CABA
Capital Area Bar Association

MAY 2012

President's Column

Laura McKinley Glaze

Wow! It has been a busy and wonderful year for CABA. CABA has:

- Played an active role to support legislation giving Mississippi's judiciary more independence and additional pay
- Offered 3 CLE-approved lunch meetings … plus Curtis Wilkie … plus Rick Cleveland
- Took the CABA Newsletter electronic and increased our other electronic communication media
- Donated the hundreds of toys gathered at the Christmas Social to Toys for Tots
- Raised thousands of dollars for the Mississippi Volunteer Lawyers Project through the Barrister's Battle Tennis Tournament and the CABA Golf Tournament
- Held an essay contest in the capital area middle schools
- Supported first responders in 3 counties through the Wills for Heroes program
- Organized a Legal Fair to help area residents dealing with legal issues affecting women and children
- Raised thousands of dollars for the CABA / Reuben Anderson Scholarship Fund at our law schools through a CLE and concert
- Supported the winner of The Mississippi Bar's High School Mock Trial competition when they advanced to Nationals
- Had a great time doing it!

There are so many people to thank for this great year. The CABA Board members and Pat Evans have served with enthusiasm and dedication and have given a multitude of hours to the many efforts of this organization. The Committee chairs have done superb work in advancing the missions of their committees. And last, but certainly not least, the CABA members have volunteered their time and energy to continue to improve the capital area and their profession.

We have one more big event before David Maron begins his term as President. I hope you have made plans to join us on May 15th at the Country Club of Jackson for the Evening Honoring the Judiciary. In addition to giving out awards, we will enjoy a presentation by our keynote speaker, Michael McCann, Director of the Sports Law Institute and Professor of Law at Vermont Law School and a nationally recognized expert in the fields of sports law, antitrust, and law and economics. Mr. McCann is the Legal Analyst for *Sports Illustrated* and NBA TV and the "Sports Law" columnist on SI.com. Mr. McCann

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Inside

Upcoming Events

May 15, 2012
CABA/JYL Evening
Honoring the Judiciary
6:00 Reception / 7:00 Dinner
Country Club of Jackson
Michael McCann, Keynote Speaker

June 19, 2012
CABA Membership Meeting
Noon • Capital Club
19th floor, Capital Towers Building
Lunch is $15

CAPTAIN EQUITY

CHEESY MITT & COMPANY

IS THIS THE BEST THE GOP CAN DO?

This column was written after the Mississippi Republican Primary. By the time you read this, former Governor Romney will be the 2012 Republican nominee for President of the United States. Consequently, you may choose to read this as history, or perhaps the latter portion as prophecy of things to come. Regardless of your choice, what is most important is that it needs to be said.

Thanks, Captain Equity

The Mississippi GOP primary in March put our state front and center on the national stage, if only for a week or so. The bad news is that it showed just how terrible the Republican Presidential field is. The more alarming truth is that Campaign 2012 is revealing just how mean and fragmented America is becoming. And the election is still some seven months away. You think this is nasty, just wait. Meanwhile, the national debt grows exponentially, the war in Afghanistan makes the Vietnam debacle look rational and the cynicism quotient rises a little more every day. And so, the Republican Party's solution in this election was:

> *"...Campaign 2012 is revealing just how mean and fragmented America is becoming."*

Mitt Romney: "Cheesy Grits, biscuits, catfish, and Oh Brother Where Art Thou." That was in Mississippi. "I love cars, the trees are the right height, Ann drives two Cadillacs." That was in Michigan a scant couple of weeks earlier. Puh-leeze. How can you be any more condescending and unaware? But here is the clincher, no normal human being other than Michael Vick would strap their family's pet dog on the roof of their car and drive for eight hours without stopping even though the poor animal had to answer the call of nature in a windblown cage. Net worth has nothing to do with it. Who in their right mind would vote for someone this phony, out-of-touch and callous. My God!

Rick Santorum: "President Obama would have everyone go to college. What a snob." This is from someone who has three higher degrees. "Listening to JFK's 1960 speech on separation of church and state makes me want to throw up." Really? Take some Pepto-Bismol, man. "I am the candidate of freedom unless it comes to

women's contraception, their sex lives and their doctor-patient relationship." There was a reason this Pennsylvania incumbent senator lost his reelection bid by 18 points back in 2006. Ever since then, he has become a non-lobbyist lobbyist by giving big business "strategic advice." Hey, Mr. Man of the People, it's called influence peddling for fun and profit. You Must Be Kidding!

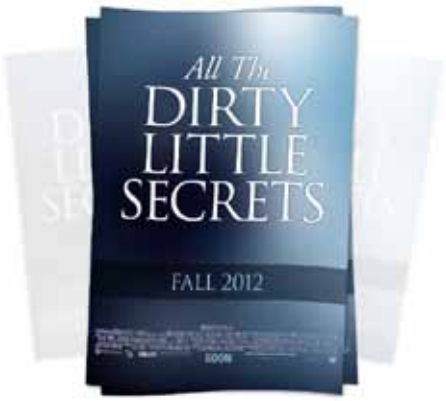
Newt Gringrich: And speaking of trusted moral paragons, the former House Speaker takes the cake. His own caucus drove him from the Speaker's Chair and out of Congress over serious ethics violations. When was the last time a sitting member of congress had to pay more than $300,000 in fines for such egregious conflicts of interest? Then there are the three wives and two mistresses which became wives two and three respectively.

Despite his emergence as a born, yet again, evangelical Catholic (if that is possible), if one's past reveals a candidate as a serial wife cheater, how easy would it be to cheat on the electorate? Add to his self proclaimed fiscal and social conservative pedigree the $1.6 million fee he got as a historian for Freddy Mac, the Tiffany's revolving charge accounts, the trip to the Greek Isles last Fall after his entire election staff resigned, etc. To put it another way, if the past is prologue, well…

Ron Paul: The 76 year old Libertarian Congressman from Texas is absolutely correct about the unpaid for nation building crusades in Iraq and Afghanistan that were authored by the last GOP Commander in Chief. Recall Governor George W. Bush's quote in the 2000 campaign. "I am against nation building." Really? That was before W got to do a little "Presidentin" with his buddies Uncle Dick, Rummy et al. Ah, those were the good ole days of GOP rule. Curiously, the Republicans never seem to mention those unforgettable eight years on the campaign trail.

However, when it comes to everything else, Ron is in favor of shutting down the federal government at every level. If you have a serious disease and no insurance, go to your church or perhaps the Rotary Club to pay for your treatment. If that doesn't work, die. To ensure total freedom, Ron would turn off the stop lights, pull up the stop signs and let the highway system devolve back to dirt roads; gravel would cost too much. We've already been there Ron, it was called the Eighteenth Century. Exaggeration? Just listen to his stump speech. Luckily, he will never be President, but he does keep the flame burning for the Tea Party—Whack Job Far Right. My Goodness!

And these guys were the finalists. Does anybody remember 9-9-9 or "Ooops?" Maybe Haley should have added this bunch of clowns to his Pardon List, provided they would promise to seek professional help. On second thought, strike Mitt from the list in light of his chronic, serial flip-flop history, but if he did it would be covered under Romneycare. You can't make this stuff up.



Coming This Fall:
"All the Dirty Little Secrets"

President Obama (The For Sure Democratic Nominee): The Republican campaign will point out that he is a black (up to half white if you are a moderate Rockefeller Republican which don't exist anymore) Muslim with Kenyan roots who attended an Indonesian Madrassa called Harvard Law School. Unfortunately for too many GOP base voters, Hawaii is suspect enough as an exotic cauldron of un-American everything, much less Kenya, Indonesia or Harvard.

While all of the foregoing is unfair, except for those who insist on believing it, much will be made of his underwhelming record of "Change You Can Believe In," which is fair. What you won't hear is that not one Wall Street robber baron has been prosecuted by the Obama Justice Department. Big money and government have become bipartisan. The only losers are the voters. You will, however, hear about the ever-increasing national debt.

And while I personally fault the President for ignoring his own blue ribbon Simpson-Bowles Debt Commission recommendations, don't expect anything concrete or constructive from the Republicans beyond platitudes, vague generalities and tax cuts for the rich. Here both parties share equal blame. The hard truth is that nobody in America really wants to sacrifice. Vague promises are one thing, but actually being President is all together different. Here is where President Obama would readily agree with W to wit: "Being President is Hard."

Mitt Romney: The Presumptive Nominee. Nobody has played the Mormon card yet, but they will. Mitt's grandfather had to go to Mexico to sustain his polygamy habit. The Garden of Eden is located near Independence, Missouri. And what's the deal with baptizing Anne Frank, murdered journalist Daniel Pearl and an assortment of non-Mormons posthumously? Really? You'd kind of think that being baptized a Mormon would be a personal decision. Oh yeah, and what ever happened to those Golden Tablets that Joseph Smith supposedly had in Newburgh, New York? Always remember, the definition of superstition is "other people's religion."

Rick Santorum: Always A Distinct Long Shot. He voted for the Bridge to Nowhere and who knows what else. That said, you've got to trust his assertion that he is a fiscal conservative who can fix America's intractable financial mess. To quote the Men on Books segment from the old TV Show *In Living Color*, to wit: "Greece is the word."

