallible nor final. It is a testament to the court's commitment to deciding cases correctly that it will reconsider the grant of certiorari and dismiss the writ rather than risk resolving a case incorrectly after unforeseen issues of fact or law come to light. ◆

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How Title III of the ADA Can Impact Your Next Client Meeting

BY SUKETA K. SHAH, ESQUIRE

When your favorite corporate client walks in to your office to get legal advice on forming a new business, what will you discuss with him? Sure, you may go through the pros and cons of an LLC compared to a corporation. You might even discuss some shareholder concerns and the structure of the board of directors. But what about the company's website?

Website, you ask? With the Plaintiff's bar gaining traction in filing class action claims under Title III of the Americans with Disability Act (ADA), that client's website should be next on your list.

Recently, several lawsuits have been filed claiming that websites are also places of "public accommodation," potentially exposing all content providers on the web to a Title III claim, including your client.

In 1990, Congress passed Title III of the ADA prohibiting discrimination on the basis of disability in places of public accommodations. The Act reads in relevant part, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation" 42 U.S.C. § 12182(a). In order to prevail on a Title III claim, a plaintiff must show that the alleged discrimination involves the services of a "place of public accommodation" 42 U.S.C. § 12182(a).

Recently, several lawsuits have been filed claiming that websites are also places of "public accommodation," potentially exposing all content providers on the web to a Title III claim, including your client.

In July 2010, the U.S. Department of Justice (DOJ) issued an "Advanced Notice of Proposed Rulemaking" (ANPRM) for public accommodation websites, online systems, and other information and communication technologies (ICT). However, five years later, the DOJ has yet to actually issue a Notice of Proposed Rulemaking that contains draft language of the proposed rule. In the fall of 2015, DOJ indicated it likely will not issue a proposed rule until 2018.

Despite DOJ's delay in its rulemaking, it has indicated a strong preference for Web Content Accessibility Guidelines 2.0 (WCAG). WCAG 2.0 is freely available online to companies in order to help ensure their goods and services are accessible by disabled users online.

In March 2014, DOJ entered into a Consent Decree with H&R Block, the national tax preparation company, requiring H&R Block to update the accessibility of its website and mobile app under Title III of the ADA as outlined in the WCAG 2.0. The decree stemmed from the DOJ's allegation that individuals with disabilities were being denied full and equal access to the tax preparer's services. See *National Federation of the Blind and the United States v. HRB Digital, LLC*, No. 1:13-cv-10799-GAO (D. Mass. filed April 8, 2013).

DOJ entered into a similar settlement with edX, Inc., the massive open online course provider in April 2015. edX provides its participants the ability to remotely and independently access hundreds of online courses in the areas of biology, business, chemistry, computer science, engineering, history, law, literature, math, medicine, music, and physics. See, *The United States of America and edX, Inc.*, DJ No.: 202-36-255 (D. Mass filed April 2, 2015). DOJ conducted a Title III compliance review and

determined the website was not accessible by disabled users. *Id.* In connection with the parties' settlement agreement, edX was required to comply with the WCAG 2.0 guidelines. *Id.*

Inconsistent Precedent

While the DOJ has been buried under bureaucratic red tape, the Plaintiff's bar has been busy bringing a variety of class action lawsuits across the country. Unfortunately, the courts have issued conflicting precedent under Title III claims.

In *National Association of the Deaf v. Netflix, Inc.*, 869 F. Supp 2d 196 (D. Mass. 2012), the court applied a broad application of the Title III requirements. Here, the National Association of the Deaf brought an action against Netflix, the online television and movie streaming provider. The plaintiffs sought injunctive and declaratory relief requiring defendant to provide closed captioning for all of its "Watch Instantly" streaming content.

Despite being solely an online provider and having no physical location, the court held that the provider was subject to the ADA under a legislative intent theory. The court held that Congress always intended that the ADA adapt and evolve with the changes in technology. *Id.* at 200–201. The court noted that it did not matter how the product was delivered to the customer, but that the product or service was "of" a place of public accommodation as opposed to "at" or "in" a place of public accommodation. Specifically, that "entities that provide services in the home may qualify as places of public accommodation" *Id.* at 201.

