



BATON ROUGE BAR ASSOCIATION • JULY 27-29, 2017  
HILTON SANDESTIN BEACH GOLF RESORT & SPA

# BIG BROTHER: PROFESSIONALISM GOES TO THE MOVIES\*

PANEL:

JUDGE JAMES J. BRADY, MAGISTRATE JUDGE ERIN WILDER-DOOMES,  
JUDGE CARL BARBIER AND JUDGE JAY ZAINY

MODERATOR:

KATIA DESROULEAUX BOWMAN

**THURSDAY, JULY 27, 2017 • 4:45 - 5:45 PM**

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## CODE OF PROFESSIONALISM

My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.

- ◆ I will clearly identify for other counsel changes I have made in documents submitted to me.
- ◆ I will conduct myself with dignity, civility, courtesy and a sense of fair play.
- ◆ I will not abuse or misuse the law, its procedures or the participants in the judicial process.
- ◆ I will consult with other counsel whenever scheduling procedures are required and will be cooperative in scheduling discovery, hearings, the testimony of witnesses and in the handling of the entire course of any legal matter.
- ◆ I will not file or oppose pleadings, conduct discovery or utilize any course of conduct for the purpose of undue delay or harassment of any other counsel or party. I will allow counsel fair opportunity to respond and will grant reasonable requests for extensions of time.
- ◆ I will not engage in personal attacks on other counsel or the court. I will support my profession's efforts to enforce its disciplinary rules and will not make unfounded allegations of unethical conduct about other counsel.
- ◆ I will not use the threat of sanctions as a litigation tactic.
- ◆ I will cooperate with counsel and the court to reduce the cost of litigation and will readily stipulate to all matters not in dispute.
- ◆ I will be punctual in my communication with clients, other counsel and the court, and in honoring scheduled appearances.

*Following approval by the Louisiana State Bar Association House of Delegates and Board of Governors at the Mid-Year Meeting, and approval by the Supreme Court of Louisiana on Jan. 10, 1992, the Code of Professionalism was adopted for the membership. The Code originated out of the Professionalism and Quality of Life Committee.*

# Reel Courtroom Dramas

by Donald G. Kempf, Jr.

"[T]he moviemaker's art is not all that different from the lawyer's—especially the courtroom advocate's."

—Hon. Alex Kozinski

In their book *Reel Justice*, Paul Bergman and Michael Asimow claim that audiences have an enduring love affair with trial movies. If that is true—and I think it is—then trial lawyers are, by far, the most amorous slice of the audience. To some that may seem strange. A trial lawyer rushing off to see a celluloid courtroom drama is something of a busman's holiday. But it is much more than that. Relating to the movie as only trial lawyers can, we conjure up images of ourselves on the silver screen. As a movie unfolds, we see ourselves as Clarence Darrow (Spencer Tracy) conducting an intricate, entertaining, and ultimately devastating cross-examination of William Jennings Bryan (Frederic March) in *Inherit the Wind*. Or maybe we fancy ourselves as Lieutenant Kaffee (Tom Cruise), adroitly maneuvering Colonel Jessep (Jack Nicholson) into blurting out "You can't handle the truth!" and then confessing from the witness stand in *A Few Good Men*.

Better still, as John Denvir noted in his introduction to *Legal Reelism*, we can learn a great deal about law from watching movies. Even for the seasoned practitioner, most cases settle. And when they do not, it takes a long time to get from complaint to verdict. For the aspiring young trial lawyer, opportunities for time in the courtroom can be few and far between, which is why all lawyers (and especially younger ones), in addition to seeking opportunities for actual courtroom experience, should take advantage of as many proxies as possible. Never pass up a chance to sit in the back of a courtroom and watch one of the legends of the bar on trial. Never skip participation in a trial advocacy program if you can fit it into your schedule. Never fail to read a good book about law—be it a biography of a great trial lawyer or judge, the lat-

est courtroom novel by John Grisham or Scott Turow, or a collection of excerpts from or stories about the great trials in history. And never, never miss an opportunity to take in a good courtroom flick. Or even a bad one, for that matter.