Newt Gingrich: Not In A Million Years. The former Speaker is 68 years old and is probably going to the GOP Convention in Tampa as a hold out candidate. The longer he stays in the race, the higher his speaker fees and the stronger his book sales are, not to mention Calista's DVD catalog. Oh, and I forgot about ego gratification, but I guess that should be out of bounds, shouldn't it, since he is a self proclaimed patriot and pure hearted public servant? Hey, if I were Newt, why drop out? Maybe we can get $2.50 a gallon gas after all.

Ron Paul: "Just Bless His Little Heart."

Oh well, November is just around the corner…NOT! But there is no law against dreaming…YET!

President's Column (continued from Page 1)

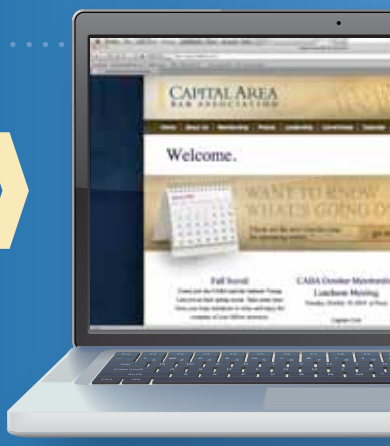
contributes to the Sports Law Blog and The Situationist, both award-winning internet blogs. Additionally, Mr. McCann is a legal correspondent for the nationally syndicated Dan Patrick Show and has been frequently interviewed on television, including on HBO's Bob Costas Now; CNN's The Situation Room with Wolf Blitzer, American Morning, Headline News, and Glenn Beck Show; Fox News' Fox Live Desk and CNBC's Morning Call and Power Lunch. Mr. McCann has also been interviewed on radio, including NPR, BBC, CBC, CBS Radio, ESPN Radio, the Lou Dobbs Radio Show, and the Jim Rome Show, and in print by the *New York Times*, *Washington Post*, *The Wall Street Journal*, and *Business Week*. Come join us for a great evening!

In closing, thank you for a wonderful and rewarding experience. I am grateful for all the friends and colleagues who have supported me this year. CABA has good things to look forward to this next year during David Maron's term and in the years to come. *Thank you.*

Joel Howell

On Computing

A Column for the Contemporary Lawyer



Free Windows Applications to Enhance Your Practice

Windows in its various incarnations has seen a number of software additions which enhance the operating system. Here, thanks to Woody Leonhard and InfoWorld, are a number of helpful free applications.

Dropbox (www.dropbox.com) can be installed on your computer or smartphone. It can drag any file you want to share to the dropbox, which copies files in the designated dropbox folder onto dropboxes on all linked computers and phones, as well as leaving an additional copy on the Web, where you can access your files through any Web browser. This effectively lets you duplicate files across multiple platforms, including Window PCs, Macs, Linux machines, iPhones, BlackBerrys, and Android phones.

SyncToy (www.microsoft.com) is freeware in the Microsoft Power Toys Series. It is used for file synchronization. It synchronizes files between two folders and provides backup.

System Information for Windows (www.gtopala.com) reports three separate data categories: software, including file associations, ActiveX controls, and file name associations; hardware, such as BIOS version, video and sound adapters, and CPU details; and network, including neighborhood devices, shares, and open ports.

Recuva (www.piriform.com) is a new incarnation of a file undelete program. When you empty the Windows Trash Bin, the files are not destroyed; rather, the space they occupy is earmarked for new data. Undelete scans this area, then puts the pieces back together.

7Zip (www.7-zip.com) creates self extracting EXE files, and supports AES 256 bit encryption. 7Zip also makes it easy to work with RAR files.

Wiseval Photophant (www.wiseval-photophant.en.softonic.com) is an image resizer/converter. It handles batch resizing, format conversions, watermarking, and renaming with just a couple of clicks. The altered pictures go into a different folder from the original.

Auslogics File Finder (www.auslogics.com) finds and eliminates duplicated files. This tool's easy to use interface makes it simple to find and select the files you want to delete, then stick the files in the Recycle Bin, where you can bring them back if needed.

Revo Uninstaller (www.revouninstaller.com) uninstalls programs. It runs the program's uninstaller and watches while the uninstaller works, looking for the location of program files and for Registry keys that the uninstaller zaps. It then removes leftover pieces, based on the locations and keys that the program's uninstaller took out. Revo gives you flexibility in deciding just how much you want to clean and what you want to save.

STATE LAW LIBRARY OF MISSISSIPPI

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Monday - Friday
8:00 a.m. - 5:00 p.m.

Gartin Justice Building
450 High Street
Jackson, MS 39201
Phone: 601-359-3672

HOLIDAY HOURS

May (last Monday)	National Memorial Day & Jefferson Davis' birthday
July 4th	Independence Day
September (1st Monday)	Labor Day
November 12th	Armistice / Veteran's Day
November *	Thanksgiving Day
December 25th **	Christmas Day

* The date of Thanksgiving is fixed by proclamation by the Governor and shall be fixed to correspond to the date proclaimed by the President of the United States. The Governor, at his discretion, designates any additional day(s) for further observance of the Thanksgiving Season by the same proclamation.

** In addition to Christmas Day, any day(s) designated, at the Governor's discretion, for the observance of the Christmas Season are fixed by proclamation by the Governor.

Paint.Net (www.getpaint.net) is a faster graphics editor. It provides powerful, easy to use photo editing, with layers, plug ins, and many other special effects. The program puts all of the editing tools a nonprofessional might expect into an intuitive package.

Autoruns (www.microsoft.com) controls autostarting programs. The Everything tab lists every program that starts automatically, in the order in which it is run. You can filter out the Microsoft programs and have Autoruns show you the third party it came from. It lets you control programs that run automatically each time you start Windows or Internet Explorer.

LastPass (www.lastpass.com) stores and retrieves passwords online. It keeps track of your user IDs, passwords, and other settings, and it offers them to you with just a click. It tool encrypts your passwords and then stores them in the cloud with a master password only you know.

VLC Media Player (www.videolan.org) will play just about anything with no additional software or downloads. It plays internet streaming media with a click, records played media, converts between file types, and supports individual frame screenshots.

Jaangle (www.jaangle.com) is a music player organizer that retrieves information about the music: album art, artist biographies, and artist pictures. It has customizable options to reorder and reorganize.

Process Explorer (www.microsoft.com) is freeware created by sysintral.com, and acquired by Microsoft. It monitors and manages running programs, and is an enhanced test manager. This tool shows you all running processes and subprocesses and tells you what is really going on. See every process that is running; its handle, and controlling DLL; the amount of CPU it is using, and tells you everything about CPU cycles, memory usage, and I/O.

PicPick (www.picpick.org) is a design tool made especially for screen capture. It lets you take screen shots with the press of a key or key combinations of your choosing. Once shot, this tool puts your screen into an editor, with tools for resizing and editing. The PicPick Image Editor includes all of the tools in Windows Paint, plus a few that are useful for editing screen shots.

Try as suits your needs. They're all free and could be the best utilities you've ever used.

A Good Lawyer & THE GOLDEN RULE

By David Maron

Incivility is one of the greatest threats to our justice system. Whether rudeness or outright personal attacks, unprofessional behavior (once the exception) has become more frequent. Certainly at times the tension and stress of the adversary system can take its toll on our better judgment. As Luther Munford's article on the consequences of "legal warfare" notes: "Much unprofessional conduct occurs when attorneys substitute feeling for thinking. Fear and frustrated expectations stir up emotions block good judgment, and lead to uncontrolled haranguing of judges, colleagues, and witnesses."[1] That accurately assesses a majority of the problem; but other unprofessional conduct is not so understandably explained. Instead it has become a tactic—part of an intentional, Machiavellian win "at all costs" strategy that, sadly, is rewarded with success and often is tolerated as part of the "adversary system."

Whether a lapse in judgment or intentional, incivility diminishes the practice of law and its reputation and, not surprisingly, erodes the public trust and respect for the justice system. And it is not always an ethics issue, either. While some of these practices may violate the Mississippi Rules of Professional Conduct and/or Rule 11, many do not. Simply expecting lawyers to accept these practices as appropriate for the "changing times" is not a solution. Nor would additional rules[2] solve the problem because, as Winston Churchill once observed, "[with] 10,000 regulations, you destroy all respect for the law."

> *"…Incivility diminishes the practice of law and its reputation and, not surprisingly, erodes the public trust and respect for the justice system."*

The issue belongs to lawyers—each of us. Beyond formal regulations, the law is one of the few remaining self-governing professions—a fact that places both the blame and the solution for the current situation primarily in our hands. And self-governance is not limited to following or enforcing the written rules. In fact, the preamble to our Rules of Professional Conduct acknowledges that in addition to the rules, "a lawyer is also guided by *personal conscience* and the approbation of professional *peers*."[3] Our collective conscience hasn't changed that dramatically; but it may be asleep.

