Federal Bar Council Quarterly

March/April/May 2012 www.federalbarcouncil.org Vol. XIX, No. 3

Provocative, Human, Eclectic

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From the President

FBC Anniversaries

By Frank H. Wohl

This is a year of anniversaries for the Federal Bar Council. On June 15, 2012, we will mark the eightieth anniversary of the founding of the Council, which held its first meeting on June 15, 1932. On that date, the new association, then calling itself the Federal Bar Association of New York, New Jersey and Connecticut, separated from the national Federal Bar Association, which persisted in a policy of excluding black attorneys. The newly independent association had been formally authorized by private legislation signed by Governor Franklin Delano Roosevelt on April 1, 1932. In 1968, the Council adopted its current name, which is based on the Bar Council, which represents barristers in England and Wales.

This year we also observe the sixtieth anniversary of the Thanksgiving Luncheon, which began in 1952, and the fiftieth anniversary of the Law Day Dinner, which was first held in 1962. From their beginnings, both events observed a similar seating arrangement, with no dais. In order to encourage the Council's objective of fostering friendly relations among members of the bench and bar, members, their guests, and judges sit together.

Also 50 years old this year are the Learned Hand Award for excellence in federal jurisprudence, the Emory Buckner Award for public service, and the Whitney North Seymour Award for public service by a private practitioner, all of which were initiated in 1962, a banner year for the organization.

Other Milestones

Other milestones for the Council have been annual and biannual trips to the U.S. Supreme Court that began in 1965, the Winter Bench and Bar conference initiated in 1969, and the annual Fall Bench & Bar Retreat, commenced in 2000. In 2000, the Council also began to sponsor its American Inn of Court. Other recent additions to the Council's activities include the formation of the First Decade Committee, designed to cater to the needs of younger members, the brown bag lunches with judges, and our several annual receptions for judges, law clerks, and interns.

I doubt that the handful of organizers who met in 1932 imagined that their new organization would become what it is today, with over 3,500 members and events that have become important markers on the legal calendar. Over those 80 years, the Council has remained true to its founding spirit of diversity. (For example, in the early days, the organization included a Women's Division, which it dissolved in 1957, abolishing any gender-based distinction among members.) The organization has also adhered to its stated goals of advancing the science of federal jurisprudence, protecting the administration of justice, upholding the high professional standards of the bench and bar, and encouraging friendly relations among members of the legal profession.

If the Council is to remain vibrant, it cannot simply rest on the enormous success we are so fortunate to have inherited. Consequently, I am making a renewed request that members communicate to the Federal Bar Council staff, or to me, suggestions for how you think the Council might provide additional services or otherwise develop in ways that would be of value to you. I cannot promise that every idea will be implemented, but I can promise that every idea will be carefully considered. Similarly, we would like to receive your expressions of interest concerning Council committees or projects in which you would like to participate. Please send your suggestions either to Council Executive Director Jeanette Redmond at jeanette.redmond@federalbarcouncil.com or to me at fwohl@lswlaw.com.

From the Editor

Mentoring

By Bennette D. Kramer

I have been thinking, reading, and talking about mentoring. What creates a good mentor-mentee relationship? How does a firm or other organization set up a mentoring program that will lead

to successful mentor-mentee relationships? How do individual lawyers find mentor relationships that work for them? The bottom line is that it depends. It depends on career stages, the type or size of the law firm or organization, and the individual challenges the person looking for a mentor faces.

I believe that individual lawyers go through many stages of mentoring needs that stretch throughout their careers. There is no one size fits all approach to mentoring or being a mentee. As a lawyer moves through her or his career, the lawyer either moves up through an organization or moves on to one, two, three, or more other types of practice. In each situation a lawyer's need for advice and support differs. Before I describe what I believe are three important stages of mentoring needs and what might work best at each stage, I would like to make a few general observations.

General Observations

First, lawyers need mentoring and advice in three major areas: (1) how to approach legal work; (2) how to deal with the internal politics of the firm or organization; and (3) how to deal with the world outside the organization, *i.e.*, judges, adversaries, bar association committees and other professional organizations – and, of course, clients and prospective clients. Each one of these areas is just as important as the other. Young associates, particularly young women associates, make the mistake of believing that all they have to do is perform at a high level. That is a given, but it is a mistake to think that firm politics are not just as, if not more, important. In a firm setting, an aspiring lawyer has to know what partners provide work that will advance careers and who one must know to be noticed. Bar committees and other professional activities are also important for lawyers who are trying to build a practice.

Second, the most successful mentor-mentee relationships occur when a personal bond and two way channel of communication is established. A mentor and mentee must have trust and respect for one another and each must be willing and able to listen and communicate with the other. There has been some discussion about whether young women should have male or female mentors, which has raised a number of issues. Should mentors be assigned by gender? Do women need other women as role models to the exclusion of men? Are men squeamish about mentoring young women because they believe (rightly or wrongly) that a lunch or dinner alone with a woman will lead to gossip?

Third, the mentoring relationships that individual lawyers develop on their own are the most successful. This of course leads to the question of how to find a mentor. There are many different opinions on this subject ranging from reaching out to strangers that you admire to asking the person in the next office for advice. In my mind, the most important responsibility of a person seeking a mentor is to think through the role that the mentee wants the prospective mentor to play. This sometimes requires the mentee to go further than his or her immediate problem or question to consider what his or her long term goals are. Lawyers also should seek out mentors outside their firms or organizations. Sometimes these outside advisors have a better overview of the legal profession and where the prospective mentee's abilities would provide the most satisfying fit.

That leads to the fourth observation: Every lawyer should develop a career plan. Of course, careers do not always follow plans or straight paths for one reason or another, but setting short term and long term goals helps to focus and puts an immediate problem or bump in the road in perspective. For example, does a litigator want to plan a stint in the District Attorney or U.S. Attorney's Office? What about another type of public service? Does a lawyer want to go in-house or a lawyer at a big firm want to transfer to a small one or set up a solo practice? Working on answering these questions before approaching a mentor for assistance serves two purposes: First, an answer will lead a mentee to one person as prospective mentor and another answer to a completely different person. Second, knowledge about one's own goals will focus the discussion.

Different Stages of Mentoring

Lawyers need mentors throughout their careers. The

stages that I describe below are the ones I believe are most critical: entry level, mid-level, and partnership level within a firm. But I can think of many other stages where a lawyer would seek advice. For example, not every lawyer (as a matter of fact, relatively few lawyers) will stay at the place where he or she began working. In those instances, a lawyer would and should seek advice when he or she considers moving from one firm to another firm, in-house, or government service.

The most obvious and greatest need for mentoring comes as a young lawyer enters the profession and starts his or her first job in a firm or organization. This is also the hardest stage to foster effective mentor-mentee relationships. Almost all big firms and other organizations that take in large classes of beginning lawyers have established mentoring programs today that match incoming lawyers with mentors. These programs are intended to provide the new lawyer with a resource and sounding board to air concerns and to learn how the firm works. The best programs have specific requirements for meetings and feedback. Sometimes these matched-up mentor-mentee relationships work and sometimes they do not. It all depends on the personal relationship and level of trust that the mentor and mentee can establish and the willingness of both to work at a successful relationship. This is the stage of every new lawyer's career that guidance is most helpful, but is also the stage where a proud new lawyer might not want to appear to be unsure or needy in any way. Both mentor and mentee should work at the relationship and firms and organizations should institutionalize follow-up to make sure both parties are putting effort into the mentor-mentee relationship.

The next stage that lawyers need mentors that they trust and respect is when they are senior associates or an equivalent mid-management level seeking advice about what to do next: stay at the firm or organization and strive for partnership or the next level or leave. If they decide to leave, what would be the best options? Here, there do not seem to be established mentoring programs, but it is a point at which firm politics plays a large role, so an established program would not necessarily provide the needed advice. In a prior From the Editor column [March/April/May 2011], I referred to a *Wall Street Journal* symposium on women in corporations. One of the recommended changes resulting from that symposium was for corporations to focus on mid-level women managers to help them advance to the next stage because so many women leave at this stage in their careers. This is true as well in law firms – both men and women leave, but the number of women leaving exceeds the number of men. Given the law firm culture, it is hard to see how any program other than encouragement of self-selected mentor-mentee relationships would work. However, an important aspect of staying at a firm is working on matters for important clients and bringing in clients. Firms must try to open opportunities for mid-level associates and managers to participate in matters for important clients and provide additional opportunities and advice for bringing in clients of their own. Also, sponsors are important at this level. A sponsor can open doors within the firm and bring an associate or manager to the attention of the decision makers.

Finally, partners in all firms and higher level management in organizations need to have comfortable, trusted colleagues to turn to for advice. Every lawyer does not know the answer to every question, and it helps to have a partner down the hall with whom to consult. Today, some of the big firms have lost the collegiality they used to have and partners are pitted against one another in efforts to serve existing clients and earn as much money as possible. Partners are also leaving firms, looking for more compensation at other firms and bringing their clients with them. This has a negative effect on collegiality and ultimately on the partners and firms themselves. Intra-firm collegiality is important for law firm well being. Without trust and an ability to share experiences, law firm partners might as well be single practitioners. On a personal level, the ability to share concerns and seek advice in a supportive co-mentoring relationship is very important.

Personal Experience

My personal experience as a mentee has had its ups and downs.

There are many people to whom I turned for advice prior to and during law school, and they have continued to be trusted advisors. Most have been men. I have received encouragement from a variety of supporters throughout my career, but none through an established mentor program. Even today, most of the other lawyers I turn to for advice are men. It has just worked out that way.

When I was an associate in a big firm, there was no mentoring program in place. There were also very few women role models, particularly in the litigation department. When I arrived there was only one woman partner and there were very few senior associates. There were cordial relationships among the lawyers, but I did not think there was anyone I could turn to for advice or anyone looking out for me.

My experience as an associate and partner at a small firm has been the opposite. My partners are my colleagues and my advisors (along with my original mentors). I turn to them with all my questions and the atmosphere is such that no question is too small or stupid. I like to think that they turn to me in the same way. For many years, I was the only woman partner, so my male partners were the only resources. Fortunately, they have been willing to listen when I have needed advice.

I have tried to be a mentor for younger and more junior colleagues both within my firm and in connection with other activities. I probably do not do enough, but have vowed to try harder.

Developments

At Winter Meeting in Kona, Patricia M. Hynes Receives Seymour Award

By Steven M. Edwards and Bennette D. Kramer

The Federal Bar Council held its annual Winter Bench and Bar Conference at the Four Seasons Hualalai Resort in Kona, Hawaii, from February 4 through February 11, 2012. Lewis Liman was chair of the meeting, and Second Circuit Judge Deborah Livingston chaired the planning committee. Patricia Hynes received the Whitney North Seymour Award for public service by a private practitioner.

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Representing Clients in Times of Crisis

Second Circuit Judge Christopher Droney moderated a panel that dealt with the intersection of law, finance, government, and the media in crisis situations. The audience was treated to a hypothetical that featured FBC Financial, a multi-national corporation facing massive trading losses in proprietary and customer accounts. There is a whistleblower who is telling his story to the press, and the company's CEO, Frank Wohlspan, is seeking advice.

Patrick Oster of Bloomberg News said he would proceed with caution. He writes for people who evaluate risks. He is interested in all information, but he gives more weight to court-filed documents. If he receives documents from unauthorized sources, he generally investigates their provenance before using them.