Opportunities abound. In fact, lawyers and courtroom scenes appeared in movies even before sound. One of the best-known silent film examples features Maria Falconetti on trial in the 1928 film *The Passion of Joan of Arc*. Early talkies included *The Case of the Howling Dog* (1934), the first Perry Mason film, and *Disorder in the Court* (1936), in which the Three Stooges are witnesses at a murder trial. The Stooges disrupt the proceedings, of course, with slapstick antics, but not before they manage to save the day for a nightclub dancer who has been wrongly accused. This is the movie, in fact, that gave birth to the classic Stooze line, "I'm a victim of soicumstance!"

The reaction of non-lawyers to courtroom movies has always intrigued me. Many take a dim view of lawyers—possibly because we refer to them as non-lawyers. Laymen dread trips to the lawyer's office, and they try everything they can to avoid jury duty. But they flock to see legal stories on film. Oftentimes, their perceptions about what is or is not realistic are precisely backward. Lots of people, for example, have told me that the scene in which Atticus Finch (Gregory Peck) cross-examines the complaining witness in *To Kill a Mockingbird* is their favorite courtroom scene because it is so "realistic." The highlight of that cross-examination is when Finch stops questioning the witness, asks his own client (the defendant) to stand up, and then proceeds not only to interrogate him but to enlist his help in conducting a demonstration—all without any objection from the prosecution. On the other hand, many of these same people have told me that they thoroughly enjoyed Joe Pesci's performance as defense counsel Vincent Gambini in *My Cousin Vinny*, although they recognized it was "unrealistic." In fact, many parts of Gambini's hilarious direct and cross-examinations are model exercises that even the best at the bar would do well to emulate.

If trial lawyers are unrepentant moviegoers when it comes to

Donald G. Kempf, Jr., is executive vice president, chief legal officer, and secretary of Morgan Stanley. He was formerly a partner with Kirkland & Ellis in Chicago, Illinois. Lee M. Kurman of the Morgan Stanley Law Division assisted in the preparation of this article.

client, a judge who has been charged with rape, and explains to the jury that "the prosecution is not going to get that man today—no—because *I'm going to get him!*" He then proceeds to tell the jury that his client "should go right to \$%\*! jail!"

Closing argument is where it all comes together—especially in reel life. From as long ago as Edward Arnold in *The Devil and Daniel Webster* (1941) and Katharine Hepburn in *Adam's Rib* (1949) to as recently as Keanu Reeves in *Devil's Advocate* (1997) and Jim Carrey in *Liar Liar* (1997), there is a special magic to the celluloid closing argument. In reel life, lawyers rely on the evidence and the reasons why it supports their clients' positions. In reel life, however, there are no such constraints. Thus, in *How to Murder Your Wife*, pro se defendant Jack Lemmon bears a murder rap by confessing to the crime during his closing argument. And in David Mamet's screenplay for *The Verdict*, where the judge has stricken—but the jury has seen—his best evidence, Paul Newman wins by simply philosophizing about the meaning of justice and the role of juries. Newman reminds the jurors that "today, you are the law—not some book, not the lawyers, not a marble statue or the trappings of the court—see, those are just symbols of our desire to be just." He then closes by saying, "In my religion, they say act as if ye had faith. Faith will be given to you. If we are to have faith in justice, we need only to believe in ourselves and act with justice. See, I believe there is justice in our hearts."

Over the years, I have found that some of the most memorable scenes from movies that deal with the law do not fit into any of the five categories that I have discussed. There is no finer example of an "other" category than the classic jury deliberation in *12 Angry Men*, in which a jury that includes Henry Fonda, Lee J. Cobb, Ed Begley, E. G. Marshall, Jack Warden, Martin Balsam, Jack Klugman, and Robert Webber decides the fate of a young minority defendant accused of killing his abusive father. There are no comparable scenes in other movies.

Just as the Motion Picture Academy has come up with the Jean Hersholt Humanitarian Award and the Irving G. Thalberg Memorial Award, celluloid courtroom dramas lend themselves to special awards, too. For instance, I think there can be only one winner of the Clarence Darrow Plea Bargain Award: the hilariously unusual deal Eugene Levy cuts with the presiding judge on behalf of his Charles Manson-like client in *Armed and Dangerous*, after approaching the bench and confiding to the judge that his client has threatened to kill him if he goes to jail. "Now, I don't usually believe every psychopath I defend," Levy says, "but I happen to believe this guy." And it would be hard to give the Edward Bennett Williams Voir Dire Award to anyone other than Spencer Tracy in *Inherit the Wind*, who gently probes the religious (and other) beliefs of potential jurors in a highly charged and overheated courtroom. My personal all-time favorite, though, is the Oliver Wendell Holmes Meaning of Law Award, which can go only to Paul Scofield for his Academy Award-winning performance as Sir Thomas More in writer Robert Bolt's 1966 *A Man for All Seasons*. More has just declined to offer a job to Richard Rich (who will later give perjured testimony that leads to More's execution). As Rich leaves the room, More's family urges that Rich be arrested. "For what?" More asks. This follows:

Margaret (More's daughter): Father, that man's bad.

