Federal Bar Council Quarterly

March/April/May 2011 www.federalbarcouncil.org Vol. XVIII, No. 3

Provocative, Human, Eclectic

In This Issue:

From the President..... 2

Council President Frank H. Wohl discusses the time demands on litigating lawyers in his column, "A Jealous Mistress."

From the Editor..... 3

Bennette D. Kramer highlights additional gender issues in her column, "Women in the Legal Profession."

Developments: Celebration of Dissents, Concurrences, and Judicial Collegiality 5

The Federal Bar Council on May 3 celebrated Law Day in a black tie event that focused on two great judges: Learned Hand, and this year's recipient of the Learned Hand Medal, retired Justice John Paul Stevens. Steven Flanders reports on the evening's festivities.

Developments: Council Holds Winter Meeting; William Plunkett Honored 7

This year's Winter Bench and Bar Conference was at the Hilton Los Cabos Beach & Golf Resort in Los Cabos, Mexico. Bennette D. Kramer describes several of the programs presented, and the receipt by William Plunkett of the Whitney North Seymour Award for public service by a private practitioner.

Personal History..... 21

Pete Eikenberry writes about his Uncle Dillon, who is most well known (or notorious) for succeeding Dwight Eisenhower's brother Milton as head of the War Relocation Authority, which interned American citizens of Japanese descent and resident Japanese aliens during World War II.

And More.....

The wide range of articles in this issue also include Edward W. Hertwig's article on "Justice Kagan's First Dissent" (p. 10); an ethics discussion by James L. Bernard entitled, "Is it Right for Journalists to Lie?" (p. 14); articles on recent Council programs by Daniel E. Wenner (p. 16) and Jeanette Redmond (p. 18); and attorney Jay Goldberg's take on "The Robert F. Kennedy I Knew" (p. 18).

From the President

A Jealous Mistress

By Frank H. Wohl

About the only thing I recall from my first day of law school is that a professor intoned with great solemnity, "The law is a jealous mistress." I was unattached at the time. Consequently, the idea of a mistress did not sound so bad. I did not give much thought to the jealous part.

Recently, I had occasion to consider the professor's serious injunction, so I looked up the entire quotation. It is from Justice Joseph Story who, in 1829, when he held down two jobs – Harvard Law professor and Supreme Court justice – warned his students, "The law is a jealous mistress and requires long and constant courtship. It is not to be won by trifling favors but by lavish homage."

I doubt that Justice Story could have imagined the "lavish homage" demanded by the law today. I am told that lawyers did not keep track of billable hours in his day. A 1958 American Bar Association pamphlet suggested that lawyers should expect to bill 1,300 hours per year. When I started practice, in 1966, 1,500 billable hours seemed a respectable year for a diligent lawyer. Those numbers are "trifling favors" by today's standards, as lawyers' billable hours seem to be headed above the 2,000 mark, and we read occasional stories of "superlawyers" with over 3,000 hours.

The intense preparation for trial, argument, drafting, and other components of increasingly complex cases seems to demand more and more time. Ironically, the advent of computers has increased, not decreased, the time demands on litigating lawyers. Computerized research, both legal and factual, is of course more efficient and effective than the old, manual method of poring over books and periodicals in libraries. Strangely, however, as capabilities have increased, expectations have moved even faster. Today, when a relevant case is decided in an obscure state court, a federal practitioner in New York is expected to know about it instantly. With all of human activity available online through the mainstream media or blogs and other sources, the well-prepared litigator must know of any development of relevance to his or her cases, if not immediately through a computerized alert, at least much faster and more reliably than would have been possible through the "snail mail" of the pre-computer age.

At the same time that clients are more demanding, they have become increasingly resistant to the cost of funding the "learning curve" for counsel unfamiliar with a specific topic. Consequently, general counsels are often searching for "specialists" who are experienced in the kind of litigation a client is either considering or, unfortunately, engaged in. As one client put it, referring to high hourly rates, "Lawyers should be paid to know, not to learn."

CLE Programs

The Federal Bar Council's CLE programs offer members a valuable opportunity to stay, or become, "learned." The Council provides a valuable array of programs of specific interest to federal court practitioners, especially those in the Second Circuit. So far this fiscal year, beginning September 1, 2010, under the direction of our Program Committee, chaired by David Pitofsky, the Council has sponsored 32 programs with expert panelists, including 45 judges from the federal courts in the Second Circuit as well as 149 experienced practitioners. While some of the programs have occurred at the Council's Winter Bench and Bar meeting or at our Fall Bench and Bar Retreat, over half have occurred locally. These programs are free for Council members.

Recent Federal Bar Council topics have included key matters in civil litigation such as updates on the federal rules, discussions of how the lower courts are implementing the ground-breaking Supreme Court decisions in *Iqbal* and *Twombly*, as well as recent developments in attorney sanctions, e-discovery, and methods for combating the spiraling cost of civil litigation. On the criminal side, expert panels have discussed recent developments in insider trading prosecutions, multi-jurisdictional Foreign Corrupt Practices Act investigations, and the implications of the Supreme Court's *Skilling* decision, which effected a major change in the application of the mail fraud

statute to "honest services" fraud. In addition, panels have discussed significant ethical issues as well as important practice developments, such as the practical and ethical implications of social networking media.

Although CLE programs certainly cannot substitute for actual experience, they provide not only valuable updates on recent developments, but also perspectives of judges and other practitioners on those developments.

Two recent programs of great importance to the bar were the May 2010 program on racial and ethnic diversity in the profession and the January 2011 program on subconscious gender bias. While we in the Second Circuit are fortunate that many of our most capable, respected, and powerful advocates are attorneys of color and/or women, we must recognize that all diversity and gender bias issues have not been solved. The statistics included in both of these programs demonstrated that the legal profession has made significant strides toward greater diversity. Those statistics also revealed, however, that much remains to be done. Aside from statistics, these programs presented valuable insights into unconscious behavior patterns that can infiltrate even the most well-intentioned organizations. The Council's attention to diversity issues continued with a program on May 18 on Best Practices for Law Firm Diversity and Accountability.

The Council's CLE programs provide an excellent opportunity for members of our learned profession to keep learning. I hope to see many of you at future programs.

From the Editor

Women in the Legal Profession

By Bennette D. Kramer

All of a sudden, it seems, there is a boom on articles, reports, and programs on women in the legal profession, conscious or unconscious bias, and how to resolve the issues arising from bias. For example, since the beginning of this year, both the Federal Bar Council and the City Bar have presented programs on the difficulty for women to achieve success in law firms. The Federal Bar Council Program (reported in the December/January/February 2011 issue of the *Federal Bar Council Quarterly*), entitled "Identifying and Tackling Unconscious Bias in the Legal Profession," addressed the issues raised in the National Association of Women Lawyers 2010 Survey on the Status of Women in Law Firms, which showed that only 15 percent of equity partners and six percent of managing partners in law firms are women and that there are very few women who play major rainmaking roles. The NAWL Survey also showed that women equity partners earn 85 percent of the compensation earned by male equity partners and that two tier firm structures that have a mixture of equity and non-equity partners have many more women lawyers who are non-equity partners. Indeed, 73 percent of fixed income "equity" partners are women. Similarly, women represent 60 percent of staff attorneys.

The City Bar program, headed by Justices Angela M. Mazzarelli and Rosalyn H. Richter of the Appellate Division, First Department, examined the lack of women in commercial cases pending in New York state and federal courts. After the justices noticed that there were few women arguing commercial cases, Justice Richter and her staff gathered statistics covering the period from September 2010 through January 2011. Of the 98 commercial cases before the court during that period, male attorneys took the lead role on 86 of those cases, with female lawyers taking the lead role in a dozen cases.

The McKinsey Report

Women lawyers are not the only women who are examining bias and discrimination resulting in fewer women in the profession. Recently, the *Wall Street Journal* commissioned a report from McKinsey and Company and held a conference on Women in the Economy. At the conference, business and government leaders looked at what is holding women back in the workplace. The *Journal* published a special section on Monday, April 11, entitled *Women in the Economy, The Journal Report*.

Issues Identified

At the Federal Bar Council conference, the panel members concluded that unconscious bias against women by men and women alike results in demanding higher standards from women, judging women more harshly, and making the assumption that women will not be able to fulfill both professional and home obligations. Preconceived ideas of behavior also affect attitudes toward women. Under some of these preconceptions women are not expected to be aggressive or ambitious and, when they are, others regard them negatively.

At the City Bar conference, the panel members – Justices Richter and Mazzarelli, U.S. District Judge Deborah Batts, Bristol-Myers Squibb general counsel Sandra Leung, Allstate Insurance general counsel Michele Coleman Mayes, and Sullivan & Cromwell partner Penny Shane – identified several factors responsible for the disparity in men and women as lead counsel in commercial cases, including big firms (which handle the majority of commercial cases) do not dedicate enough resources to developing female talent; clients expect older white men to lead the team; women choose other job options that they believe will allow more time for mothering and other domestic responsibilities; and women do not develop the relationships with clients that enable them to take the lead.

The McKinsey report and resulting *Wall Street Journal* conference looked at the problem as waste of the resources that corporations could be using. The major problem is that women do not advance from middle management. The barriers that the McKinsey report identified are lack of women role models; exclusion from informal networks; lack of sponsors; family concerns with perceived conflict between executive lifestyles and home responsibilities; institutional mindsets; and individual mindsets. The study did find that women do not lose confidence in their own abilities, but do lose confidence in their ability to surmount barriers to advancement.