In the Foreword to his ethics treatise, Professor Jeffrey Jackson hints at a potential source of the problem: The Rules of Professional Conduct "mandate honesty, loyalty, competence, diligence, discretion,

fairness and respect for clients, adversaries, third parties, and for the courts. Good lawyers understood this even *before* the MRPC made that plain."[4]

What is "good lawyer?" Good lawyers don't always win — just read *To Kill a Mockingbird*. Financial success can't be the sole measure of a good lawyer either. It means something more; something like *"honorable"* — a word that, outside the military and formal titles, has been left the shelf collecting dust. But words like "honorable" and "integrity" have meaning and best reflect the authentic character of a true professional — a good lawyer.

True professionalism is not a shallow, public display for important people (judges, bosses, and clients); nor can it be reduced to (the appearance of) congeniality among adversaries. As Supreme Court Justice Anthony Kennedy observed "civility is not some bumper sticker slogan, 'have you hugged your adversary today?' Civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself." Civility, integrity, professionalism are not theoretical aspirations either. They must be foundational to our profession not merely because they make our jobs more pleasant (which they do), but because they are essential to a functioning and respected justice system that the public entrusted to us.

If, as Justice Kennedy observed, civility should be an end in itself: *"what should it look like in practice? And what practical steps can we take we ensure that it remains a lasting legacy of our profession?"* Those were far easier questions a generation ago. But today we have principled standards that capture the essence of professionalism and civility and tell us what it should look like in practice. Two excellent examples are The Mississippi Bar's *A Lawyer's Creed*[5] and the American Board of Trial Advocates' (ABOTA) *Principles Of Civility, Integrity, And Professionalism*.[6] Mississippi Bar's Lawyers' Creed provides straightforward guidance.

The Creed answers our first question (what it should look like in practice) by requiring honor, dignity and integrity; and it gives meaningful guidance by describing a lawyer's duty to his *clients and colleagues in the practice of law* applying the timeless principle of the golden rule. As with the Biblical injunction *"so whatever you wish that others would do to you, do also to them…"*[7] our duty is not passive restraint. It requires action. To ensure these standards endure within the practice of law requires that we: (1) *control* our own behavior and (2) positively *influence* those around us.

As a self-regulating profession, we own this issue both individually and corporately. Reform won't happen on its own. It starts with each of us. Our second question is more personal: How can *we* ensure that these qualities endure? In the Foreword to his ethics treatise Professor Jackson begins "In law practice, *I had a mentor…*" Mentoring is vital to both personal character and professional development—and each is essential to producing the next generation of good lawyers. Mentoring is *teaching* through both words and actions; consistently *following* professional standards of our practice (honesty, integrity, civility, and courtesy); *encouraging* respect for the law; and *reflecting* a commitment to the practice as a learned profession.

Whether formal[8] or informal, mentoring is not optional. Professor Jackson's mentor taught him that good lawyers conformed to norms of professional behavior even without rules and importantly *"even when not being observed by others."* Mentoring (or at least influence) happens whether we know it or not because rarely is no one watching. Perhaps, more than any well-meaning instruction, what is done under adversity and against hostility — especially when the correct thing is also the unpopular thing — is probably the most instructive and remembered teachers of these values.

Since this issue belongs largely to lawyers, what can we do? The next page contains a few practical guides.

Mississippi Bar LAWYERS' CREED

To my clients, I offer faithfulness, competence, diligence, and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.

To the opposing parties and their counsel, I offer fairness, integrity, and civility. I will seek to fairly resolve differences and, if we fail to reconcile disagreements, I will strive to make our dispute a dignified one.

To the courts, and other tribunals, and to those who assist them, I offer respect, candor, and courtesy. I will strive to do honor to the search for justice.

To my colleagues in the practice of law, I offer concern for your reputation and well-being. I will extend to you the same courtesy, respect, candor and dignity that I expect to be extended to me. I will strive to make our association a professional friendship.

To the profession, I will strive to keep our business a profession and our profession a calling in the spirit of public service.

To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through effective and ethical representation of my clients.

1 ***Don't start it.***
And when you feel drawn into the fray, don't take the bait and respond in kind. As the old saying goes: "Never argue with an idiot, someone watching might not be able to tell the difference."

2 ***Talk about it first.***
When you receive a "hot" letter, "toxic" email, or the unilaterally set deposition, try practicing the golden rule. It may not succeed; but at least first *try* to talk with opposing counsel — by phone, at lunch or over a cup of coffee.

3 ***Keep perspective on what is at stake.***
While responding in kind might make us feel better in the short term (about 3 seconds after pressing "send") it rarely does anything to advance our client's cause, our own credibility, the reputation of the profession, or — most importantly — the public's respect and trust for the justice system.

4 ***Don't be Rambo.***
Remember guerrilla warfare is a terrorist tactic. Zealous representation never requires hostility or cheap shots. If the NFL thinks they're dangerous, not to mention bad for its image, lawyers should learn a lesson.

5 ***Guard your credibility & reputation.***
The importance of reputation with the court and among your peers cannot be overstated. In his article, *How to Persuade a Judge — The Art of Legal Writing*, U. S. District Judge Daniel P. Jordan succinctly captured the issue: "Judges talk, and they know who does great work and who they can and cannot trust. This is not to say that judges intentionally alter rulings to favor certain attorneys; but the line between success and failure is often thin, and your reputation can affect the judge's attitude toward your arguments." [9]

6 ***Never make it personal.***
For the times a lawyer's conduct is *the issue*, the solution still will involve the facts and the law, not whether you *feel* that your opponent is a no-good, lying liar — however true it may be. Instead, make your record. Introduce relevant evidence. Argue the law. Do everything possible to keep the dispute on the facts and law instead of a personal attack. Zealous advocacy is not venomous advocacy and ad hominem attacks should always be avoided. They rarely are persuasive; and, worse, when you (inevitably) overstate your case, they will backfire. As the Mississippi Supreme Court has cautioned: "This litany of unreliable representations… compels us to place little reliance on [counsel's] briefs and we strongly urge [him] to carefully consider and check the accuracy of his representations to this Court before signing them." [10]

7 ***Get to know your fellow lawyers.***
Long before conflict has a chance to arise, get to know your colleagues as more than names on letterhead, an email address or signatures on a pleading. Get involved with your state and local bar associations. One of the greatest benefits of the Mississippi Bar, CABA and other bar associations is the opportunity to develop relationships with fellow lawyers whether at the bar convention, other social events, or working together on public service projects.

8 ***Avoid even the seemingly harmless jab.***
Remember "a soft answer turns away wrath, but a harsh word stirs up anger." [11] By consciously refusing to practice or tolerate even "incremental" incivility, (angry letter, sarcastic argument) your relationship with others is less likely to escalate to scorched-earth or personal attacks. And when someone does push your button, wait. Let your letter sit for an hour. Ask someone else to read your email or draft motion before it is sent.

9 ***If you need to ask, the answer is usually "no."***
The Rules of Professional Conduct and the "personal conscience and the approbation of professional peers" provide sufficient clarity in most situations. But what if (and especially if) there is no rule that seems to directly provide guidance? The Mississippi Bar's Lawyers Creed incorporates the principles of the golden rule. And if the golden rule proves too esoteric, try the following: The "smell test." The newspaper headline test. The exhibit to a motion test. The "would I want the person I most admire to know what I've done/said" test.

These suggestions are certainly not all-inclusive. But hopefully they offer some practical guidance. The Mississippi Bar Lawyers Creed calls us to "strive to keep our business a profession and our profession a calling in the spirit of public service." Ultimately, to keep true professionalism engrained in the practice of law, let's all be vigilant examples and defenders of these principles.

1. Luther T. Munford, *The Peacemaker Test: Designing Legal Rights to Reduce Legal Warfare*, 12 HARV. NEG L. REV. 377, 413 (2007).
2. The Mississippi Rules address honesty, diligence, candor, loyalty, but some state bar associations have formally included civility as part of their oath of admission. Florida's oath, for example, includes the following pledge for its new admittees: "To opposing parties and their counsel, I pledge fairness, integrity, and *civility*, not only in court, but also in all written and oral communications."
3. Miss R. Prof Cond. Preamble (emphasis added).
4. Jeffrey Jackson, Donald Campbell, Professional Responsibilities for Mississippi Lawyers, MLI Press (2010) at iii (emphasis added).
5. http://www.msbar.org/admin/spotimages/2400.pdf
6. https://www.abota.org/index.cfm?pg=ProfEthicsCivility
7. *See* Matthew 7:12 (emphasis added),
8. Many law firms have formal mentoring programs and the Mississippi Bar's James O. Dukes Professionalism Program also includes a pilot mentoring program to match up mentors with new bar admittees. Information on this is available on the Mississippi Bar website at www.msbar.org/professionalism.php
9. Judge Daniel P. Jordan III, *How to Persuade a Judge— The Art of Legal Writing*, The Mississippi Lawyer, 11, 14 (March-April 2010).
10. In *re Blake*, 912 So. 2d 907, 913 (Miss 2005).
11. *See* Proverbs 15:1

THE GOLDEN AGE OF GREECE *Retold*

BOOK REVIEWS BY JOHN C. HENEGAN

The Song of Achilles
by Madeline Miller

The Lost Books of the Odyssey
by Zachary Mason

Each of these novels — the result of many years of individual effort and rich imagination and invention — marks a stunning, magnificent debut.