As the company's lawyer, Bob Giuffra said that his first priority would be to try to stop the story so he could have time to conduct an investigation. He would want to talk to the right people in the company, the outside auditors, the chair of the audit committee, and the lead director if there is one. He might also talk to regulators.

Kevin O'Connor stressed the importance of establishing a litigation hold. There are going to be subpoenas, and it is important to avoid questions about whether relevant documents were destroyed. He would also arrange for the retention of counsel for the individuals involved, and would retain counsel for an internal investigation.

George Sard, a media advisor, would want to obtain the key documents so he could tell the company's side of the story. It is important to be accurate; otherwise credibility will be lost. Sard also said he would pay close attention to the stock market, and if the stock price collapsed, that would be an indication that the market did not believe the company's story. He also would try to give the press as much context as possible on a background basis.

The panel discussed ways to handle the crisis as events unfold. Many of the panelists stressed that accuracy and credibility are important. All agreed that in most cases it is a mistake to try to respond to social media on a real time basis.

Crime Fraud and Privilege

Judge Naomi Reice Buchwald of the Southern District of New York chaired a panel on the use of the crime fraud exception to the attorney-client privilege in both criminal and civil cases. Judge Buchwald gave a brief introduction explaining the legal issues involved, presenting a hypothetical and introducing the panelists. Judge Buchwald said that the major focus in determining whether the privilege applied was whether the advice of an attorney furthered commission of crimes by his or her client.

The program began with a skit designed to demonstrate some of the civil issues. John Keker explained the application of the exception in civil cases, followed by Alan Vinegrad, who discussed the criminal context. Both pointed out that civil litigants and the government are using the exception more frequently to obtain disclosure of otherwise privileged material. UC Berkeley School of Law Professor David Sklansky reviewed the trends in the law and said that the crime-fraud exception had expanded gradually, but steadily. He said that there were two separate questions that a court considering whether the exception applied had to address: (1) whether the crime-fraud exception applies, and (2) whether the judge may undertake an *in camera* review. Vinegrad pointed out that the lawyer's action had to be "in furtherance" of the client's intent to commit a crime. Vinegrad noted that a civil litigant had an opportunity to be heard on an application for discovery under the crime-fraud exception, whereas government applications were *ex parte*. As a result, decisions in civil cases are more likely to have collateral estoppel effect.

The next part of the skit presented issues related to criminal cases. Vinegrad noted that proceedings in criminal cases were typically *ex parte*; the defendant had no opportunity to be heard; and the probable cause standard was easier to meet than the preponderance of the evidence standard in civil cases. As a result, applications are more often granted in criminal cases. Keker pointed

out that for the system to work fairly, district judges and magistrate judges had to be responsible in considering applications, particularly in criminal cases.

Representing Controversial Clients

Judge Vincent L. Bricetti of the Southern District of New York chaired a panel that discussed different aspects of dealing with difficult clients. Panel members included Bob Anello, Susan Brune, and Ira Sorkin, all of whom are criminal defense lawyers. The first issue, illustrated by a skit, was about making the decision whether to accept the case. Brune pointed out that there was no ethical obligation to accept a client assigned by the CJA panel, particularly when it would impact the lawyer's practice. Sorkin noted two considerations in such a representation: (1) could the lawyer represent the client zealously, and (2) would the client accept the lawyer. He agreed that lawyers had to consider business issues such as how the representation of a notorious client would affect the firm's finances and reputation. Anello stated that a lawyer had to consider safety issues and the needs of existing clients, particularly if there is a conflict.

The second issue was how to withdraw from a case under pressure from an important preexisting client and defense tactics. The court must approve withdrawal. One potential argument to make to the court is that, because of negative feelings toward the client, the lawyer could not do a good job. Another issue was how to deal with the press, particularly in instances where the government is holding press conferences. All panelists agreed that defense lawyers should seek the advice of an experienced public relations firm, but differed on just how much defense lawyers should say to the press.

The third segment dealt with the trial and how to deal with demands by defendants that contradict good trial practice and/or lawyers' ethical responsibilities. The first issue was a client demand to exclude all Jewish jurors. All panel members agreed that you cannot use race or gender to challenge a juror, but neither the Supreme Court nor the Second Circuit has decided whether you can base a challenge on religion. Judge Briccetti said that if it is not illegal, the lawyer has the responsibility to exclude Jews. In addition, the client has the right to decide how he or she will testify – by speech or questions or dramatic presentation. This is one area where the client has absolute control. Finally, the panel discussed how defense counsel should handle information from the client concerning jury tampering following a hung jury. All agreed that defense counsel had the obligation to disclose improper conduct to the court and withdraw on retrial.

Class Actions

A panel chaired by Judge Nicholas Garaufis of the Eastern District of New York discussed recent developments in class actions. New York University Law School Professor Samuel Issacharoff described the history of class actions and discussed four recent Supreme Court cases: *Wal-Mart v. Dukes, AT&T Mobility v. Concepcion, Erica P. John Fund v. Haliburton,* and *Smith v. Bayer*. Professor Issacharoff described *Concepcion* as a very important case. In that case, the Court held that the Federal Arbitration Act preempted a California rule that provided that contracts that compelled arbitration but prohibited class actions were unconscionable. In *Haliburton*, which Professor Issaharoff also described as an important case, the Supreme Court declined to require proof of loss causation at the class certification phase. In what Professor Issacharoff described as a symbolic decision, the Supreme Court in *Dukes* held that the commonality requirement under Rule 23 was not satisfied where class members were differently situated, even though Wal-Mart's conduct was similar in every case. Finally, in *Bayer*, the Court held that a federal court's denial of class certification did not preclude a state court from granting class certification in an identical case under state law. Professor Issacharoff characterized Bayer as a "gem."

Laurence Gresser pointed out that *Dukes* would have been one of the largest classes ever, and the mere fact that Wal-Mart had allegedly discriminated against all class members did not satisfy the

commonality requirement. Commenting on the impact of these decisions on lower courts, Jay Waks noted that at least one lower court has decertified a case based on *Dukes* and other courts have been reluctant to follow *Concepcion*. Thomas Dubbs noted that *Haliburton* had clarified the efficient market concept, making clear that it creates a rebuttable presumption of reliance. Gresser also commented on *Bayer*, noting that it was essentially a due process issue because a class had never been certified in the federal case and the state court was entitled to interpret its class action rule differently from the federal court's interpretation of the federal rule.

Students, Free Speech, and the Internet

Led by Judge Deborah Batts of the Southern District of New York, a panel discussed the impact of the internet on First Amendment issues involving students. Beginning with some apt lyrics from a famous Chuck Berry tune, Judge Batts introduced the panel. Second Circuit Judge Debra Livingston then provided a brief overview of the Supreme Court cases in this area, and the panel discussed four case studies: off campus versus on campus student speech, bullying student-to-student speech, sexually provocative student speech, and racially offensive student speech.

The initial case study was patterned after *Doninger v. Niehoff*, where the Second Circuit ruled that school officials could discipline students for off campus speech where there is a reasonably foreseeable risk that it will come to the attention of school authorities and materially disrupt the work and discipline of the school. Michael Grygiel was critical of the reasonably foreseeable test, because it enables school authorities to discipline students for speech having nothing to do with school activities. Judge Livingston noted that the speech addressed in the *Doninger* opinion, which she wrote, actually concerned school activities.

On the issue of cyber-bullying, Marjorie Bronster discussed several cases in which courts ruled that schools have a right to discipline students for acts committed outside of school. In her view, the schools' ability to regulate student-on-student conduct should end at the schoolhouse door. Steven Hyman disagreed, noting that fights between students outside of school could easily disrupt order within the school.

Aviam Soifer, Dean of the University of Hawaii School of Law, led the discussion of the third case study, which involved members of the cheerleading squad posing for risqué photos prior to the start of school. He observed that, "What's in school and what's out of school has been changed by the internet." In his view, the conduct would not be subject to school discipline, unless they were wearing their uniforms.

The final case study addressed a rap video that went from student to student outside of school. Even though the video had an impact on the school, Hyman expressed the view that it could not be regulated by school officials. In his view, if adult activity of that nature would be protected by the First Amendment, student activity should be as well.

Funding of Litigation

Eastern District Judge Joanna Seybert chaired a panel entitled "Funding of Litigation: What You Need to Know," which included Sean Coffey, Peter Jarvis. and Benjamin J. Cardozo School of Law Professor Anthony Sebok. Coffey explained recent developments in funding. He stated that there were three types of funding: litigation finance, alternative litigation finance, and third party litigation finance, and that finance was divided into three categories: consumer, commercial, and lending to law firms.

The panel discussed commercial finance. Coffey described commercial finance as an equity investment in the proceeds of a lawsuit with recourse only against the proceeds. Such investments range from $500,000 to $10 million. In most cases the investor is a repeat player in the litigation field, and sophisticated outside counsel represent the parties. Most investors are former lawyers, but do not give any legal advice. The parties generally agree on a budget in advance.

Professor Sebok noted that legal, practical, and ethical issues

regarding litigation funding have been debated since the earliest common law. Helping another prosecute a suit was a crime in common law, as was champerty, which is maintaining a suit and sharing in the proceeds. Now, different states view financing differently. Twenty-seven states permit financing with some restrictions and 15 states prohibit champerty.

Jarvis presented the ethics rules, which raise issues concerning (1) competence and scope of representation, along with standing to bring malpractice claims; (2) control of the litigation; (3) confidentiality; (4) conflicts; and (5) fee splits. Jarvis and Coffey discussed confidentiality and the tension between the client's desire to maintain privileged information confidential and the funder's desire to know all the details to evaluate the strengths and weaknesses of the case. There may be a "common interest" privilege, but that is not clear.

The panelists discussed disclosure of the existence of funders, negotiating the contract, how to deal with settlement negotiations, and offers when a funder was involved. In connection with settlement offers, the client must approve all settlements, but the situation can be tricky if the funder wants to push for settlement and the client is not happy about it. Usually contracts provide for consequences to a client who rejects an approved settlement. The panelists agreed that many issues are undeveloped and that this is an area that will receive a lot of attention in the coming years.

Recent Developments in Sports and the Law

Southern District Judge Colleen McMahon chaired a panel on Recent Developments in Sports and the Law. Panel members were Second Circuit Judge Ralph K. Winter, the coach; Jeffrey Mishkin, representing management; and Alexis Hunter, representing labor.

The first topic concerned amateurism and the right of publicity. In order for a third person to use an image of a well known person without violating his or her right, the image must be transformative, not a mere replication of the sports figure. Under NCAA rules, however, an athlete cannot take money for use of his or her name. If an athlete tries to collect money for the use of his or her name, he or she will not be able to play in NCAA games. Some perceive this as unfair because money is pouring into universities and the NCAA is making hundreds of millions of dollars from college sports – just look at March Madness.

The panel next addressed antitrust issues. The main issue is whether teams can band together and force players to bargain against them all at once. The discussion focused on whether the action by basketball players to disband their union and end their collective bargaining relationship enabled them to sue for anti-trust violations. Panelists agreed that it was a gamble on the part of the union to cease bargaining and begin litigation that could lead to endless litigation. Basketball players would have been seriously disadvantaged by a prolonged walk-out, because their careers are short and each day of a walk-out deprives the players of a large percentage of lifetime earnings. This issue has not been resolved, because the teams and players settled the basketball strike.