Proposed Solutions

The Federal Bar Council panel members recommended first and foremost that women at law firms aim toward gaining access to power at their law firms. To do this they recommend that women lawyers find partner sponsors; engage in more self-promotion; emphasize the positive aspects of their activities, rather than pointing out inadequacies; demonstrate that they can handle home responsibilities and law firm demands; and accept most work assignments. Firms must develop procedures for conducting unbiased reviews and be vigilant for unacknowledged bias.

The City Bar panel members recommended that women be less reluctant to ask acquaintances and friends for business; build strong relationships with clients; and be more aggressive within firms for opportunities to put themselves on the front line. Following the program, City Bar President Samuel Seymour sent an e-mail to all participants thanking them for attending the program and stating that the City Bar wanted to make sure that the momentum generated by the program continued. He reported that a number of firms had agreed to keep the conversation going and invited the participants to do so, too.

The McKinsey report, focusing on the employer side of the equation, recommends comprehensive change to increase and sustain gender diversity in senior management. Accordingly, its recommendations were directed to U.S.-based corporations to help them achieve economic growth and to be globally competitive. The report's recommendations included emphasizing the benefits of increasing the senior management pool to create the desire for change; changing the organizational processes to reinforce the change (*i.e.*, track performance); building the capabilities that enable the desired behavior (*i.e.*, train men and women to become more effective sponsors); and modeling the change through all levels of leadership from the top leaders to line supervisors.

The *Journal* conference had a panel that recommended how to move forward by industry. The recommendations for those in Law and Professional Services included having professional schools and companies train women students and employees in business-development skills to enable women to market themselves effectively; developing

objective and transparent compensation systems; supporting women in collaborative relationships across professional boundaries; and using the procurement power of companies to encourage providers to promote women and people of color.

Conclusion

The common theme that runs through all these discussion is that access to power, expanding business development skills, attentive mentoring, and a more assertive posture are essential to the success of women in law firms and the corporate world. The message here is that, while women are now participating in law firm and corporate life, even highly qualified women are struggling to reach the top in terms of management positions and earnings. That struggle arises, in part, from the inability, for whatever reason, to attract clients. The McKinsey report is correct: there must be actual systemic changes that result in training and encouraging both women and men to create an atmosphere where women are given the tools and encouragement to succeed. Mere discussion of change will not result in the necessary changes.

Developments

Celebration of Dissents, Concurrences, and Judicial Collegiality

By Steven Flanders

The Federal Bar Council on May 3 celebrated Law Day in a black tie event that focused on two great judges: Learned Hand, and this year's recipient of the Learned Hand Medal, retired Justice John Paul Stevens. The evening's festivities began on a light note. Following an informative introduction by President Frank H. Wohl, Justice Stevens indicated that if he had known while on the bench what he knew from President Wohl's introduction, "[he] might have kept [his] mouth shut more."

Quite evidently, this remark was intended purely for the laughter that it generated. Mr. Wohl had observed that Justice Stevens, in 34 years on the Supreme Court, wrote 1,390 opinions, far more than any other justice ever. Moreover, he wrote opinions in 37 percent of the argued cases on which he sat, almost certainly the highest figure ever. No surprise, this: "In his Supreme Court confirmation hearing, Justice Stevens explained that he would very likely write many separate opinions, based on his view that the public should know what judges think if they disagree with the

Editors

Managing Editor
Steven A. Meyerowitz

Co-Editors-in-Chief
Bennette D. Kramer
James L. Bernard

Editors Emeriti
Steven M. Edwards
Charles C. Platt
Marjorie J. Peerce
Peter G. Eikenberry

Board of Editors
Marjorie E. Berman
Steven Flanders
James I. Glasser
Stephen L. Ratner
Hon. Lisa Margaret Smith
C. Evan Stewart

Federal Bar Council Quarterly (ISSN 1075-8534) is published quarterly (Sept./Oct./Nov., Dec./Jan./Feb., March/April/May and June/July/Aug.) for $40 per year by the Federal Bar Council, 123 Main St., Suite L100, White Plains, NY 10601-3104, (914) 682-8800. Periodicals postage paid at White Plains, NY. POSTMASTER: Send address changes to Federal Bar Council, 123 Main St., Suite L100, White Plains, NY 10601-3104. Copyright 2011 by Federal Bar Council. All rights reserved. This publication is designed to provide accurate and authoritative information but neither the publisher nor the editors are engaged in rendering advice in this publication. If such expert assistance is required, the services of a competent professional should be sought. E-mail: *federalbar@federalbarcouncil.com*. Web site: *http://www.federalbarcouncil.org*.

majority's result or reasoning." And so he did. "Over his career on the Court, he wrote over 600 dissents, more than any justice in history, and over 350 concurrences, again the most in the Court's history." And it is clear that volume hardly defines Justice Stevens' legacy. "Throughout his tenure on the Court, his opinions have shaped our understanding of virtually every area of the law."

The core of Justice Stevens' generous address that followed could be taken as a demonstration that, truly, one can disagree without being disagreeable. His comments about judicial colleagues past and present were unfailingly insightful and yet also positive, whether he agreed with the judicial action in question or not. And several comments offered perspectives new to his listeners. On Judge Hand, Council attendees were treated to an interesting personal perspective. "When Jimmy Byrnes retired from the Supreme Court in October 1942 after only one term, Learned Hand and Wiley Rutledge were leading contenders for his seat. Hand was, and no doubt still is, the best qualified judge never appointed to the Court. In 1942, Hand was 70 years old, whereas Rutledge was only 48. Their differing life expectancies may well have motivated President Roosevelt's choice of Rutledge. Ironically, Rutledge died in 1949 while Hand remained active on the Second Circuit. Despite my respect and admiration for Judge Hand, given the fact that Rutledge later hired me as a law clerk, I must acknowledge that I am grateful the president made the choice that he did."

Taking his cue from the traditional focus on Hand's judicial excellence as the core of the Law Day event, Justice Stevens continued: "I think it appropriate at a dinner in his honor to pay tribute to two other fine federal judges as well." Speaking of Justices Tom Clark and John Marshall Har-



Justice Stevens, flanked by Council President Frank Wohl and Lewis Liman

lan, Justice Stevens declared that "neither has received the acclaim that his judicial service merits." Justice Stevens appeared before Justice Clark in important cases before the Court, but his closest contact came after Justice Clark's retirement, when he sat regularly on the Seventh Circuit with then-Judge Stevens during a judicial crisis of that court occasioned by the Chicago Seven appeals and the indictment of Otto Kerner. Justice Stevens stated that he thought that as a retired Justice, "Tom did almost as much judicial work as when he was active." He added that he would "never forget his selfless and invaluable contribution to our work during that difficult period." (The Seventh Circuit had lost the services of half of its active judges to these twin judicial crises.)

Justice Stevens had first known Justice Harlan when he came to New York "as a Chicago journeyman" when Justice Harlan "was the master craftsman from New York trying the DuPont antitrust case in Chicago." After he became a judge and then a justice, the Council's honoree said, "The most gratifying praise I have received as a judge is flattering comparisons of our work."

Justice Stevens commented "on differences between John Harlan's approach to law and views that the current holder of his seat – Justice Scalia – has recently expressed," gently taking on the latter's views on originalist interpretation. Early in his speech he quoted with pleasure two well known observations of Judge Hand: "There is no surer way to misread any document than to read it literally," and "No doubt one may quote history to support any cause, as the devil quotes scripture." In an observation toward the conclusion of his speech he stated that "it is clear to me that Justice Harlan would have dissented in" *McDonald v. City of Chicago* and *NASA v. Nelson.* As to the former, Justice Stevens stated that, "I think it likely that Justice Harlan…would have conclud[ed] that a constitutional amendment that was adopted to protect the states' right to determine how best to regulate their militias, and which for over 140 years had imposed no impediment to state regulation of firearms, should not be changed by federal judges."

Justice Stevens had a busy day on May 3 for anyone, and especially for a nonagenarian. As the justice who had most dramatically and emphatically drawn attention to the crisis in representation (as well as non-representation) of immigrants facing deportation, he had given the keynote address to a major conclave on that subject at Cardozo School of Law that same afternoon. As reported in *The New York Times*, that event was convened as part of an effort launched two years ago by Second Circuit Judge Robert Katzmann. Justice Stevens, not long before his retirement from the Supreme Court, "galvanized immigrant advocates with a decision last year that said lawyers must tell their clients about the deportation consequences of pleading guilty." In his Cardozo address, the Justice was quoted as saying that the need for legal representation of immigrants "is really acute." In addition to pressing for more and better representation, Justice Stevens urged his listeners at Cardozo to press for legislation that would offer greater judicial discretion in deportation cases: "the consequences are just so drastic." The Federal Bar Council may be proud of the leadership of Judge Katzmann and our courts in these important matters.

The Law Day Dinner broke all records for attendance. President Wohl thanked Executive Director Jeanette Redmond and staff, and the staff of the Waldorf-Astoria for "a terrific job in organizing this event."

Developments

Council Holds Winter Meeting; William Plunkett Honored

By Bennette D. Kramer

The Federal Bar Council held its annual Winter Bench and Bar Conference at the Hilton Los Cabos Beach & Golf Resort in Los Cabos, Mexico, from February 19 through February 26, 2011. David B. Pitofsky and Mary Kay Vyskocil were the co-chairs of the meeting, and Second Circuit Judge Peter Hall chaired the planning committee. William Plunkett received the Whitney

North Seymour Award for public service by a private practitioner. Below, we describe several of the programs presented.