Similarly, the First Circuit in *Carparts Distrib. Ctr. v. Auto. Wholesaler's Assoc.,* held that "places of public accommodation" are not limited to "actual physical structures" 37 F.3d 12, 19 (1st Cir. 1994). The First Circuit held that "it would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result." *Id.* Not all courts have had such an expansive view of the ADA requirements.

In *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006), the district court took a more conservative approach, holding that there must be a "nexus" between the online services provided and a brick-and-mortar location. Here, the National Federation of the Blind and blind customers brought a class action against the giant retailer under the ADA, alleging that its website was inaccessible to the blind. Target moved for a Motion to Dismiss, arguing that its physical locations did not violate the ADA. The court held that, to the extent that the website impedes the plaintiff's "full and equal enjoyment of goods and services" offered in stores, the plaintiffs had a viable claim. *Id.* at 956. However, "to the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores," the plaintiffs do not have a claim under the ADA. *Id.* at 956. Other courts have also articulated the "nexus" theory in their rulings.

The Ninth Circuit has held that a "place of public accommodation," within the meaning of Title III, is a physical place. See *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000). In *Weyer*, the court held that "[a]lthough a plaintiff may allege an ADA violation based on unequal access to a 'service' of a place of public accommodation…a plaintiff must allege that there is a 'nexus' between the challenged service and the place of public accommodation." *Id.* Although a tougher burden, it has not discouraged plaintiffs from bringing suit or being successful in their claims.

Even the federal government is not immune to Title III claims. In April 2014, the American Council of the Blind sued the General Services Administration (GSA) in U.S. District Court in Washington, D.C., alleging GSA's own website, SAM.gov, is inaccessible and denies certain blind and visually impaired government contractors the ability to register or timely renew their government contracts online. The parties ultimately settled the matter in November 2015, in which the GSA agreed to make its website compatible with assistive technology, as specified under the WCAG 2.0. See *American Council of the Blind v. General Services Administration*, No. 1:14-cv-00671-BAH (D. D.C. Filed April 22, 2014).

Advising Clients

Although there is myriad case law and this area of the law is still developing, some basic precautions can help protect content providers on the web such as educating small business owners on these issues. Small business owners should also discuss any concerns with their website providers and suggest that the website be compatible under the WCAG 2.0 standards. ◆

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RUTH BADER GINSBURG AMERICAN INN OF COURT

How One Inn Strives to Embody the Ideals of its Namesake

By Kari A. Hawthorne, Esquire, Doneen D. Jones, Esquire, and Rhonda McLean, Esquire

In 1995, after attending the national conference of the American Inns of Court, Gloria Bates returned to Oklahoma City and sought out a steering committee to create an Inn locally. Bates believed that a diverse membership would promote the Inn ideals of professionalism and ethics and provide an exchange of different ideas, backgrounds, and experiences. When naming the Inn, Bates wanted to choose someone representative of these ideals. Bates had long-admired Ruth Bader Ginsburg for her dedication to promoting women's constitutional rights.

Prior to appointment to the Supreme Court in 1993, Ginsburg built an extraordinary legal career fighting many types of discrimination, including the kinds she experienced herself many times. She began to work for the federal government when she experienced discrimination firsthand after being demoted when her employer found out she was pregnant. Upon entering law school, she was one of only nine women in her class at Harvard, and after graduating from Columbia Law School, she was unable to find employment simply because she was a woman. Ginsburg fought to defy stereotypes in her personal life and career, and fought to end discrimination against women and people from all walks of life.

At the time Bates was forming the Inn, Ginsburg was on her way to building her reputation as a Supreme Court justice. Ginsburg embodied the ideals the founding members sought to promote and Ginsburg had ties to Oklahoma: The Ginsburgs lived in Lawton, Oklahoma, while her husband Martin served in the military, and their daughter Jane was born there.