The final issue concerned the right to control game broadcasts and other game-related information. Television broadcasts, which the networks easily control, are not the only means of spreading information about games. Today, Tweeters and bloggers distribute information in real time while games are ongoing. The broadcasters would like to commercialize and control this information. Courts, including Judge Winter and the Second Circuit, have held that games and statistics cannot be copyrighted and that the federal copyright laws preempt misappropriation claims under state law. The only prohibition is broadcasting games.

Supreme Court Review

The participants were fortunate to have two of the leading Supreme Court advocates in the country to discuss recent and pending decisions in the Supreme Court: Miguel Estrada and Neal Katyal. Second Circuit Judge Debra Livingston introduced the topics and moderated the discus-

sion. The subjects included the Affordable Care Act, a patent case, and a search and seizure case.

Katyal, who argued all the Affordable Care Act cases in the courts of appeals as acting Solicitor General, led off a discussion of that topic. There are many issues, but the one that has received the most attention is whether Congress can require people to purchase insurance. In Katyal's view, it is a fairly straightforward argument: Everyone will need healthcare at some point, so it makes sense to require them to purchase insurance up front so that risks can be spread and coverage can be maximized. Uninsured cases cause cost shifting over state lines, thereby implicating the commerce clause.

Estrada disagreed and noted that this is the first time Congress has ever tried to regulate inactivity. In his view, Congress cannot cause commerce to come into existence so it can be regulated. Estrada felt that it is very difficult to predict the outcome, but Katyal expressed confidence, observing that the Affordable Care Act provides a national solution to a national problem.

Mayo Collaborative Services v. Prometheus Laboratories involved the patentability of certain diagnostic tests. In *Mayo,* the Court found that the tests were not patentable because they simply relied on the laws of nature, but Estrada noted that it is very difficult to determine the point at which an inventive use of the laws of nature yields a patentable process. Katyal agreed that the Court appears to be uncomfortable with the current state of affairs, but is not sure what to do.

In *United States v. Jones*, decided in January, the question was whether the police could put a GPS device on a car without a warrant. Estrada observed that the usual test – whether there is reasonable expectation of privacy – does not work well in this area. In a unanimous decision, therefore, the Court reverted to an invasion of property analysis, which people had thought was outmoded, and found that the search was covered by the Fourth Amendment and a search warrant was required. Katyal noted that the Supreme Court is very cautious in this area.

The other topics discussed included missed filing deadlines in a capital case, the Alien Tort Statute, foreign relations, the FCC's Decency Rules, the First Amendment, and upcoming arguments in the Arizona immigration case and cameras in the courtroom.

Whitney North Seymour Award

Federal Bar Council President Frank Wohl presented the Whitney North Seymour Award for public service by a private practitioner to Patricia Hynes. In his presentation, Wohl listed Pat Hynes' many achievements and outlined her dedication to public service. He noted that she had been president of the City Bar and was a Fellow of the American College of Trial Lawyers. She was also chair of the American Bar Association Standing Committee on the Federal Judiciary and chair of the board of directors of the Legal Aid Society. She has received many honors and has been noted as an outstanding member of the New York bar by many organizations. When she accepted the award, she stated that she valued her public service and urged all present to serve as well.

Invitation to Debate

The Future of Affirmative Action

The Supreme Court recently granted certiorari in *Fisher v. University of Texas*, 631 F.3d 213 (5th Cir. 2011), a case in which two Caucasian females claim they were denied admission to the University of Texas ("UT") as a result of the university's diversity program. UT argued that its diversity program is patterned after the Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), where the Court held that it is permissible to consider race as one of many factors to be taken into account in the admission process. In other cases, the Supreme Court has held that reserving a certain number of slots for disadvantaged minority students is unconstitutional, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), awarding a certain number of points for race in the admissions

process is unconstitutional, *Gratz v. Bollinger*, 539 U.S. 244 (2003), and assigning students to a particular school to achieve racial balance is unconstitutional, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

The plaintiffs in *Fisher* argue that any consideration of race in the admissions process is unnecessary because UT has already achieved adequate diversity by automatically admitting the top 10 percent of every high school class regardless of race. The district court granted UT's motion for summary judgment, and the Fifth Circuit affirmed, with one judge "specially concurring" to explain that, although bound by the *Grutter* decision, he believed affirmative action was unconstitutional. Some believe that the Supreme Court's decision to grant certiorari, thereby indicating a willingness to reverse, could spell the end of affirmative action of all types except in cases where it is necessary to remedy past acts of intentional discrimination.

Given the renewed interest in this issue, we asked two former presidents of the Federal Bar Council to debate the merits of affirmative action generally. Here is their discussion.

The Case Against Affirmative Action

By Gerald Walpin

Answers to six crucial questions demonstrate that affirmative action (racial preference) programs are unconstitutional:

What role should race play in governmental action? Martin Luther King provided the answer in stating that people should not be "judged by the color of their skin, but by the content of their character." Affirmative action makes judgments heavily impacted by applicants' skin color.

What does our Constitution mandate as to consideration of race? The 14th Amendment prohibits denial "to any person" of "the equal protection of the laws." The Supreme Court instructed that its "central purpose is to [(i)] prevent the States from purposefully discriminating between individuals on the basis of race,"[1] (ii) "do away with all governmentally imposed discrimination based on race,"[2] and (iii) thereby to create "a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement."[3] Contrary to the assertion that the 14th Amendment's purpose was to protect only blacks as a group, it was carefully worded to protect "*any* person." Even Justice O'Connor, in her opinion in *Grutter,* recognized that the 14th Amendment "protects persons, not groups."[4]

Supporters of affirmative action engage in disingenuous semantics to avoid these clear holdings against using race in state university admission decisions. Thus the University of Texas, before the Supreme Court, asserted that the Equal Protection Clause bans only discriminatory enforcement of laws, but not discriminatory laws itself. If that were true, it would validate a law prohibiting Jews from serving on a jury, if enforced in all trials. No such irrationality can validate using race to discriminate between individuals. Simply put: applying a separate standard because of skin color – which affirmative action demands – is government-directed racism, outlawed by the 14th Amendment.

My adversary here offers a retrogressive solution to save affirmative action: return our country to the discarded "states' rights" doctrine whereby each state decides how and the extent it considers race in allotting school slots. That must be rejected.

Does affirmative action help or injure preferred minorities? The Supreme Court found that affirmative action racial classifications "may in fact promote notions of racial inferiority and lead to a politics of racial hostility,"[5] and "inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race."[6] These "notions of racial inferiority" adversely affect minorities in at least two ways. First, when racial preferences are granted to some minority members, prospective employers will likely harbor the suspicion that any minority graduate may be the beneficiary of racial preferences, unfairly stigmatizing the

many minority members who needed no racial preference to be admitted. Second, the U.S. Civil Rights Commission reported that racial preferences actually undermined minority graduation from science and engineering programs.[7] Another study reported that racial preferences were adverse to minority entrance into academia; those admitted under racial preferences obtained lower grades, and had problems academically and lower self-esteem, while minority students with no (or *de minimis*) racial preferences generally did better, and developed self-confidence in pursuing their original aims.[8] This record of ultimate failure, by too many preference-admitted blacks, disincentives young blacks to work hard for grades to be admitted without racial preferences.

Did UT institute racial preferences to obtain admission of minorities or to further political correctness? The Supreme Court, in sustaining racial preferences, specified that a racial preference be allowed only if motivated by a sincere desire to benefit the minorities,[9] and not "rest on impermissible stereotypes."[10] The court of appeals in *Fisher* admitted that the Supreme Court limited affirmative action only to "a transient response to anemic academic diversity."[11] UT did not meet this requirement: when UT decided to reinstitute racial preferences in 2004, African-Americans and Hispanics already made up 21.4 percent of the incoming class,[12] a percentage greater than the 13.5 percent to 20.1 percent minority enrollment that the Supreme Court previously suggested was sufficient diversity.[13] And that percentage of minorities at UT did not include Asian-Americans who represented at least another 20 percent of the incoming class. These figures cry out the question: Why did UT insist on adding racial preferences when, without them, a sufficiently high percentage of minorities was already being admitted? The only reasonable answer: It did so to implement someone's idea of political correctness, and thus there is no basis to employ racial preferences.

Apparently recognizing that UT's minority population met Supreme Court prior guidelines on adequate college diversity, the court of appeals invented a new requirement that "aggregate minority enrollment" must produce "adequate diversity *in the classroom*."[14] UT asserted that a large number of its small classes (between five to 24 students) had fewer than two students of any minority. But it is minority students, of their own volition, who "remain cloistered in certain programs,"[15] causing the minority student deficit in other program classes. Unless affirmative action proponents demand unacceptable pigeonholing of minorities into classes they do not want, the aim of numerical diversity in each class is unattainable and must be rejected.

This lack of need for racial preferences is not unique to UT. For example, a 1996 California referendum halted consideration of race in University of California admissions. Yet, by 2002, black enrollment returned to the percentage attained when racial preferences had been applied, and, for the 2007 to 2010 period averaged 40 percent above the pre-1996 black enrollment. Likewise, by 2008, Hispanic enrollment had doubled what racial preferences had produced.[16] Thus, whatever the past asserted need for racial preferences, minorities today are admitted on their own merit.

Two other facts support the conclusion that racial preferences are purely a political tool to patronize blacks and Hispanics, not to assist minorities. First, Asian-Americans are a minority in this country. Yet, UT grants no preference to that minority; indeed UT does the opposite by preferring blacks and Hispanics over Asian-Americans. History is full of colleges imposing a limitation – discrimination quotas – on, for example, the number of Jews and Asian-Americans, because, simply on merit, they filled too many "slots." This country does not need a return of such discriminatory quotas, the practical reciprocal of affirmative action.

Second, if academia were motivated simply to overcome numerical discrepancies in representation on campus, preferences to males would have been instituted. The Bureau of Labor Statistics reported that 28 percent of 24 year old women had earned a bachelor's degree compared to only 19 percent of men.[17] Few suggest a sex preference for

males[18] – obviously because protecting males, unlike blacks and Hispanics, is not considered politically correct.

Is diversity actually furthered by racial preferences? The Supreme Court explained that the purpose of promoting "diversity" is to obtain "widely diverse … ideas and viewpoints"[19] – a worthwhile aim. But viewpoints do not depend upon race: just as whites are not all conservatives or liberals, Democrats or Republicans, carnivores or vegetarians, etc., blacks do not all hold one view: compare Al Sharpton and Herman Cain. Indeed, the Supreme Court correctly held that the 14th Amendment forbids "the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens."[20] Asserting that only the presence of blacks would allow a diverse viewpoint is a classification "that rest[s] on impermissible stereotypes [that] violate the Equal Protection Clause."[21] Justice Stevens – hardly a conservative – well wrote: The "premise that difference in race, or the color of a person's skin, reflect real differences … is utterly irrational and repugnant to … a free and democratic society."[22]

Circuit Judge Garza, concurring in *Fisher*, essentially asking the Supreme Court to declare affirmative action unconstitutional, described the true sources of idea "diversity": "race-neutral factors like specific hardships overcome, extensive travel, leadership positions held, volunteer and work experience, dedication to particular causes, and extracurricular activities."[23] Those and similar factors, not race, produce idea diversity.