Trial of Harry Truman

The Trial of Harry Truman was finally performed at the Winter Meeting. In 2010, the production was thwarted by the tsunami warning in Hawaii, so it was performed last September at Brooklyn Law School. This year, under the direction of Steve Edwards, an able cast, starring Eastern District Chief Judge Dearie as President Truman and presided over by District of Connecticut Judge Janet Arterton, participated in the trial of President Truman for dropping atomic bombs on Hiroshima and Nagasaki in August 1945.

Federal-State Judicial Issues

Former Council President Mark Zauderer led a panel on how the federal and state courts address various litigation issues. The first issue discussed was e-discovery. William McGuinness explained the differences, from a practitioner's point of view, in the state and federal court approaches to e-discovery. In federal court there is an affirmative obligation to preserve evidence, while in state court the focus is on the intent to destroy or spoliate evidence, which begins when a party has a reasonable expectation of a claim. Justice Bernard Fried of the Commercial Division, Supreme Court, New York County, noted that there were no e-discovery rules in state courts and few state court decisions addressing the issue. Only one Commercial Division judge refers to the need to preserve electronic evidence in pending litigation, potential prejudice, and regulatory requirements.

Judge Barbara Jones of the Southern District of New York pointed to Judge Shira Scheindlin as the thought leader on e-discovery for the district courts. Beginning in the pre-litigation phase litigants in federal courts have many duties, including:

- issuing a litigation hold on electronic material;
- identifying key players and preserving their records;
- stopping deletion of e-mail;
- contacting former employees; and
- preserving back-up tapes.

The state imposes no similar duty to institute a litigation hold.

Justice Fried discussed parallel state and federal court litigation. It is Justice Fried's belief that one judge should not speak to another judge about the substance of a case. The only discussions should involve working out scheduling problems, unless lawyers agree. Justice Fried also discussed the differing standards for preliminary injunction hearings in federal and state courts.

Finally, panel members, led by Second Circuit Judge Peter Hall, considered the certification procedures for referral of questions from the Second Circuit to the New York State Court of Appeals. He noted that a panel will ask parties if they will agree to certification, and that the Second Circuit certifies a question only if it is critical to the determination of a matter. Justice Fried added that questions had been certified to the Court of Appeals from other courts as well, including the Delaware Supreme Court and the Australian Supreme Court.

Gun Laws After *McDonald* and *Heller*

Professor Nicholas Johnson, Fordham University, School of Law, chaired a panel discussion on the impact of *McDonald* and *Heller* on current local and state gun laws. The lively discussion focused on the need for gun control to reduce crime on the one hand versus the right of citizens to bear arms on the other. William Bratton, former Commissioner of the New York Police Department and Chief of Police of Los Angeles, explained the need for control of firearms in the hands of citizens and criminals to curb violence and how the efforts to control firearms has bumped up against the growing momentum to deregulate firearms. Michael Cardozo, New York City Corporation Counsel, explained that under New York state law, a citizen may obtain a permit to keep a gun in his or her home, subject to a background check, but to obtain a carry permit in New York City, a person much show "cause" such as self defense or the need to carry a lot of cash. Cardozo said that many assume that *Heller* granted a right to carry, but that is not correct. *Heller* is concerned only about self-defense in the

home, not the right to carry a gun in the street. Richard Aborn stated that the debate should focus on the effort to control illegal guns, not to ban guns.

Professor Johnson explained the tensions between the right to bear arms defined in *McDonald* and *Heller* and current state regulation. He said that the rule developed by the Supreme Court was that citizens have the right to bear arms. The states can regulate the bearing of arms, but cannot impose a complete prohibition. Professor David Kopel of Denver University, Sturm College of Law, a strong supporter of the right to bear arms, agreed that firearms in the wrong hands are dangerous, but believes that guns in the right hands serve a public purpose. He pointed to reports that indicate that burglars are less likely to break into homes with people in them in the United States where they might encounter guns, than in Great Britain where guns are not allowed. The result is that there are many more assaults and rapes during burglaries in Great Britain than in the United States. Alan Gura, who represented the plaintiffs in *Heller* and *McDonald*, contended that the right to bear arms extends beyond the right to maintain a gun in one's home and beyond handguns. For example, the Uzzi assault rifle is very effective in home self defense and in competitive contests, he said.

The panel concluded with a lively exchange on how to keep guns out of the hands of the wrong people to prevent events like the Virginia Tech and Giffords shootings; gun show regulation; and the effects of deregulation of automatic weapons on violence.

Extraterritorial Reach of U.S. Law

Judge Paul G. Gardephe chaired a panel on the Extraterritorial Reach of U.S. Law following the Supreme Court decision in *Morrison v. National Australia Bank Ltd.*, which limited the reach of Rule 10(b)(5) in securities cases. Judge Gardephe explained the *Morrison* holding that unless a statute explicitly provided for extraterritorial effect, there is none. Panel members included:

- George Conway;
- Thomas Dubbs;
- David Pitofsky;
- Tai Park; and
- Damon Volke.

The panel discussed the cases decided under various federal statutes and the Congressional fix following *Morrison*, using a hypothetical to illustrate the factual issues, including cases decided under the securities laws and antitrust laws. What is consistent in the cases is that even when a statute provides for extraterritorial application, a clear nexus between the alleged wrongful conduct and the United States is necessary.

David Pitofsky explained that the Department of Justice does not believe *Morrison* applies to criminal cases, although he believes there will be more scrutiny on the connection of the criminal activity with the United States that will result in ruling out incidental contacts as the basis for jurisdiction in U.S. courts. Tai Park explained that courts will focus on the core purpose of the applicable statute and then look at the facts to determine the nexus of the criminal activity with the United States.

Eyewitness Identification

The final program of the Winter Meeting dealt with eyewitness identification. At the welcoming dinner, the program participants staged an "incident" that involved a person walking through the dinner carrying a sign. Following the "incident," attendees at the Winter Meeting were asked to fill out questionnaires. The results, reported at the program, were shocking. Virtually no one was able to describe the look of the person, his clothing, and what was written on the sign.

Ron Fischetti explained that 217 people had been exonerated by DNA – 16 of whom had been on death row – and that 75 percent of the people exonerated had been convicted based solely on eyewitness identification. Other panel members included:

- Judge Nina Gershon;
- Sheila Boston;
- Stephen Marshall; and
- Breon Peace.

Professor Gary Wells of Iowa State University, an expert on eyewitness identification and advisor to prosecutors and police across the United States, spoke

about the convictions and exonerations of innocent defendants who had been convicted based on eyewitness identification. He then explained how memory works and what can be done to make eyewitness identification more reliable. Finally, Professor Wells described the five elements for line-up procedural reform:

(1) sequential line-up;
(2) double blind line-up;
(3) pre-line-up admonition;
(4) properly selected fillers for the line-up; and
(5) taking a certainty statement by the blind administrator at the time of the identification.

These safeguards help to prevent bias in the administration of line-ups. Even using safeguards, 20 percent of the time fillers are identified as the perpetrator. Professor Wells said that his suggested reforms had been adopted in four states and numerous cities and counties.

Whitney North Seymour Award

On the last evening, Council President Frank Wohl presented the Whitney North Seymour Award to William Plunkett for outstanding public service by a private practitioner.

Plunkett thanked the people who were responsible for his receipt of the award and the success of the Winter Meeting, including Bob Giuffra; the Awards Committee; the co-chairs of the Winter Meeting; the FBC staff; his colleagues at Plunkett & Jaffe and McKenna Long; and his family.

Plunkett noted that Whitney North Seymour had defined public service as it applied to lawyers and their families to include government service, Bar association service, pro bono litigation, and community service. Regarding government service, New York lawyers have long been active in government service, starting with John Jay and Alexander Hamilton, and continuing through five presidents, cabinet members, and senior advisors to presidents. He noted that many judges, former U.S. attorneys and other federal, state, and local government officials were present at the Winter Conference.

Plunkett pointed out that Whitney North Seymour had been extremely active in Bar association activities and argued many pro bono cases. Plunkett challenged those who have much to give back and the opportunity to use their lawyers' training and talents for community service. He urged all lawyers to contribute their talents to the public good.

The Judiciary

Justice Kagan's First Dissent

By Edward W. Hertwig

One of the early milestones in a newly-minted Supreme Court Justice's career is his or her first authored dissenting opinion. Likely more telling about a justice's philosophy than his or her first majority opinion, a justice's first dissenting opinion represents the justice's first public rebuke of his or her colleagues, an act of defiance that cannot be easy given the justice's newcomer status. Associate Justice Elena Kagan reached this milestone on April 4, 2011, when she authored the Court's dissenting opinion in *Arizona Christian School Tuition Organization v. Winn, et al.*, No. 09-987, a case involving Article III standing and the viability of taxpayer challenges to government involvement in religious organizations under the Establishment Clause of the First Amendment.