Ginsburg has continued to voice her strong opposition to discrimination from the bench. She has proven that differing opinions can be stated respectfully, and that despite differing views, people can collaborate every day. The Ginsburg Inn strives to further those ideals by bringing together a diverse group of legal professionals.

The Inn fosters teamwork and civility through its pupillage teams. Members are divided into teams, each proportionately composed of judges, experienced lawyers, young attorneys, law professors, and third-year law students. Each team prepares and presents one program during the term (September through May). The programs deal with important issues facing members of the legal profession and contribute to improving professionalism, civility, and ethics of the legal community by allowing a diverse set of members to work together to present sometimes-sensitive topics in a safe and educational environment.

The Inn has also built a strong mentoring program, holding smaller events designed to encourage interaction and professional collaboration. These mentoring programs bring members together in an informal setting to socialize and learn about each other's practice areas and provide a comfortable setting for younger members to seek out advice or assistance they may need in their jobs or otherwise.

Philanthropy is important to the Inn and many Ginsburg Inn members donate their time and professional skills to Oklahoma Lawyers for Children and Trinity Legal Clinic. Members have also joined together within the Inn and raised funds for many local charities and schools.

In 2015, the Inn celebrated its 20th anniversary and was honored to host California Supreme Court Justice Goodwin H. Liu at its anniversary celebration. Liu clerked for Ginsburg and shared memories of the goings-on behind the scenes in Ginsburg's chambers. Ginsburg was invited to share in the celebration, and although unable to attend, she graciously sent a handwritten note to the Inn congratulating the members on the anniversary that was shared with attendees as part of the celebration.

The Inn members strive to be the kind of attorneys that Ginsburg can be proud to carry her name, and take very seriously their roles in educating the legal community not only in the law, but how to practice the law with honor. ◆

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How Inn #48 Became the Anthony M. Kennedy American Inn of Court

By Jed Scully

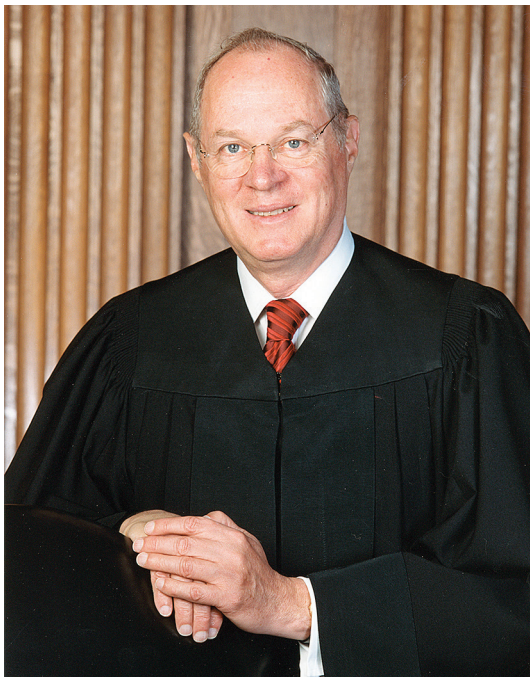

PHOTO CREDIT: Collection of the Supreme Court of the United States

In early 1988, Gordon D. Schaber, Dean of the University of the Pacific's McGeorge School of Law, had lunch with Anthony M. Kennedy, then a judge on the U.S. Court of Appeals for the Ninth Circuit; Milton Schwartz, a judge on the U.S. District Court for the Eastern District of California; and Professors Robert O'Neal and Jed Scully, the two full-time faculty teaching in the trial advocacy program at McGeorge School of Law. Conversation focused on how to establish and bring to life a local American Inn of Court and locate it at McGeorge.

Born in Sacramento, Kennedy had practiced and, after appointment to the U.S. Court of Appeals, maintained his chambers and his personal and professional affiliations in Sacramento. He continued to teach constitutional law, maintaining a tradition of teaching and practice as complementary aspects of professional life. Because he was under consideration for nomination to the Supreme Court of the United States, Schwartz agreed to assume leadership as the interim president of a prospective Inn.

