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The Bencher®

THE MAGAZINE OF THE AMERICAN INNS OF COURT®

Alternative Dispute Resolution

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American Inns of Court®

FROM THE PRESIDENT

Chief Judge Carl E. Stewart

Alternative Dispute Resolution, or ADR, encompasses the diversity of methods used to resolve a dispute between parties without resorting to traditional courtroom litigation and without regard for the burgeoning courtroom queues, robust cost, time delays and backlogged dockets that many litigants face. Several ADR proceedings continue to develop in response to the need for practical and new problem-solving methods—among them are arbitration, mediation, neutral evaluation and collaborative law negotiations with third parties. As the legal profession has blossomed in a number of nontraditional directions, it is not surprising that frequently the resolution of legal disputes today occurs other than inside a courtroom.

Twenty years ago, our court joined the other federal circuits in instituting its Appellate Conference Program, providing mediation services for counseled civil appeals. As we have hoped, the program has assisted the court by taking a substantial number of resolvable cases off the docket, usually before briefing and almost always before consideration by a panel. The program has also helped litigants and attorneys. It provides opportunities for communication between counsel, which otherwise are much rarer at the appellate level than they are during trial court litigation. It gives the parties a way to reach intermediate or creative solutions that are often beyond the court's power to impose. It also offers the parties the chance to save time and costs of further litigation, which often comes on top of years of trial court battles. Perhaps most importantly, it gives parties (many of whom may have had their cases decided on summary judgment, without live testimony) the chance to be heard, and to exercise ownership of the outcome of their case, rather than having an outcome imposed by the court.

Though the dispute resolution setting has evolved over time, the core principles of the American Inns of Court—professionalism, ethics, civility, and excellence in the legal profession—are just as applicable in this context. This is best exemplified by one of our many preeminent Inns, the Justice Marie L. Garibaldi American Inn of Court for ADR, the first of its kind established for Alternative Dispute Resolution. The Inn, which focuses its programming on a wide array of interesting topics, has facilitated primers on avoiding implicit bias for arbitrators, probate mediation, negotiating settlements, and ethics for attorney-mediators, among other subjects. Each new programming initiative is established with the focus of the American Inns of Court's values and mission in mind.

As Laura Kaster of the Garibaldi Inn describes, "there is an essential connection between private dispute resolution processes and the conduct of disputants and their representatives who are engaged in those processes…. Arbitration doesn't just value civility among the participants—it relies upon it. Civil conduct is the only way to conduct a private resolution process consistent with its goals." Retired Louisiana State Judge W. Ross Foote, an active ADR mediator, similarly expounds that in striving for civility and professionalism in the context of the American Inns of Court, the ADR component of our profession is in direct play. "As lawyers we strive to resolve disputes with the least financial, emotional and psychological impact on clients as possible. If our only tool is the hammer of litigation, we make every dispute a nail."

According to Foote, another key component of ADR is the creativity engendered in lawyers who take on the role of mediators and arbitrators. Parties benefit from the life lessons of their lawyers and not just the legal code, statutes, or case precedents that comes into play during courtroom litigation. Lawyers may fashion remedies well beyond the purview of the court and build upon the motivation of parties who are distinctly prepared to negotiate.

As the articles in this issue of *The Bencher* denote, ADR programs have expanded exponentially over the last several decades. Each program is unique in outcome, yet they serve the same purpose: facilitating the resolution of disputes through negotiation. With the tremendous value that ADR methods add to the legal profession, we would be wise to encourage familiarity with arbitration, mediation, and other settlement dispute negotiations in both law schools and professional settings where they are not yet widely promoted. I am confident that more Inns devoted to ADR will be key parts of the growing American Inns of Court movement. ◆

Scheb Inn president, Judge Maryann Olson Boehm, left, and Inn president elect, Bonnie Lee Polk, Esquire, right, present Steven Chase, Esquire, center, with a certificate recognizing his appointment as an honorary member of the Judge John M. Scheb AIC at the Inn's 25th Anniversary Gala on May 10, 2016.

Judge John M. Scheb American Inn of Court

The Judge John M. Scheb American Inn of Court held its 25th Anniversary Gala on Tuesday, May 10, 2016 at Michael's on East Restaurant in Sarasota, Florida. More than 200 lawyers, judges, and law students attended the gala, which was co-chaired by the Judge Maryann Olson Boehm and Dana M. Moss, Esquire.

The event featured the film premiere of *Legacy of Professionalism: John M. Scheb and Our Inn of Court*, a 20-minute documentary celebrating the life and career of Judge John M. Scheb as well as the story of the founding of an American Inn of Court in Sarasota.

Other highlights of the evening included the induction of attorneys Steve Chase, Dan Bailey, and Donna-Lee Roden as honorary members of the Inn, recognition of April's pupilage group for the Richard Garland Outstanding Program of the Year award, presentation of the Judge John M. Scheb American Inn of Court Professionalism Award to Mark Kapusta, and the swearing in of the Inn's 2016–2017 executive committee.

Scheb founded the Sarasota County American Inn of Court as Inn #139 in 1991 and in 1994, the Inn's membership voted to change the name to the Judge John M. Scheb American Inn of Court as a tribute to Scheb's commitment to legal excellence, ethics, civility, and professionalism. ◆

Seattle Intellectual Property American Inn of Court

On May 19, 2016, the Seattle IP American Inn of Court, presented a program entitled "Several Angry Men and a Few Ticked Off Women: Effective Oral Voir Dire in Patent Litigation." Participants included Judge James L. Robart; Isabella Fu, Esquire; guest jury consultant Karen O. Lisko, PhD; and Jonathan L. McFarland, Esquire. The presentation centered around a series of mock voir dire exercises to demonstrate practical skills for effective oral voir dire. The presentation began with an example of "bad" voir dire of the jury panel followed by a lecture. Next, an example was given of improved voir dire, followed by lecture. Throughout the presentation, helpful (and often humorous) insights and thoughts were offered on effective voir dire techniques. ◆

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Stann W. Givens Family Law American Inn of Court

Eliane "Ellie" Probasco has been awarded the 2016 Theodore Millison Professionalism Award by the Stann W. Givens Family Law American Inn of Court of Tampa, Florida. The award, named in honor of the late Theodore Millison, a beloved Tampa family law practitioner, is given annually to an attorney who exemplifies the highest standards of ethics and professionalism in the practice of family law.

The award was presented to Probasco at the Inn's April 6, 2016 meeting and on May 26, 2016, Probasco, along with her husband and three children, unveiled the new plaque permanently located in the George E. Edgecomb Courthouse courthouse.

Probasco is a solo practitioner with her own firm, Probasco Law, P.A., where she practices exclusively in the area of marital and family law. She is a member of the Florida Bar, a former chair of the Hillsborough County Bar Family Law Section, and a Barister member of the Givens Inn.

Also in May, the Givens Inn won the coveted Spirit Award along with Best Banner at the 2016 Justice Games. The Justice Games was conceived by Inn members in Tampa as a joint activity for the Inns of Tampa, Florida. The first event was held in May 2013, with six Inns participating and the fourth annual Justice Games was held on May 12, 2016, with eight Inns participating. ◆

Eliane "Ellie" Probasco, Esq., second from left, with her family and plaque recognizing her as the 2016 recipient of the Stann W. Givens Family Law Inn's Theodore Millison Professionalism Award.

The Walker Inn's Madrigal singers perform "Shake(speare) It Off" during the Inn's program.

Garland R. Walker American Inn of Court

On April 12, 2016, the Garland R. Walker American Inn of Court of Houston, Texas, presented a modern thespian experience: "Don't Kill All the Lawyers: Law and Lessons from the Bard." Inn members and guests gathered to celebrate the 400th Anniversary of the death of William Shakespeare with a modern tale that explored some of the bard's most notable plays and their intersection with modern law. The plays of the Bard of Avon offered insight into current legal issues such as eminent domain, mediation, and benevolence. The event was held at Christ Church Cathedral, which provided a classic backdrop for a night of Shakespearean revelry. Guests enjoyed dinner at long, family style tables decorated with photos and facts about the great bard.

Members and guests participated in a variety of activities prior to the presentation including Taste the Three Witches eye—cake balls, a game of Toss the Frog, take a photo with a costumed thespian, and a Shakespearean trivia contest. On hand to provide members with opportunities to volunteer were representatives from the Dispute Resolution Center and Houston Volunteer Lawyers of the Houston Bar Association, the Barbara Bush Houston Literacy Foundation, and Agape Development.

The presentation began with musical performances by several Inn members featuring parodies including "Brush Up Your Shakespeare" and "Shakespeare it Off". The theatrical presentation opened with the iconic balcony scene from *Romeo & Juliet*, which began the tale of a modern theater owner faced with the powers of eminent domain threatening to destroy his humble theater house to make way for housing developments and a toxic waste recycling center. A greedy politician taking under the table bribes and his developer benefactors served as the villains.