More: There's no law against that.

Roper (More's son-in-law): There is! God's law!

More: Then God can arrest him.

Alice (More's wife): While you talk, he's gone!

More: And go he should if he were the Devil himself, until he broke the law.

Roper: So—Now we'd give the Devil benefit of law!

More: Yes, what would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

More: Oh. And when the last law was down and the Devil turned round on you, where would you hide, Roper, the laws all being flat?—This country's planted thick with laws from coast to coast—Man's laws, not God's, and if you cut them down—and you're just the man to do it—do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law. For my own safety's sake.

But enough of entertainment. Can there ever be an intersection of reel life and real life? Of course. I allude to movies in the courtroom all the time—sometimes by design, sometimes spontaneously. Once I was defending against a trade dress infringement charge where the issue was whether consumers would confuse two similar products and buy my client's, believing it to be the plaintiff's. My client had been asked a series of questions on cross-examination designed to show that, while the plaintiff's product was quite attractive, my client's allegedly infringing product was really unattrac-

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tive. In my closing argument, I came back to that testimony: "Ladies and gentlemen of the jury, ask yourself this: If our product is so ugly and theirs is so beautiful, why do they think consumers will confuse the two? Nobody confuses the Wicked Witch with Snow White, and nobody confuses me with Robert Redford."

In another case, I was conducting a direct examination. As usual (where the court permits), I was moving about during my examination. I had stopped for a moment and asked several questions from one spot. Defense counsel objected: "Your Honor, Mr. Kempf is deliberately blocking my line of sight to the witness." I said, "Come on, counsel, we've all seen *Anatomy of a Murder*. You can do better than that." The judge was already laughing, and he immediately called a recess. Upon returning, the judge explained that Escanaba, Michigan (where the film's author was a judge and where the story was set), was his own hometown, and that he had had precisely the same reaction I did—even before I said anything. Interestingly, none of the young lawyers in the courtroom had seen *Anatomy of a Murder*. They did not have the faintest idea what we were talking about. Needless to say, that night there was a run on the local video store.