Schaber contacted Georgetown Law Professor Sherman L. Cohn, who was then president of the American Inns of Court. Cohn invited Schwartz, along with O'Neal and Scully, to attend a conference at Georgetown in order to present their application and seek a new Inn charter. Schwartz was unable to attend, but O'Neal and Scully attended the conference and brought the required documents to support the establishment of a new Inn, along with the agreement of Schwartz to serve as its president and the agreement of Scully to serve as the secretary–treasurer. The application was approved and a charter for American Inn of Court Number 48 was issued on March 30, 1988.

As it happened, the question of the selection of a name for the Inn arose concurrently with the nomination of Anthony M. Kennedy to the Supreme Court of the United States. Kennedy agreed to sponsor the Inn under his name.

The other founding committee members unanimously agreed that naming the Inn for Kennedy would aid the fledgling Inn in developing a new, active, and committed membership in three ways: First, Kennedy's long association as a professor of constitutional law and his own reputation for civility and professionalism would encourage attorneys and judges in the Sacramento region to become affiliated with an organization bearing his name. Second, the University of the Pacific McGeorge School of Law was crucial in that Kennedy, both before and after his appointment to the Supreme Court, maintained an active interest in the law school and in continuing his teaching of law students. Third, Kennedy's personal reputation in the Sacramento region and more broadly in the federal judiciary amply demonstrated his commitment to the values of civility, ethics, and professionalism on which the American Inns of Court movement is based.

Encouraged by Kennedy's own interest, the Kennedy Inn has committed itself continually to the inclusion of law students as members of the Inn and as active participants in the Inn and its programs. This is a reflection of Kennedy's own involvement and interest in the education and development of a new generation of committed, ethical attorneys who practice with the highest level of professional responsibility. He has reinforced that commitment by visiting the Inn when in Sacramento concurrently with Inn meetings and teaching in a summer program sponsored by McGeorge in Salzburg, Austria, during every summer recess since he was appointed to the Supreme Court.

The Inn bearing Kennedy's name has continued to flourish for the past 28 years by sponsoring three "daughter" Inns, at Davis, Stockton, and Modesto, California, and by consistently being honored by the Foundation for its programs and outreach. ◆

Jed Scully is an emeritus professor of law at University of the Pacific, McGeorge School of Law in Sacramento, California. He is a founding member of the Anthony M. Kennedy AIC.

PHOTO CREDIT: Collection of the Supreme Court of the United States

SANDRA DAY O'CONNOR AMERICAN INN OF COURT

Arizona's First American Inn of Court Proud to Be Named for Sandra Day O'Connor

By Sean J. O'Hara, Esquire

When the members of American Inn of Court LVIII decided to ditch its clunky numerical name, there was little debate about what the new name would be. With her permission, Arizona's first American Inn of Court would be named for the first woman on the Supreme Court of the United States.

The Inn was organized in 1988 by a group of prominent Phoenix lawyers and judges, including the chief justice of the state, the presiding judge of the local trial courts, the dean of Arizona State University's law school, and several leading practitioners from firms of all sizes.

The Inn received its charter on June 10, 1988. Whether due to amazing foresight or simply the coincidence of having a court reporter on hand, the Inn is fortunate to have a partial transcript of its first full meeting on November 30, 1988. Michael J. Valder, presided over the meeting as the Inn's first president.

After introductions, discussion about the typical format for meetings, and some background about the Inn had come to be, Valder related to the membership that they had received the charter from Sandra Day O'Connor at the annual meeting of the American Inns of Court Foundation that summer. Before moving on to that evening's program, Valder raised the possibility of a name change for the brand-new Inn. "Ultimately, if we come up with a name that we would like to attach to ourselves, we can do that," Valder said. "A lot of Inns have given themselves a name after somebody famous in the legal profession or in the judicial circle of their state or their jurisdiction, so that is an option and we will get to it maybe down the road."