Sprinkled with the works of Shakespeare and moving back and forth through Shakespeare's and modern times, the tale develops and the audience learns more about the issues associated with eminent domain, the ethical rules endorsing pro bono legal work, and the virtues of mediation. The grand finale toasted the learned and honorable legal profession and a custom designed Shakespearean cake was enjoyed by all. ◆

The leadership and hosts of the Northern California joint Inn reception included, from left to right, Justice Louis R. Mauro, president, Kennedy Inn; Judge Linda L. Lofthus, Callahan Inn; L.D. Louis, Earl Warren Inn and American Inns of Court Board of Trustees; Chief Judge Carl E. Stewart, president, American Inns of Court; Judge Emily E. Vasquez, president, Schwartz/Levi Inn; Justice Elena J. Duarte, Kennedy Inn; and Judge Linda A. McFadden, Wray Ladine Inn.

Northern California American Inns of Court Host Reception for Chief Judge Carl E. Stewart

Chief Judge Carl E. Stewart, president of the American Inns of Court, was welcomed as an honored guest to the San Joaquin Valley in Sacramento, California on June 14th, 2016. The welcome reception was hosted by four Inns: the Wray Ladine Inn, Modesto; Consuelo M. Callahan Inn, Stockton; Anthony M. Kennedy Inn, Sacramento; and Milton L. Schwartz/David F. Levi Inn, Davis/Sacramento. The special event was held in the beautiful, ceremonial courtroom of the California Court of Appeal, Third Appellate District in Sacramento, and was organized by a joint committee of members representing all four Inns.

The lively, social gathering was well attended by members of all four Inns, including many trial judges from the Superior Court of California for Sacramento, Modesto, San Joaquin and Yolo Counties, as well as several appellate justices from the Court of Appeal. Also in attendance were L.D. Louis, of the Earl Warren Inn in Oakland and the American Inns of Court Board of Trustees, and Caryn Worcester, American Inns of Court Director of Chapter Relations for the Western Region.

Stewart was the "highlight" of the evening and in his remarks he asked attendees to continue to elevate the standards of ethics, civility, professionalism, and excellence in the practice of the law and to continue to fulfill the solemn duty to mentor and usher in the next generation of young attorneys. The judge regaled the audience with humorous and interesting anecdotes regarding new technological advances that have had a significant impact on the legal profession and the judiciary. Stewart concluded his comments by reflecting on the importance of the national leadership of the American Inns of Court to visit Inns throughout the nation.

The entertaining evening gave the members an opportunity to meet the president of the American Inns of Court, a distinguished jurist, and to socialize with members of the other Inns. ◆

Justices Ray L. Brock Jr.–Robert E. Cooper American Inn of Court

On June 9, 2016, the Justices Ray L. Brock, Jr.–Robert E. Cooper American Inn of Court of Chattanooga, Tennessee, presented Lee Davis, Esquire with its 2016 Civility Award. The award is presented annually to a lawyer who has been voted by local state and federal court judges to be the most civil and at the same time most effective lawyer practicing in the local court system.

"Lawyering is a demanding and difficult profession for many reasons," said Judge Jeff Hollingsworth, who presented the award to Davis. "Part of the challenge is the fact that lawyers must simultaneously represent their clients as zealously as possible while also remaining civil and professional to the opposing party and opposing counsel. It is a fine line to walk, but one that is critical to the effective functioning of our legal system. The exemplary way in which Mr. Davis navigates that fine line every day is what made him a unanimous choice for this year's Civility Award."

Judge W. Neil Thomas III, a founding member of the Chattanooga Inn, added "Lee Davis practices law with skill, grace, and professionalism every day. He truly embodies the excellence that every lawyer aspires to achieve."

Davis was further honored during the meeting by being elected to serve as the Inn's president elect.◆

Brock-Cooper Inn members and officers are, from left to right, Ron D. Powers, immediate past president; Lee Davis, 2016 Civility Award recipient and president elect; Judge Jeff Hollingsworth; and Richard C. Rose, president.

Delaware Bankruptcy American Inn of Court

On June 15, 2016, the Delaware Bankruptcy Inn of Court of Wilmington, Delaware, held its annual banquet. Judge Laurie Selber Silverstein recognized pupilage team leaders and mentors and the winner of the best program award. Judge Brendan L. Shannon recognized the recipient of the Hon. Thomas L. Ambro Fellowship, James F. Lathrop. The fellowship is an eight-week summer internship with the U.S. Bankruptcy Court for the District of Delaware.

The Inn also joined forces with the Bankruptcy Section of the Delaware State Bar Association to honor David Bird, the clerk of court for the U.S. Bankruptcy Court for the District of Delaware. Bird retired in August after more than 16 years of service. During his tenure, Bird guided the court through many challenges, including the implementation of electronic filing. Inn co-president, Judge Mary F. Walrath, who has been on the bench for Bird's entire tenure, delivered the evening's remarks recognizing his contributions to the court and presented him with gifts from the Bankruptcy Section and the Inn. The evening closed with Bird relaying a few of his more memorable experiences while working for the court and recognizing the skill and dedication of the court staff. ◆

Villanova Law J. Willard O'Brien American Inn of Court

On May 21, 2016, the Villanova Law J. Willard O'Brien American Inn of Court of Philadelphia, Pennsylvania, provided pro bono estate planning legal services to more than 20 firefighters, police officers, veterans, and partners/spouses, at Holmes Fire Company, Station 43 in Holmes, Pennsylvania, as part of the Wills for Heroes program. The event was the largest Villanova Inn pro bono project in recent years, following a push by longtime-member Judge David Strawbridge who has been strongly advocating for and developing an increased pro bono and public service element for the Inn.

Villanova Law J. Willard O'Brien Inn members provide pro bono legal services through Wills for Heroes to first responders at Holmes Fire Company Station 43 in Holmes, Pennsylvania.

Wills for Heroes is a national nonprofit pro bono organization founded following the 9/11 attacks to provide meaningful support to first responders. Despite the inherently dangerous nature of their jobs, an overwhelmingly large number of first responders—approximately 80–90%—do not have wills. When an opportunity arose for the Villanova Inn to team up with Wills for Heroes, Inn members were quick to volunteer their time and skill.

Upon arrival at the Holmes Fire Department, Inn members were treated to donuts and coffee by their gracious hosts. Soon after, the two-hour CLE estate planning and software training began. By the time the training wrapped up, first responders were lined up in the hallway to have their wills, financial powers of attorney, and healthcare powers of attorney completed free of charge. Each appointment lasted between 45–60 minutes and included an initial question and answer session, electronic form completion, review by an estate law expert, and notarization and execution. At the conclusion of their appointment, each client thanked the volunteers and walked away with valuable estate planning documents as well as peace of mind. Meanwhile, the unanimous reaction from Inn member volunteers was one of satisfaction at all they had accomplished for such worthy clients in such a short period of time. The Villanova Inn plans to continue its relationship with Wills for Heroes in the coming years. ◆

Judge William Wieland Workers' Compensation American Inn of Court

On July 12, 2016 the Judge William Wieland Workers' Compensation American Inn of Court of Orlando, Florida, presented the inaugural David Hammond Professionalism Award to the president and co-founder of the Inn, Judge Neal P. Pitts. Pitts was selected from 11 nominees by the Inn's professionalism committee. The main criteria for the award are professionalism, preparation, legal knowledge, ethics, respect by all parties, honesty, conduct, and longevity. Hammond was a well-respected attorney in Orlando who was known for all of these qualities. We were honored to have his family—wife Cheryl, daughter Kate, son Mark attend the presentation of the award. ◆

At the presentation of the Judge William Wieland Workers' Compensation Inn's inaugural David Hammond Professionalism Award are, from left to right, Cheryl Hammond, Judge Neal P. Pitts, Kate Hammond, Mark Hammond, and Frank C. Wesighan, Esquire.

Judge Consuelo M. Callahan American Inn of Court

Several years ago, Judge Consuelo M. Callahan of the U.S. District Court of Appeals for the Ninth Circuit and a long-time member of the Anthony M. Kennedy American Inn of Court in Sacramento, California, longed to start an Inn her home county of San Joaquin. Callahan enlisted Judge Barbara A. Kronlund of the San Joaquin County Superior Court, to undertake the project. Kronlund contacted Dean L. Patrick Piggott at the Humphreys College Laurence Drivon School of Law in Stockton, and they then asked Professor Phyllis Berger to help.

A team from the Kennedy Inn came to the law school and presented a program skit and gave inspirational speeches. In no time there were 60 members and the American Inns of Court issued Charter 389 to the Judge Consuelo M Callahan American Inn of Court. The Kennedy Inn has remained a great source for advice and encouragement to the Callahann Inn.

In May of this year the Inn celebrated it's tenth anniversary. Justice Carol A. Corrigan of the California Supreme Court attended and was the guest speaker. The anniversary celebration included a great deal of humor, special awards to Inn's past presidents, all original members still with the Inn, and guests including Justice Louis R. Mauro, president of the Kennedy Inn. ◆

Distinguished members and guests at the 10th Anniversary celebration of the Callahan Inn included, from left to right, Dean L. Patrick Piggott, Justice Carol A. Corrigan, and Judge Consuelo M. Callahan.