The insincerity of academia's insistence on racial preferences to obtain idea diversity is shown by academia's rejection of an obvious readily available means to enhance diversity of ideas. A 2005 study[24] reported that, in 1999, the faculty identified themselves 72 percent liberal to 15 percent conservative, figures that remain essentially unchanged, altering the almost equal divide found in 1984. Additionally, 50 percent of the polled faculty members identified themselves as Democrats while only 11 percent as Republicans. If academia were sincere about seeking greater diversity of ideas, it can add conservatives to the mostly liberal faculties, thereby enhancing the diversity of thought in the faculty, responsible for directing the path of thinking in each classroom. That has not occurred.

Even assuming the Supreme Court does not overrule prior rulings to declare affirmative action unconstitutional, did the UT affirmative action plan comply with Grutter? The court of appeals engaged in stand-on-your-head reasoning to sustain UT's affirmative action. First, it conceded that *Grutter* and many earlier decisions required strict scrutiny, to "carefully examin[e] the importance and the … reasons … for the use of race," to "ensure that" it was adopted in "good faith."[25] The Supreme Court explained that "searching judicial inquiry" was needed to determine whether the race-based program was improperly "in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[26]

The circuit court implicitly admitted that its review method reflected the antithesis of strict scrutiny: it declined to "second-guess the merits of [UT's] decision," instead simply "presume[d] the University acted in good faith," and gave "a degree of deference to [UT's] educational judgments."[27] It thereby ignored the Supreme Court's directive that a state university "cannot render race" an admissions factor "merely by declaring that" a need for it exists.[28] The decision must be reversed on those facts alone.

Conclusion

To attain Reverend King's goal of all persons being judged solely on individual merit, not by the color of their skin – the purpose of the Fourteenth Amendment – the Supreme Court should end all affirmative action racial preferences. In 2003, Justice O'Connor, in *Grutter,* foresaw that the country would progress in color-blindness so that "by 25 years from now, the use of racial preferences will no longer be necessary." The dramatic proof of our already reaching color-blindness is our election of a black as our president. Whether one agreed with Justice O'Connor's then approval of affirmative action, it is

time, within the time she predicted, to abide by the 14th Amendment rule against considering race in deciding a person's merit for a seat at a state university.

Notes

[1] *Shaw v. Reno*, 509 U.S. 630, 642 (1993).
[2] *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).
[3] *Richmond v. J.A. Croson Co*., 488 U.S. 469, 505-06 (1989).
[4] *Grutter v. Bollinger,* 539 U.S. 306 (2003).
[5] *Richmond v. J.A. Crosson, 488 U.S.* at 493.
[6] *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 229 (1995).
[7] U.S. Commission On Civil Rights, *Encouraging Minority Students To Pursue Science, Technology, Engineering and Math Careers,* Briefing Report (October 2010).
[8] Cole and Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* (Harvard University Press 2003).
[9] *Grutter v. Bollinger,* 539 U.S. 306, 327 (2003).
[10] *J.E.B. v Alabama,* 511 U.S. 127, 139n. 11 (1994).
[11] *Fisher v. University of Texas,* 631 F.3d 213, 222 (5th Cir. 2011).
[12] *Id.* at 243.
[13] *Grutter, supra.*
[14] *Fisher,* 631 F.3d at 245 (emphasis added).
[15] *Id.* at 240.
[16] Amicus Brief for Richard Sander and Stuart Tyler, Jr., in *Fisher v. University of Texas,* U.S. Supreme Court (No. 11-345) p. 11.
[17] Bureau of Labor Statistics News Release (Feb. 9, 2012) found at http://www.bls.gov/news.release/pdf/nlsyth.pdf (visited March 27, 2012).
[18] One attempt to provide it was struck down. *Johnson v. Bd. of Regents,* 106 F.Supp.2d 1362 (S.D.Ga. 2000).
[19] *Grutter,* 539 U.S. at 330.
[20] *Miller v. Johnson,* 515 U.S. 900, 914 (1995).
[21] *J.E.B. v. Alabama,* 511 U.S. 127, 139n. 11 (1994).
[22] *Wygant v. Jackson Board of Education,* 476 U.S. 267, 316 (1986).
[23] 631 F.3d at 253.
[24] Rothman, Lichter and Nevitte, *Politics and Professional Advancement Among College Faculty,* 3 The Forum (issue 1) (2005).
[25] 631 F.3d at 231.
[26] *City of Richmond v. Croson,* 488 U.S. 469, 493 (1989).
[27] 631 F.3d at 231-32.
[28] *City of Richmond v. Croson,* 488 U.S. 469, 501 (1989).

The Case for Affirmative Action

By Steven M. Edwards

The Supreme Court has lost its way on affirmative action. If a state wants to spend $10 million to build a prison that – as a practical matter – will house predominately blacks, that is okay. But if a state wants to spend $10 million so that more blacks can go to law school, that violates the equal protection clause, at least according to the Supreme Court.

That is a complete perversion of the equal protection clause. The equal protection clause was adopted to prevent states from discriminating against blacks. The notion that it could be used to enable Abigail Fisher, who is white, to take a slot at the University of Texas away from a black student, would strike the people who drafted the equal protection clause as inconceivable.

Some might say that my stylized example is flawed. Additional funding for prisons is race neutral, while affirmative action programs make distinctions based on race. "The way to stop discrimination on the basis of race," according to Chief Justice John Roberts, "is to stop discriminating on the basis of race." But that simple syllogism ignores practical realities. We live in a society in which one in nine black men between the ages 20 to 34 is in prison, according to a report by the Pew Center in 2008. That statistic is shocking.

States have tried to use educational policy to do something about this, only to be stymied by the Supreme Court in a series of decisions beginning with *Bakke* and extending through *Gratz* and now possibly *Fisher*. A reversal in *Fisher* would be unfortunate, but it is not the real problem. The real problem is the entire body of jurisprudence that has evolved in this area.

Ironically, the analytical difficulty that led the Court down this path probably began with *Brown v. The Board of Education.* The Court could have taken an originalist/textualist approach and held that school policy does not implicate equal "protection" of the laws, choosing instead to rely on the due process clause, which was an alternative argument. But the equal protection clause seemed to be a better fit, and it provided a launching pad for the ineluctable conclusion that separate but equal is "inherently unequal" – which is kind of hard to argue with.

In the aftermath of *Brown,* the Court developed a taxonomy in

which a court should first consider whether a law making a distinction adversely affects a fundamental right or a suspect class, and if it does, the court should determine whether the government has demonstrated that the law was narrowly tailored to achieve a compelling governmental interest.

One would have thought that blacks would be a suspect class, but in 1978 Justice Powell challenged that premise with great effect in *Bakke,* which involved a program at the Medical School of the University of California at Davis that set aside 16 out of 100 places in its entering class for minorities. Announcing the judgment of the Court in an opinion in which no other Justice joined, Justice Powell noted that Chinese, Japanese, Celtic Irishmen, Austrians, and Mexican-Americans had been found to be suspect classes, and he reasoned that whites might qualify as well, especially if they are the minority in a particular situation. From this he concluded that the suspect class should be race in general, not a particular race. In his dissent in *Bakke,* Justice Brennan questioned this logic, but in the end he conceded that "because of the significant risk that racial classifications established for ostensibly benign purposes can be misused," affirmative action can only be constitutional when it is justified by a compelling governmental interest.

Justice Brennan found that the affirmative action program at issue in *Bakke* was justified by a compelling governmental interest in remedying minority underrepresentation in the medical profession, but Justice Powell found that the medical school had not presented sufficient "evidence" of that. Justice Powell also observed that the goal of remedying the effects of "societal discrimination" was far too amorphous to constitute a compelling governmental interest. The only legitimate goal, in his view, was a general interest in having a diverse student body, and that goal could only be satisfied if race was one of many factors to be considered. Because an affirmative action program that set aside 16 places for minorities considered only one factor, the Court ruled that it was unlawful.

The Supreme Court considered the constitutionality of diversity programs in which race was one of many factors in *Gratz* and *Grutter,* two cases involving the University of Michigan decided on the same day in 2003. *Gratz* concerned the undergraduate admissions program, which awarded points based on race; *Grutter* addressed the law school program, which made race a subjective factor. The Court struck down the undergraduate program in *Gratz,* but upheld the law school program in *Grutter.* The majority in *Gratz* concluded that an admissions program awarding points for race was unconstitutional because it was not "narrowly tailored," while the majority in *Grutter* concluded that a subjective approach satisfied that test. One might wonder why a subjective standard is narrowly tailored while an attempt to make consideration of a factor more concrete is not. As Justice Souter aptly pointed out in *Gratz*: "The very nature of a college's permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants' chances for admission."

In the wake of *Gratz* and *Grutter,* a number of Justices have also adopted the view that race based distinctions can only be used to remedy past intentional discrimination. This conclusion is based on a series of cases in which courts issued orders requiring students to go to schools outside of their home districts as a means of achieving racial balancing where there had been past intentional discrimination. There is, of course, a significant distinction between *requiring* affirmative action as a judicially created remedy for past acts and *prohibiting* an affirmative action program that a state wants to implement as a means of addressing a serious problem, but the majority chose to ignore that distinction in *Seattle,* and the absence of a demonstrable need to remedy past intentional discrimination may be the basis for a decision to overrule the Fifth Circuit in *Fisher.*

The number of hurdles that have been erected to invalidate affirmative action programs have multiplied over time. According to the Supreme Court's jurisprudence, race can only be one of many factors, it must be a subjective factor, and affirmative action programs must be "narrowly tailored," whatever that means.

Furthermore, affirmative action can only be used to remedy past intentional discrimination, and the goals of remedying the effects of societal discrimination or correcting racial imbalances cannot be compelling governmental interests as a matter of law.

Reading through the cases, it is hard to avoid the impression that the Supreme Court is making it up as it goes along. There is no basis in either the language or the purpose of the equal protection clause for any of these hurdles, particularly the proposition that remedying the effects of societal discrimination is too amorphous to be a compelling governmental interest. The states clearly have a compelling interest in taking steps to deal with the problem of the one in nine.

As a practical matter, many people of color grow up in this country feeling that they have no real stake in society. As a result, we have a disproportionate crime rate. Why follow the rules of a society that does not benefit you? One way to deal with that problem is through role models. There have always been inspiring leaders like W.E.B. DuBois, Martin Luther King, Jr., and President Barack Obama; unfortunately, they have to compete with the likes of Bone Crusher, DMX, and The Notorious B.I.G. Affirmative action in higher education has the potential to increase the number of role models exponentially. A state could reasonably conclude that if young people of color believe there is a career path that can give them dignity, respectability and material comfort, they will pursue that path in droves. They will feel that they have a true stake in society because it is possible to achieve equality in fact. That would be consistent with the purpose of the equal protection clause, which was to require equality in law so that blacks could achieve equality in fact. The equal protection clause was not designed to enable Abigail Fisher to go to the University of Texas, as opposed to LSU, which she currently attends.

Concepts such as "suspect class," "fundamental right," "compelling governmental interest," and "narrowly tailored" are not the law. They are analytical constructs that assist courts in carrying out the purpose of the law. When they are used to frustrate that purpose and, in effect, create new law, they turn judges into legislators or, even worse, the Court into a nine person constitutional convention.