The dust jacket of *The Song of Achilles* tells us that Madeline Miller teaches Latin and Classical Greek and that before now she also had been adapting classical tales for present day audiences. Her first novel is neither an adaptation nor derivative. Ms. Miller plumbs the depths of the psyche of a conflict-ridden Achilles and his wrath, which is the underlying theme of *The Iliad*, as we read in Robert Fagles' translation of the opening line: "Rage – Goddess, sing the rage of Peleus' son Achilles …" *The Song of Achilles* convincingly reconciles the different stories of Achilles' adolescence and his relationship with Patroclus, his boon companion, whom Achilles "loved beyond all other comrades, loved as [his] own life," as Homer tells us, in an authentic and convincing manner that holds the reader's suspense to the end. When doing so, Ms. Miller not only expands the narrative and the character of Achilles, but she remakes Thetis, Achilles' mother, the sea goddess, anew rightfully transforming her into a powerful willed shimmering force.

Some reviewers have compared Ms. Miller's first novel to the compelling works of Mary Renault who working with historical sources brought the age and person of Alexander the Great to life for her readers. This is generous praise indeed, but Ms. Miller has done in my judgment what is even more difficult, which is to absorb the Classic Greek literature and religion to such a degree that her work is filled with the very marrow of the Golden Age of Greece.

"Sing to me of the man, Muse, the man of twists and turns," so opens *The Odyssey*, a peon to wily Odysseus and his trials and misadventures during his 10-year journey home from a defeated razed Troy to his Kingdom of Ithaca, where his wife Penelope and their son Telemachus have waited for Odysseus for 20 years. During his absence, his palace has filled with suitors who go there daily to feast on Odysseus' food and wine and wait for Penelope to give up all hope that Odysseus has survived the Trojan War or the return trip home and to marry one of those present. Penelope puts her suitors off by saying she will decide whom to marry once she finishes reweaving the worn shroud of old Laertes, father of Odysseus. At night she unravels the work she has done each day. Odysseus, disguised as a beggar, eventually returns home. Initially abused by the suitors of Penelope, he discloses his identity to Telemachus, and they combine and kill the suitors. Penelope and Odysseus re-join, but only after Odysseus successfully convinces Penelope that the man before her is truly Odysseus, her husband.

> *"Each of these novels — the result of many years of individual effort and rich imagination and invention — marks a stunning, magnificent debut."*

Unlike the canons of sacred literature of the Hebrew, Roman Catholic, and Protestant faiths, there is no one canon of Greek mythology. For a period in the 19th century, the existence of the Trojan War (and the key historical figures of Homer's epic) was seriously questioned by some historians until Schliemann excavated Troy and then Mycenae, where he recovered Agamemnon's mask and Nestor's cup or a cup that uncannily resembles the one that Homer describes. Did Homer hear about Nestor's cup or did an admirer of Homer make a cup like the one Homer describes? In recounting the ordeals of the Greeks during and after the Trojan War, Homer at different times omits or makes no reference to certain stories about his characters that were known in and sometimes unique to certain parts of Greece. One of the most curious of these stories is that Helen, the cause célèbre of the Trojan War, was a phantom who never existed or who never made it to Troy after leaving Sparta having disembarked in Egypt. Homer's inclusion of Helen in both *The Iliad* and *The Odyssey* should be read as a clear rejection of Helen as a phantom. Or should it?

Odysseus' homecoming is repeatedly thwarted by Poseidon, who favored the Trojans and is now Odysseus' avowed enemy. The 10-year voyage should take Odysseus ultimately south and west from Ilium across the Aegean and into the Ionian Sea where Ithaca lies northwest of the Peloponnese. Instead, attempts to chart the voyage are a cartographer's nightmare because Homer adapts the trip to the stories of Jason and the Argonauts who traveled from west to

east on the Caspian Sea. During his sails, Odysseus encounters seductresses, sorcerers, enchantresses, and fantastical creatures and monsters before finally reaching Ithaca, but not without the repeated intervention of Athena, defender of the Achaeans with her favorite being Odysseus himself.

Against this backdrop of gods and goddesses, superheroes and heroes, alternate, even competing, realities, the supernatural and the natural, magic and sorcery, Zachary Mason, a mathematician who is now working on a second novel, gives us *The Lost Books of the Odyssey*. The "preface" explains that it consists of 44 "fragments" found at Oxyrhynchus. The recovered papyri of Oxyrhynchus are still in the process of being uncovered and translated; they include so far *The Gospel of Thomas*, fragments of the poetry of Sappho, and the plays of Meander. The site is on the western mouth of the Nile, near the City of Alexandria, where extant versions of Homer's epic were first collected and compiled into a standardized edition after Alexander the Great had founded the city.

In the first fragment, Odysseus returns to Ithaca and enters his home to find that Penelope has remarried. Penelope jumps from her chair and embraces Odysseus, telling him that she thought he had died long ago. Odysseus had not envisioned that Penelope would abandon him like this. His torment and disillusion and profound disappointment are overcome when he realizes he is not standing before Penelope, and he is not in his home or on Ithaca. He "flees the tormenting shadows" escaping "a vengeful illusion, the deception of some malevolent god."

In another, Odysseus enters Agamemnon's tent alone, awaiting the convening of yet another Achaean council of war. Odysseus sees an anachronistic book in an open chest and picks it up out of curiosity to see what Agamemnon is reading. It is Homer's epic, both all that has happened up to that point in the Trojan War, and all that is yet to happen, including what will happen to Odysseus.

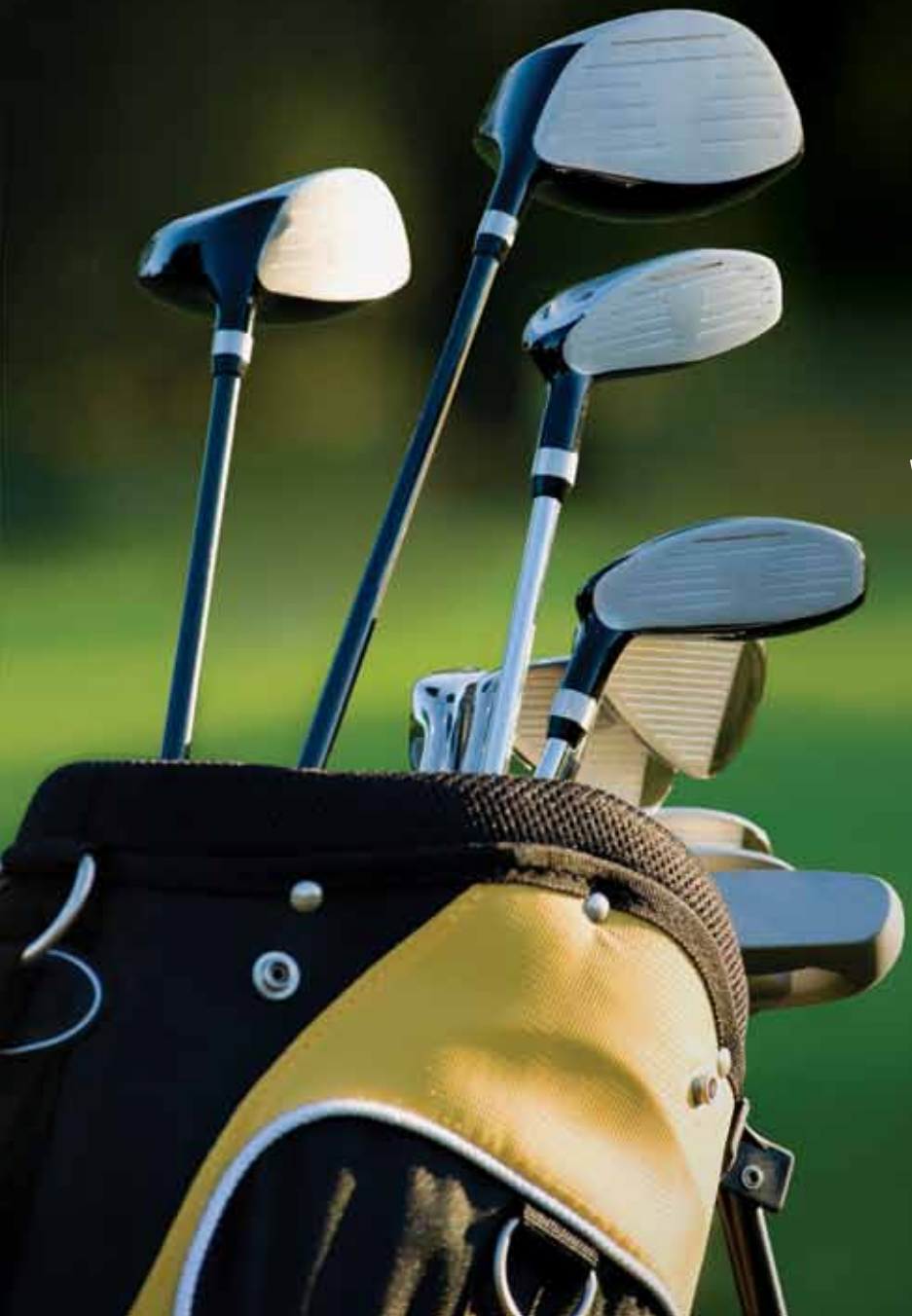
In the last fragment, Odysseus after having been in Ithaca for many years returns to Ilium to see the ruins of Troy. When he arrives, he is repelled by what he sees, the walls have been restored, the Trojans' homes have been rebuilt, shops and stalls sell drinking cups and statuettes, and numerous men walk around with sword and shield pretending they are Achilles or Hector or Patroclus or Agamemnon or Priam, reciting lines from *The Iliad*. Outside the city walls, Odysseus finds the shield of Achilles, forged by Hephaistos, the god of fire, which Odysseus had won in the games held to honor Achilles after his death but lost on his way home. He believes it is too heavy to take it back to Ithaca so he walks to the Ilium shore and throws it as far into the sea as he can and watches as it disappears into the wine dark sea while "[a]mong the dunes stood Athena, who still watched over him as best as she was able. She was relieved to see him sail back toward Ithaca. . . . She was grateful that his eyes were not as sharp as they had been and that . . . he had not noticed that the workmanship of the shield was crude, the figures awkward, that there had been countless other shields just like it for sale cheap among the stalls in Troy's ruins."