Breaking with the five member majority led by Justice Anthony Kennedy, Justice Kagan voiced the dissenting justices' displeasure with the majority's holding that the taxpayer-plaintiffs lacked standing to challenge an Arizona program allowing a taxpayer to take a credit on his or her state taxes if the taxpayer makes a monetary contribution to a school tuition organization, many of which are religiously affiliated. This was the second time that the federal action challenging Arizona's credit for school tuition organizations reached the Court; the Court, in a five-to-four decision by Justice Ginsburg in 2004, held the suit viable and ruled that the Tax Injunction Act, 28 U.S.C. § 1341, did not preclude the plaintiffs' claims. In this iteration of the suit, however, the majority, which included Chief Justice Roberts and Justice Ali-

to, neither of whom were on the Court in 2004, held that the plaintiffs lacked standing to maintain an Establishment Clause challenge to the tax credit under Article III of the U.S. Constitution. It is from this holding that Justice Kagan dissented, in an opinion in which Justices Ginsburg, Breyer, and Sotomayor joined.

Dissent

During the Court's early years, following its creation in 1787, dissenting opinions were uncommon. This differentiated the Court from the British judiciary's customary practice of issuing decisions in seriatim, which left the advocates tallying the varying opinions of the individual jurists to discern the court's holding. The U.S. Supreme Court's early custom of unanimous decisions, usually issued as *per curiam* opinions by the Chief Justice, eliminated any uncertainty involving the Court's ruling and provided clarity to the litigants appearing before the Court. Over time, however, and as the Court's docket began to expand, maintaining unanimity among the Court's members became more difficult and divergent opinions on controversial issues emerged.

Dissenting opinions are often clarion calls containing blueprints for lawyers to use either to circumvent the majority's holding or to challenge its application in a different context. Dissenting opinions also are viewed as opportunities to scrutinize the majority's reasoning and to sow the seeds of future doctrinal shifts that may come about after the passage of time or the appointment of new members to the Court. Finally, for the opinionated justice or for the justice with the courage of his or her convictions, a dissenting opinion is often emblematic of his or her ideological stance on a given issue.

Issuing a dissenting opinion, of course, involves a calculus beyond whether to voice discontent with the majority's decision. Authoring a dissenting opinion that is overly critical of the majority may cause alienation among a tenuous majority in another pending case; majorities and dissents do not exist in isolation, and a dissenting member must be cognizant of the ripple effect his or her words may have beyond the confines of a given case. Authoring a dissenting opinion also opens up the dissenting justice to future possible attacks of inconsistency, thus giving the Court's other members fodder for use when compiling their own majority, concurring, and dissenting opinions. Lastly, a dissenting opinion usually best represents a justice's ideology and typically will define a member of the Court better than his or her majority opinions, which, by definition, are products of compromise. A dissenting opinion permits a justice to write more freely and to advance points of view that might not otherwise be endorsed by the Court's members in a majority opinion. A dissenting justice, moreover, usually has little to lose; if his or her dissent is not supported by the remainder of the dissenting colleagues, the dissenting justice can always issue the dissent on his or her own.

The *Winn* Dissent

In *Winn*, a majority of the Court concluded that the general presumption against taxpayer standing precluded the plaintiffs from challenging Arizona's tax credit for financial contributions made to school tuition organizations, and held that the plaintiffs' claim did not fit within the "narrow exception" to the general bar against taxpayer standing articulated by the Court in *Flast v. Cohen*. In *Flast*, the Court, in a majority opinion penned by Chief Justice Earl Warren, held that taxpayers have Article III standing to maintain a cause of action challenging a government's appropriation of tax proceeds to religious institutions under the Establishment Clause. Reasoning that without such standing the Establishment Clause would fall silent, Chief Justice Warren concluded that a taxpayer suffers the requisite injury to bring a federal cause of action when he or she alleges that the government, through its "taxing and spending power," aids or assists a religious institution in violation of the Establishment Clause.

The Court's decision in *Flast*, however, represents the high watermark for plaintiff-taxpayers advancing Establishment Clause claims. Since *Flast.* the Court has narrowed the scope of claims that taxpayers can bring pursuant to the Establishment Clause, holding, for example, that taxpayers

lack standing to challenge either the government's transfer of real property to a religious organization or the Executive Branch's discretionary appropriation of funds to faith based organizations. Building upon this line of cases distinguishing *Flast*, the *Winn* majority held that the plaintiffs challenging Arizona's state tax credit did not suffer a cognizable injury because the state tax credit at issue inured to the benefit of private individuals and the money donated to religious organizations was done pursuant to private choice rather than under the government's "taxing and spending authority." Distinguishing the state's tax credit for taxpayers from an affirmative expenditure by the state to a religious organization, the *Winn* majority held that a taxpayer cannot maintain a challenge to a state tax credit given to a third party who voluntarily contributes money to a religious school tuition organization.

In dissent, Justice Kagan sharply questioned whether there was a meaningful difference between a tax appropriation and a tax credit, concluding that the result to the state and its taxpayers under both mechanisms was the same: a reduction in the amount of money in the state's tax coffers. For Justice Kagan, there existed no difference between whether the reduction in the state's tax revenue was achieved by the state affirmatively giving the money to an organization or by the state allowing an individual taxpayer to lessen his or her personal tax obligation by taking a pre-tax credit. According to Justice Kagan, the variation between the two tax vehicles amounted to a "distinction …in search of a difference," and the state's taxpayers displeased with the tax credit scheme who sought to challenge the credit's constitutionality should have had their day in court.

Justice Kagan's dissent, however, is more notable for its style than its substantive argument that a tax appropriation and a tax credit are synonymous. Representing her first written foray into the world of dissenting opinions, Justice Kagan carefully dissected and analyzed the majority's conclusion. Most notably, and in sharp rebuke to her former colleagues in the U.S. Solicitor General's office, Justice Kagan highlighted that the acting Solicitor General had conceded at oral argument that several of the Court's previous decisions that did not address the question of taxpayer standing should have been disposed of on standing grounds rather than the substantive questions presented in those cases. Both at oral argument and in her written dissent, Justice Kagan challenged this proposition, commenting that it was peculiar for so many other cases to have gone forward with the Court's implicit imprimatur that such cases could be maintained. Justice Kagan noted, moreover, that several of those decisions, many of which have served as jurisdictional bedrock for other constitutional challenges, have now been drawn into doubt.

This facet of Justice Kagan's opinion was the only portion of her dissent to elicit a response from the majority in writing. Noting that the federal courts have the continual obligation to examine their jurisdictional predicates, Justice Kennedy declared that the Court's failure to question its jurisdiction in earlier cases should not be read to mean that jurisdiction was properly vested. Although this precept is a generally recognized proposition of constitutional law, the application of this principle in this case is inconvenient given that the litigants in *Winn* were before the Court just a few terms ago on a separate legal issue. It is hard not to speculate that the recent *Winn* majority, which had the benefit of Justice Alito's vote over that of now-retired Justice Sandra Day O'Connor's (who was in the majority when the Court permitted the suit to proceed in 2004), *sua sponte* charted a new path to disposing of the litigation that was not possible just a few years ago. This speculation is reinforced subtly by Justice Kagan's parenthetical observation that even the members of the Ninth Circuit Court of Appeals who had voted to rehear the matter *en banc* did not question the plaintiffs' standing to maintain the action at bar.

In an effort to illustrate what the majority opinion permitted, which to some may appear only to involve an abstraction, Justice Kagan drew a parallel between the tax scheme in *Winn* and a more contemporary illustration: rather than "pay[ing] hundreds of billions of dollars to insolvent banks in the midst of a financial

crisis…the Government will allow banks to subtract the exact same amount from the tax bill they would otherwise have to pay to the U.S. Treasury." Justice Kagan noted that the public's furor over either of these hypothetical proposals would be the same since the result of both programs would be the same, *i.e.* a reduction in the taxes paid to the government and a benefit to the recipient-banks. Relying upon this exemplar, Justice Kagan argued that the structure in *Winn* should be seen no differently. Although evocative and pithy, Justice Kagan's illustration does lose some of its poignancy when it is considered within the context of the specific constitutional challenge in *Winn*, *viz*. whether a state's tax credit gives rise to a cognizable injury under the Establishment Clause, not whether the policy of extending tax credits – or bailouts – is sound, just, or likely to spark outrage among taxpayers.

Justice Kagan's first dissenting opinion, with the exception of her allusion to the government's recent involvement in the banking industry, is free of the rhetoric that often accompanies dissenting opinions and will be remembered for its composed response to the majority's reasoning. This is informed by several factors. First, this being her first authored dissent, the Justice likely did not want to begin her career issuing a jeremiad. Second, the issue at stake – the scope of taxpayer standing – is not the most sensational issue requiring a combative or hyperbolic dissent; the tax credit at issue ranges between $500 and $1,000 depending on whether the taxpayer claiming the credit is single or married. Third, and likely most important, is that Justice Kagan's opinion dissented from the majority opinion of Justice Kennedy, the Court's swing vote and frequent ally of the liberal wing of the Court. Authoring an acid dissent critical of the majority, and by extension of Justice Kennedy, would do little to advance Justice Kagan's interests in future cases.

Most notable about Justice Kagan's dissent, however, is her observation about the practical effect of the Court's holding. Justice Kagan opined that governments now need only create a program similar to that of Arizona's in order to circumvent *Flast*, the Establishment Clause's prohibitions, and the threat of taxpayer litigation. Although the majority asserted that there may be other causes of action that plaintiffs could advance in this arena challenging such programs, Justice Kagan believed this possibility to be slim, noting that the majority's opinion "devastates" taxpayer standing and "offers a roadmap – more truly, just a one-step instruction" to creating a shoal for state financing of religious institutions.