In their efforts to interpret the equal protection clause broadly, some Justices appear to have forgotten about the Tenth Amendment to the Constitution, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Apparently, in their view, the powers reserved to the states do not include the power to promote equality. Apparently, as a result of certain penumbras that emanate from the equal protection clause, the states do not have the ability to take reasonable steps to promote equality as a way of preventing their cities from burning.

Some might counter that the cities are not burning – but they have in the past. In fact, the affirmative action movement arose out of the civil unrest of the 1960s. A prudent person should not have to wait until the house is on fire to remove any flammable materials. States should be able to pursue more enlightened programs than simply building more jails.

I am well aware of the arguments that affirmative action does not work, that it is demeaning, and that it sets up the recipients of affirmative action for failure. But those arguments are best addressed by state legislatures, college administrators, and local school boards, who can weigh the benefits of affirmative action against its shortcomings with the help of experts. Judgments as to the efficacy of affirmative action are best left to state officials who are answerable to the democratic process, as opposed to judges who have no particular expertise in this area and are purporting to interpret a constitutional amendment that was adopted almost 150 years ago.

People uncomfortable with affirmative action often express a concern that if we permit racial distinctions based on good motives we will be susceptible to racial distinctions based on bad motives as well. As a practical matter, that is not a real risk. It is not difficult to distinguish between a program that creates 16 out of 100 slots for minorities and a program that limits a minority group to 16 out of 100 slots. There are many elite

private institutions in our society today with affirmative action programs that do not undermine their egalitarianism or their reputations for excellence.

To those who would argue that we have enough diversity in our institutions of higher learning, I would suggest that they look at the faces of the people at the next bar association function they attend. According to one study, between 1993 and 2009, proportional enrollment of blacks in law schools declined 9.9 percent and proportional enrollment of Mexican-Americans declined 26 percent. Similarly, when the right data are used, proportional enrollment of blacks in the University of California system declined from 4.2 percent in 1995, before the passage of Proposition 209, to 3.8 percent in 2008, after Proposition 209 had been in effect for 10 years, and while proportional enrollment of Mexican-Americans increased from 15.1 percent to 18.3 percent during that period, the Mexican-American population in California grew from 20 percent to 30 percent of the total population in the state between 1990 and 2010.

Instead of the rigid jurisprudence that has prevented it from making sensible decisions in this area, the Supreme Court should consider taking a practical approach to affirmative action. Call it the practical school of jurisprudence. As a practical matter, states adopt affirmative action programs because they feel they have a compelling need to do so, and affirmative action programs do not cause whites to suffer the kinds the kinds of harm that blacks were suffering when the equal protection clause was passed.

Slavery is the original sin of the United States. The residual effects of slavery have plagued us throughout our history and threaten to do so in the future. The rhetoric of color blindness sounds good, but to quote Justice Brennan, "[W]e cannot ... let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens." If the Supreme Court does not change course, I fear that future generations may look back on this era and wonder, as we wonder about *Plessy v. Ferguson,* "What were they thinking?"

The author would like to acknowledge the assistance of his associate, Luz Maria Henriquez, in conducting the research for this article.

In the Courts

Federal Rule of Civil Procedure 30 and the Conduct of Depositions[1]

By U.S. Magistrate Judge Lisa Margaret Smith

Over the course of my career as a U.S. Magistrate Judge I have had occasion to rule upon countless deposition disputes, brought to my attention by the parties, on issues ranging from the serious (potential intrusion into areas protected by privilege) to the mundane (the frequency and length of breaks during the deposition). I have also occasionally supervised the conduct of complete depositions. In particular, I have supervised a deposition conducted pursuant to Rule 27 of the Federal Rules of Civil Procedure, for the purpose of perpetuating the testimony of a Plaintiff who was fighting untreatable cancer; I have supervised depositions of a child and a mentally disabled adult to determine whether each witness was competent to give sworn testimony under Federal Rules of Evidence 601 and 603; and I have supervised portions of depositions conducted by *pro se* litigants, whose understanding of the applicable rules have been limited. I have also read myriad depositions and deposition excerpts in connection with various motions filed in cases over which I have had supervisory responsibility, including most especially motions for summary judgment. Although some attorneys and litigants have reported unruly conduct by opposing counsel during depositions, such as yelling at or ridiculing witnesses, most of the time the depositions I have supervised or reviewed have been appropriately and professionally conducted. However, it has been apparent to me that some attorneys have occasionally forgotten the rules that govern the conduct

of depositions in federal cases, and this article is intended to serve as a gentle reminder of the importance of complying with the applicable rules.

Federal Rule of Civil Procedure 30(c)(1) and (2) provide, in pertinent part, that at a deposition:

> [t]he examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence…. An objection at the time of the examination – whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition – *must be noted on the record, but the examination still proceeds*; the testimony is taken subject to any objection. *An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).*[2]

The limitation on speaking objections incorporated into Rule 30 resulted from the Advisory Committee's assessment that "[d]epositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond." The Advisory Committee intended that the applicable Rule would prevent such prolonging and frustrating of depositions.

A deposition is a part of a legal proceeding the conduct of which should require little guidance to counsel beyond that in the Federal Rules, and especially the limits established in Rule 30, *supra*; there are times, however, when additional guidance is required to assure appropriate attorney behavior during the conduct of depositions.

> As officers of the court, counsel are expected to conduct themselves in a professional manner during a deposition. A deposition is intended to permit discovery of information in the possession of the deponent or perpetuate the testimony of the deponent. In either case, it is to be conducted in a manner that simulates the dignified and serious atmosphere of the courtroom. Thus, the witness is placed under oath and a court reporter is present. Conduct that is not permissible in the courtroom during the questioning of a witness is ordinarily not permissible at a deposition. Thus, accusations of wrongdoing against witnesses and attorneys have no place in a deposition. Attempts to interrogate opposing counsel during the course of a deposition are improper. Because a judge is not present to rule on legal disputes, arguing legal matters during a deposition serves no purpose. A deposition is not to be used as a device to intimidate a witness or opposing counsel so as to make that person fear the trial as an experience that will be equally unpleasant, thereby motivating him [or her] to either dismiss or settle the complaint.[3]

The Local Rules for the Southern and Eastern Districts of New York, available on the courts' websites (http://www.nysd.uscourts.gov/rules/rules.pdf and http://www.nyed.uscourts.gov/pub/docs/local/localrules.pdf), contain a number of applicable provisions of which counsel should be aware. Local Civil Rule 26.4 provides, in part, that "[c]ounsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other[.]" Local Civil Rule 30.4, in its Committee Note, recognizes that certain obstructive behavior which may require judicial intervention does occur at depositions, and the Rule itself specifically disallows a deponent's attorney from initiating a private conference between the deponent and counsel "while a deposition question is pending, except for the purpose of determining whether a privilege should be asserted." Other instances of obstructiveness are to be referred to the court for a ruling. The Western District of New York maintains Local Rules of Civil Procedure, in which parties are directed to the court's Civility Principles with regard

to cooperation between counsel in the context of discovery, which would include the conduct of depositions. *See* The Local Rules of Civil Procedure for the Western District of New York (http://www.nywd.uscourts.gov/document/civil%20-%202012.pdf), augmented by the Civility Principles (http://www.nywd.uscourts.gov/document/civilityprincpreamle.pdf). The Civility Principles incorporate the following with regard to counsel's conduct in the taking of depositions: take depositions only when actually needed, and not for the purposes of harassment or other improper purpose; do not engage in conduct during a deposition that would not be appropriate in the presence of a judge; do not obstruct questioning during a deposition or object to deposition questions unless permitted under applicable law; ask only those questions that counsel reasonably believes to be necessary.[4] Other district courts within the Second Circuit do not have specific local rules that would apply to an attorney's behavior at a deposition, presumably relying on Civil Procedure Rule 30 to establish appropriate conduct. *See generally* The Local Rules of Practice for the Northern District of New York (http://www.nynd.uscourts.gov/References.htm); The Local Rules for Procedure for the District of Vermont (http://www.vtd.uscourts.gov/sites/vtd/files/LocalRules.pdf); The Local Rules of Civil Procedure for the District of Connecticut (http://www.ctd.uscourts.gov/).

The provisions of Rule 30 have been invoked on occasions where an attorney's behavior has warranted a consideration of sanctions. In a *per curiam* decision in *Craig v. St. Anthony's Medical Center*, 384 Fed.Appx. 531 (8th Cir. 2010), the Eighth Circuit affirmed a monetary sanction against counsel who:

> arrived late at the…deposition…, and…initially refused to produce his client…. Once the deposition started, [counsel] continually made argumentative and suggestive objections. He also engaged in private and off-the-record conversations with his client, answered multiple questions in place of his client, and instructed his client to refuse to answer questions. Only once did [counsel] assert a privilege to justify an off-the-record conversation or an instruction to his client to refuse to answer.

Relying on Rule 30(d)(2) ("The court may impose an appropriate sanction – including the reasonable expenses and attorney's fees incurred by any party – on a person who impedes, delays, or frustrates the fair examination of the deponent"), the circuit upheld the district court judge's imposition of a $1,000 sanction against counsel, despite counsel's claims of poverty. The Advisory Committee Note on the sanctions provision in 30(d)(2) summarizes that "[i]t authorizes the court to impose an appropriate sanction on any person responsible for an impediment that frustrated the fair examination of the deponent."

This author has dealt with any number of situations that were potentially sanctionable, and on occasions I have imposed sanctions for an attorney's conduct during a deposition. The most flagrant and most common violations of the rules are those in which counsel directs a witness not to answer a question on the grounds of something other than privilege or the other limitations set forth in Rule 30, most frequently on the basis of a claim of intrusion into the deponent's personal privacy (but not a claim of privilege), or on relevance grounds. Such an instruction is blatantly violative of Rule 30(c)(2), which restricts the use of instructions not to answer to circumstances "when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion [to terminate or limit the deposition] under 30(d)(3)." One of my fellow Magistrate Judges dealt with this issue in *FedEx Corp. v. U.S.*, No. 08–2423 Ma/P, 2011 WL 2023297 (March 28, 2011, W.D. Tenn.), concluding that counsel had repeatedly instructed the witness not to answer a question for reasons other than those permitted in Rule 30. The court sanctioned the party by requiring the deposition to be reopened in order to permit the objected-to questions to be answered, and required the party to reimburse the opposing party for its attorney's fees and costs associated with

making the motion, and with the reopened deposition. In similar circumstances this author has required the offending party to pay the costs of the reopened deposition, and in certain circumstances has even required that counsel pay the cost of a special master to supervise the conduct of future depositions, where the past behavior raised a significant concern that the offensive conduct would continue. While I am reluctant to impose sanctions, and I am particularly reluctant to issue opinions in which an offending attorney's name is mentioned, certain behavior will warrant such a consequence. In one case, in which counsel repeatedly and knowingly permitted the client to give false testimony, a sanction was warranted; in another case an attorney physically pulled a telephone cord out of the wall to prevent the adversary from contacting the court during the deposition, and a sanction was warranted; in a case in which counsel engaged in sarcastic and harassing speaking objections, where the clear intention was to discourage opposing counsel from making a complete inquiry into the client's actions, a sanction was warranted; in yet another case, in which counsel permitted the deponent, who was a practicing attorney, to interpose his own objections to the questions being posed by a *pro se* plaintiff, and then to refuse to answer the questions for reasons other than those provided for in Rule 30, sanctions were warranted.