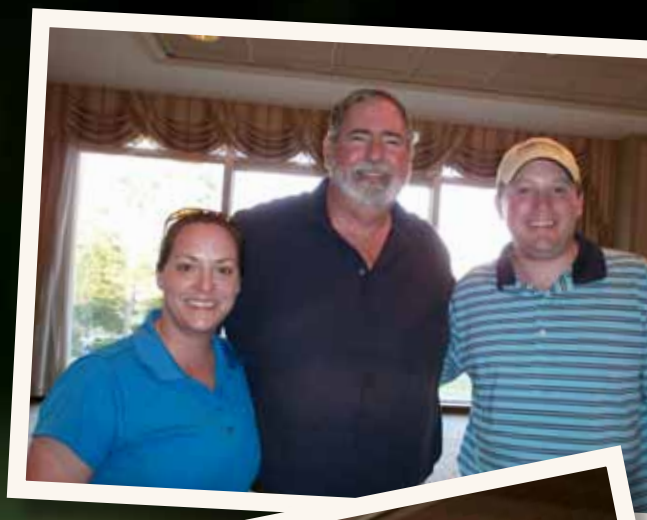
There is a line that arcs from Plato, Aristotle, Aeschylus, and Sophocles through Aquinas and Montesquieu and Locke to Madison and the founding fathers, who tried to establish a permanent form of political self-government. The origin of this line begins with Homer and the complex characters and fundamental themes of human nature that he gave us in *The Iliad* and *The Odyssey*. Ms. Miller and Mr. Mason have created signal works that enrich and bring this tradition home once again.

2012 GOLF TOURNAMENT

Scenes from the CABA Golf Tournament held on May 17th at Annandale.

(Continued on next page.)





2012 GOLF TOURNAMENT

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A History of Chancery & Its Equity:
From Medieval England to Today

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By Russell Fowler

The states of Tennessee, Delaware and Mississippi are the three states maintaining distinctly separate courts of equity: Chancery Court. Yet every jurisdiction, state and federal, maintains equity jurisprudence, even if more commonly administered in the same tribunal. Equity is a product of centuries of historical development, and an appreciation of history is required for its understanding. As Justice Holmes observed, "The life of the law has not been logic: it has been experience." [1]

The story of equity is one of centuries of struggle inherent in the dual nature of equity: the systematic restraint of its theory and the practical resourcefulness of its purpose.

The concept of equity originates in the law of ancient Greece and Rome. Aristotle pondered it much, and his view of equity has been described by the preeminent Aristotelian expert Sir Ernest Barker:

> *In a sense, equity is a correction of the law, where it fails on account of its generality: in another sense it is fulfilling of the real law. In either sense it gives the law that flexibility in which it has been accused of failing: through equity, law is alive to the play of circumstances; through equity, it can meet new stimulus with an answering reaction.*[2]

Aristotle further observed that equity is bound to follow legislative enactments. He said, "That laws properly enacted, should themselves define the issue of all cases as far as possible, and leave as little as possible to the discretion of the judges." [3]

Rome's magistrates, the praetors, administered through their precedential edicts the practical equity of the Roman Republic. The praetors' function was as follows:

They had to work with a primitive system of law based on the Twelve Tables, standard and rigid forms of procedure, and ancient custom. What they did was to build up alongside that primitive system more flexible intuitions, enabling the law of the Republic to keep pace with its economic and social development and its increasing contact with foreign peoples. This was the ius honorarium, the 'Roman Equity.' [4]

England's Chancery

However, it is to England that America owes its equity jurisprudence. Our equity's cradle, the High Court of Chancery, orientated as an offshoot of the King's Council or *Curia Regis* in medieval England. When the law courts failed to provide "an adequate remedy at law," often due to unfair or moribund legal technicalities or corruption, subjects sought the help of the king, "the fountain of justice." [5] The king first referred these petitions to his council, and later his chief minister, the powerful Lord Chancellor, handled them.[6] The chancellor was England's top bureaucrat, secretary of state,[7] and Keeper of the Seal.[8] All legal actions in the law courts began with the issuance of writs from his office, the Chancery.[9] In the early Middle Ages, Chancery, as the great secretariat and writ shop of government, operated in a corner of the hall where the king presided separated by a screen called a *cancella*. It is from this source that the chancellor received his name.[10] Until 2005, the Lord Chancellor presided over the House of Lords, by tradition sitting on a red sack of English wool before the throne. The Lord Chancellor still carries and presents the monarch with the official speech prepared by the government at the opening of each British Parliament.

By the year 1280, in the reign of Edward I, the Lord Chancellor clearly had his own court and established jurisdiction. Petitions, or "bills," were now addressed directly to the chancellor instead of the king.[11] In resolving cases, the chancellor, who acted as judge and jury, would look to the right and justice of matters and was neither bound by the oppressive formalities of the law courts nor intimidated by the powerful who could sometimes circumvent, corrupt, or bully the normal legal processes. Furthermore, unlike the law courts that only acted upon a defendant's property (*in rem*), he acted against the person of the respondent (*in personam*).[12] Thus, the chancellor's court was efficient and probing.

The chancellor could also construct new remedies or "extraordinary" solutions not offered by inflexible law court procedures and writs. His most powerful tools were the decree of injunction (a court order to do or not to do something) and the subpoena (a writ requiring personal appearance before him to answer questions). These were enforced by the irresistible contempt power. As said, the chancellor "carried the Bible in a mailed fist." [13] He could even enjoin the execution of judgments won in the law courts.[14] Chancery

1. Oliver Wendell Holmes Jr., *The Common Law* 1 (1881).
2. Ernest Baker, *The Political Thought of Plato and Aristotle* 333 (1959).
3. Aristotle, *Rhetoric* 1353a-b (J. H. Freese trans., Harvard 1926).
4. J. A. Crook, *Law and Life of Rome* 24 (1967).
5. L. B. Curzon, *English Legal History* 102 (2d ed. 1979).
6. See, e.g., Theodore F. T. Plucknett, *A Concise History of the Common Law* (1956).
7. See, e.g., L. B. Curzon, *English Legal History* 104 (2d ed. 1979).
8. See Charles Rembar, *The Law of the Land: The Evolution of Our Legal System* 282 (1980).
9. See, e.g., J. H. Baker, *An Introduction to English Legal History* 112-21 (1990).
10. W. L. Warren, *King John* 129 (1978).
11. See Bryce Lyon, *A Constitutional and Legal History of Medieval England* 616 (1980).
12. See, e.g., L. B. Curzon, *English Legal History* 106 (2d ed. 1979).
13. Dan B. Dobbs, *Handbook on the Law of Remedies* 31 (1973).
14. See L. B. Curzon, *English Legal History* 108 (2d ed. 1979).

became particularly adept in rooting out fraud and was known for protecting "widows and orphans," even against rich and powerful barons. Court sessions were held in Westminster Hall in London where the Lord Chancellor presided from his marble chair.

The High Court of Chancery became so popular that the chancellor had to rely greatly on the assistance of his skilled clerks, particularly his chief clerk, who originally just managed Chancery records or "rolls." The rolls were Chancery Court decrees written on sheepskin. The bottom of the last order was sewn to the top of the next and rolled.[15] These grew to an enormous size and number. The head clerk in charge of these cumbersome records was called the "Master of the Rolls." In an illiterate medieval world, Chancery, with its mysterious writings, writs, rolls, ribbons and wax, seemed almost magical to many, especially to the poor and powerless peasants it often helped because conscience and equity demanded it.[16]

Lord Chancellor Ellesmere wrote of Chancery Court's benevolence: "It is the refuge of the poor and afflicted, it is the alter and sanctuary for such as against the might of rich men and the countenance of great men . . . ." [17] Thus through countless decisions arose the maxim of equity: "Equity Delights in Equality" [18] or "Equality Is Equity," [19] which forbid Chancery from awarding preferences among creditors and, more importantly, making prejudicial "distinctions in personal rank, in social positions, in forms of procedure" [20] or between rich and poor.