Lastly, a comparison of Justice Kagan's questioning at oral argument and her written dissent reveals that the newest Justice had likely determined her vote prior to oral argument. Whereas her written dissent is respectful and measured, her questioning of both the acting Solicitor General and the state at oral argument was aggressive, which is in keeping with her general approach to oral argument since joining the Court. Listening to the oral argument – which is available along with all other oral arguments on the Supreme Court's Web site – also provides insight into the dynamic between the newest Justice and Justice Scalia. During an intense period of questioning of the plaintiffs' counsel led in large measure by Justice Scalia, Justice Kagan interjected herself into the colloquy, provided an answer to Justice Scalia's rhetorical question, and took advantage of the opening in the dialogue to launch into her own questioning, thereby preempting Justice Scalia's interrogation. When listening to the oral argument one can envision, if not audibly detect, Justice Scalia's frustration and disdain as he silences his microphone to prevent his full exasperation from being broadcast throughout the Court. While Justice Kagan may have had the last word during oral argument, her point of view, which now occupies the annals of dissent, did not carry the day.

A newly-appointed Supreme Court Justice's first dissenting opinion represents a point of maturity in a Justice's nascent tenure on the Court. Justice Kagan's first dissenting opinion is a focused critique of the majority's holding without overstating the Justice's case. It will be interesting to see if Justice Kagan's patient tone and discipline remain the same when she reaches one of the next milestones in her career

as an Associate Supreme Court Justice: her first solo dissent.

Editor's note: The author served as a law clerk to the Hon. Lisa Margaret Smith, U.S. Magistrate Judge (S.D.N.Y.) from 2005 until 2009 and currently serves as an attorney with the federal government in Washington, D.C.

Ethics

Is it Right for Journalists to Lie?

By James L. Bernard

Jeffrey MacDonald was convicted of murdering his pregnant wife and their two daughters in a gruesome slaying at their home on a military base in Fort Bragg, North Carolina, in February 1970. Joe McGinnis wrote a famous book ("Fatal Vision") about the trial and events that led to that conviction. In 1984, MacDonald filed a lawsuit (while he was still in prison serving his sentence) against McGinnis for fraud and breach of contract in connection with publication of "Fatal Vision." The basic theory of that lawsuit was that McGinnis lied to MacDonald to get information from MacDonald to publish his book, and that the lie took the form of a false expression of belief in MacDonald's innocence when McGinnis actually believed that MacDonald was guilty. Then, in 1990, Janet Malcolm wrote a book about all of this, "The Journalist and the Murderer," and for anyone interested in the intersection of law and truth, that book is essential reading. Here is a brief summary of this fascinating story, and some thoughts on what I think it tells us about telling the truth.

"The Journalist and the Murderer"

MacDonald was a captain and surgeon in the Green Berets at the time his family was murdered. After the crime, he was charged in a military tribunal, but was acquitted. One year later, however, he was indicted in federal court in North Carolina. That trial promised to be long, complicated, and expensive. So MacDonald and his defense team came up with an idea. They interviewed various authors who would be given complete and exclusive access to the defense team, in return for which the author would agree to write a book about the trial and share in the financial proceeds derived from the sale of the book and any upfront payments made to the author. McGinnis ultimately agreed to this basic structure.

Among the host of issues and potential problems such an arrangement created were two in particular. One, the author would be given exclusive access to the most confidential attorney-client communications in advance of a major criminal trial. How to avoid against waiver of the privilege? Putting aside the state of the law today, in 1979 this problem was "solved" by having McGinnis sign an employment agreement with the defense attorney who was representing MacDonald. As part of the defense team, so the theory went, McGinnis' presence would not breach privilege and his notes could not be subpoenaed. Two, and this would prove more significant and controversial, authors often demand freedom to write what they want and how they want. But MacDonald did not really want someone to write a devastating critique of his life or the trial; he wanted someone who would portray him in the best light possible. How did this get resolved? McGinnis' publisher insisted on a release, from defamation, among other things, as part of the deal, and in the critical sentence in that release, the following italicized language was added by MacDonald's defense attorney:

> I [MacDonald] agree that I will not make or assert against you…any claim or demand whatsoever based on the ground that anything contained in the book defames me, *provided that the essential integrity of my life story is maintained*.

Malcolm comments about this additional language that "on first reading, [it] seems oddly ambiguous for a lawyer to use." As I am sure many of us have come to understand, whether in litigation or in corporate drafting, clarity can be a friend, but so, too, can ambiguity, and I dare say that this

bit of engineered ambiguity was really nothing short of brilliant and prescient in light of how this story unfolded.

Let me try to summarize what Malcolm's book addresses so well. MacDonald and McGinnis became good friends. They lived in the same house together. They ran on the beach together. They swapped stories together. They bonded. There really is no dispute about this. But then MacDonald was convicted. It was a devastating loss to the defense team, McGinnis (rightly or wrongly) included. And this was when the problems began.

MacDonald was denied bail. McGinnis' book was not finished, and he needed more information about MacDonald to finish the book. He wrote MacDonald while MacDonald was in jail to get that information, and the 40 or so letters he sent MacDonald became perhaps the key piece of evidence in the subsequent lawsuit MacDonald filed against McGinnis. Malcolm excerpted many of them in her book, and let me give you a brief sense of one of them with some further editing (which is probably not completely fair on my part). As Malcolm explained, McGinnis later said it was important to read these letters with the knowledge that he was in part responding to a letter he received from MacDonald, wherein MacDonald wrote, among other things, "All I want to know is that you're still my friend and you believe in me." McGinnis said to Malcolm, "So what's the appropriate response? To send back a paragraph that says, 'I reserve the right to my own opinions, and I remind you that I'm the author and you are the subject….'"

In any event, McGinnis wrote the following:

> Every morning for a week now, I've been waking up wondering where you are.… I'm sure your destination seems awful. Is awful…. There could not be a worse nightmare than the one you are living through now – but it is only a phase. Total strangers can recognize within five minutes that you did not receive a fair trial…. You must fear…that you will somehow become a non-person…. Well, that's not going to happen, because there are too many people who care too much about you…. Jeff, it's all so fucking awful I can't believe it yet – the sight of the jury coming in – of the jury polling – of you standing – saying those few words – being led out – and then seeing you in fucking prison. It's a hell of a thing – spend the summer making a new friend and then the bastards come along and lock him up. But not for long, Jeffrey – not for long.

Tone, emotional force, content, language – all of this is important for a point I am going to ultimately make about this, and this excerpt should give you a good enough flavor for that. There is more along the same lines detailed in Malcolm's book. The point MacDonald ultimately made is this: McGinnis was trying very hard to make me believe that he thought I was innocent.

But, in "Fatal Vision," McGinnis concluded that MacDonald murdered his family. McGinnis came to that belief sometime after meeting MacDonald, and certainly by the time he wrote the letters. MacDonald learned for the first time about the conclusion reached in the book during an interview with Mike Wallace on "60 Minutes" concerning his trial and conviction; a conviction that to this day he claims was unjust and which he continues to challenge. Wallace confronted MacDonald with critical passages from the book, passages that Wallace had received as an advance copy of the book, but which MacDonald had not because part of the deal between McGinnis and MacDonald was that McGinnis had the right to publish the book without pre-approval.

To say that MacDonald felt betrayed and angered would be an understatement. He channeled those emotions into a lawsuit against McGinnis for fraud and breach of contract. Think about that. A man convicted of murdering his family sued a writer for fraud because the writer published a book that reached the same conclusion a jury of 12 people, charged in a criminal trial, had reached. How could that be? The theory of the case, in essence, was that McGinnis lied to MacDonald in the letters in an

effort to get MacDonald to give him more information so that he could publish his book and earn a lot of money. The putative lie was that McGinnis told MacDonald that he believed MacDonald was innocent, when in fact McGinnis had already concluded that he was guilty. The defense? Journalists lie all the time to get information and that is acceptable. Of course, I am simplifying. But that is the essence of it, and the core subject of Malcolm's book. Journalists serve a higher purpose, to uncover truth and provide information to the public. And if they have to lie along the way to do that, there is nothing wrong with that. William F. Buckley, among others, took the witness stand in McGinnis' defense and testified, much more eloquently, to make that basic point.

The jury could not reach a verdict (there are competing versions of why that was the case). Three months after the trial, however, an agreement to settle the suit was reached and McGinnis agreed to pay MacDonald $325,000.

The Lies We Permit

Let me get right to the point I want to make in light of all this. People lie and we as a society accept that, and, indeed, the law permits it. We have legal ethics opinions that permit lawyers to engage in "puffery" in the settlement context where lawyers say their clients will not settle for less than $100,000 when the lawyer knows the client will settle for $50,000. We have judicial opinions that permit lawyers, or their agents, to lie (or engage in acts of deception if you want to dress it up a bit) to figure out whether housing discrimination or trademark laws are being violated. We have rules that permit process servers to lie (or use trickery if you want to put it differently) to serve process, and we permit agents of prosecutors to lie (trickery again if you prefer) to root out criminal wrongdoing and bring prosecutions.