In the experience of this author, the purpose of any court in resolving these disputes is to insure that discovery is completed in a fashion that is fair to all sides. Imposition of sanctions is intended to assure that this result will be achieved. In order to accomplish this goal, sanctions other than simply reopened depositions and payments of attorney's fees and costs have been found to be appropriate. In *D'Agostino v. Housing Authority of City of Waterbury*, 3:06cv1000 (PCD), 2007 WL 283082 (D. Conn. Jan. 29, 2007), the offending party was required not only to sit for a reopened deposition, but to arrange to have the deposition videotaped, cost split between the parties, in order to protect all sides from future accusations of bad behavior, and to provide an interpreter, cost to be borne by the deponent, to insure that there was no misunderstanding during the reopened deposition because of any language barrier. In another case in which the Magistrate Judge supervising discovery had repeatedly issued orders intended to encourage cooperation between the parties (but they persisted in engaging in "discovery nitpicking"), the court revoked counsels' *pro hoc vice* status, and precluded the violating attorneys from working on the case in future. *Ricoh Co., Ltd. v. Quanta Storage, Inc.*, 06-C-462-C, 2007 WL 5404935 at *2 (June 1, 2007, W.D.Wis.). These creative sanctions were intended to move the parties toward the goal of completing discovery.

Competent and professional conduct by counsel, in accordance with the provisions of Rule 30, will result in depositions which are not marred by the kinds of disputes that are discussed here. Typical descriptions of the challenged behavior includes statements such as: the "lawsuit has been contentious from the beginning," and "[i]t is easy to see that the dispute at [the] deposition resulted from the attorneys' mistrust and difficulty in working cooperatively to date." *Oseman-Dean v. Illinois State Police*, 11 C 1935, 2012 WL 243217 at *1-*2 (N.D. Ill. Jan. 24, 2012). Notwithstanding the presence of acrimony between the parties to the litigation, counsel have an obligation to follow the rules, and do so in a spirit of cooperation. In discussing a particularly difficult deposition dispute, one judge said: "Litigation at times can be trying. However, it is at the intersection of frustration and demand that the wise lawyer will check two axioms: (1) collegiality can displace cost, and (2) know the rules." *Pioneer Drive, LLC v. Nissan Diesel*, 262 F.R.D. 552, 553-54 (D.Mont.2009). After making specific reference to the dictates of Rule 30, the court said: "Given the protective provisions of the Rules, counsel is ill advised to invoke obstinance as opposed to collegiality. An even better option is to read the Rules before the deposition or at least do so when a potentially acrimonious issue arises." It is for this reason that the standard discovery order issued by the undersigned directs counsel to read

Rule 30 in connection with deposition disputes before contacting the court.

The provisions of Rule 30, particularly as amplified by the applicable Local Rules, ought to be enough to guide any attorney in how to behave during a deposition. Counsel who choose to ignore the rule's dictates should be prepared to explain themselves to the court, and, potentially, to face sanctions.

Notes

[1] Any opinions set forth in this article are those of the author and do not necessarily represent the position of the U.S. District Court for the Southern District of New York, or of any of its judges.

[2] Fed. R. Civ. P. 30(c) (emphasis supplied).

[3] *Ethicon Endo-Surgery v. U.S. Surgical Corp*., 160 F.R.D. 98, 99 (S.D. Ohio 1995).

[4] Local Civil Rules, *supra*, at Rule 26(h); Civility Principles, *supra*, at ## 19-22.

Ethics

The Constitutional Struggle Over New York's Attorney Advertising Rules

By James L. Bernard

New York's advertising rules took another blow from the Second Circuit last month, and this got me thinking about some recurring problems or issues with New York's efforts to regulate attorney advertising.

Stepping back, the subject of attorney advertising has seen a sweeping shift in the law over the last few decades. Starting with the Supreme Court's 1977 decision in *Bates v. State Bar of Arizona*, the Court upheld an attorney's right to advertise services, and the benign headline of the ad at issue reflected the times, "Do You Need a Lawyer? Legal Services At Very Reasonable Fees." Over the ensuing decades, the Court addressed a range of other means of advertising and soliciting, upholding a bar on in-person solicitation in 1978, in *Ohralik v. Ohio State Bar Assoc.*, striking down a bar on targeted print advertising in 1985 in *Zauderer v. Office of Disciplinary Counsel*, striking down a bar on targeted direct mail advertising in 1988 in *Shapero v. Kentucky Bar Assoc.*, and upholding a 30 day moratorium on targeted direct mail solicitation of accident victims in 1995 in *Florida Bar v. Went For It, Inc.*

An on-going tension in these decisions is the extent to which some Justices are prepared to let attorney advertising be regulated by the same commercial speech standards applicable to other forms of commercial speech, in contrast to those Justices who would be comfortable permitting states to adopt rules that permit regulation of, for lack of a better way of putting it, "taste" in attorney advertising. The first group of Justices essentially believes that if an advertisement is not misleading, it cannot be prohibited. The second group of Justices believes that even non-misleading advertising can be prohibited if it degrades the legal profession in some way. These conflicting views came to a head in *Florida Bar*, where the Court upheld a 30 day moratorium, not because it was misleading – in fact, one would not even think of a moratorium in those terms – but because, critically, the Florida Bar presented evidence that direct mail solicitation of accident victims was perceived by the public as "deplorable and beneath common decency."

The American Bar Association and the states have reacted to these rulings with what can often seem like an ever-changing landscape of rules and regulations governing attorney advertising. New York was no different, but New York went much further than many other states. All one need do is to compare the advertising rules embodied in Rule 7.1 of New York's Rules of Professional Conduct with ABA Model Rule 7.2. The Model Rule occupies about half a page of text; the New York rule occupies about three pages. New York adopted a bold set of restrictions. And the Justices of the Appellate Division made clear that they were trying to ensure that "the image of the legal profession is maintained at the highest possible level." The key issue is how that goal was accomplished in light of the jurisprudence briefly summarized above.

The Second Circuit has issued two rulings addressing New York's advertising rules.

In 2010, in *Alexander v. Cahill*, the Second Circuit upheld New York's 30 day moratorium on soliciting accident victims even though, notably, it was not limited to any one form of solicitation, unlike *Florida Bar*, which concerned a ban only on direct mail solicitation. But the Second Circuit struck down two more controversial parts of New York's advertising rules. In my view, New York realized that a direct effort to regulate "taste" would meet with a near-certain striking down of the legislation, and thus New York took a less direct route and instead prohibited certain advertising techniques that, arguably in the eyes of some, lead to advertisements that lack "taste." Thus, New York prohibited the use of a "nickname, moniker, motto or trade name that implies an ability to obtain results in a matter" and New York barred the use of "techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence." With respect to both, the Second Circuit essentially held that these advertising techniques may be irrelevant to the selection of counsel, but the First Amendment only permits a state to bar misleading, not irrelevant, advertising.

Fast forward one year and another aspect of New York's reform efforts was before the Second Circuit. And again, like the advertising rules, New York decided to chart a different course. The issue in the March 5, 2012, decision in *Hayes v. State of New York Grievance Comm*. was New York's requirements when attorneys advertise that they are a "specialist" in a particular field. New York requires attorneys advertising that they are a "specialist" to "prominently" display the following disclaimer: "The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law[.]" The Second Circuit struck down the second sentence in this disclaimer on the grounds that one aspect was not supported in the record (that some members of the public believe specialty certification might be required to practice law) and that the other would lead to more confusion than clarity (permitting attorneys, on the one hand, to say that they are a specialist, but then on the other requiring them to tell the public that specialization does not indicate greater competence).

The broad conclusion I draw from this brief history on attorney advertising is that the law is far from settled, and that as new technologies and means of advertising develop, we will see further efforts to regulate and further challenges to those regulations. In *Alexander*, the Second Circuit, in addressing the 30 day moratorium, specifically "eschew[ed] a technology-specific approach to the First Amendment" and held that that 30 day moratorium survived constitutional scrutiny regardless of whether an attorney streamed a radio advertisement online, played a television advertisement on the web, or placed pop-ads on web pages. Either way the intrusion into one's home and personal space was a sufficient enough concern to uphold the moratorium. In what may be a sign of things to come, the Second Circuit noted, in a footnote, that Google, when placing advertisements next to email messages, blocks such ads when the email refers to a catastrophe or tragedy. But the Second Circuit did not find sufficient enough comfort in this fact to hold that the 30 day moratorium should be technologically specific because it noted that "[i]t is by no means certain, however, (a) that Google will continue such a policy, (b) that the algorithm [which blocks these ads] runs without flaws, or (c) that other e-mail providers will exercise similar good taste." Tracing the history of attorney advertising from the simple ad in *Bates* to the use of "meta tags" (regulated by NY Rule 7.1(g)(2)), one thing we can be certain of is that we have not seen the last of creative efforts to regulate attorney advertising, nor have we seen the end of the courts trying to establish proper boundaries in an ever-changing legal and technological landscape.

Second Circuit Decisions

Unsettled Class Settlement Issues

By Charles C. Platt

The Second Circuit's recent decision in *In re American Express Financial Advisors Securities Litigation* addressed "several unsettled issues concerning the effect of a class-action settlement on [a] class-member's pre-existing rights to arbitrate certain claims." Although the court concluded that the settlement precluded most of the claims raised in arbitration, some suitability claims "were not, and could not have been released by the class settlement."

The plaintiffs in the case were individual investors who used American Express Financial Advisor services. They commenced a FINRA arbitration in 2009 alleging, among other things, that their advisor had not followed their preferred conservative investment strategy, but instead had invested in risky funds that led to large losses.

The defendants in the FINRA arbitration (Ameriprise entities that succeeded American Express Financial Advisors) moved to stay the arbitration based on a class action settlement that they had reached in the Southern District two years earlier in 2007, which allegedly released and precluded plaintiffs' FINRA claims. When the arbitrators refused to stay the arbitration, the defendants moved in the Southern District to enforce the class action settlement.

In the motion to enforce the settlement, the defendants argued that plaintiffs were members of the class who had received notice of the settlement, and who had claims against their financial advisor that were fully and finally released as part of the class action settlement in 2007. The "released claims" in the settlement agreement were broadly defined to include any claims that were or could have been asserted against the defendants, including claims based upon the facts alleged in the complaint. The facts alleged in the complaint focused on the defendants' purported use of generic financial plans to steer clients into certain proprietary and other funds that made certain payments to the defendants. Significantly, the settlement "carved out" any suitability claims unless they arose out of the "same common course of conduct" that was alleged or could have been alleged in the class action complaint.

The Ruling

The court focused first on whether a federal court could enjoin a pending arbitration, which was a question that had never been explicitly resolved in the Second Circuit. The court recognized that defendants had consented to arbitrate in FINRA proceedings any claims with its clients arising out of its business activities. However, the class action settlement agreement could revoke that consent, in the court's view. Since the class settlement not only resolved certain claims that class members might have, but also implicitly revoked the defendants' existing consent to arbitrate those claims, the "question of arbitrability" is reserved to the federal courts, not the arbitrators. Moreover, the settlement agreement explicitly vested the federal court with exclusive jurisdiction to enforce its terms. Thus, the claims that were resolved in the settlement were no longer subject to arbitration, and could be enjoined.