The early chancellors were preeminent churchmen, the most literate of medieval society.[21] These clerics applied moral precepts of fairness to the deciding of cases (or "equity"). The chancellor became known as the "Keeper of the King's Conscience." Most notable of the churchmen chancellors was Cardinal Wolsey, who, although untrained in the law, had an abundance of confidence (and arrogance) and street smarts.[22] In order to combat deficiencies and technicalities in the law and frauds, chancellors created its law of

15. See Arthur R. Hogue, *Origins of the Common Law* 180-81 (1966).
16. See A. H. Marsh, *History of the Court of Chancery and the Rise and Development of the Doctrines of Equity* 47-48 (1890).
17. Id., at 48.
18. Henry R. Gibson, *Gibson's Suits in Chancery* § 2.14 (8th ed. 2004).
19. *Id.*
20. *Id.*
21. See Dan B. Dobbs, *Handbook on the Law of Remedies* 29 (1973).
22. See J. H. Baker, *An Introduction to English Legal History* 123 (1990).

trusts and the concept of equitable ownership of property. And while the common law had evolved in response to land disputes, Chancery's creative equity responded to the disputes occasioned by the growth of trade, urbanization, and new forms of wealth. Hence, chancellors would refine the law of corporations, partnerships, and contracts in recognition of these emerging concepts of property and duties, thereby facilitating commercialism. In this manner, equity once again facilitated economic development as it had in ancient Rome.

Recognizing the value of the distinction between law and equity, the adroit Henry V (1387-1422), of Agincourt and later Shakespeare fame, commanded that the clerks and apprentices in Chancery (known as the Office of the Six Clerks) should not socialize with the law court clerks and attorneys at law.[23] Lawyers devoted to Chancery practice appeared and were called "solicitors in equity" and were trained and housed at the Inns of Chancery on Chancery Lane in London. The Chancery clerks also worked at the Inns of Chancery. These clerks developed their own distinctive form of writing known as "Chancery hand." Chancery judicial business continued to grow and the Master of the Rolls would be assigned or referred accountings and other judicial tasks by the chancellor. Eventually the post would evolve into an appellate judgeship.

From 1529 to 1532, Sir Thomas More served as Lord Chancellor, the first non-cleric in the position. He would become the second English chancellor declared a saint. The first was Thomas Becket, who was also the first commoner to rise to importance in English history. Both Becket and More died martyrs for resisting the secular power of state-building kings named Henry. For our purposes, however, More is more important for successfully healing the rift between the law courts and Chancery.

A masterful lawyer, Chancellor More established binding Chancery procedural rules and brought the order of precedent to equity, especially concerning injunctions against common law proceedings and judgments.[24] Owing much to More, equity became a highly organized and predictable system of law. Most significant were its "maxims of equity," such as "Equity will not suffer a wrong without a remedy," "Equity will undo what fraud hath done," and "Equity follows the law." The maxims serve as the foundation of all equity jurisprudence,[25] which became a fully and carefully developed body of law grounded upon precedent. Sir William Blackstone lauded this fact:

> *[I]f a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to reside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible.*[26]

By the reign of James I, tension between the law courts and Chancery grew to a crisis when Sir Edward Coke, judge in the Court of

23. See G. L. Harris, *Henry V: The Practice of Kingship* 78 (1985).
24. See Gordon Rupp, *Thomas More: The King's Good Servant* 38 (1978).
25. See Henry R. Gibson, *Gibson's Suits in Chancery* § 2.01 (8th ed. 2008).
26. William Blackstone, *Commentaries on the Laws of England* 440 (15th ed., A. Strahan 1809).

King's Bench (the principal law court), overruled a Chancery Court decision of Lord Chancellor Ellesmere that had overridden a common law court judgment. Ellesmere appealed to King James. The king, guided by his attorney general, Francis Bacon, who later became Lord Chancellor, ruled that when decisions of the law courts and Chancery conflict, Chancery's decisions prevail. It was reasoned that Chancery, within the confines of equity jurisprudence, was created to achieve the king's justice, even if circumventing normal legal processes. Therefore, when in conflict, applicable equitable principles trump those of law.[27]

Following the English Civil War and the execution of Charles I, Chancery was almost abolished by Parliament because it was so associated with royal prerogative.[28] However, the Lord Protector, Oliver Cromwell, wanted to keep Chancery.[29] It was too ingrained in the English judicial system to be permanently dissolved,[30] but it was suspended for four years.[31] Following reforms by a three-lawyer commission,[32] a more procedurally controlled Chancery was introduced by Parliament.[33]

Another royal court that had grown out of the council like Chancery was the infamous Court of Star Chamber. It was a "court of criminal equity"[34] and handled important criminal cases such as treason and political corruption. The inquisitorial Star Chamber, which sometimes resorted to torture, got its name from the azure blue ceiling decorated with gilded stars where it met.[35] It did not survive the Civil War.[36] Yet while Star Chamber, like Charles I, was put to death for its abuses, Chancery, its sister concillar court, thrived as it experienced further "doctrinalization" under the great chancellorships of Nottingham, Hardwicke and Eldon. This was aided by published reports of decisions and the institution of appellate review by the House of Lords.[37] Star Chamber did not survive for the very reasons Chancery did. While Star Chamber was unbridled by rules and precedent, Chancery jurisprudence had shaken off arbitrary whim and rested upon fixed principles and internal constraints.

Although never as unpopular as Star Chamber, by the early nineteenth century, Chancery Court did become subject to criticism because of outrageous delays, moribund and inflexible rules, corruption and excessive fees.[38] Hence, ironically, Chancery had become the perpetrator of the judicial abuses it had been established to remedy.[39] In other words, equity had become inadequate. Reflecting the frustration, the ultraconservative Duke of Wellington, certainly no friend of reform in general, called Chancery "that damned court."[40] Various piecemeal reforms were enacted beginning in 1833 but proved insufficient.[41] One of the harshest critics was Charles Dickens. His novel Bleak House centers on the terrible cost and delays of Chancery in the Victorian era. As suits dragged on for generations, litigants turned into paupers. Dickens wrote of Chancery at the time: "Suffer any wrong that can be done you, rather than come here!"[42]

April Membership Meeting

Rick Cleveland spoke to an overflow crowd at the April CABA Membership Meeting. Pictured are David Maron, Laura Glaze, Rick Cleveland, and Meade Mitchell.

Equity Comes to America with the Settlers

A simplified Equity jurisprudence was brought to America with the English settlers, although in the early colonial period equity cases were often heard by the governors and their council. Later Chancery Courts were established, which was seen as an enlightened reform by lawyers and symbolized maturing American law. Robert Livingston, the Chancellor of New York, administered the first presidential oath of office to George Washington. One of the greatest Chancery lawyers of the period was Alexander Hamilton. In defending the proposed equitable jurisdiction of federal courts, Hamilton wrote in *The Federalist Papers:* "There is hardly a subject of litigation between individuals which may not involve those ingredients of fraud, accident, trust,

27. See, e g., Charles Rembar, *The Law of The Land: The Evolution of Our Legal System* 283-86 (1980).
28. See Christopher Hill, *God's Englishman: Oliver Cromwell and the English Revolution* 140 (1970).
29. *Id.*, at 142.
30. John H. Langbein, et al., *History of the Common Law: Development of Anglo-American Legal Institutions* 350 (2009).
31. Norman F. Cantor, *Imagining the Law* 287 (1997).
32. Christopher Hill, *God's Englishman: Oliver Cromwell and the English Revolution* 144-45 (1979).
33. See, *id.*, at 170.
34. See, e.g., L. B. Curzon, *English Legal History* 182 (2d ed. 1979).
35. See, *id.*, at 179-82..
36. John H. Langbein, et al., *History of the Common Law: Development of Anglo-American Legal Institutions* 348 (2009).
37. See *id.*, at 346-47.
38. See L. B. Curzon, *English Legal History* 128- 133 (2d. ed. 1979); Charles Rembar, *The Law of the Land: The Evolution of Our Legal System* 298-302 (1980).
39. See L. B. Curzon, *English Legal History* 128 (2d ed. 1979).
40. *Id.*, at 132
41. See *id.*, at 138.
42. Charles Dickens, *Bleak House* 3 (Oxford 1987) (1853).
43. *The Federalist* No. 83, at 512 (Alexander Hamilton) (Robert Scigliano ed. (2000).

or hardship, which would render the matter an object of equitable rather than legal jurisdiction, as the distinction is known and established in several of the States." [43]

Like during the English Civil War, Chancery and equity had become unpopular with many during the revolutionary era, this time being seen as too aristocratic, arbitrary, and British, but this began to change upon James Kent's assuming the chancellorship of New York. Kent (1763-1847) was a graceful legal writer, teacher, and Chancellor of New York from 1814 to 1823,[44] and "he became the most famous chancellor in American history." [45] According to Joseph Story, "Mr. Chancellor Kent brought to it the fullness of his own extraordinary learning, unconquerable diligence, and brilliant talents." [46] Kent frankly wrote:

> *I took the court as if it had been a new institution, and never before known to the United States. I had nothing to guide me, and was left at liberty to assume all such English Chancery powers and jurisdiction as I thought applicable … . This gave me grand scope. … I might once and a while be embarrassed by a technical rule, but I most always found principle suited to my views of the case.*[47]

Chancellor Kent rendered such well-reasoned opinions that they served to make equity relevant to a rapidly developing United States and restored trust in Chancery. Therefore, once again, as in Rome and medieval England, equity helped to make law responsive to new societal needs. Chancellor Kent's most famous work was his 1827 four-volume *Commentaries on American Law*, which became a primary legal authority and textbook for law students for generations.[48] Oliver Wendell Holmes Jr. edited the 12th edition in 1873.