To me, the issue in the MacDonald/McGinnis case boils down to two questions. One, do we also think it is OK for journalists to lie? As someone in Malcolm's book said, and I am paraphrasing here, do we think it is wrong for a journalist to express a false sense of sympathy to someone who has been accused of raping a young girl to find out if the accused really committed rape? My reaction is that if we let process servers lie to serve process, I am prepared to say a journalist should be able to lie (express false sympathy) under those circumstances. But, of course, the devil (and let me be clear about this lest I be accused of condoning that which should be condemned; devil is the right word because lying is wrong) is in the details. We reach these conclusions because we believe that settlements are good (and everyone expects some "puffery"), breaking the law is bad (and finding out about it is good), and serving process is necessary (even if you have to lie to someone who is evading it to accomplish it). Having journalists uncover the truth is such a good.

This leads to my second question: Why is it then that I think some (most) of us feel uncomfortable after reading McGinnis' letters in light of the conclusion he reached in "Fatal Vision"? I think that is because not all lies are the same. Even for a cause in which we as a society are otherwise prepared to accept some amount of lying, there are some lies – in quantity, tone, nature, call it what you will – that simply just go too far. And perhaps what makes McGinnis' lies unattractive is that they also exhibited betrayal. A lie to a stranger to obtain information is one thing, a false promise of friendship and sympathy to a purported friend at a time of extreme vulnerability in an effort to obtain information is not just a lie, it is a betrayal. The betrayal here, given the background, the letters, etc., strikes people as being, if you will, more (worse) than a lie and that is what makes these particular lies troubling, even if we are prepared to accept that some lies by journalists to uncover the truth are acceptable.

FBC News

Second Circuit Appellate Advocacy

By Daniel E. Wenner

Participants at the March 22 Second Circuit Appellate Advocacy Workshop were treated to an enjoyable, informative, and help-

ful program about how to hone their appellate advocacy skills by Second Circuit Judge Denny Chin and New York's Solicitor General, Barbara D. Underwood.

The Program Format

The program was unique for continuing legal education. The attendees were provided the briefs for one of the cases due to be argued that day, along with case summaries for the others. On the docket for argument were an appeal from a criminal conviction and an appeal from the grant of summary judgment in an employment discrimination action. The panel for the day's arguments was Second Circuit Chief Judge Dennis Jacobs, Second Circuit Judge Guido Calabresi, and Second Circuit Judge Raymond J. Lohier, Jr.

During the breakfast buffet in the court's cafeteria, Judge Chin and Ms. Underwood briefly discussed the cases that would be argued and highlighted areas of focus. Ms. Underwood emphasized the need to be clear during oral argument, even if one were inclined to muddy the waters to show genuine issues of material fact, which may be a strategy in the civil case.

Judge Chin discussed the dynamic of the judges on the panel. He also explained that the judges on the panel would not have spoken with each other about the cases prior to argument, would hear argument, and then would caucus after argument to share their votes and make writing assignments for opinions or summary orders. Judge Chin also discussed the Second Circuit's workload and the court's weekly schedule for motions and arguments.

The participants then repaired to the courtroom to observe the arguments.

The Arguments

During the arguments, the judges quickly zeroed in on the weaknesses in each advocate's positions without betraying their own views. At one point, one litigant agreed with Judge Calabresi's purported position, prompting the judge to say, "I'm just asking questions." The gallery chuckled when Judge Lohier repeated that line in the subsequent argument.

The Recap

After argument, the participants reconvened, and Judge Chin and Ms. Underwood discussed oral advocacy and then brief writing over lunch. As for oral advocacy, both panelists repeatedly emphasized the importance of answering the question asked. Judge Chin noted that nothing is more frustrating to a judge than to ask a question that is not answered. He recalled that in the civil argument, Judge Calabresi asked the appellant to list the instances of alleged racial discrimination and, when that question went unanswered, ticked off those instances himself. Judge Chin noted that the appellant should have listed the instances himself and then given the arguments to support his position.

In the same vein, Ms. Underwood suggested approaching oral argument by thinking of oneself as an aid to the court. She recommended preparing for argument by creating modules of arguments to adapt to the court's questions. Ms. Underwood also suggested that, to prepare for argument, one should ask colleagues to help think of the hardest questions possible and plan answers for them.

Both Judge Chin and Ms. Underwood stressed the importance of professionalism, courtesy, and politeness with the panel. Each said it was inoffensive to disagree with a judge as long as one was respectful. And neither thought introductory remarks, such as "with all due respect," were useful; in fact, each said one should disagree with a simple, "No, Your Honor."

As for written advocacy, Judge Chin and Ms. Underwood were again on the same page. Each said that short, simple sentences were better than long, cumbersome ones. Each also discussed the burdens of reading briefs as a judge. To understand what it is like to be a judge, Ms. Underwood suggested taking a stack of briefs for three-to-four arguments and sitting down to read them straight through. She also noted that one circuit judge, who she said is "now on the Supreme Court," told her that the real estate at the beginning of a brief is very precious and not to waste it. They both also emphasized that one should not ridicule the arguments in an opponent's brief because a judge may find those arguments persuasive. The better course, they suggested, is

to simply explain why the argument was flawed without using hyperbole to characterize it.

The program was informative and useful, and tapping into the experience and perspective of Judge Chin and Ms. Underwood was invaluable.

FBC News

Council Honors Magistrate Judges

By Jeanette Redmond

On March 31, hundreds of members of the bench and bar took time out to pay tribute to all 49 magistrate 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 magistrate judges for their important work on the bench. A great many of the magistrate judges were able to attend.

Council President Frank H. Wohl noted that "[t]he magistrate judges bring a wealth of experience and knowledge to bear on many issues of great importance to our clients and to us." In particular, Wohl observed that magistrate judges, in addition to conducting arraignments, issuing warrants and conducting trials and sentencing in some cases, "play a really critical role in setting bail." For example, "[i]n today's increasingly complex criminal cases, which can go on for many months, the magistrate judge's bail decision or recommendation can be key to the client's ability to survive the criminal process and mount a defense."

On the civil side, Wohl reminded us that the magistrate judges "often provide the district courts with valuable reports and recommendations on dispositive motions. They can also conduct settlement conferences. When magistrate judges succeed in settling cases or narrowing issues for more efficient litigation, everyone wins." Wohl concluded that "magistrate judges are truly the unsung heroes of our judicial system."

The co-chairs for the reception were Tracy Richelle High, a partner at Sullivan & Cromwell LLP, and Russell M. Yankwitt, a founding member of Yankwitt & McGuire, LLP. Together, High and Yankwitt shared the honor of welcoming each of the honorees. "If it were not for the magistrate judges," Yankwitt remarked, "many of us would still be in the office fighting over a discovery objection instead of enjoying each others' company this evening." High said the fact that hundreds had gathered to celebrate the magistrate judges clearly demonstrated the high esteem in which the magistrate judges are held by both the bench and bar.

Chief Magistrate Judge George A. Yanthis of the Southern District of New York addressed the gathering on behalf of his fellow honorees. "Thank you," Magistrate Judge Yanthis said. "We do like to be honored. This is nice! It's nice to realize that we have all this support out there."

Legal History

The Robert F. Kennedy I Knew

By Jay Goldberg

I read with interest C. Evan Stewart's article, *Bobby Kennedy's Department of Justice: RFK and his Greatest Nemesis*, in the last issue of the *Federal Bar Council Quarterly.* While it is justly laudatory of Kennedy's legacy, it does not fully describe what had occurred during his tenure as attorney general. The picture of Kennedy as an unbiased law enforcement officer is not entirely accurate. I witnessed the slippage, tried to prevent it, and agonized over his behavior. (The events described below were first discussed by the then-editor of *The Nation*, Victor Navasky, in "Kennedy Justice" (Atheneum 1997), whose only error was in writing I graduated from Brooklyn Law School when it should have been the Harvard Law School. The events also are recounted in Ronald Goldfarb, "Perfect Villains: Imperfect Heroes" (Random House 1995); and C. David Heymann, "RFK" (Dutton 1998).)

RFK was a complex man, widely thought to be one of the most active, effective attorneys general in history. But there is more to the story. During his tenure, RFK's direction brought law enforcement agencies together and pioneered new laws to fight organized crime. However, as one senior Justice Department official remarked: "When it came

to making a decision, RFK's first criterion was, is it good for my brother?; his second criterion was, is it good for the democratic party?; and his third criterion was, is it good for the country?"

There was no FBI organized crime squad when RFK came to Justice. So rudimentary was the government's understanding of the extent of the danger posed by organized crime that the names of suspected members of organized crime were noted on index cards and stored in shoe boxes in the offices of the assistant attorney general in charge of the criminal division.

RFK was keenly aware of the threat posed by organized crime. Despite some opposition by J. Edgar Hoover (*see* Burton Hersh, "Bobby and J. Edgar: The Historic Face-Off Between the Kennedys and J. Edgar Hoover That Transformed America" (Carroll & Graf Publishers 2007)), RFK chose to assemble what *Reader's Digest* described as "an elite group of crime fighters." The group was 15 in number, charged with the responsibility of selecting areas of the country that needed federal intervention to expose and prosecute organized crime members and officials corrupted by them.

While the group consisted of former state and federal prosecutors, it also included younger members recruited because of their extraordinary intellect, among them John E. Sprizzo who became a U.S. District Judge in the Southern District of New York, and G. Robert Blakey, the architect of the Racketeer Influenced and Corrupt Organizations Act, known as the RICO statute.