The court also considered whether the release in the settlement agreement barred plaintiffs' FINRA arbitration claims even though those claims were not specifically raised in the class action complaint. The definition of the "released claims" was "expansive," but it did not include suitability claims unrelated to the "common course of conduct" that was the subject of the class action. Although the plaintiffs' FINRA claims seemed to identify alleged wrongdoing that closely resembled the "common course of conduct" set forth in the class action, the court found that plaintiffs' emphasis on their individual advisor's mismanagement and failure to follow a conservative investment philosophy was a "quintessential suitability" claim that fell outside the conduct at issue in the class action.

Conclusion

The decision highlights the difficulty of settling putative class

actions that complain of conduct by many different distributors of financial services. Although there may be a "common course of conduct" that permits a class to be certified and is the basis for a settlement fund, the loopholes for individualized claims that may exist in even an expansive class release remain a trap for the unwary, and may prevent the global peace that a settlement is designed to achieve.

Editor's note: The author's firm, but not the author, represented the defendants in this case.

The Interview

The Justice Resource Center

By Marjorie Berman

Each year the Federal Bar Council's charitable arm, the Federal Bar Foundation, authorizes a generous grant to the Justice Resource Center ("JRC") to aid its work of bringing knowledge of the law and the legal system to New York City high school students. Recently, I sat down with Debra Lesser, Executive Director of the JRC, to learn about the program, its history and its close connection to the Federal Bar Council and many of its member lawyers.

Q. What is the JRC?

A. The JRC is an Internal Revenue Code Section 501(c)(3) charitable organization developed as public/private venture between the New York City Department of Education and the New York City legal community. It is New York City's leading provider of law-related and civic education programs and curricula to New York City middle and high schools. The JRC offers a wide array of comprehensive programming, professional development, and curriculum materials, accompanied by school-level implementation support. Our programs are student-centered and teach middle and high school children their rights and responsibilities as citizens with the goal of cultivating future leaders. The JRC has about 24 programs in all that serve about 60-100,000 students each year.

There are two programs in which the FBC and its members are active – MENTOR and the Federal Courts Visits Program.

Q. When and how did the JRC begin?

A. Back in 1988, former Mayor Koch created a Mayoral Blue Ribbon Commission to establish a Law and Justice Program in NYC schools. The commission included a number of prominent lawyers including Joseph Barbash, Tom Evans, and the former Police Commissioner Ben Ward. The first program was established at Martin Luther King High school and was so successful that 99 percent of the students in that first year program went on to college, with the remaining one percent enrolling in the military. Based on its success, the program was replicated all over the city.

About four years before the commission was formed, Tom Evans, a former president of the Federal Bar Council, had envisioned an opportunity for lawyers to play a role in educating high school students about the legal system. To carry out that vision, he created the MENTOR law firm/school partnership program. MENTOR paired major firms with New York City high schools to create an opportunity for private lawyers to speak at public schools, for students to visit law firms to understand a firm's inner workings, for students to participate in moot court, and for lawyers to bring students to court to observe legal proceedings and meet with judges and court personnel. Based on Tom's work with the MENTOR program, Mayor Koch invited Tom Evans to be a co-chair of the commission.

When the commission ended, Tom Evans, along with others, was concerned about preserving the law and justice programs that the commission had created in the schools. He recruited lawyers who had been most active in the MENTOR program and set up the JRC to

implement MENTOR and to create a center to continue law- related education in New York City public schools.

Q. How did you personally get involved?

A. I was teaching social studies and a law elective at Martin Luther King High school when the program began. I had a background in criminal justice, having earned a Master's Degree from John Jay College. I started with the commission's program in its first year and was asked to join the JRC when the commission ended. I have now been with the JRC programs for 24 years.

Q. Can you tell me more about the activities of the MENTOR Program?

A. Currently, 51 law firms, including many of the city's largest firms, as well as smaller firms, participate in the MENTOR Program. Each firm is paired with a law-related class of approximately 32 students in one inner city school. The individual lawyers at these firms develop relationships with the students in a variety of ways. The relationship may involve the lawyer's visit to a law or social studies classroom, a lawyer-directed visit to a federal court or a student visit to the law firm. Some relationships are more involved and include tutoring, coaching, judging a moot court or mock trial, assisting teachers in developing law-based curriculum, and even paying for SATs or assisting with summer employment. Many of these relationships have been ongoing for decades. By way of just one example, Cadwalader, Wickersham & Taft has been associated with James Madison High School for approximately 29 years.

Q. Who arranges the activities between the law firm lawyers and the high school?

A. A law coordinator at each high school meets with the attorneys from the volunteer firm to plan and coordinate events.

Q. How would an interested law firm become involved?

A. We are always looking for new law firms to join our program. We presently have schools eager for a law firm to



Winning New York City team with the judges on the steps of the Peace Palace, The Hague, Feb. 2012

From left: Shannika Campbell, Harry S Truman High School; Juan Lopez, Flushing High School; Shannon Chang Hanson, Clifford Chance; Rafael Henriquez, Bronx High School of Science; Peiran Zhang, Francis Lewis High School; Debra Lesser, Justice Resource Center; Deputy Mayor Van Engelshoven, The Hague; Judge Bevers (ICC); Judge Howard Morrison (ICTY); Catrina Livermore, Forest Hills High School; Judge Christine van den Wyngaert (ICC); Judge Alphonse Orie (ICTY); Christopher Llego, Sheepshead Bay High School; Sophia Weinstock, Susan E. Wagner High School; Judge Stefan Treschel (ICC); and Tyler Deharrte, Cobble Hill School of American Studies. Photo courtesty Loes Schleedoom.

pair up with them. Interested lawyers or law firms can contact the JRC at 212-580-5905 or can contact me by email at deblesser@aol.com.

Q. What is the Federal Courts Visits Program?

A. There is an extensive courts visits program administered by the JRC. Students in the program spend a day visiting the Eastern District of New York, Southern District of New York, or federal bankruptcy court to observe trials, meet a judge in chambers and get a better understanding of the legal system. The students are accompanied by lawyers from the paired firm.

Q. How is the Federal Bar Council involved with the Federal Courts Visits Program?

A. The Federal Bar Foundation generously supports the program with a $17,000 annual grant. That grant pays for the cost of the Court Visits Coordinator, transportation for the students, and other costs to administer the program. The Foundation's support is critical to the program's success.

Q. How has the Federal Courts Visits Program been received by the students?

A. The Institute for Political Literacy and Civil Engagement ("IPLACE"), based at Pace University, evaluated the Federal Courts Visits Program in 2007-2008 based on student survey responses. The comments from the students reflect that the visits are well received by the majority of students participating. One of the most common sentiments expressed by the students was their appreciation of the opportunity to meet and speak with a judge. Other students commented that their perception of the law was shaped by television shows and the reality of viewing a true legal proceeding was quite eye-opening. Among the things the students noted was that legal proceedings can be complicated, confusing, long, and boring. However, they also commented that they came to have a better understanding of how strict the law can be and the consequences of breaking the law.

Q. Overall, what effect do these law and justice/civic based programs have on student performance?

A. The law and justice programs at the New York City high schools are generally three to four year programs. The goals of these programs are to ensure that students are college and career ready, are good citizens, learn respect for the law, and know and understand their legal rights. There is no question that these types of programs really help kids mature and develop critical thinking skills. National findings have demonstrated that students that participate in these types of programs have higher success rates than those who do not participate.

Q. Tell me a little bit about the JRC's Mock Trial Program?

A. Our annual mock trial program is sponsored by the New York State Bar Association. The JRC administers the program, which is held each February through May at the Manhattan Criminal Court, the Eastern District of New York, and Queens Supreme in Kew Gardens. While the firms involved in the MENTOR program are not required to participate in coaching students for the Mock Trial, in fact, almost every participant firm does so. The Mock Trial program is a fantastic experience for the students on so many levels. Approximately 100 public, private and parochial schools participate each year.

Q. I understand that this year JRC also became involved in an International Moot Court Program?

A. Yes, six countries were involved in the first-ever International Moot Court Competition, which took place at The Hague this past February. The fact pattern was based on child soldiers and involved application of international criminal law. The judges were from Amsterdam University and Leiden University and the final round judges were from the International Criminal Court and the International Court of the Yugoslavia Tribunal. The competition was held in the English language.

Qualified juniors and seniors were required to try out for the program. Prerequisites for the program included a minimum grade point average of 80 and prior participation in a moot court or mock trial. JRC formed two New York City all star teams with six participants and two alternates per team.

In preparation for the competition, the teams were coached by local firms. Clifford Chance and Weil Gotshal & Manges coached one team and Akin Gump Strauss Hauer & Feld and Winston Strawn coached the other.

Q. So, how did the New York City teams fare?

A. I am beyond delighted to say that one our New York City teams won the competition! The New York City teams were competing against 10 other teams from St. Petersburg, Russia; Buenos Aires; The Hague; Caracas; and Warsaw and Gdynia, Poland. I was incredibly proud of our students.

Q. Congratulations. That's a fantastic accomplishment. Do you intend to continue to participate in the International Competition?

A. We are certainly hoping to do so, provided we have the funding and continued support of law firms willing to coach. We are also looking to expand our MENTOR program internationally. Currently, we are seeking to partner with law firms with offices in various cities around the world to arrange law firm/school partnerships in Europe, Asia, and Africa.

Q. Can you tell me a bit more about how the programs at JRC are funded?

A. We are funded by a variety of sources including the Federal Bar Foundation, New York City, and some private law firms and foundations. For many years, we received substantial funding from the Center for Civic Education (www.civiced.org), a nonprofit organization dedicated to bringing civic education to schools. The Center had received Congressional funding through the Education for Democracy Act, which provided funds to many local organizations like the JRC. Those funds supported our We the People program, Project Citizen, the School Violence Prevention Demonstration Program, the Representative Democracy in America program, and the Civitas International Programs. Unfortunately, those funds are now completely gone.

Despite this, we are doing our best to keep *all* of our programs going. It's a challenge, but is well worth it in light of the results we see for our students. I really want to encourage additional participation by individual lawyers and law firms.

Q. Thanks so much for sitting down with me.

In the Courts

Judge Oetken Appointed to the Southern District Bench

By Robin Nunn

On January 26, 2011, President Barack Obama nominated James Paul Oetken to serve as a U.S. District Court Judge for the Southern District of New York. On July 20, 2011, he received his commission, and he was sworn in on September 19, 2011. Judge Oetken fills the vacancy created when Judge Denny Chin was elevated by President Obama to the U.S. Court of Appeals for the Second Circuit.

Born in 1965 in Louisville, Kentucky, Judge Oetken grew up in Iowa, where he was both class president and valedictorian of his graduating class at Regis High School in Cedar Rapids, Iowa. He received a bachelor's degree in philosophy from the University of Iowa in 1988. In 1991, he earned his law degree from Yale Law School.

From 1991 until 1992, Judge Oetken served as a law clerk for Judge Richard Cudahy on the U.S. Court of Appeals for the Seventh Circuit, and from 1992 until 1993, he served as a law clerk to Judge Louis F. Oberdorfer on the U.S. District Court for the District of Columbia. From 1993 until 1994, Judge Oetken served as a law clerk to Associate Justice Harry Blackmun on the

U.S. Supreme Court.