W. Edward Sell American Inn of Court

Edward C. Flynn received the 2016 Eric W. Springer Professionalism Award at a meeting of the W. Edward Sell American Inn of Court in Pittsburgh, Pennsylvania on February 18. The award is named in honor of Eric W. Springer, a long-time member of the Sell Inn. Flynn was honored not only for serving as the Sell Inn's treasurer for many years, but for his recognition among the bench and bar as an effective and ethical litigator. The award honors a member of the Sell Inn whose life and practice display sterling character, unquestioned integrity, and an ongoing dedication to the highest standards of the legal profession and the rule of law. ◆

In the photo are, from left to right, Judge W. Terrence O'Brien, and Sell Inn members Chief Judge Joy Flowers Conti, Inn counselor; Edward C. Flynn, Esq., 2016 Springer Award recipient and Inn treasurer; Michael K. Feeney, Inn president; and W. Scott Hardy, Esq.

2016 Temple Bar Scholars Selected

The American Inns of Court is pleased to announce the selection of four law clerks to be the 2016 Temple Bar Scholars®. The scholars will spend a month in the United Kingdom, visiting Inns of Court and other landmarks and meeting with members of the British bench and bar. The 2016 Temple Bar Scholars are Barbara A.S. Grieco, Marisa C. Maleck, C. Harker Rhodes IV, and Julia K. Schwartz.

Barbara A.S. Grieco is law clerk to Associate Justice Samuel A. Alito, Jr. She is a graduate of Stanford Law School, where she served as editor-in-chief of the *Stanford Journal of Law, Business, and Finance* and president of the Federalist Society. Grieco received prizes for outstanding performance in Administrative Law and her Supreme Court Simulation Seminar. She earned her bachelor's degree in economics and political science with honors from Wake Forest University. Between college and law school, Grieco worked in the White House Counsel's Office; she has clerked in the chambers of Judge Richard Sullivan, U.S. District Court for the Southern District of New York, and in the chambers of Judge Thomas B. Griffith, U.S. Court of Appeals for the D.C. Circuit.

Marisa C. Maleck is law clerk to Associate Justice Clarence Thomas. She attended the University of Chicago Law School, where she received her J.D. with honors. She was a 2010 Hinton Moot Court Competition Semi-Finalist, and was awarded the Thomas R. Mulroy Prize for Appellate Advocacy as well as the Ann Watson Barber Outstanding Service Award. Maleck is a graduate of Amherst College, where she earned a bachelor's with honors in political science and women and gender studies. She received several prizes for debate and public speaking. She has also clerked for Judge William H. Pryor, Jr., of the U.S. Court of Appeals for the Eleventh Circuit, and Senator John Cornyn of the U.S. Senate Committee on the Judiciary.

C. Harker Rhodes IV is law clerk to Justice Anthony M. Kennedy. He earned his J.D. from Stanford Law School, where he served as managing editor of the *Stanford Law Review* and senior editor of the *Stanford Law & Policy Review*. Rhodes received the Judge Thelton E. Henderson Prize for Outstanding Performance in Clinical Practice in the Supreme Court Litigation Clinic, and the Gerald Gunther Prize for Outstanding Performance in thirteen classes. He attended Harvard University as an undergraduate, where he graduated summa cum laude with a degree in linguistics. He is a member of Phi Beta Kappa. Rhodes has worked as a summer associate at Skadden, Arps, Slate, Meagher & Flom; and as an associate at Bancroft PLLC.

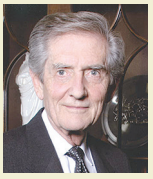
Julia K. Schwartz is law clerk to Judge Richard A. Posner, U.S. Court of Appeals for the Seventh Circuit. A graduate of the University of Chicago Law School, she served as executive topics and comments editor of the *University of Chicago Law Review*. Honors included the Illinois Women's Bar Foundation Scholarship, the Bradley Fellowship, and the Donald E. Egan Scholarship. Schwartz earned her bachelor's degree in anthropology summa cum laude from Princeton University, where her thesis research on an organization working to free the wrongly convicted was nominated for the Hank Dobin Thesis Prize. She clerked for Judge Matthew F. Kennelly on the U.S. District Court for the Northern District of Illinois, and has worked as a summer associate at Sidley Austin LLP and Grippo & Elden LLC. ◆

Christensen, Powell, and O'Connor Award Recipients Announced

The American Inns of Court is pleased to announce the 2016 recipients of the A. Sherman Christensen Award, Lewis F. Powell, Jr. Award for Professionalism and Ethics, and Sandra Day O'Connor Award for Professional Service. The awards will be presented November 5, 2016 during the 2016 American Inns of Court Celebration of Excellence in Washington, DC. ◆

Lewis F. Powell, Jr. Award for Professionalism and Ethics

Robert B. Fiske, Jr., Esq.
Davis Polk & Wardwell LLP
New York, NY



A. Sherman Christensen Award

Hon. J. Clifford Wallace
U.S. Court of Appeals for the Ninth Circuit
San Diego, CA

Sandra Day O'Connor Award for Professional Service

Kate Conyers, Esq.
Salt Lake Legal Defender Association
Salt Lake City, UT

Judges James M. Colaw, left, and Donna M. Keim, right, are the 2016 winners of the James C. Adkins, Jr. Inn's annual Gary N. Holthus Bowling Challenge.

James C. Adkins, Jr. American Inn of Court

This spring the James C. Adkins, Jr. American Inn of Court of Gainesville, Florida, hosted its annual Gary N. Holthus Bowling Challenge. The event grouped teams of law students, attorneys, and members of the judiciary in a charity bowling tournament. Proceeds of the event were donated to PACE Center for Girls Alachua, a center for at risk young women. With a two year winning streak under his belt, Judge James M. Colaw returned to defend his title in the men's' division. With a skilled performance he turned his winning streak into a "three-pete"! The judiciary continued its excellent showing with Judge Donna M. Keim taking the women's' division title. The Adkins Inn looks forward to continuing this event next year and having Judges Colaw and Keim return to defend their titles. ◆

Barbara M.G. Lynn American Inn of Court

The Barbara M.G. Lynn American Inn of Court in Dallas, Texas, held its third annual design competition on April 19, 2016.

Judges David C. Godbey and Barbara M.G. Lynn, left, judge bridges built by Inn members during the Lynn Inn's annual design competition.

Each year the focus of the competition is on a different aspect of design. This year's task was for the pupilage groups to compete against one another in creating a popsicle stick bridge. The competition was fast-paced and the pupilage groups were allowed only 30 minutes to design and build their bridges. The submissions were judged on strength and that special quality that we know as "Lynn-ness." Judges Barbara M.G. Lynn and David C. Godbey judged the Lynn-ness of the bridges and then the bridges were placed in a testing apparatus to determine the maximum amount of weight that could be supported by the bridge without causing the bridge to break or buckle. The winning submission held nearly 100 pounds. The evening also included a presentation on intellectual property protection for architectual works. ◆

2016 American Inns of Court Professionalism Awards Recipients

Congratulations to the recipients of the 2016 American Inns of Court Professionalism Awards. The awards were presented at the circuits' judicial conferences and the honorees will also be recognized at the 2016 American Inns of Court Celebration of Excellence at the Supreme Court of the United States in Washington, DC, on November 5, 2016. The awards are underwritten in part by Thomson Reuters. ◆

Federal Circuit
Donald R. Dunner, Esq.
Finnegan Henderson Farabow Garrett & Dunner LLP
Washington, DC

Second Circuit
Peter G. Eikenberry, Esq.
Law Office of Peter G. Eikenberry
New York, NY

Fourth Circuit
Dr. Phillip C. Stone
President of Sweet Briar College
Sweet Briar, VA

Fifth Circuit
Hon. Mary Ann Vial Lemmon
U.S. District Court for the Eastern District of Louisiana
New Orleans, LA

Seventh Circuit
Collins T. Fitzpatrick, Esq.
Circuit Executive of the U.S. Court of Appeals for the Seventh Circuit
Chicago, IL

Eighth Circuit
Hon. Catherine D. Perry
U.S. District Court for the Eastern District of Missouri
St. Louis, MO

Ninth Circuit
Robert B. Jobe, Esq.
The Law Offices of Robert B. Jobe
San Francisco, California

Tenth Circuit
Hon. Philip A. Brimmer
U.S. District Court for the District of Colorado
Denver, Colorado

Eleventh Circuit
Henry M. Coxe III, Esq.
Bedell, Dittmar, Devault, Pillans & Coxe, P.A.
Jacksonville, Florida

The Honorable John Antoon II
U.S. District Court for the Middle District of Florida
Orlando, Florida

Ruth Bader Ginsburg American Inn of Court

Members of the Ruth Bader Ginsburg American Inn of Court in Oklahoma City, Oklahoma, have enthusiastically supported community service projects for several years. The 2015–2016 term was no exception, with members once again assisting one particular Oklahoma City Public School.

Most students at Emerson High School come from overwhelmingly challenging circumstances and backgrounds. Many students are in foster care, are homeless, have children of their own, or are the sole providers for their families. Many must work one or more jobs while attending school. In addition, the students are transferred to Emerson from all over the Oklahoma City Public School District (estimated 171 square miles) and must orchestrate their own transportation to the school's downtown location. With all of this working against them, it is amazing that Emerson students are able to graduate with a full diploma.