Nor is the productive use of movies limited to the court-

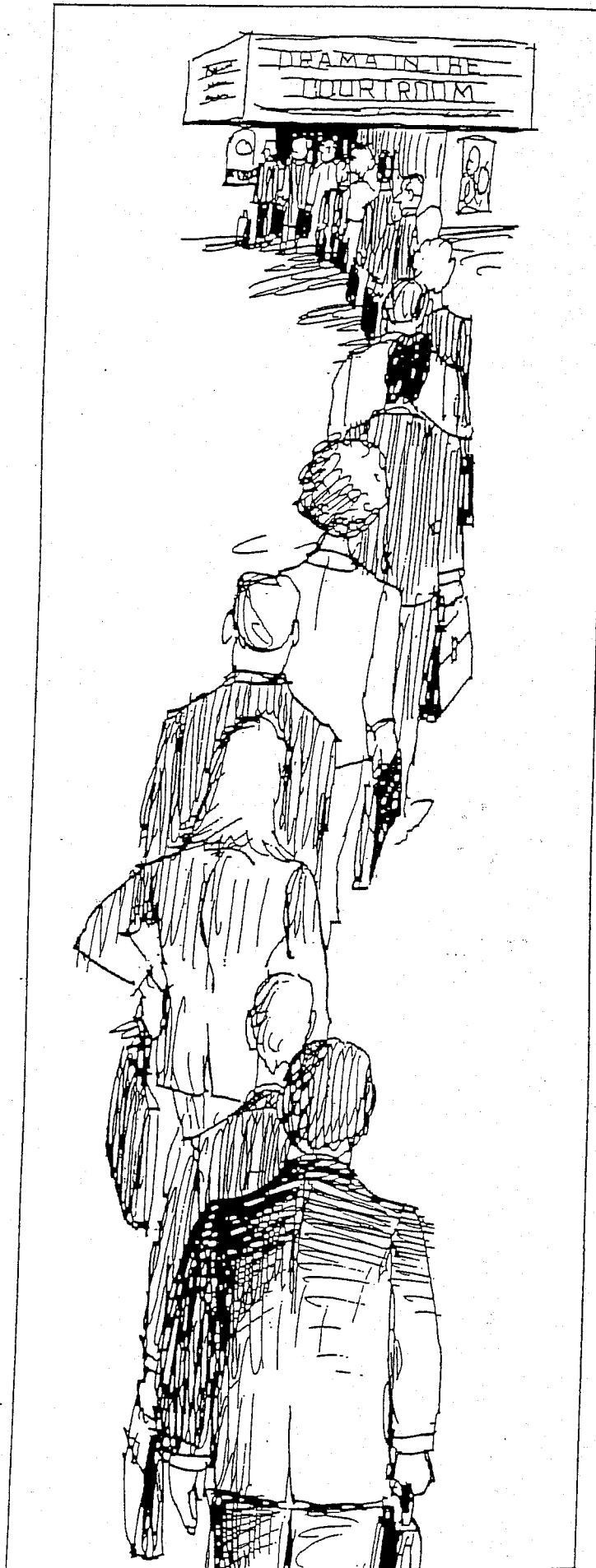
courtroom drama buffs, they provide the perfect setting for more in-depth coverage of what happens in the courtroom. Thus, for example, while the trial is just one scene in the film *The Caine Mutiny*, it is the entirety of the play, *The Caine Mutiny Court-Martial*, by Herman Wouk. Moreover, the range of learning opportunities from a single work can be more expansive on the stage than in the movie. No matter how many times you see *The Caine Mutiny*, for example, Jose Ferrer will always be defense attorney Lt. Barney Greenwald. And his powerful cross-examination of Captain Queeg will always unfold in precisely the same manner. On the stage, however, the Lt. Barney Greenwald of Henry Fonda (who played the role when *The Caine Mutiny Court-Martial* opened on Broadway in 1954) could vary from performance to performance. Even greater insights could be gleaned over the years as Barry Sullivan and a host of others took their turn at the role. And it is interesting to watch the interplay between Greenwald and his client, Lt. Stephen Maryk, change as the Maryk role passed from Van Johnson (in the film) to John Hodiak to Broadway Joe Namath (on the stage). (Namath played the role of Maryk in Circle-in-the-Square's 1983 production.)

Back in 1959, when I was a young officer in the Marine Corps, I made a trip to New York from Quantico, Virginia, to see George C. Scott perform his Tony-winning role as the prosecuting attorney in *The Andersonville Trial*. I saw it three times. He was always riveting, but never quite the same.

I know better than most the impact a powerful courtroom drama can have on career development. Indeed, in my case, it was a theatrical drama that was responsible for my subsequent career as a trial lawyer. Ayn Rand wrote a play, *Night of January 16th*, in which all of the action takes place in the New York City Supreme Court, where Karen Andre is on trial for the murder of her lover, Bjorn Faulkner. The play opened on Broadway in 1935. It also opened on a high school stage in Chicago in 1955 during my senior year. I ended up with the role of defense attorney Stevens. Interestingly, each night 12 people were selected from the audience to serve as jurors. After these jurors saw and heard the evidence, summations, and the judge's charge, they adjourned briefly and decided upon a verdict. The play then had two different endings that depended upon whether the jury voted guilty or not guilty.

Up to that point in my life, I had never even met a lawyer. My father was a fruit and vegetable salesman at Chicago's produce-selling South Water Market. My mother was an actress and writer, however, and she had worked with me on such endeavors since I was a youngster. She told me there was something going on in this particular play that was different from what I usually did. Specifically, she said that, while in most plays my overriding objective was to turn in a good performance, in this play my overriding objective was to secure the acquittal of Karen Andre. "You should go to law school and become a trial lawyer," she said. And so I did.