"Down the road" came in 1992. According to founding Master Gary L. Stuart, the Inn membership knew there was one obvious choice and did not really consider any alternatives. The task of getting O'Connor's consent fell to Judge Ruth V. McGregor of the Arizona Court of Appeals, who was serving as Inn president and had served as O'Connor's first Supreme Court law clerk.

O'Connor was pleased to have her name associated with the Inn and on May 23, 1988, a new charter was issued to the Sandra Day O'Connor American Inn of Court. McGregor accepted the charter at a Foundation event at the Supreme Court.

Since then, the O'Connor Inn has been proud to bear her name. The Inn is proud not just of her work as a jurist, and not just of her status as a pioneer for women in the legal profession, but also her tireless work supporting the ideals of the American Inns of Court movement. Beyond lending her name to the Foundation's Award for Professional Service for younger members dedicated to public interest or pro bono activities, since her retirement from the court, O'Connor has been involved with numerous initiatives supporting civic education, civility, and professionalism.

In 2014, O'Connor authored the O'Connor Judicial Selection Plan with the Institute for the Advancement of the American Legal System (IAALS). Focused on maintaining judicial independence by promoting merit selection for judges at the state level, this project gave her an opportunity to once again work alongside her former clerk. Since coordinating the name-change, McGregor was appointed to the Arizona Supreme Court served as that court's chief justice for four years, and also served on the American Inns of Court Board of Trustees. Now retired from judicial service herself, McGregor remains active in professionalism and judicial independence causes, including IAALS and its O'Connor Advisory Committee.

The Sandra Day O'Connor AIC is proud to be associated with O'Connor, and even more proud of the work of its members who follow her example. ◆

Sean J. O'Hara, Esq., is an attorney at Kercsmar & Feltus, PLLC in Scottsdale, Arizona. He is the president of the Sandra Day O'Connor AIC in Phoenix.

PROFILE IN PROFESSIONALISM

Donald R. Dunner, Esquire

2016 Professionalism Award for the Federal Circuit

By Jennifer J. Salopek

Donald R. Dunner, Esquire, has been named the recipient of the 2016 American Inns of Court Professionalism Award for the Federal Circuit. The award was presented to Dunner on April 11, 2016 by Judge Timothy B. Dyk at the Federal Circuit Judicial Conference.

Holding an undergraduate degree in chemical engineering, Dunner has had a long and distinguished career in intellectual property law. Not only has he developed this singular specialty over the course of his career, but he played a major part in the establishment of the Federal Circuit. He has written authoritative texts on intellectual property and is an unparalleled expert on the Federal Circuit. It was his love of argument, or at least public speaking, that drove him to law school in the first place.

The son of an optometrist and a secretary, Dunner attended one of New York City's finest public schools, Stuyvesant High School, which prepared him well for college. Its specialized and challenging curriculum helped Dunner identify an interest in engineering and qualify for an academic scholarship to Purdue University. While there, he became interested in public speaking and student government, and was elected president of the student government. A post-graduation engineering job at a steel mill was interrupted by military service, but by then Dunner was pretty sure that engineering was not the profession for him.

"I thought that patent law, which I learned about from one of my engineering professors, would involve a perfect combination of my interests," he says. Accepted at Georgetown University Law School, he took classes at night while working days as an examiner at the U.S. Patent & Trademark Office. When a clerkship vacancy arose in the chambers of the Chief Judge of the U.S. Court of Customs and Patent Appeals, Noble Johnson, Dunner jumped at the chance; he stayed for two years.

"It was the most wonderful education I could have gotten in the law," he says.

Aside from the responsibility and extensive writing experience the position provided, Dunner also had the opportunity to get to know then new Judge Giles S. Rich, who became a significant mentor and friend to Dunner, an example of a work ethic that was "meticulous and methodical."

Dunner describes the patent litigation system at the time as a "backwater," and credits Rich, co-author of the 1952 Patent Act, with contributing significantly to the education of his colleagues in the judiciary and the patent bar by authoring tutorials in his written opinions. "Slowly but surely, his colleagues and the patent bar picked up on his teachings. He was truly a great patent lawyer and scholar."