At graduation time, most of students are unable to pay their senior dues and, thus, are unable to participate in senior activities. Many of them must make the difficult decision to pay an electric bill, or for other life necessities, instead of walking across the stage at the graduation ceremony. No cap, no gown, no diploma, no recognition.

The 2016 senior class was larger than usual. Teachers and administrators have historically been able to help cover some senior fees out of their own pockets. They did so because these students will not ask for help. The class of 2016 was also a much more cohesive group than their predecessors, an important development for Emerson, and the staff saw this as an opportunity to garner some positive energy for future seniors. As a result, the school made an unusual request of the Ginsburg Inn: that each Inn member sponsor an Emerson senior by covering the cost of a cap, gown, diploma, and diploma cover. True to form, Inn members took it up a notch by each of us paying for our student's prom ticket and senior luncheon fee for a total of $110.00.

Ultimately, the Ginsburg Inn sent 175 seniors across the stage. Each had a cap and gown and their diploma. ◆

ETHICS COLUMN

John P. Ratnaswamy, Esquire

Fee Dispute Arbitration or Mediation

The American Bar Association's Model Rules of Professional Conduct (1) recognize that arbitration of a fee dispute between lawyer and client may be subject to mandatory arbitration or meditation in some jurisdictions and (2) encourage the lawyer to consider fee arbitration or mediation in other jurisdictions.

Model Rule of Professional Conduct 1.5 is the central rule on fees. Rule 1.5 sets forth various requirements and prohibitions regarding fees without directly addressing fee disputes, although it does contain some brief language on changing fee arrangements. Rule 1.5's Comment 9, "Disputes over Fees", however, does address the subjects of fee arbitration and mediation.

Comment 9 states:

> If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

The web page of the ABA's Standing Committee on Client Protection contains several resources relating to fee arbitration and mediation. Their general page with materials on fee arbitration is: *https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/client.html*

The page contains links to:

- four surveys on fee arbitration programs conducted from 1999 to 2013;
- a June 2015 chart of jurisdictions with mandatory fee arbitration programs (although note that the chart contains some disclaimers);
- a directory of fee arbitration programs; and
- the ABA's Model Rules for Fee Arbitration (adopted by the ABA's House of Delegates in February 1995).

The ABA Model Rules of Professional Conduct and Model Rules for Fee Arbitration are just that, model rules, of course.

A separate question is whether or when a lawyer may, or should, propose a written fee agreement that includes a fee dispute resolution clause. The website of the American Arbitration Association includes a 2010 article entitled "Should Your Firm's Engagement Letter Contain an Arbitration Clause". I was not able to find a way to directly link to the article, but if you go to the AAA's home page and enter "lawyer fees" (without the quotation marks) into the Search box, the article is one of the search results. The article, in brief, mentions factors including, among others, the nature of the firm's clients and matters and the policy of the firm's malpractice insurance carrier regarding fee arbitration.

In 2002, the ABA's Standing Committee on Ethics and Professional Responsibility issued its Formal Opinion 02-425, "Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims". The Opinion's Conclusion states: "It is ethically permissible to include in a retainer agreement with a client a provision that requires the binding arbitration of fee disputes and malpractice claims provided that (1) the client has been fully apprised of the advantages and disadvantages of arbitration and has been given sufficient information to permit her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement, and (2) the arbitration provision does not insulate the lawyer from liability or limit the liability to which she would otherwise be exposed under common and/or statutory law." A number of state bar ethics opinions also have addressed this subject, and they have reached varying conclusions.

A lawyer considering her obligations and options with respect to seeking arbitration or mediation of a fee dispute as a term of a retention agreement or when a dispute arises or appears that it may arise should consider the laws of the application jurisdiction(s). Please note that in some jurisdictions, there are relevant statutes as well as court directives and guidance. ◆

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Alternative Dispute Resolution

A New Harmony of Civility and Professionalism

BY DEBORAH WOOD BLEVINS, ESQUIRE

Two recent "movements" have reshaped the landscape in the practice of law. The American Inns of Court movement has brought a renewed focus to ethics, civility, and professionalism in the field of law. The Alternative Dispute Resolution (ADR) movement has altered the role of conciliation and self-determination in the process of dispute resolution. There are parallels in these movements that complement one another.

One of my colleagues tells a story that sounds kind of funny today. He graduated from law school and started to work with a large law firm in its civil litigation section. He was introduced to another attorney who had just left a top-drawer firm to found a mediation firm. The judge-to-be young lawyer had dreamed of trying cases, arguing motions, and conducting direct and cross-examination. He wondered, "Can anybody make money on lawyering without litigation? What kind of attorney would leave the world of litigation to start a legal firm without it?" What kind of lawyer? A really smart one! The lawyer who left litigation grew a pre-eminent business in his region and cornered the market by hiring many of the state's talented retired judges to work for him as mediators. He was the visionary.

Alternative Dispute Resolution (ADR) programs have grown exponentially in the past 30 years. There are a myriad of ADR mechanisms (mediation, conciliation, arbitration, early neutral evaluation, etc.). For the purposes of this article, mediation is the mechanism highlighted to explore how ADR can be effective for promoting professionalism and civility for attorneys.

Self-Determination Promotes Civility: In court, someone else imposes outcomes on individuals. The rules of evidence dictate who says what when. There are winners, losers, and a lot of cost. The loss of control experienced by a party involved in litigation manifests itself in big emotions: fear, anxiety, helplessness, distrust, and unhappiness.

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Uncontrolled, these emotions engender anger and aggression.

ADR empowers all participants to make their own decisions. The issues that matter to the parties are the issues that are discussed. People have a chance to say what they want to say—to "vent" negative emotions.

ADR presents unique opportunities for parties, adjudicators, and most importantly attorneys, to exercise civility. Consider the case of Bill Smith. He consented to settlement mediation. The opposing attorney offered the following introduction:

> Hello, Mr. Smith. My name is David French. I am the attorney for your employer, ABC Company and its insurance carrier. Thank you for being here today. Today is a special day in terms of your claim. This may be the only day when I have the opportunity to speak with you freely and say whatever I want to say to you. Likewise, you may say whatever you wish to me. That is because, at any other time in your claim, how we speak and when we speak will be directed and managed by the court and rules of evidence and procedure. So I can say to you, I am sorry that you were injured and for the difficulty that has caused you and your family. I care about you and want you to have a fair and reasonable result. I look forward to our discussion and I am hopeful that today we will all be able to work together to craft a solution that will represent a fair and just resolution of this claim.

How empowering! And how civil. Because ADR is not bounded by rules of evidence and procedure, opposing parties may create their own framework for resolving virtually any type of dispute. For attorneys, the ability to leave the rules behind can allow them to say all those things they could not or would not say in the course of a trial. They can display empathy, express understanding, and even say "I'm sorry."

Confidentiality Encourages Civility: ADR systems usually incorporate components requiring strict confidentiality. Mediators are separated from the fact-finders of the litigation process. What is said in mediation cannot be relied upon or recited in court. This gives all parties the opportunity to speak and act with a degree of candor not otherwise obtainable. A defendant or his lawyer is not bound to silence by the fear that his or her words will become an admission with a potentially binding effect. Confidentiality builds trust for all. Trust creates an environment supportive of civility.

Interest-Based Negotiation Encourages Civility: The American Bar Association's (ABA) Model Rules of Professional Conduct, adopted by many states, mandate that attorneys discuss the client's objectives and the variety of means available to pursue those objectives. *See* Rule 1.2; Comment, Rule 1.3; Rule 1.4. While mediation or ADR will not satisfy all objectives, as a general rule mediation focuses on interest-based negotiation, which highlights the interests of the parties, rather than their positions.

For example, the position of a wife in a divorce might be: "I want more spousal support." Her interest in taking that position might be: "My car is old and is taking more and more money for repairs." By focusing on the interest in negotiating, the parties can focus on problem solving, allowing both sides to find a win–win (husband agrees to perform minor car repairs, decreasing cost to both sides).

Interest-based negotiation focuses on the problem, and the people who are experiencing it. It allows all participants to focus on solving the problem, rather than "winning" the case.

ADR Promotes Professionalism through Education: The ADR environment is conducive to education, both teaching and learning. Professionalism demands knowledge of competing dispute resolution systems. It also requires competency in using them. Rule 2.1 of the ABA Model Rules of Professional Conduct mandates that attorneys educate themselves, and in turn, educate their clients, about the range of alternatives available to them. In the role of teacher, ADR gives attorneys the chance to educate the client, a mediator, the opposing attorney, and the opposing party. In 2005, the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution approved Model Standards of Conduct for Mediators. These standards reflected the unique challenges imposed upon attorneys acting as mediators. The standards demonstrate there are professional requirements for mediators that are different from those necessary in the traditional roles of attorney and advocate. These include impartiality, maintaining confidentiality in a fluid process with multiple parties, managing distinct possible conflicts of interest, and ensuring integrity and quality in the mediation process.

Many forms of civil litigation involve complex questions of damages. ADR allows lawyers to educate others on perceived valuation. A lawyer must educate himself through the process of gathering, reviewing, and analyzing data. This allows attorneys to educate others about valuation or substantive law. Mastering the unique skills set for a presentation in the ADR realm makes good

lawyers better. The argument that may be most persuasive to a judge or jury may not be the most persuasive to the opposing attorney or party.