Of monumental influence on American lawyers, judges and legislators were the legal treatises of Harvard law professor and United States Supreme Court Justice Joseph Story (1775-1845) of Marblehead, Mass. The gregarious Story, appointed by James Madison to the high court at the age of 32 after a stint in Congress, was John Marshall's right hand, a legal anglophile, and prolific writer and erstwhile poet. The subjects of his legal volumes included equity jurisprudence and procedure, bailments, conflict of laws, agency, partnership, pleadings, bills of exchange, promissory notes, and constitutional law.

In opposition to the codification movement seeking to replace the common law with a uniform code, Story's books Americanized[49] and modernized[50] the common law, including equity, and transmitted legal principles to an isolated frontier far from law libraries containing the precedents that are the fuel of a common law system. As the penultimate authority of equity, his volumes on the subject are so influential that they are cited by British courts to this day. Many basic rules of state law are traceable back through the case law to an original citation to a work of Story.

Through his writings alone, "no man has done more to create American law." [51] His influence on early constitutional law was also tremendous, and the images of Marshall and Story appropriately adorn the bronze doors of the Supreme Court building.

Defending equity in America, Justice Story painstakingly demonstrated that equity is neither the ever-changing will of a favorably situated chancellor-politician presiding at the moment, nor is it amorphous ideals of "natural justice," [52] but is predictable in substance and procedure because it is completely infused and bound by precedent like the rest of the common law. Moreover, he instructed that equity is more than a set of unique and useful remedies; it is a system or "science" of law that includes types of suits, defenses, estoppels, rules of adjudication, and carefully designed processes. Story further argued that the common law cannot function without equity, and equity cannot exist without the common law. They are mutually dependent.[53] In addition to being controlled by procedure and precedent, Story stressed that equity is always grounded by the fundamental rule: "Whenever a complete, certain, and adequate remedy exists at law, courts of equity have generally no jurisdiction." [54] Overall, Story exerted much of his great legal talent in proving a lie the famous words of the English Commonwealth era lawyer and parliamentarian John Selden:

> *Equity is a roguish thing: for law we have measure, know what to trust too. Equity is according to ye conscience of him that is Chancellor, and as it is larger or narrower so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would be this. One Chancellor has a long foot another a short foot, a third an indifferent foot; 'tis the same thing in the Chancellor's Conscience.*[55]

Justice Story abhorred Selden's vision of equity, not simply for the arbitrariness inflicted upon individual litigants, but also for the danger presented to society:

> *If…a Court of Equity…did possess the unbounded jurisdiction, which has been thus generally ascertained to it, or correcting, controlling, moderating, and even superseding the law, and enforcing all the rights, as well as the charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument*

44. See Lawrence M. Friedman, *A History of American Law* 331 (1985).
45. Darien A. McWhirter, *The Legal 100: A Ranking of the Individuals Who Have Most Influenced the Law* 83 (1998).
46. Joseph Story, 1 *Equity Jurisprudence* 62-63 (1st ed. 1836).
47. Lawrence M. Friedman, A History of American Law 136 (2d ed. 1985).
48. See Darien A. McWhirter, *The Legal 100: A Ranking of the Individuals Who Have Most Influenced the Law* 85 (1998).
49. See Grant Gilmore, *The Ages of American Law* 27-28 (1977).
50. See Morton J. Horwitz, *The Transformation of American Law* 181 (1977).
51. *Cambridge Biographical Dictionary* 1406 (Magnus Magnusson, ed., 1990).
52. See Morton J. Horwitz, *The Transformation of American Law* 265 (1977).
53. See generally Joseph Story, *The Miscellaneous Writings of Joseph Story "Chancery Jurisdiction"* 148-79 (William W. Story, ed., Lawbook Exchange 2000) (1852) (a discussion by Story in defense of equity).
54. *Id.*, at 173-74.
55. John Selden, *Table Talk* 42 (Frederick Pollock, ed., 1927).

of arbitrary power, that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the judge, acting, if you please, arbitrio et bono, according to his own notions and conscience, but still acting with a despotic and sovereign authority.[56]

Like his heroes in equity, Francis Bacon [57] and Alexander Hamilton,[58] Joseph Story would vigorously defend separate state courts of law and equity. He did so not simply upon the judicial expertise separation promoted. He asserted that merger of law and equity would endanger the extraordinary nature of equitable remedies. Law court judges would be tempted to resort to the more coercive equitable remedies when legal remedies are adequate, thereby undermining the predictability and valuable constraints of the common law. Likewise, common law rules and procedure would undermine the flexibility of equity and perhaps defeat the purpose it was intended to serve.[59] This value applies to the administration of law and equity within the same tribunal.

Finally, Justice Story saw "rival coordinate courts" [60] of law and equity as internal "checks and balances to each other," [61] within the judicial branch of government. Hence, Story explained equity, a legal institution once suffering from an image of being too undemocratic, as having values commensurate with American ideals of constitutionalism. Other important American scholars of equity jurisprudence from then to now include John Norton Pomeroy, Henry L. McClintock, Edward D. Re, Dan B. Dobbs and Doug Rendleman.

In Great Britain, Parliament enacted the Supreme Court of the Judicature Act of 1875.[62] This measure corrected the problems in British Chancery bemoaned by Jeremy Bentham, Charles Dickens, and other judicial reformers. The enactments and strong chancellors caused Chancery to retrieve its zeal for creative and inquisitive justice. As stated in a 1921 British law court decision: "If in 1815 the common law halted outside the bankers' door, by 1879 equity had had the courage to lift the latch, walk in and examine the books." [63] The common law courts and Chancery were merged into one court: The High Court of Justice. However, jurisdiction of the Chancery Court was placed in the Chancery Division of the High Court and thereby the distinction between law and equity survived.[64] This would have pleased Joseph Story.

U.S. Equity Reform

The United States also experienced reform of equity. Under the able leadership of Supreme Court Justice Horace H. Lurton, who had served as chancellor in Tennessee and traveled to England to study equity practice in 1911, the federal "Equity Rules" achieved much needed revision and precision.[65] Because of perceived anti-labor abuse, legislation limited injunctions against labor strikes such as the 1932 federal Norris-La Guardia Act.[66] Moreover, amid controversy, by mid-century, instead of only providing relief to individuals in private disputes, injunctions were accessed to implement public policy. This involved judges in issues never envisioned by Story and the chancellors of old, such as the protection of constitutional and civil rights through decrees, assuming control of prisons and requiring and managing desegregation of public schools.

Some legal scholars would rebuke this public use of injunctive relief, as best represented by Professor Gary L. McDowell of Dickenson College in his 1982 book, *Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy*.[67] Contrarily, governmental equity was enthusiastically encouraged by Professor Peter Charles Hoffer of the University of Georgia in his 1990 book, *The Law's Conscience: Equitable Constitutionalism in America*.[68] Both professors argued that equity's history, purpose and philosophy supported their position. While McDowell saw equity's new public or "sociological" uses as violating its basic constraining concepts established by its history and its procedure, Hoffer believed that by freeing equity from the imposition of its procedural compressions, it could bring needed equitable ideals of fairness, innovation, trusteeship, equality and reality to constitutional interpretation.

McDowell dissented from these non-traditional injunctions as disregarding the "no adequate remedy at law" requirement, believing their admirable aims achievable through money judgments and processes that are more democratic. Hoffer countered that these new injunctions were an effective and democratic means of fulfilling the Constitution's equitable goals due to the inadequacy of other avenues. Both professors pointed to *Brown v. Board of Education* [69] (Brown II) as the exemplar of their thesis. Thus, McDowell faulted and Hoffer praised Brown's use of public injunctive relief, a difference rooted in their differing views of the meaning of equity itself: McDowell seeing equity as a limited system of private law and Hoffer as the animating and broader spirit of all law, including the highest law of the Constitution.