Other significant influences were Professor Irving Kayton, a former head of the patent law program at the George Washington University School of Law, and Professor Jim Gambrell, both of whom Dunner later partnered with on writing project in which they reviewed CCPA and other court decisions on a monthly basis. Later, Dunner authored a how-to guide to conducting appeals before the CCPA (and later the Federal Circuit).

Dunner worked for a progression of small law firms in Washington, DC, and became involved in bar association activities. He became president of the American Patent Law Association and chair of the IP Section of the American Bar Association. As a result of those activities and his scholarly output, Dunner was asked to serve as a patent consultant on the Hruska Commission, which was considering the revision of the federal court appellate system. He later served on the Carter Commission for Industrial Innovation, whose recommendation of merging the CCPA with the Court of Claims to form the Court of Appeals for the Federal Circuit was instrumental in the formation of that court.

In 1982 once the Federal Circuit came into being, Dunner served as chair of the court's advisory committee and helped to write the rules that would govern its activities. "The creation of the Federal Circuit brought patent law into the mainstream," he says, "as a result of which it is today one of the hot areas of legal practice."

Over the course of his nearly six-decade career, Dunner has had significant success overturning jury and other verdicts handed down by lower district courts, and has earned the reputation of being one of the finest litigators in the country. He argued his first case before the Supreme Court of the United States in early 2014: "The justices were imposing, but I just tried to relax and enjoy it; it was among the significant experiences of my life," he says. ◆

Jennifer J. Salopek is a freelance writer based in McLean Virginia.

TECHNOLOGY IN THE PRACTICE OF LAW

Kevin F. Brady, Esquire

The Role of Artificial Intelligence in the Practice of Law

How long will it be before your lawyer is replaced by an artificial intelligence (AI) life form like Ava from the movie *Ex Machina*, a computer, or even an app? Sound absurd? AI is already influencing many daily activities: We have driverless cars, virtual personal assistants (Apple's Siri and Amazon Echo's Alexa), fraud detection services, and smart homes devices, just to name a few. Despite the growing prevalence of AI in our lives, many argue that computers will not replace lawyers, because AI lacks creativity, empathy, judgement, intuition, and values. Lawyers provide advice, make decisions, and use their judgment based on past experiences (which machines can replicate) and intuition (which machines supposedly cannot replicate.)

Man v. Machine

The volume of digital information has increased ten-fold just in the past five years due to the network of physical objects embedded with technology that enables these objects to communicate with each other—the so called "Internet of Things." Many of these devices like fitness monitors, GPS in cars, smartphones, and cloud computing storage devices, which are already emitting a staggering amount of data, will function at speeds that will outpace human intervention, thus requiring machines with AI to operate them.

In 1997, IBM's supercomputer Deep Blue defeated world chess champion Garry Kasparov using its ability to calculate the outcomes of more moves than Kasparov could. Recently, Google DeepMind's AlphaGo AI beat a professional player at a game of Go, a 2,500 year-old Chinese game of strategy where players take turns placing black or white stones on a 19X19 square board trying to capture the opponent's stones or surround empty space to make points of territory. Google DeepMind's researchers trained the system to play Go on its own and then matched their system against itself to enable it to increase its skill and ability. Notably, unlike chess, Go is played using intuition and feel and not simply brute force computing.

Unintended Consequences and AI

In the spring of 2015, Mattel launched "Hello Barbie," a doll with speech recognition and "progressive learning features." Hello Barbie asks questions to elicit information from children about their likes, interests, and family, and then learns from these conversations and improves its ability to engage in conversations, play games, and tell stories. Hello Barbie connects to the Internet and the dialog is stored in the cloud. Unsurprisingly, privacy advocates have raised concerns about children sharing their thoughts with a doll that are being recorded, analyzed, and stored.