ADR Serves Professionalism by Encouraging Creativity: In a legal world with few rules, predictability might be a challenge. No green lights or red lights—everyone is required to proceed with caution. It would not serve many of the needs of an orderly society. But there could be a benefit. Presented with a conflict or dispute, parties could operate without boundaries to resolve it.

ADR permits everyone involved to exercise creativity in problem solving. In today's society, positions are often taken because "It's just business; it's not personal." In mediation and other forms of ADR, the process is intensely personal. Everyone focuses on the multi-dimensions of a problem: legal, financial, medical, emotional, etc. ADR affords an avenue for attorneys to think and act creatively in developing satisfactory outcomes.

ADR Promotes Professionalism Among Judges: In my home state of Virginia, some judges are precluded by Judicial Canons of professional responsibility from serving as mediators. Others, such as administrative law judges, are not. For judges not barred from ADR, the ability to serve in a different role offers opportunities to sharpen skills and develop new tools.

ADR requires mastering the art of active listening, in order to assist the parties in moving from position to true interest. The attorney or judge acting as a mediator has greater opportunities to ask questions of all parties in order to learn the factors that affect decision making which are not apparent in a courtroom proceeding. The mediator can gain insight into issues such as market pressures, claim evaluation, incentives and disincentives to settlement. Virtually every judge who serves as a mediator tells me the experience has improved his or her skills and perspective. Those who begin mediating after they retire often express the wish, "If I knew then what I know now." ADR makes good judges better.

Conclusion: Proponents of Alternative Dispute Resolution stress that these non-traditional dispute resolution mechanisms engage and empower parties. They foster a flexible, creative approach for problem solving, which moves parties in conflict from the realm of position to interest. Through ADR, attorneys can craft appropriate solutions while enjoying unique opportunities to develop and exhibit civility and professionalism. ADR is a voice in the chorus contributing to a legal system where attorneys and judges may act as they should and not just as they must. ◆

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Victim–Offender Dialogue:

A Benefit to Youth and Society

BY MARY KATE COLEMAN, ESQUIRE

Over the years, I heard a lot about Victim–Offender Dialogue (VOD) through the community mediation center for which I do work. I was intrigued enough by the concept to sign up for the training offered for potential volunteers. Participating as a facilitator struck me as a good way to volunteer and give back to the community and also to use some of the skills and techniques that I use in my work as a mediator and arbitrator.

VOD is a type of Alternative Dispute Resolution (ADR). While some of the skills and techniques used in VOD are skills and techniques used in mediation, VOD is different from mediation. VOD is considered a "Restorative Justice" practice. Restorative Justice is a framework for looking at offending behavior in terms of the harms created by the behavior rather than by the rules that were broken.

In a VOD, the victim and offender meet in person in a safe location and, with the assistance of trained facilitators, talk about the crime or violation. During the meeting, the victim and offender talk about what occurred, who was harmed and who is responsible for the harm, and what can be done to make things as right as possible after the incident occurred.

In the community mediation center's VOD program, we work with youth. Referrals come from probation officers and school principals. VOD is considered a diversionary program. In order to participate in the VOD, the youth must have been between the ages of 10 and 17 at the time of the offense. The youth must willing to do the following:

- take some responsibility for his or her actions
- talk about what happened and respond to questions
- listen to how his or her actions affected others
- participate actively in the VOD process.

Cases can involve a variety of violations or crimes. However, the center will not accept stalking cases or cases where there are prohibitive safety concerns. The process is free and voluntary; both victim and responsible youth must agree to participate. If the responsible youths do what they commit to doing in the VOD, they stay out of court and avoid adjudications on their records.

After the staff determines that the case is appropriate for VOD and that both parties wish to participate, the case is assigned to two volunteer facilitators. The facilitators meet with the youth and victim separately in pre-dialogue meetings. These meetings permit the participants to begin processing what occurred and what needs to happen so that they are prepared for the VOD. During the pre-dialogue meetings, the two facilitators also determine if the process should move forward.

In the pre-dialogue meeting with the victim, the facilitators ask the following questions:

- What happened?
- How were you affected?
- How were others in your life affected?
- What has happened for you since that time?
- What would you like to see happen now or in the future?
- What would you like to ask or say to the youth?
- What could the youth do to make things right?

The facilitators explain what to expect at the upcoming face-to-face meeting with the youth by reviewing the VOD process and asking the victim if he or she has any questions or concerns.

In the pre-dialogue meeting with the responsible youth and his or her support person, the facilitators ask the following questions:

- What happened?
- What caused you to act the way you did?
- What were you thinking about or feeling when it occurred?
- Who do you think was affected and how?
- What has happened since the incident occurred?
- How do you feel about it today?
- For what do you take responsibility?
- What would you do differently if you could?
- What will you do differently in the future to ensure that this does not happen again?
- What can you do to try to make things right?

The facilitators give the support person the opportunity to say how the incident has affected him or her. The facilitators explain what to expect at the upcoming face-to-face meeting with the victim by reviewing the VOD process and asking the youth and support person if they have any questions or concerns.

During the process, facilitators act in a fair, impartial, and non-judgmental manner. They use active listening skills. They aim to build rapport with the victim and youth. Additionally, the facilitators engage in reality testing: For example, if the victim (or youth) has an idea for a way for the youth to repair the harm or make restitution, the facilitators will discuss the idea with him or her to ensure that the task is realistic, achievable, and does not set the youth up for failure. During the pre-dialogue meetings, the facilitators also act as screeners for the next step. For example, if the youth indicates that he or she will not accept responsibility for the incident, the process ends so as to avoid re-traumatizing the victim.

If the facilitators determine that the process should move forward, the case is scheduled for a dialogue between the victim, the youth, and the youth's support person. During the dialogue, the youth and victim share their stories and perspectives and the group hears from the support person. The questions asked are often the same questions that were asked in the pre-dialogue meeting. The facilitators ask the victim what he or she needs to have happen in order to make things as right as possible, then the youth responds with ideas for how to make things as right as possible. Creativity is encouraged and facilitators can help to brainstorm ideas.

Often agreements are reached as a result of the dialogue. If the youth does what he or she agrees to do, the youth stays out of court and avoids an adjudication on his or her record. If not, the case goes back to court or the referral source. In some cases, just having the dialogue is sufficient response to the incident and the case is closed. If no agreement is possible, the case is returned to court or the referral source.

VOD can be used for a variety of crimes and offenses. My involvement has been in cases arising out of incidents in school. I have found that it takes a lot of courage for youths to participate in the VOD process and to accept responsibility for their actions. I have a lot of respect for the young people who are able to do this. In the cases I have facilitated, the victims were caring people who wanted the youth to go down a better path. In one case in particular, the victim had been in a bit of trouble as a youth. The victim saw something special in the youth who committed the crime because the youth apologized immediately for the incident after it occurred. The victim told the youth during the dialogue that the victim was given a second chance when the victim was young and that the victim wanted the youth to also have a second chance. When such conversations occur, it is gratifying to be a part of the process. ◆

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Improving Professionalism by Improving Judgment:

Keys to Advising about Settlement and Mediation

BY LAURA A. KASTER, ESQUIRE

The American Inns of Court goals of promoting professionalism, excellence, and civility are complemented by the American Inns of Court Professional Creed that includes a very specific endorsement of a kind of alternative dispute resolution (ADR) pledge: "I will represent the interests of my client with vigor and will seek the most expeditious and least costly solutions to problems, resolving disputes through negotiation whenever possible." However, the judgment required to advise clients on dispute settlement timing and amounts is infrequently discussed in law schools and law firms, and even in continuing legal education. Many lawyers, myself included, considered that the necessary savvy would have to be a product of osmosis and experience honed over a long period of time. Nevertheless, Rule 2.1 of the American Bar Association (ABA) Model Rules of Professional Conduct (which have been adopted in 51 jurisdictions) mandates the exercise of judgment:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Therefore when a client is involved in a dispute, we must also develop the ability to evaluate the best next step, including whether settlement negotiation or mediation would best serve the client and how to advise the client on an appropriate value at which settlement would be better than ongoing dispute. The good news is that we can improve our judgment; the bad news is that we very much need to do so. We know that lawyer–client decisions not to settle are often poor. Randall Kiser and his colleagues have conducted two large data studies relating to cases in which settlement offers were made and rejected, followed by a trial. These

studies clearly establish that lawyers are turning down settlements only to obtain a less satisfactory result at trial. They are not assessing the value of the case at trial correctly.

In 2008 Kiser, along with Martin Asher and Blakely McShane, published a study entitled, "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations." *Journal of Empirical Legal Studies*, Vol. 5, Issue 3, (Sept. 2008). The authors analyzed more than 2,000 California state court cases where, in rejecting settlement, over 60 percent of the plaintiffs' counsel made a "decision error" (as defined by Kiser et al), turning down a settlement and obtaining the same amount or less at trial. The rate of decision error for defendants' counsel (turning down a settlement only to pay the same amount or more at trial) was much lower (but not admirable): only 24 percent. Thus, just under 25 percent of the defendants in the study sample faced a verdict higher than the rejected settlement offer. However, the impact (or magnitude) of decision error was very different: The mean cost of defendants' mistakes was $1.1 million—much higher than that of plaintiffs, which was only $43,000.