In addition to the substantive changes in equity, profound structural changes took place as most states merged their law and equity courts, usually renamed "Superior Court." Despite the almost universal success of merger efforts, there were notable defeats, such as the ill-fated merger campaign led by Gov. Andrew Johnson in Tennessee in the 1850s, with its chief argument being procedural efficiency and economy.[70]

56. Joseph Story, 1 *Commentaries on Equity Jurisprudence* 21 (3d ed. 1842)
57. See Lawrence M. Friedman, *A History of American Law* 331 (1985).
58. *The Federalist* No. 83, at 540 (Alexander Hamilton) (Robert Scigliano, ed., 2000).
59. See generally Joseph Story, *The Miscellaneous Writings of Joseph Story "Chancery Jurisdiction"* 168-70 (William W. Story, ed., Lawbook Exchange 2000) (1852).
60. See Joseph Story, *The Miscellaneous Writings of Joseph Story "Chancery Jurisdiction"* 172 (William W. Story, ed., Lawbook Exchange 2000) (1852).
61. *Id*.
62. L. B. Curzon, *English Legal History* 139 (2d ed. 1979).
63. *Banque Belge pour L'Etranger v. Hambrouck*, 1 K.B. 321, 335 (1921).
64. See L. B. Curzon, *English Legal History* 139-40 (2d ed. 1979).
65. See *The Supreme Court Justices* 305 (Clare Cushman, ed. 1993).
66. 29 U.S.C. § 107.
67. Gary L. Mcdowell, *Equity and the Constitution* (Univ. of Chicago Press 1982).
68. Peter Charles Hoffer, *The Law's Conscience: Equitable Constitutionalism in America* (Univ. of North Carolina Press 1990).
69. 349 U.S. 294 (1955).
70. See Andrew Johnson, "Legislative Message of Dec. 19, 1853," in 4 *Messages of the Governors of Tennessee* 555-57 (Robert H. White, ed. 1957).
71. Ark. Const. amend. 80 6(A) (2001).

Chancery Today

Today only three states maintain distinctly separate Chancery Courts: Tennessee, Mississippi and Delaware, the last of which is known for its expertise in corporate law. Other states, such as New Jersey, have separate equity divisions within trial courts of general jurisdiction. Despite widespread merger, most recently in Arkansas in 2001,[71] the United States has produced a number of influential chancellors over two centuries. They include Robert Livingston, James Kent and Rueben Walworth of New York; Kensey Johns Jr. and Collins Seitz of Delaware; and Horace Lurton and Henry Gibson of Tennessee.

The current High Lord Chancellor of England is the lawyer and politician Kenneth Clarke, and the office of Lord Chancellor remains a vital post in Britain. His office is the second highest ranking of the great officers of state. The chancellor oversees the operation of the courts but, as mentioned, since 2005, he is no longer Speaker of the House of Lords. The chancellor is now, ironically, a member of the House of Commons and in the Cabinet as the powerful Secretary of State for Justice; therefore he continues as head of the English judiciary, but his adjudicatory duties have ceased. Today the holder of the new judgeship of "Chancellor of the High Court" presides over the Chancery Division of the High Court, currently located in the Royal Courts of Justice building with the other civil courts on the Strand near St. Paul's Cathedral. However, it will soon be moving to new quarters on Chancery Lane in London, near the site of the medieval Inns of Chancery. Accordingly, law and equity remain substantively, procedurally, and structurally separate in England. Most of English Chancery's litigation docket is crowded with contract and partnership disputes, and the injunction is a frequent remedy.[72]

Repeatedly proving true the words of Britain's greatest twentieth-century jurist,[73] Alfred Lord Denning, that "equity is not past the age of child-bearing,"[74] new equitable answers appear for novel problems of evolving complex economies, just as equity's imaginative responses to the needs of emerging commercialism of the Tudor age. Originating in Britain and now regularly sought in international business disputes, the Mareva injunction, which freezes assets in aid of a potential money judgment, is a good example of equity's continued inventiveness. It is similar to an attachment and entails adequacy of remedies at law and trans-jurisdictional perplexities. Of greater liking to traditionalists, in 1999 the United States Supreme Court rejected the asset-freezing injunction in federal courts in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund Inc.*[75]

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72. See Leonard Freedman, *Politics and Policy in Britain* 189 (1996).
73. Darien A. McWhirter, *The Legal 100: A Ranking of the Individuals Who Have Most Influenced the Law* 346 (1998).
74. *Eves v. Eves*, 3 All E.R. 768, 771 (1975).
75. 527 U.S. 308 (1999).

A Brief History of Mississippi's Chancery Court

By Kate Margolis

Prior to statehood, the Mississippi Territory already had a system of multi-tiered courts adapted from the Northwest Territory, but no separate chancery court. *See* Michael H. Hoffheimer, *Mississippi Courts*: 1790-1868, 65 Miss. L.J. 99, 116 (1995) (hereafter *Miss. Courts*). During Mississippi's first constitutional convention of 1817, former territorial judge George Poindexter, who led the drafting, persuaded the committee to authorize the state legislature to create a chancery court "with exclusive original equity jurisdiction." James W. Shelson, *Mississippi Chancery Practice* § 14 (West 2011 ed.) (hereafter *Miss. Chancery Practice*); *see Miss. Courts*, at n.72. On November 23, 1821, during Poindexter's subsequent service as governor, the legislature established a "superior court of chancery" made up of one chancellor (Joshua G. Clarke) who would sit in two districts: in Adams County for the western district and Marion County for the eastern district, and by 1827, Mississippi had four chancery districts. *Miss. Courts*, at 125 & n.106; *Miss. Chancery Practice*, at § 14.

John A. Quitman succeeded Chancellor Clarke in 1828; Quitman was serving as governor in 1832 during the second constitutional convention. *Miss. Chancery Practice*, at § 16. The 1832 constitution gave the chancery court the power to grant divorces (without the previously required two-thirds approval of the legislature), and provided for the popular election of judges. *Miss. Courts*, at 139-140 & n.192. The provision for only one chancellor remained. *Id.* at 149. However, the new constitution endowed circuit courts with concurrent jurisdiction over equity matters of $500 or less, as well as divorces and mortgages. *Id.* at 146 This was meant to ease the burden on litigants who were hard pressed to attend the sessions of the chancery court, which were held in limited venues. *Miss. Chancery Practice*, at § 16. Even so, the chancellor likely had a tremendous case load; the legislature created three inferior

> *"[Mississippi] chancery practitioners relied on 'the general law of equity' established in England and other states."*

chancery courts—for a northern, southern and middle district—between 1838 and 1852. *Miss. Courts*, at 150-151; *Miss. Chancery Practice*, at § 16.

Until the appearance of Mississippi-specific chancery manuals in the 1900s, chancery practitioners relied on "the general law of equity" established in England and other states; in the early years in particular, Mississippi's chancellors relied heavily on the great Chancellor James Kent of New York, even establishing a rule that chancery practice should conform to the practice of New York unless inconsistent with an established Mississippi rule. *Miss. Chancery Practice*, at § 15; Michael H. Hoffheimer, *et al., Pre-1900 Mississippi Legal Authority*, 73 Miss. L.J. 195, 204 & n.26 (2003).

Due to continued growth of the chancery court case load and limited modes of transportation, the constitution was amended in 1856 to provide a chancery court in each county administered by circuit judges; in 1857, the legislature abolished the separate chancery courts altogether and gave full equity jurisdiction to the circuit courts. *Miss. Chancery Practice*, at § 16; *Miss. Courts*, at 148, 153. However, the circuit courts would typically try jury cases first, leaving equity cases unresolved when the court adjourned at the end of a term. *Miss. Chancery Practice*, at § 17. This unsatisfactory result led to the separate chancery courts being reestablished in the 1868 constitution, with chancery court to be held in every county, where they have remained to this day. *Id.*

The primary drafter of the article on the judiciary was Mississippi's federal judge, Robert A. Hill, who participated at the insistence of political associates controlling the convention. *Id.* Judge Hill did away with longstanding "primitive tribunals," such as local probate courts (which had traditionally been administered by those "unlearned in the law"), making the jurisdiction of Mississippi's chancery courts "as broad as, if not broader than" that of any chancery court in England. *Id.* at § 18; *see Miss. Courts*, at 170. The structure of the court system has remained basically intact since that time. *Miss. Courts*, at 169-170.

Besides the restoration of judicial elections—which had been eliminated in 1868 in favor of gubernatorial appointment—the most significant change in the 1890 Constitution was section 147, providing that civil judgments should not be reversed solely for jurisdictional error as to which court—chancery or circuit—should have heard the case. *Miss. Chancery Practice*, at § 19. The difficulty in determining the nature of a case as legal or equitable has led some to argue for unification of our court system. *See, e.g.,* Joseph M. Gianola, Jr., *Comment: Changing Jurisdiction in Chancery Court*, 25 Miss. C. L. Rev. 109, 109 (2005) (arguing "the time may be now for Mississippi to join forty-seven other states in allowing all equity matters to be heard in circuit court"). Our neighbors in Arkansas are the most recent to make that change. *See* Larry Brady & J.D. Gingerich, *A Practitioner's Guide to Arkansas's New Judicial Article*, 24 U. Ark. Little Rock L. Rev. 715, 719 (2002). However, by all accounts, along with our sister states of Tennessee and Delaware, Mississippi's rich tradition of chancery court practice is likely to endure well into the 21st century.