There are many wonderful courtroom dramas on stage. With ever-changing casts, they can be seen and savored repeatedly over the years. Many have been done both on stage and in film. Two of my favorites are *The Dock Brief* and *Compulsion*. *The Dock Brief* is a two-person play in which Morgenhall, "an unsuccessful barrister," is visiting his client, Fowle, "an unsuccessful criminal," in his prison cell. While there, they act out all of the things that could occur at the upcoming trial, with everything comically going awry. Peter Sellers reprised the role of Morgenhall in the film, which I



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# Reel Courtroom

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that once a soul gets to Hell, it will not leave. Therefore, no souls are leaving. As for how many souls are entering Hell, let's look at the different religions that exist in the world today. Some state that if you are not a member of their religion, you will go to Hell. Since several religions harbor this belief and since people don't belong to more than one religion, we can project that all souls go to Hell. With birth and death rates as they are, we can expect the number of souls in Hell to increase exponentially.

Now, we look at the rate of change of the volume in Hell because, according to Boyle's Law, the volume of Hell would have to expand as souls are added in order for the temperature and pressure to stay the same. This allows two possibilities: 1. If Hell is expanding at a slower rate than the rate at which souls enter, then the temperature and pressure will increase until *all Hell breaks loose*. 2. Of course, if Hell is expanding at a rate faster than the increase of souls, then the temperature and pressure will drop until *Hell freezes over*. So which is it?

If we accept the postulate given to me by Ms. Teresa Banyan during my Freshman year that, "it will be a cold day in Hell before I sleep with you!" and take into account that I still have not succeeded in having sex with her, then #2 cannot be true, and thus I am sure that Hell is exothermic and will not freeze.

The student received the only A on the exam. This story may or may not be true, of course, but, if it is, then I think the young man may be wasting his talent as a scientist. Anyone who can spin a tale that good on the spur of the moment has great potential as a trial lawyer—or, at the very least, a screenwriter. □

# The Last **WORD**

By Judge Jay C. Zainey

FLOODING, SOLACE & SENIOR LAWYERS

When I was asked to write this article, I immediately began to think of topics of interest to senior lawyers, as the article was originally intended for publication in *Seasoning*, the e-newsletter of the Louisiana State Bar Association's (LSBA) Senior Lawyers Division. Was I going to write about substantive law, procedure, mentoring young attorneys, winding down a law practice, or, even better, quality of life after retirement?

But, then things radically changed.

Devastating floods in August destroyed many parts of our state, and, in fact, dashed the hopes of retirement for many of our senior lawyers. Many lawyers, young and old, lost their homes and offices as a result of the overflow of numerous rivers in the Florida parishes, in Baton Rouge and as far west as Lafayette. (We also remember that, earlier this year, flooding devastated north Louisiana and other areas of the state.)

Instead of making arrangements to wind down, numerous senior lawyers are now faced with the daunting task of starting over and otherwise assisting younger lawyers with starting over.

It is said that the practice of law is an honorable profession.

Although the floods were of catastrophic proportions, our legal community rose to the challenge and our members came to the aid of our fellow attorneys in need.

Through the LSBA's SOLACE (Support of Lawyers/Legal Personnel: All Concern Encouraged) Program, members of the legal community help each other, and their families, in times of need.

Within minutes from the time the rivers started to overflow and cause havoc to members of our profession, our fellow attorneys leaped into action. Members of the legal community immediately opened the doors of their homes and offices and offered to provide housing and office space to those displaced by the flood. Before people even had the opportunity to ask for



specific items, our attorneys reached out to fellow attorneys who lost their homes and donated furniture, appliances, clothes, toiletries, gift cards, and just about anything that would help the victims of the flood attempt to start to resume some sense of normalcy.

Members of our legal community assisted total strangers by gutting their houses and removing debris in the hope of enabling the flood victims to return to their homes. Their only bond was that they were fellow members of the legal community.

One couple from New Orleans, who insisted on remaining anonymous, even donated their SUV to a fellow attorney in need.

To those members of our legal community who lost their offices, our fellow attorneys provided office space free of charge and donated computers, office furniture, law books, suits and dresses, and even covered court appearances for attorneys in need.

As we look back at our careers and take stock at what we have accomplished professionally, the SOLACE Program gives us the opportunity to proudly assist each other.

The SOLACE Program, which originated in Louisiana, is now in 24 states and Puerto Rico. Recently, the national Federal Bar Association adopted the program as one of its benefits of membership.

Why is this important? The more people who are aware of the program, the larger the pool of potential volunteers.