Although the first study focused on California cases, Kiser followed up with studies in New York that reached substantially similar findings with a similarly large body of data. *Beyond Right and Wrong* (Springer 2010). The magnitude of New York defendants' mean cost of error was approximately 19 times the magnitude of the plaintiffs' mistakes. And in larger cases the dollar amounts become startling. For all the cases studied, where the claim was $1 million to $50 million, the mean cost of decision error for plaintiffs was approximately $327,000, and the mean cost for defendants' decision error was $5.326 million.

Why do lawyers and clients make these kinds of mistakes? Because lawyers suffer from the same kinds of unconscious cognitive biases and heuristics (mental shortcuts) that all decision makers do; and because those unconscious biases are exacerbated by the lawyer–client relationship. The need to serve the client and the knowledge of the outcome sought results in a species of groupthink that I call "client-think." Decision science is a developed science whose most famous practitioner is Nobel Laureate Daniel Kahneman of *Thinking, Fast and Slow*. But lawyers are behind the curve in studying and employing the ideas and practices developed by these scientists and scholars.

Lawyers are invariably put into situations that constitute a perfect storm of unconscious influences calculated to impair their judgment. The lawyer and the client constitute a group of two people. In large cases, the lead (i.e., first chair) lawyer may have others working with him or her (partners, associates, investigators, paralegals, and experts). Their task is to find ways to support the client's case and uncover weaknesses in the adversary's case. Unconsciously, they have taken a side from the outset. Once the parties file their pleadings, submit their motions, and engage in discovery, which usually leads to disputes, the table has been set for client-think.

Groupthink, the term invented by Irving Janis, describes the kind of impaired group decision-making that led to the Bay of Pigs Invasion. *Psychology Today* 5:6 (Nov. 1971, 43-44,46.74-7)

Janis identified the following symptoms of groupthink:

- The group feels it cannot fail.
- The group rationalizes away disconfirming data and discounts warnings.
- The people in the group believe they are inherently better than their rivals; the opposition is demonized or stereotyped.
- Dissent is discouraged, overtly or covertly.
- The group comes to the belief that it unanimously supports a particular proposal without necessarily asking what each individual believes (a process of polling that Kahneman thinks should be done in writing and before discussion).
- Individuals self-censor. Few or no alternatives are discussed and people do not survey all participants.

To groupthink we add universal cognitive impediments, anchoring, sunk cost bias (especially powerful and often heard in mediation as the statement "I'd rather pay my lawyer than the other side"), overconfidence bias, and risk aversion. It is worth reading *Thinking, Fast and Slow* and other expositions of unconscious bias to get a feel for the insidious impact of these subterranean mental influences. But for a quick and dirty shocker about how these and other unconscious processes create attention blindness and impact our ability to simply collect the facts on which our cases may turn (let alone analyze the likely outcome), nothing is better than the YouTube video of "The Monkey Business Illusion." A quick two or three minutes of viewing will convince you that being distracted by the task of looking for evidence to

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support your position can blind you to critical information that would make you skeptical about outcome. We actually see what we believe and not the other way round.

So how can we teach and learn an improved way of making critical judgments in order to provide the professional advice our clients so badly need? First we have to recognize the issue. We need to understand the mental processes that impede us and then we need to counter them. Specific training on how to prepare for settlement negotiations or mediation is not a frequent element in even trial Inn training programs. We need to know that we can improve our own ability and work to do so, including by discussing these issues at our Inn programs. We can turn to other resources on prediction and assessment, such as *Superforecasting: The Art and Science of Prediction* (Philip E. Tetlock and Dan Gardner, Crown 2015), and we can take the following steps:

1. **Use the devil's advocate.** Organize your team and your collection of information for better absorption of the information, avoidance of attention blindness, and to ensure better risk assessment. For example, once a team of lawyers is assigned to work on a case, assign one member of the team to play the role of devil's advocate (i.e., assume the perspective of the adversary). This person will examine all the evidence (from the beginning) in that light, and bring damaging evidence directly to the lead lawyer and the client without gloss. The use of a devil's advocate should not await the mock trial or jury study.
2. **Keep communications open.** To avoid attention blindness, it is vital for the team to keep talking to the other side, trying to learn how it views the issues, the witnesses (its and yours), the arbitrators or judge, and the evidence.
3. **Involve the client.** One way is to probe the client for information about the adversary's views of the facts and other aspects of the case. It can be useful to ask the client how he or she can explain what the adversary experienced, what it wants, and how it might interpret key evidence.
4. **Do pre-mortems.** Kahneman suggests doing pre-mortems. It involves having the team imagine, well before the trial, that it lost the case. Then have the team discuss the reasons for the loss. This will bring up troubling evidence or issues of law. Having this information will enhance the reliability of the team's risk assessment.
5. **Record each team member's views on each issue.** Kahneman also suggests that before undertaking a group risk analysis, each member of the team should write down his or her views on each issue. This can also avoid the trap of groupthink. This suggestion is especially useful in firms where teams are hierarchical, because it encourages lawyers who are lower down in the hierarchy to speak up and thereby make a real contribution to the assessment process.
6. **Budget going forward.** Be sure to budget and account for costs and fees going forward in assessing the value of a case for settlement. This avoids sunk cost bias. It also requires honing the skill of predicting fees and costs.
7. **Describe the case to others.** Another technique is to describe your case to others (without breaching confidentiality) who have no interest in the outcome, and do not know or care what side you are on. Don't even tell them. Then ask how they see the case, and ask what they think are the risks.
8. **Use jury studies.** Undertake jury studies if the case warrants the expense, or use online jury research.
9. **Document for going forward.** Keep records of your case valuations, liability assessments, and budgeting costs and fees in order to evaluate them at the end of the trial, or after a settlement, to calibrate them against actual results. By recording the settlement analysis for comparison to the eventual result at trial, arbitration, or mediation, you will be able to discern your errors or their patterns.

Inns of Court, law firms, and corporate law departments could help attorneys refine their judgment skills by encouraging them to keep a file of their risk assessments and budget estimates at various stages, to have other firm lawyers comment on them, and then to actually compare them to the final award or settlement. These are skills; they can be developed and honed, and they are precisely the kind of judgment your client is seeking from you. Over 98 percent of cases are resolved not by trial, but by settlement or mediation. The skills that can assure the best results for your client include the skill of valuing their cases. ◆

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Disputants:

The Missing Third Leg of the ADR Stool

BY TERRI ROTH REICHER, ESQUIRE

Professor Frank E. A. Sander of Harvard Law School first articulated the notion of the "multi-door courthouse" in 1976, when Chief Justice Warren E. Burger convened the Pound Conference to address the problems faced by judges in the administration of justice. This concept envisioned that the "courthouse of the future" would be a "dispute resolution center" offering an array of options for resolving legal matters. Professor Sander proposed that alternative forms of dispute resolution (ADR) should be used to reduce the reliance on conventional litigation. Mediation and arbitration, in addition to other processes, would be added to litigation as a means to resolve disputes. This construct would advance excellence in the application of law while providing a simpler, more cost-effective and perhaps a more civil method of handling disputes. Prior to this time, ADR processes were frequently used in labor/management and divorce/child custody disputes, but had not been incorporated in any concerted manner in the widespread resolution of commercial issues.

For years, U.S. courtrooms have been overcrowded. Judges are faced with huge backlogs. Lawyers and their clients are faced with excessive delays. Many judges welcome methods that would ease the congestion and provide an alternative that encourages a civil and efficient means to deal with the traditional functioning of the courthouse. Many states have adopted a wide array

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of programs to encourage or require the use of ADR or Complementary Dispute Resolution (CDR). They became an integrated part of dispute resolution systems.

Much has been done by judges and courts since 1976 to advance the notion of the "multi-door courthouse." The increased use of ADR can be thought of as a *three-legged stool* that requires the continued support of the neutrals, the litigators, and the clients in order to stand firm. The focus of the ADR community has been on training the neutrals and reorienting the litigators. But in doing so, the end users have been largely ignored. The business people whose disputes we help resolve have been omitted from the process. Much has been achieved, but in order to reach the level of success envisioned 40 years ago, the needs of the disputants must be more fully addressed.

The increased use of ADR can be thought of as a three-legged stool that requires the continued support of the neutrals, the litigators, and the clients in order to stand firm. The focus of the ADR community has been on training the neutrals and reorienting the litigators. But in doing so, the end users have been largely ignored.

Neutrals: The First Leg of the Stool

The first leg of the stool is made up of the neutrals. Training seasoned mediators and arbitrators is commonplace. Such training is widely available through bar associations, the courts, mediation societies, and other institutions. ADR courses are currently part of most law school curricula, encompassing both dispute resolution courses and clinics. Basic mediation training often focuses on the structure of the process (opening statements, joint session, and caucus, etc.), negotiation theory and impasse-breaking techniques, confidentiality and the corresponding ethical issues; as well as legislative components such as the Uniform Mediation Act and local rules of court that incorporate the use of ADR. Role plays are often a fundamental component of this training, highlighting the importance of information gathering and teaching active listening techniques.