In March, Microsoft launched a new AI "chatbot" named "Taylor", which was designed to interact and learn from conversations with 18–24 year-olds on social media sites, allowing the bot to continuously improve its ability to engage in conversations. Unfortunately, the target audience started giving Taylor racist and sexist ideas, forcing Microsoft to pull the plug on the project after only a few days.

Is the AI Lawyer Far Off?

While no one is suggesting that machines will replace lawyers altogether, there are certain legal tasks that are being done by machines today, and more machine-learning tasks are coming. AI will permit faster and more effective analysis of large data sets, and draw connections in information at a rate that no human attorney could ever do.

Given the vast amount of preexisting legal work product that machines can analyze and learn from, it will not be long before AI devices replace many activities in which lawyers engage. While it may seem preposterous to suggest that there will come a time when a machine will be taking a contentious deposition, engaging in meet and confer with opposing counsel (or computer), or arguing before the Supreme Court of the United States, it is not far off that machine-learning will drive arguments and strategy based strictly on data analytics.

Will AI free lawyers to focus on their craft rather than the mundane tasks they are bogged down with on a daily basis? For example, can a computer research and draft a basic, acceptable brief that the lawyer can fine tune into a powerful, sophisticated piece of advocacy? Will AI take over mundane legal tasks, allowing lawyers to focus on relationships with their client and opposing counsel? Or, will it be like many innovations in technology that heralded great changes, but in fact made the practice of law more stressful and demanding? ◆

Kevin F. Brady, Esquire is of counsel in the firm of Redgrave LLP in Washington, DC. He is the president of the Richard K. Herrmann Technology AIC in Wilmington, DE, and a former member of the American Inns of Court Board of Trustees.

Judging the Justices: The Changing Public Perception of the U.S. Supreme Court

Program No.: P13265
Presented By: American Inn of Court of Acadiana, Lafayette, LA
Presented On: September 24, 2015
Materials: Script, Handouts, PowerPoint
CLE: 1.3 LA

Summary

This program, inspired by a Pew Research poll released right after the Supreme Court of the United State's 2014 term, addresses the changing public perception of the court. The program is based on a "show-within-a-show" model and simulates a Public Broadcasting Service (PBS) fundraising telecast. The featured program during the "telecast" is an interview-style program with three former and current supreme court justices—Justice Ruth Bader Ginsburg, Justice Oliver Wendell Holmes, Jr., and Justice Antonin Scalia. During the interview segments, the justices explore these issues with the "host," Dr. Horace Berkeley.

Roles

PBS Host #1	Female team member
PBS Host #2	Male team member
Discussion Moderator	Master of the Bench
Dr. Berkeley	Any team member
Justice Ruth Bader Ginsburg	Female team member
Justice Oliver Wendell Holmes, Jr.	Male team member
Justice Antonin Scalia	Male team member
Off-stage voice	Any team member
Powerpoint operator	Any team member
Pianist	Any team member able to play piano

Agenda

Introduction	5 minutes
Skit	75 minutes

Recommended Physical Setup

Projector, Screen, Laptop, Props to resemble the vignettes described

Submit your Inn Programs!

Submitting your programs to the Program Library helps us deliver convenient, meaningful and up-to-date program information to Inns and other Inn members. With the first program meeting of the Inn year fast approaching, now is the perfect time to start collecting materials for submission.

Electronic submissions are encouraged; please include all materials necessary for other Inns to restage the program. These materials might include a script, supporting documents, research materials, or any handouts.

When submitting a program please include a Program Submission Form, which can be downloaded from our website www.innsofcourt.org. Every program that the national office receives is included in the current Program Library Catalog and helps your Inn along the track to Achieving Excellence.

If you have any questions please call 703-684-3590 or send an e-mail to programlibrary@innsofcourt.org.

The national program library is an important service offered to the Inn membership by the Foundation. This Program Spotlight highlights the best of the program library as an offering to spark your own program creativity. If you would like to order any of the featured programs, please visit our website at www.innsofcourt.org or send an e-mail to programlibrary@innsofcourt.org.

The Bencher

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