As an example, one afternoon after the floods, a SOLACE request was circulated

on behalf of Olivia, a 10-year-old terminally ill child of a member of the legal community. Our colleague's family lost most of Olivia's crucial supplies. Literally overnight, at 10:11 the next morning, in response to the SOLACE request, we received the following message from an LSBA member who now works for the City of Birmingham. Our member reached out to the Birmingham government officials for assistance:

*"UPDATE: The City of Birmingham EMA official contacted me to say that all of the items on the list for the terminally ill child have been sent by Amazon."*

If you have been adversely impacted by the floods, or if you have other needs, email the SOLACE Program at: [JayZainey@LASOLACE.org](mailto:JayZainey@LASOLACE.org). Your requests are confidential, and you will be pleasantly surprised at how quickly your fellow attorneys will spring into action to assist you and your family.

Yes, we are truly members of an honorable profession. Please give our fellow attorneys the opportunity to serve you.

*Judge Jay C. Zainey has served as a U.S. District Court judge in New Orleans since 2002. In 2004, he and Mark C. Surprenant, senior partner in the New Orleans office of Adams and Reese, L.L.P., co-founded the SOLACE Program. ([jay\\_zainey@laed.uscourts.gov](mailto:jay_zainey@laed.uscourts.gov); 500 Poydras St., C-455, New Orleans, LA 70130)*



## JAY C. ZAINEY

**HONORABLE JAY C. ZAINEY** was appointed by President George W. Bush to the United States District Court for the Eastern District of Louisiana on February 19, 2002. He is the past President of the Louisiana State Bar Association. As State Bar Association President, he created the Community Action Committee and the Committee to Provide Legal Services for the Disabled. These two committees are purportedly the first of their kind in the nation. Jay graduated from Jesuit High School, the University of New Orleans, LSU School of Law, and received an honorary doctor of laws degree from the Loyola University New Orleans College of Law.

Jay is co-founder of SOLACE, a Louisiana State Bar Association program, which provides services to members of the legal community and their families who experience tragedies, and who otherwise have special needs. There are currently over 10,000 volunteer attorneys throughout the state who participate in the SOLACE Program. SOLACE Programs have now been developed in 23 states and Puerto Rico.

In May 2004, Jay organized the Homeless Experience Legal Protection (H.E.L.P.) Program. In this program, over 450 attorneys provide legal consultation services and notary services at five homeless centers in New Orleans. HELP Programs are now in 34 cities throughout the country. Plans are underway to start H.E.L.P. Programs in other major cities. The Program has been instrumental in assisting many members of the homeless community escape the bonds of homelessness, rebuild their lives, and restore their dignity. H.E.L.P. volunteers are also assisting members of the homeless community obtain their birth certificates, identification cards and social security benefits. The program operates recurring legal clinics at homeless shelters, using volunteer attorneys to bring legal consultation and services directly to the homeless individuals. Homeless individuals generally lack access to legal services and to the courts because homelessness engenders a fear of the system and makes it highly unlikely that they will voluntarily visit a courthouse or seek out an attorney. HELP clinics address this problem by making legal services available to the homeless, on a regular and reliable basis, in the surroundings in which the clients are comfortable.

He assisted in developing a Homeless Court in New Orleans, and is assisting in developing Veterans Courts in Jefferson Parish, St. Tammany Parish and in Federal Court.

Jay has also worked with the Louisiana State Bar Association Committee to Provide Legal Services for the Disabled in providing pro bono legal services to people with disabilities and their families, and has assisted Tulane Law School develop its Disability Law Society, one of the first of its kind in the country.

In October, 2004 Jay and his wife Joy founded the God's Special Children's Program. The program includes a monthly mass for people with special needs, their families and friends.



Jay and Joy co-founded St. Andrew's Village, a faith-based long term living community for adults with disabilities. St. Andrew's Village will provide a loving environment for many of God's special angels. Jay proudly serves as President of the Board of St. Andrew's Village.

Besides serving as president of the Louisiana State Bar Association, Jay is also past president of the Jefferson Bar Association, Former Chair of the Pro Bono Project, Former member of the New Orleans Chapter of the Executive Board of the Federal Bar Association, and is Past-President of the Judge John C. Boutall American Inn of Court. He also served on the American Bar Association's Hurricane Katrina Task Force, and has written a chapter in "Lawyer's Working to End Homelessness," a book published by the American Bar Association's Commission on Homelessness and Poverty.

He served in the United States Air Force Reserves from 1970-1976.

In 2011, Chief Justice John Roberts appointed Judge Zainey to serve on the Judiciary Commission Codes of Conduct Committee.