The participants in mediation training are often lawyers but may also come from such fields as accounting, engineering, human resources, clergy, and mental health. Many jurisdictions require a minimum number of hours of training, and impose mentoring obligations for the newly trained in addition to regular continuing education going forward. Of note, there is a proliferation of subject-specific ADR training in such fields as employment, construction, healthcare, and bankruptcy, just to name a few. All of this is done to assure that a well-qualified cadre of neutrals is available to the public.

Litigators: The Second Leg of the Stool

The second leg of the stool is made up of the litigators, who regard the courtroom as their sanctuary. An experienced litigator controls the flow of information and zealously represents his client. A savvy litigator is a skilled professional who is a master in this adversarial setting. A key component required to make the "multi-door courthouse" function is to "sell" the notion to the litigators. These members of the bar have very well established, predictable court rules that are woven into the fabric of our judicial system. These history-laden processes are still followed by judges who administer the rules, by our major law firms who embrace the rules, and by young lawyers who are taught the rules. Litigants are forced to follow complicated, costly, and time-consuming methods of discovery, as well as rules of civil procedure and evidence production.

The key to gaining the support of litigators for ADR is to assure them that they are neither eliminated nor minimized in the process. Instead, ADR means that they may offer their clients another service. If mediation is possible, the client has a unique opportunity in the justice system to participate, to speak without formality, and to listen to the opposing party. Confidentiality will be protected and the formality of the courtroom suspended. The client can preserve relationships and reach results that are simply unavailable in the courtroom. Currently there are many seminars offered to litigators on mediation advocacy, which focus on the differences in advocating for a client in a mediation as opposed to the courtroom setting. If arbitration is the process of choice, the parties handle the dispute in a private, more cost-efficient manner that incorporates a means for the parties to choose their own neutral.

Disputants: The Third Leg of the Stool

The third leg of the stool is the client who is embroiled in a dispute and is faced with selecting a method for resolving this conflict. Colleges and particularly our business schools have an opportunity to expose the next generation of business leaders to the wide range of ADR options by placing greater emphasis on ADR processes in their curriculum.

Many of today's youths have already been exposed to the concept of mediation through peer mediation programs in their high schools. This is a form of conflict resolution in which trained student leaders help their peers work together to resolve everyday disputes. Participation in peer mediation is often voluntary and the data indicates that the success rates are very high. Often students reach an agreement that satisfies not only the parties, but teachers, administrators, and parents as well. When students choose to end a conflict in mediation, it is often resolved for good, because mediators encourage peers to discuss all issues in dispute, not only the precipitating incidents. Even in cases where written agreements do not result, parties often learn enough about the situation to defuse their conflict.

I have been able to use the students' familiarity with peer mediation as a starting point to bring ADR into my business law classes. During the past 15 years, I have seen our texts go from a page or two devoted to ADR to an entire chapter. Not only are the students learning the concepts and studying the key cases, but I have found that sharing the role plays that we traditionally use for mediator training is also a means to truly engage them in the process. In addition, I have adapted some of my own mediation cases into role plays. The students are particularly interested in comparing the results they have reached in their role play exercises to the actual outcome achieved between the real disputants. Taking the time to truly expose the next generation of managers to the value of ADR is a critical component in advancing the successful use of ADR in resolving future commercial disputes.

The Global Pound Conference 2015–2017

This year the Global Pound Conference (GPC) is being held internationally specifically to find out what businesses want from ADR. Stakeholders in the fields of dispute prevention, management, and resolution are gathering in 38 cities in 29 countries worldwide. The goal of the GPC is to change the culture and methods of resolving commercial disputes. The GPC provides an opportunity to define the way disputes of the future should be resolved in our increasing global economy. Information will be gathered at each event and a final report addressing the needs of the disputants will be issued by the end of 2017.

The Education of Future Business Leaders

Although the courts will continue to play an important role in the evolution of dispute resolution, justice needs to take place outside of the courtroom. Appropriate dispute resolution that complements the judicial system needs to be our focus. Whatever data is gathered from this current Global Pound Conference, let us not forget that our classrooms have created an opportunity to showcase the wisdom of the expansion of ADR. If ADR training is embraced in undergraduate and graduate institutions in a more meaningful way, attorneys will no longer be faced with the prospect of reticent clients being reluctantly steered toward ADR. Our goal is for the use of ADR by the legal community to become a familiar concept to the business community that will be readily embraced by disputants and perhaps even actively requested.

Although the courts will continue to play an important role in the evolution of dispute resolution, justice needs to take place outside of the courtroom. Appropriate dispute resolution that complements the judicial system needs to be our focus.

Let's educate our future business colleagues so that they can better understand what the alternatives look like. It is incumbent upon the leaders of the legal ADR community to reach beyond our traditional training grounds and realize what a fertile opportunity college and graduate schools provide to helping us reach the goal announced 40 years ago, so the "multi-door courthouse" becomes a true reality. ◆

Terri Roth Reicher, Esquire, is the immediate past president of the Justice Marie L. Garibaldi AIC for ADR in Basking Ridge, New Jersey. She is a professor at the William Paterson University Cotsakos School of Business and is a frequent ADR trainer for the Institute of Continuing Education of the New Jersey State Bar Association and the New Jersey Association of Professional Mediators.

PROFILE IN PROFESSIONALISM

Collins Fitzpatrick, Esquire

2016 Professionalism Award for the Seventh Circuit

By Jennifer J. Salopek

When Collins Fitzpatrick was hired to be a law clerk for a year at the U.S. Court of Appeals for the Seventh Circuit in 1971, he probably never foresaw that he would still be with the circuit 45 years later. Fitzpatrick became circuit executive for the federal courts of the seventh circuit in 1976; he is the only person to have held the position. Congress created the position in 1971 and Chief Judges Swygert and Fairchild apprenticed him into the position. Fitzpatrick says, "I look at my job as ensuring that the 15 courts in the seventh circuit operate well." In a quest for continuous improvement among other ways, he reads the appellate briefs and decisions, learning about the quality of justice, problems, and issues that should be addressed by the chief judge, the Seventh Circuit Judicial Council, and the Seventh Circuit Judicial Conference. In a role that is "half law and half administrative," Fitzpatrick assists the Circuit's 155 judges and court staff with many issues.

During his tenure, Fitzpatrick has witnessed enormous change, from an organization without staff attorneys, circuit executives, or magistrate judges, to a sophisticated operation that leverages technology and management skills to improve the courts' functionality in an era of expanding caseloads.

The nature of those caseloads has changed as well. When Fitzpatrick assumed his role, "We didn't have a lot of guns and drugs," he says. Most cases were for white-collar crime and defendants were rarely incarcerated. Nowadays the court is much more security-conscious and the majority of crime involves guns, drugs, and gangs.

Fitzpatrick grew up on the South side of Chicago, and still lives within a mile of his childhood home. He followed in the public service footsteps of his assistant state's attorney father, who died when he was 14. While a student at Harvard Law School, he worked with the Cambridge Legal Assistance Office, where he was representing clients in court by his second year of law school and got his first exposure to professionalism and civility in practice from the attorneys supervising the program. After graduation, he spent two years providing legal assistance to the poor in Cook County, Illinois.

"I was always interested in public service, but I also wanted to be able to raise a family and legal service lawyers did not make much," he says. He went to the seventh circuit for a one-year appointment as a law clerk and never left.

Fitzpatrick's altruism now manifests itself in his service as a volunteer arbitrator and mediator through the American Arbitration Association and the CPR Institute for Dispute Resolution. "Lawyers have gained a reputation as being too litigious, and some of it is well deserved," he says. "We should be helping all people with legal needs. Lawyers should be trying to keep people out of court and people need to be encouraged to consult lawyers earlier."

A member of the Chicago American Inn of Court, Fitzpatrick says, "Blessed be the peacemakers. Mediators will save our professional reputation, because they solve problems that do not need to be resolved by litigation." He also adds: "Experienced lawyers and judges have an obligation to bring along younger people, and the American Inns of Court provide the ideal forums."

Issues of judicial disability and misconduct and the appointment of bankruptcy judges are the most important things Fitzpatrick works on. He has brought his experience with these issues, as well as his expertise in arbitration and medication, to bear in consulting and speaking engagements all over the world, including Australia, Russia, China, Turkey, and Laos.

"My central theme is judicial independence and its importance to the rule of law," he says. "We need good judges who exercise self-discipline through codes of conduct."

He deplores the politicization of the judiciary in this country. "It's very bad, something we need to stop. Judges should be selected solely on their integrity and good judgement, their ability to make decisions on difficult issues. Politicization, security threats, and campaign costs, dissuade good people from becoming a judge—nobody takes a job thinking that they're putting their family at risk."