Heading the unit was Byron White – a tough person to say the least – who was so hardened that a simple anecdote is reflective of his nature. RFK from time to time would hold staff meetings between 5:30 and 6:00 a.m. One such meeting was scheduled at a time when Washington was experiencing a blizzard with temperatures hovering near the zero mark. When one entered the attorney general's office, the temperature in his office had to be somewhere around 55 degrees. When drink orders were taken, most of the shivering attendees opted for piping hot coffee. But not White. He asked for "iced tea." I knew then I was dealing with a tough person.

During RFK's tenure, there were three major organized crime investigations, according to Navasky, that were of primary interest to RFK.

One was the investigation of N.Y. State Supreme Court Justice J. Vincent Keogh, the brother of Congressman Eugene Keogh. The Congressman had been a dear friend of the Kennedys. Word had leaked out that an Assistant U.S. Attorney in the Eastern District of New York and an organized crime member, Tony "Ducks" Corallo, had entered into a conspiracy to help a doctor get a light sentence in a criminal bankruptcy case in return for $35,000. Keogh was indicted and sentenced to two years in prison, over the strong objections of his Congressman brother.

The second investigation that occupied a great deal of RFK's time has been accurately described in C. Evan Stewart's article detailing the efforts against Jimmy Hoffa and lauding RFK for his dedicated pursuit of wrongdoers.

There was a third investigation, where I was intimately involved, and the events spell out conduct that hardly justifies the myth surrounding RFK.

This investigation centered on two cities in Lake County, Indiana – Gary, which had the highest per capita murder rate in the nation, and Hammond, whose inability to combat organized crime was presaged a generation earlier when the city found itself unable to stop John Dillinger from breaking out of its jail. The investigation involved local officials who allegedly were so tied in with the mob that only an outside force could hope to clean things up. United States Steel had its home office in Gary and had an interest in bringing safety to the community, but it and the citizens were powerless to remedy the alleged wrongdoing. As it turned out, the entire City Council of Gary and the Sheriff and the District Attorney of Lake County allegedly were involved in the criminality.

United States Steel implored RFK to send someone from the Department to Gary to do what was necessary to rid the cities of Gary and Hammond of their wrongdoers. RFK could not find a suitable local person for the position of U.S. Attorney and so, with the approval of the district judges and RFK, I received an appoint-

ment as acting U.S. Attorney for the Northern District of Indiana, even though I was not a member of the Indiana Bar. I was commissioned on August 17, 1961, and shortly thereafter my wife and I left Washington and headed west to Gary, Indiana, which was a city in the shadow of Chicago. The mission had been set forth in the letter that RFK sent me, ending with the extraordinary signature lines which read "Respectfully, Robert F. Kennedy, Attorney General."

The investigation revealed that George Chacheris, Mayor of Gary, Indiana, who along with Mayor Richard Daley of Chicago had played an important role in the 1960 convention supporting JFK, and was slated to be our Ambassador to Greece, was behind and played a major role in the organized crime enterprise that existed in Gary and Hammond.

With great difficulty, a case was developed against the mayor. Witnesses had decided to step forward at great risk to themselves, as Gary, Indiana, had the largest per capita murder rate in the nation.

Chacheris' chances for Senate confirmation as our Ambassador to Greece would be crushed with an indictment. With the grand jury scheduled to meet the following day, I received a call from RFK that went, as best as I can recall, as follows:

RFK: I understand that you are presenting a case to the grand jury tomorrow.

JG: That's right. I have assembled some 35 witnesses to testify to the mayor's involvement and expect that he will be indicted.

RFK: I think in fairness you should have the mayor in, give him a chance to go over the evidence, tell him of the witnesses, for they may have some ulterior motive to implicate him.

JG: I can't allow the mayor this kind of inspection. It would jeopardize the case and the safety of the witnesses. I just can't do it.

RFK: I am not asking you to do it; I am directing you to do it.

JG: I am sorry. It may be insubordinate but it would be contrary to the way I believe a prosecutor should act. I am sorry.

RFK: Then you will have to put the grand jury off and come back to Washington this evening.

Remarkably, during this conversation I was able to hear RFK say, despite the fact that he had apparently put his hand over the mouthpiece of the phone, "George, he won't let you see the papers or tell you about the witnesses." The target of the investigation, the wrongdoer, was there in the attorney general's office. This experience astounded me. Where was the commitment to the "no holds barred" effort to root out crime and corruption?

I flew to Washington that night, met with RFK, who not only had Chacheris in his office, but also Alexander Campbell, the Democratic National Committeeman from Indiana. I met privately with RFK and convinced him that compliance with his direction could result in serious harm to government witnesses. He withdrew the order that he had given me. IRS internal memoranda later accused the Justice Department of leaking evidence to Chacheris without my knowledge.

I returned to Gary, but received notice that Kenneth O'Donnell, then President Kennedy's special assistant, had stated that Congressman Ray Madden from Gary, the ranking member of the House Rules Committee, had threatened to hold up the president's farm bill and not allow it to reach the floor for a vote by the Congress if Chacheris were indicted.

I notified officials of United States Steel whose efforts had led to my appointment in the Northern District of Indiana. Their efforts saved the day. They must have had conversations that I am not aware of. Officials of United States Steel insisted that the Chacheris matter go forward. It was later learned that the president had resolved the dispute over Chacheris with Congressman Madden and the farm bill was allowed to reach the floor of Congress. RFK then withdrew his objection to the indictment and prosecution of Chacheris. Walking in Chicago's Easter Parade as its Grand Marshal, he was asked about the Chacheris matter and he responded that he was in touch with me every day. That was hardly true. The investigation went forward despite his efforts, and not with his support.

Weeks later, after the grand jury was convened and heard testimony, the mayor was indicted

along with every member of the Gary City Council, the Sheriff of Lake County, and the District Attorney of Lake County. Following their pleas of guilty and their sentence to prison, I left Gary and met with the Attorney General in Washington, who had this to say:

RFK: I note everyone who was indicted was a Democrat. My brother said if I don't stop locking up democrats he's going to have to put me on the Supreme Court.

This was light spirited.

Postscript

Years later, the Senator from New York hosted a celebration at a penthouse apartment in New York in honor of Richard Hatcher, who had then been elected as the second black mayor of a major city, Gary, Indiana. While RFK was receiving plaudits for all that he had accomplished for Gary, Indiana, he turned to me and told the guests what he had failed to say in the intervening years: "The credit goes not to me, but to my assistant." RFK was not only gracious, but he showed a degree of warmth that had been missing in the early days of his tenure as the attorney general. He was now on his way, hopefully, to be nominated for the presidency. Weeks later, everything ended – that night in the Ambassador Hotel.

To say that the man was complex is an understatement. His role as the nation's chief law enforcement officer, given his commitment to politics and to his brother, left him with conflicts that he obviously found were not easy to resolve. On the one hand, he helped advance the federal government's long neglected fight against the ever increasing threat from organized crime at a time when J. Edgar Hoover was still pre-occupied with Communist threats, real and imagined. On the other hand, his commitment to fighting organized crime was sometimes compromised by his political and familial loyalties.

Despite those conflicting political and familial loyalties, it is now generally recognized that RFK became a changed man following his brother's assassination. By the time of RFK's assassination, he had become a more idealistic and, perhaps, more principled man – one who, to paraphrase another great stricken leader, was finally ready to embrace the better angels of his nature and lead a nation in a time of political and social upheaval.

Personal History

My Uncle's Thankless Job

By Pete Eikenberry

The oral history of my uncle, Dillon Myer (my mother's brother), is in the Truman Library and available online. Dillon was a farm boy from central Ohio who had to milk cows seven days a week from age seven to the time he went to college. Yet, he ended up with several sub-cabinet jobs in Washington, including Commissioner of the Federal Public Housing Administration (his apparent favorite) and president of the Institute of Inter-American Affairs. He is most well known (or notorious) for succeeding Dwight Eisenhower's brother Milton as head of the War Relocation Authority, which interned American citizens of Japanese descent and resident Japanese aliens during World War II.

Milton was at Dillon's house for dinner one night when Milton asked Dillon if he would take the job so that Milton could get out of it. Milton said he could not sleep at night. To the day of his death, and including his funeral (as evident by the participation of several Japanese Americans) Dillon and his immediate family were "defensive" as to his role in administering the WRA. I remember his view as being that he had from the beginning lobbied for an end to the WRA and his job.

Uncle Dillon was alive and encouraging during my runs for Congress in 1968 and 1970 and he knew Congressman John Rooney, my adversary. In those years, John was chair of the house appropriation subcommittee on Commerce, State and the Judiciary and had virtual dictatorial power over their budgets. Uncle Dillon told me that John, a notorious tormentor of State Department officials, once complimented Dillon on the floor of Congress when he had testified in support of his budget as president of the Institute of Inter-American Affairs, a government

corporation initially conceived by Nelson Rockefeller to foster good relationships with Latin American countries that was funded by the U.S. State Department. When Dillon called John to thank him, John replied only that, "I had to do it Dillon, you are a Democrat and you were being attacked by the Republicans."

As related by Dillon, relationships in Washington appeared to have been closer and more informal than the ones today, impeded as they are by substantial staff barriers. At one point, Dillon, in a meeting with Harry Truman, got an extra $1.5 million he needed for the Institute. About two years later, a colleague told Dillon how he happened to get the funds. Truman told Dillon's friend that, "I got Dillon the money for his agency because I had a shitty ass job I wanted him to take," *i.e.*, Commissioner of Indian Affairs (a position he later held).