From 1995 until 1997, Judge Oetken worked as an associate with the law firm of Jenner & Block in Washington, D.C. He then joined the Office of Legal Counsel in the U.S. Department of Justice as an attorney-advisor, where he worked until becoming an associate counsel to the President of the United States in the office of the White House Counsel in 1999. As associate counsel , Judge Oetken specialized in First Amendment issues, presidential appointments, ethics, civil rights, and legal policy. He held that job until President Bill Clinton left office in 2001.

Judge Oetken worked as an associate and then as counsel at the law firm of Debevoise & Plimpton from 2001 until 2004. During his time at Debevoise, he specialized in general commercial litigation.

In 2004, Judge Oetken joined Cablevision Systems Corporation as its associate general counsel. In that capacity, Judge Oetken directed all of the company's litigation matters. In particular, Judge Oetken had significant involvement in a number of cases, including the *Cartoon Network, L.P.* v. *CSC Holdings, Inc. & Cablevision Systems*, a case regarding copyright infringement in the context of digital video recorders.

Judge Oetken was an adjunct professor at Fordham University School of Law from 2009 to 2010, teaching employment discrimination. He also served on the Communications & Media Law Committee for the New York City Bar Association.

Chief Judge Loretta Preska administered Judge Oetken's oath of office to a courtroom filled to capacity with family, friends, and colleagues attending the induction ceremony. Recommending Judge Oetken to President Obama for the Southern District, New York Senator Charles E. Schumer described him as having "sterling legal credentials" and a "distinguished career in private practice and public service."

Judge Oetken is the first openly gay man to serve on the federal bench in the United States. Senator Schumer added that Judge Oetken's judgeship was "a pebble in the water, sending ripples through history." He continued, "In this case, at this moment, we must note that Judge Oetken is not just the embodiment of excellence and moderation. As the first openly gay man to be confirmed as a federal judge and to serve on the federal bench, he will be a symbol of how much we have achieved as a country in just the last few decades."

Judge Oetken reports that he is thrilled with the opportunity to serve on the bench and enjoys working with his new colleagues. He notes that the judges for the Southern District of New York are not only extraordinarily intelligent, hard working, and thoughtful, but also extremely collegial as well. "I am impressed with my colleagues because they are really outstanding." Judge Oetken remarked that he works with "delightful people" who "have been warm and welcoming to [him] as a new judge."

FBC News

Council Honors Senior Judges of the Second Circuit

By Elizabeth A. Fitzwater

On March 29, hundreds of members of the bench and bar took time out to pay tribute to the senior judges who serve in the Second Circuit. The event, held at The Union League Club, was a festive celebration and a special occasion to thank the senior judges for their important work on the bench. A great many of the senior judges were able to attend.

Council President Frank H. Wohl opened the evening's remarks by applauding the "senior" senior judges – those with over 40 years of judicial service – which included Judge Feinberg (51 years), Judge Weinstein (45 years), Judge Curtin (45 years), Judge Griesa (40 years), Judge Duffy (40 years), and Judge Newman (40 years). President Wohl noted that the collective years of service of the senior judges being honored added up to over 1,500 years.

Breon S. Peace, a partner at Cleary Gottlieb Steen & Hamilton, and Marjorie E. Berman, a partner at Krantz & Berman, the co-chairs for the reception and longtime members of the Council, shared the honor of welcoming each of the honorees. Peace reminded those assembled that the Second Circuit's senior judges represent "some of the most

active senior judges in the federal judiciary, handling caseloads at levels well beyond those of their peers in other circuits." Peace shared the sentiments of the Council that it could "easily devote a dinner to each senior judge to recognize each of their individual achievements and contributions." Berman shared her surprise (and "dismay") in how quickly the judges who she viewed as the "young" and "new" judges of her generation were now being honored in their senior status. Peace, too, reminded the attendees that many of the honorees continue to serve actively and well in excess of the time required to qualify for senior status.

The event was a festive celebration and a special occasion to thank the senior judges for their important work on the bench.

The Hon. Robert D. Sack of the Second Circuit Court of Appeals addressed the gathering on behalf of his fellow honorees. Before offering his remarks, Judge Sack and the Council observed a moment of silence for the recent passing of Senior Judge Roger Miner. Judge Sack began by talking about a private moment on August 5, 2009, shared with his wife in a rustic cabin in Wyoming, when he became qualified for, and took, senior status: "I announced with all the gravity I could muster: 'I am now having a senior moment.'" Remarking how senior status is far from retirement, Judge Sack said that his "senior" status allows him – "albeit with frequent seven day working weeks" – to "keep up with the work of my three wonderful law clerks – down from the four with whom I worked as an active judge." Judge Sack lamented that if only "the rest of society had a way to engage the remaining talents of its seniors as the federal courts do."



Frank H. Wohl, Council President, Judge Sack, Judge Buchwald (the newest "senior" judge in the Second Circuit), and Marjorie Berman and Breon Peace, co-chairs for the reception.



At the reception.

Public Service

Two Legacies of Judge Morris E. Lasker

By Pete Eikenberry

On May 8, 1989, Judge Lasker made a speech at the Federal Bar Council Law Day Dinner where he was awarded the Learned Hand Medal for Excellence in Federal Jurisprudence. That evening I was seated at the very back of the Waldorf grand hall at a table with my close Brooklyn friend, Richard Huffman. Since it was easy for us, we ducked out after dinner and went home, skipping the speeches.

At that time, I had previously appeared before Judge Lasker in a case involving the "winding down" of artist Georgia O'Keefe's relationship with my client, her long time agent. O'Keefe's lawyer, the late Jim Oliensis, and I developed a good rapport over the three weeks I had been in the case, and we settled it. Jim graciously invited me to O'Keefe's hotel to meet her and to witness her signing the settlement agreement. However, when Jim called from the lobby to announce our coming, O'Keefe told Jim that she did "not want to meet one more lawyer," and I did not meet Georgia O'Keefe. After Jim and I "order to show caused" each other back and forth in a "dust up" about settlement agreement compliance, Judge Lasker sat us down at a table and extracted a promise that we could work all this out in the greater interest of New York City as a world art center, etc. Jim and I did so and all issues thereafter were mediated by former Southern District Judge "Ace" Tyler.

I have some regret at not having met Georgia O'Keefe. However, I profoundly regret not having heard Judge Lasker's speech where he proclaimed that:

> So long as we shall continue to conceive of law not as the disguised manifestation of mere will but as the effort of reason to discover justice, the body of [Judge Hand's] opinions will be an enduring source of truthseeking and illumination.

I love his definition of law as "the effort of reason to discover justice." He went on to discuss Hand as follows:

> Hand the Citizen who [in] speaking to Yale Law School graduates in 1931 told them: "The condition of our survival in any but the meagrest existence is our willingness to accommodate ourselves to the conflicting interests of others, to learn to live in a social state." During World War II in Central Park, he described the spirit of liberty as remembering, "That not even a sparrow falls to earth unheeded…."
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> [T]he problems of homelessness, AIDS and drugs are issues of such magnitude that a profession charged with the administration of justice, a profession which prides itself on being a caring profession, cannot regard them with equanimity…The nature of all three of these social ills demands approaches much broader than ordinary pro-bono efforts…At the very least, and at the very beginning, the profession can organize for the purpose of determining what it can do to help conquer these adamantine enemies.
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> The undertaking of such a venture would help to unify and heal the community at a time when these social maladies are causing divisiveness and pain within the City. It would also justifiably result in a renewed respect for a profession whose ancient and honorable purposes were intended to earn that respect… And we would all know that "not even a sparrow falls to the earth unheeded."

On the morning following Judge Lasker's award acceptance speech – May 9, 1989 – Rich Rothman of Weil Gotshal, then chair of the Federal Bar Council's Second Circuit Courts Committee, of which I was a member, called me. On behalf of the Federal Bar Council, he asked if I would form a committee to respond to Judge Lasker's call for the legal profession to accept responsibility for helping to solve the three leading problems of the day: drug addiction, homelessness, and AIDS. I had to ask Rich to get me a copy of the judge's speech, but I accept-

ed the assignment.

Some people from Rich's committee, including Steve Edwards, volunteered to join me, and I recruited other friends, including Richard Huffman and now-Judge William Kuntz, whose young daughter, Liz, later donated her favorite Snoopy toy to give to me for a homeless child. We informed Judge Lasker of our nascent effort through formation of the Federal Bar Council Public Service Committee. Though I set the meetings at 7:45 a.m., the judge regularly caught a 5:30 a.m. train to join us. Everyone agreed that taking on AIDS, drug addiction, or homelessness alone was a challenging-enough assignment without trying to be effective in all three. We chose homelessness.

We had a parade of homelessness experts and officials who attended our meetings and we became steeped in information without having taken an action step. Still, with Judge Lasker in attendance, we had a good turnout each month. I thought maybe some "young blood" would help identify a project. I asked my son David, a junior associate at Simpson, if he knew of any young lawyers who might be interested. He recommended a first year associate at Debevoise, Mary Beth Hogan, who recruited "Tiggy" (Tigren) Eldred, a public service intern at Sullivan & Cromwell, and Maria Horn, also from Debevoise. They were appropriately enthusiastic and Mary Beth and Tiggy put us in contact with Nazareth Housing.

It had purchased a couple of buildings on the lower east side that they made available for homeless people to buy into with "sweat equity." There were a total of only 11 units when we did a lower east side tour of the projects. Nazareth had some legal documentation problems with "yuppies" finding a way to displace the homeless for whom the units were intended. We brought in the Real Estate Committee of the City Bar and solved the problem. I once observed that maybe we could help Nazareth with "board building," but we did not follow up on the concept.

However, Nazareth did recruit Steve Edwards from our committee, who became its president. Over time, he recruited, *inter alia*, Bennette Kramer, Mary Beth Hogan, and Alice Beal, who was known to the Federal Bar Council through her husband, Judge Kuntz. Nazareth's budget has multiplied and it has become one of the most highly recognized not-for-profits in the city, not only for its good work but for its doing so much per budget dollar. In 2011, Nazareth served 4,341 individuals from 2,405 households with shelter, preventive services, financial counseling, literacy, and job training or permanent housing placement. Most heads of families served have income of less than $10,000 per year and have no high school education.

Mary Beth Hogan is succeeding Steve Edwards as president and many Federal Bar Council leaders have been honored at Nazareth's annual fund raising event including Steve Edwards, Betsy and Ken Plevan, Audrey Strauss, and "Rusty" Wing. A few years ago, after I was invited to speak at the annual fund raiser, I called Judge Lasker in Boston to tell him of Nazareth's terrific work, boosted substantially by an infusion of Federal Bar Council leadership. He was very pleased and told me at the age of maybe 92 that he had just stopped trying cases. He was still going to work every day doing mediation. If there ever could be such a thing as a Federal Bar Council charity, maybe Nazareth should be it. I do not know the grant philosophy of the Federal Bar Council Foundation or of its available funds but possibly it might entertain a grant application from Nazareth.

The Federal Bar Council Public Service Committee has recently trained hundreds of pro bono volunteers to represent immigrant litigants in support of the Katzmann Study Group efforts. For the last 10 years, Judge Denny Chin has taken on Judge Lasker's role of providing judicial leadership and inspiration by regularly attending meetings and fully participating in the committee's activities. Judge Lasker has many legacies but two very important ones were born of his 1989 speech: Nazareth Housing and the Federal Bar Counsel Public Service Committee. He thus contributed substantially to an "effort of reason to discover justice" – which he wisely defined with the help of Learned Hand more broadly than our formal justice system.

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