With no thoughts of retirement, Fitzpatrick continues to pursue the ideal of a truly independent judiciary. Although he "felt a loss" when he could no longer represent people in court as a lawyer due to his position, he represents all stakeholders as he ensures the highest possible quality of justice in the seventh circuit. ◆

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

PROFILE IN PROFESSIONALISM

Judge Catherine D. Perry

2016 Professionalism Award for the Eighth Circuit

By Jennifer J. Salopek

Although an early attempt to create an American Inn of Court in St. Louis, Missouri, foundered due to insufficient involvement, the second attempt was successful after careful planning and broad inclusion. Judge Catherine D. Perry, of the U.S. District Court for the Eastern District of Missouri, was engaged in the second effort. She explains the steps to success:

"I was contacted by a couple of lawyers and law professors who were interested in starting an Inn of Court," she explains. "We wanted to be more strategic, so we got together for lunch and plotted it out. We enlisted a small group of people who would do the initial work, but tried to be as broad as we could in attracting members—not just the usual suspects (local lawyers who often appear in federal court), but state court practitioners also, including defenders and prosecutors. We worked hard to get a diverse practice mix in the Masters group."

The Inn was chartered in 2009 and named for Theodore McMillian, the first African-American judge on the Eighth Circuit Court of Appeals. He was also a friend of Perry's: "He was a wonderful person who supported many young lawyers and new judges, including me," she says.

Perry thinks the need for American Inns of Court teachings and principles remains great. She witnesses unprofessional behavior from her perch on the bench. "Even for such basic things as discovery disputes, lawyers attack the other side with nasty e-mails and letters," she says. "I have a real problem with the way they do it. They could achieve so much more by talking to one another directly. Both sides behave badly, and it's so unprofessional."

A native of Hobart, Oklahoma, Perry hails from a family of lawyers, each of whom earned their law degree on their own terms. Her father quit his agricultural job at the age of 30 to go to law school at the University of Oklahoma in Norman, while his wife taught school to support him and their four children. Perry's mother later earned money by writing stories for true confessions magazines. Her father encouraged his daughters to go to law school, saying that the United States needed more women lawyers. Perry entered law school in 1977; her mother, two years later, at the age of 50.

The law exercised a particular attraction for women students in the late 1970s. Upon entering Washington University School of Law in 1977, the recipient of a scholarship for which she is "eternally grateful," Perry found a first-year class that was 50 percent female, and several female law professors.

"It did not seem all that unusual, and the professors treated us all equally," she says. Perry was active in the Women's Law Caucus, elected to the Order of the Coif, and served as managing editor of the *Washington University Law Quarterly*.

Upon graduation, Perry joined the St. Louis firm of Armstrong, Teasdale, where she was the only woman and the first female partner. "I was often mistaken for the court reporter when I appeared at depositions," she says. Due at least partly to Perry's encouragement, the firm improved its hiring practices to gain more gender parity.

At Armstrong, Teasdale, Perry specialized in complex commercial litigation. Although some of her clients began to be sued for gender discrimination in the 1980s, she declined the opportunity to join that practice area. "I didn't want that to become my specialty, and I loved the other business litigation I was doing," she says.

Perry remained with the firm until she was appointed a magistrate judge in 1990. She was appointed a district judge by President Bill Clinton in 1994, and served as chief judge from 2009 to 2016. "I had not thought much about becoming a judge, but I when I learned there was an opening for a magistrate judge, I applied. I was thrilled to get the job and found it fascinating and very satisfying."

To Perry, the key to being a good judge is simple: "First, love the law," she says. However, "the practice of law is not as much fun at some of the larger law firms as it used to be, when firms were investing in your future. I hope the large law firms figure out a way to become more family-friendly."

Through the McMillian Inn of Court and other venues, Perry loves to talk with young lawyers about what they do. "Many people don't seem to understand how important professionalism and honesty really are. It's important for young lawyers to see those who have become successful by following the rules. There is a lot of neglect lately in the practice of law, in client files, in responsiveness…

"There is a crying need for an organization like the American Inns of Court." ◆

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

TECHNOLOGY IN THE PRACTICE OF LAW

Richard K. Herrmann, Esquire

To Err is Human—To Err Again May be a Violation of Rule 1.1 and 1.6

The experts opine that mediation requires more than one party. I disagree. In fact, I would like to facilitate a compromise that you should make with yourself going forward. Remember a successful mediation means you have to bleed a little. In this case, I want you to give up a little convenience for a lot of risk.

How many of you have had a near death experience because of an e-mail mistake? We all have, and those of you who haven't are likely in denial. Our business culture has evolved to the extent we have made a proverbial deal with the devil, to wit, "I know it's risky but it's so damned convenient." Of course, the efficiency saved by taking the risk amounts to seconds for any one e-mail, certainly nothing that will appear as a benefit on a client's invoice. When it comes to certain common e-mail risk we simply refuse to play it safe.

Let's focus on the low hanging fruit, those risks that are clearly avoidable. They fall into the following buckets (1) auto-complete in the address field, (2) bcc.

Auto-Complete in the Address Field

We all use this wonderful feature. We begin typing a few letters and Outlook completes the e-mail address, based on information in recent memory or your contacts list. It is very convenient; however, it is not always correct. The most extreme example relates to a lawyer at a large Philadelphia firm working on behalf on Eli Lilly and intending to e-mail confidential information concerning a huge anti-trust settlement to her co-counsel named, Berenson. Unfortunately, she had two Berenson's in her contacts list and Outlook chose the wrong one, a reporter for the *New York Times*. *http://abovethelaw.com/2008/02/atl-practice-pointer-when-emailing-super-sensitive-settlement-information-double-check-the-recipient-list/*

How often do you send an e-mail to a lawyer who you know has changed firms but your auto-complete still has him at his old e-mail address? That is exactly what happened when a lawyer in Massachusetts sent an e-mail to his client who left his old engineering firm to compete. The former employer and its attorneys tried to exploit the ill-gotten communication. The court found that intentional misuse of inadvertently disclosed confidential information trumped the inadvertency. *https://apps.americanbar.org/litigation/litigationnews/top_stories/031611-inadvertent-disclosure-ethics.html*

PRO TIP: Deactivate auto-complete in Outlook

Bcc (Blind carbon copy)

Let's put aside the question from the millennials who have never personally touched a typewriter, let alone carbon paper. In the high tech parlance of today's digital age, "bcc" in Outlook still refers to blind carbon copy. This is a very convenient function, just as it always has been. Of course, "back in the day" when a client received a bcc of a letter to opposing counsel, if the client wanted to discuss the contents, he would write a letter or pick up the phone. In today's world, the client simply clicks "reply", unless he inadvertently clicks on "reply to all". And we all know the result—an intended confidential communication inadvertently sent to opposing counsel and anyone else on the cc (carbon copy) list. You might think this kind of hypothetical is a bit esoteric and unlikely to really occur. Well, you would be wrong. Fortunately for the client, the judge followed the "one bite rule" in *Charm v. Kohn*, 27 Mass. L. Rep. 421, 2010 Mass. (Mass. Super. Sept. 30, 2010). (Actually, it was the two bite rule since the client had made the same mistake previously). In finding it a close call but that no waiver had occurred, the court noted:

> Kohn and his counsel should not expect similar indulgence again. They, and others, should take note: Reply all is risky. So is bcc. Further carelessness may compel a finding of waiver.

Of course, you may say, the mistake was the client's and not the attorney's. The court observed this as well; but the court pointed out counsel chose the manner of communication with the client. Think about this when you reread Rule 1.1 since, as the court in Kohn observed:

> Kohn's counsel's practice of sending him a bcc of e-mails to opposing counsel, with a cc to co-counsel, gave rise to a foreseeable risk that Kohn would respond exactly as he did.

PRO TIP: DO NOT BCC

Of course, had the client not selected "reply to all" there would have been no issue. But we all use "Reply to all" and we should not. "Reply to all" is a topic for another day. ◆

Richard K. Herrmann, Esquire is a partner in the firm of Morris James in Wilmington, Delaware. He is a Master in the Richard K. Herrmann Technology AIC.

Ethics in Modern Arbitration

Program No.: P13458
Presented By: The New York American Inn of Court, New York, NY
Presented On: April 13, 2016
Materials: Script, PowerPoint, DVD
CLE: 1.5

Summary

The program was inspired by recent national press coverage of the role of compulsory and binding arbitration in the resolution of consumer and employee claims as well as by a series of recent and controversial U.S. Supreme Court decisions, e.g. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), that favor compulsory arbitration of consumer and employee claims while enforcing waivers of class-wide arbitration rights. The program examined the policy debates over the use of arbitration clauses in the consumer and employment context, focusing on the ethical issues surrounding their enforcement and use in practice. It also included a foundation on the basics of how arbitration works.

Roles

Merchant Michael	Master
Merchant Paul	Master
Client	Barrister
Attorney	Associate
The Consumer	Barrister
Nursing Home Administrator	Barrister
Lawyer for Joe	Master
Joe	Barrister
Barb	Master
Nursing Home Executive	Associate
Lawyer for Jams	Master
Jams Johnson	Barrister

Agenda

Introduction	10 minutes
Background: Nuts and Bolts of Arbitration Ethics	25 minutes
Ethics of Arbitration—Dynamic Interactive Questions	30 minutes
"Binding" Arbitration—The Ethics of Consumer Arbitration Clauses	20 minutes
Guided Discussion and Conclusions	10 minutes

Recommended Physical Setup

Set described in scripts for three scenes and all appropriate A/V.

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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 Bencher

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