Once when Dillon remarked to Eleanor Roosevelt that he was not getting the support he needed for something, she said, "Come to lunch and talk to the president." Dillon got the problem solved at a one and one half hour Sunday afternoon luncheon on the White House lawn. Dillon and my Aunt Jeness were at one table with the president and his daughter Anna; Eleanor and Harry Hopkins were at a separate table with others.

Dillon and the WRA

As to whether Uncle Dillon should be criticized for accepting the job as head of WRA, or whether he did his job in a way that inflicted further hardship on the 120,000 American citizens or residents who were unjustly imprisoned as being of Japanese origin or ancestry, I herein withhold judgment. However, I cannot see myself as ever having taken the job.

Nevertheless, I have tried to some degree to look at the situation from my uncle's point of view as a person of his age. As a young boy, I experienced the World War II era as a time of righteous anger at Nazi and Japanese leaders Hitler and Tojo and of a "feel good" war experience in throwing back the aggressions of Germany and Japan. Dillon chafed in his oral history at being barred from enlistment into the army in World War I as an exempt agricultural county agent; he was a very patriotic American. It is from this context that he stated that, "The war was on and I was requested to take on a special war-time job with a presidential appointment and unless you have a very good reason you don't turn down a presidential request during wartime."

His personal belief about the evacuation and relocation was as follows:

> I, of course, was not sympathetic to the evacuation…. [W]hen I first took over I had very little information about the Japanese people on the West Coast and I had very little clear information about the basic reasons that were given for the evacuation and whether the reasons were sound or whether they weren't. I found out very quickly after I became Director that most of the reasons were phony and many of the rumors which were used to justify the evacuation which came out of the attack on Hawaii were proven to be completely untrue as were many other things that were put forth by the people who were pressuring for the evacuation.

On March 11, 1943, about one year from the time that the relocation orders were issued, Uncle Dillon sent a letter to Secretary Stimson of the War Department "recommending immediate lifting of the evacuation order to allow people to return to their west coast homes." Not only was this rejected, but the WRA was pressured to "separate the so called pro-Japanese from the people who were in support of the American effort and to set up a special center for those who wanted to be Japanese and wanted to return to Japan." The internees experienced repeated setbacks, legislative and court related. For instance, Dillon describes one statute passed by Congress as follows:

> One of the worse pieces of legislation ever passed by the United States Congress was passed on June 30th of 1944. This provided that American citizens could renounce their American citizenship while on American soil if the renunciation was approved by the

> Attorney General… [T]his is the bill that led some five thousand four hundred evacuees to renounce their American citizenship, frequently under pressure.… [F]ortunately only a few hundred of them returned to Japan. The rest in a series of court tests over a period of years regained their American citizenship. I think only about four hundred did not and some of that group went to Japan. The great majority of them did regain their American citizenship. Some of them by court action and later I think by the action of the Attorney General in 1959 which cleaned up the whole mess. It was a mess and it was most unfortunate.

Dillon also related a political barrier to one litigated matter to gain personal freedom for an intern as follows:

> In the *Endo* case, which was a case of a young Nisei girl who had asked that she go freely from the centers without signing up of forms or anything of the sort, which we wanted heard long before it was heard, much to our pleasure they, the Supreme Court, held, that a loyal American citizen should not be held under any circumstances. This was a ruling that we had been hoping for months.
> The reason why we didn't get it before the Court sooner was because the Solicitor General Charles Fahey had a record that he didn't want to break. He had won every case that he had argued before the Supreme Court and he was sure that he was going to lose this one. We argued with him time and time again and he finally agreed to take it to the court.… [He] asked us several times to mute the case, but we wanted the backing of the Supreme Court to permit the evacuees to go where they wanted to go at anytime.

Uncle Dillon and the FBI

I can only speculate as to why Uncle Dillon and J. Edgar Hoover were photographed on a walk together although the FBI was involved at many points during the WRA's existence. The FBI had a mixed history in the Japanese American evacuation tragedy. For example, even after Pearl Harbor, "J. Edgar Hoover of the FBI maintained that no mass action [*i.e*., evacuation] was necessary or advisable." *See Muller, The American Inquisition, The Hunt for Japanese American Loyalty in World War II* (University of North Carolina Press, 2007, p. 16.) Yet, in October 1943, when the WRA proposed Chief Justice Wolfe of the Utah Supreme Court for membership on a board to permit release of internees, Hoover vetted Wolfe as possibly being "sympathetic with and possibly one of the leaders behind the local communists party." *Id*. at 146. It took Wolfe six years to clear his name. *Id*.

Refugees Interned In Oswego

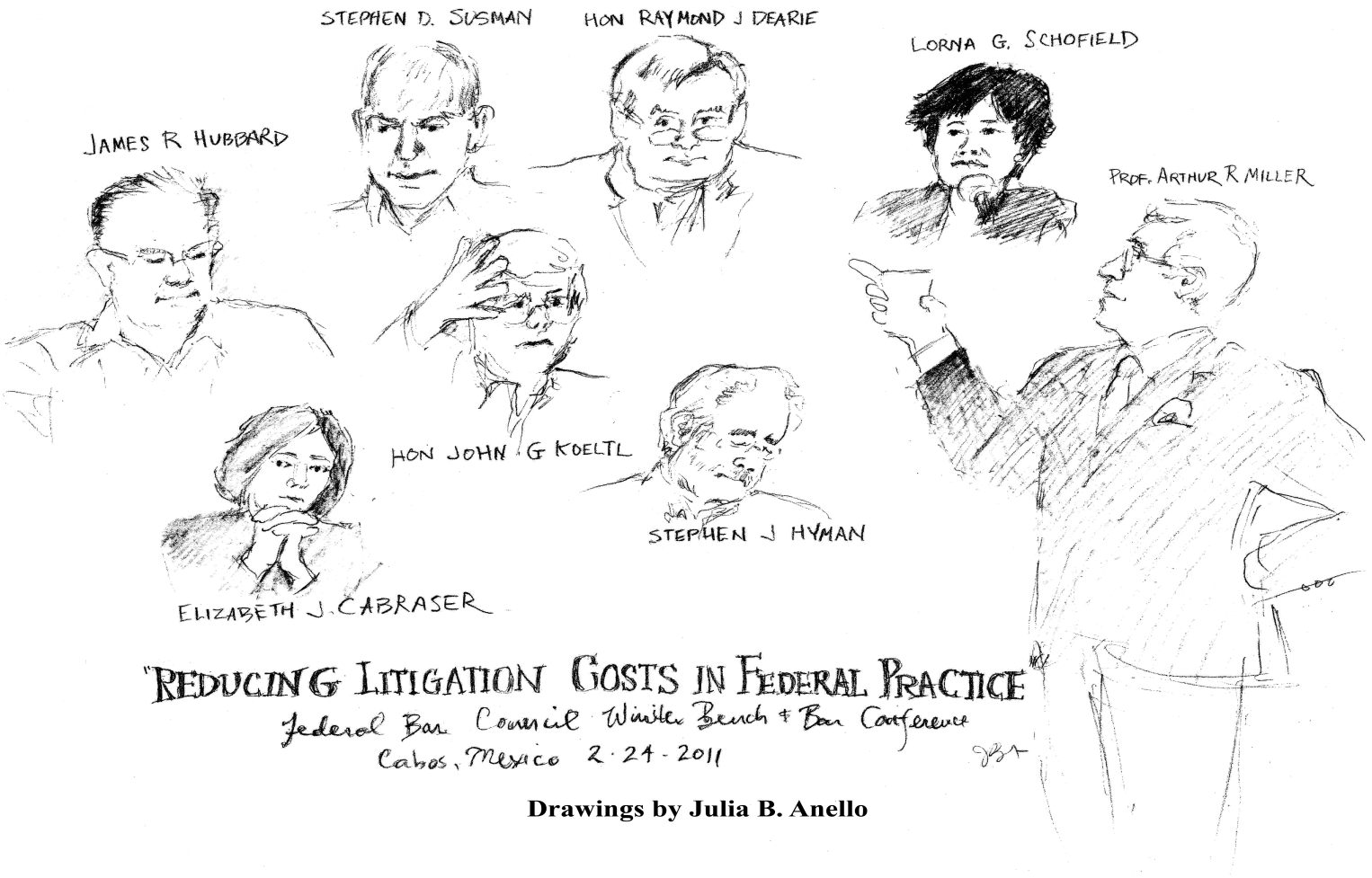
It was not only Japanese Americans who were interned; there was a group of European refugees as well. In order to at least make a token gesture to solve the European refugee problems created by Nazi persecution of Jews and others, President Truman agreed to take 1,000 refugees. However, because the refugees were being admitted to the country outside of the immigration laws, the president insisted upon their being interns (over Dillon's recommendation that they be released into the general population). To avoid public and political criticism, the European refugees were interned at Oswego, New York, in an old army post, and the children of the refugees attended public schools in Oswego. Eventually, President Truman agreed to release them into the general population, but he insisted that they be taken to Canada, walked across the border, and admitted into the U.S. from Canada. Through Jewish relief agencies, the largely Jewish population of the Oswego center was easily integrated into the U.S. population, mostly into New York City.

Conclusion

Now that I have related some of my uncle's personal history, I hope, in another article, to more thoroughly review the legal history of the relocation of Japanese Americans during World War II.

Federal Bar Council
123 Main St., Suite L100
White Plains, NY 10601-3104

Periodicals
Postage Paid
White Plains, NY



Drawings by Julia B. Anello