# Federal Bar Council News

April 1999 Vol. VI, No. 2

## The Judicial Process

### Judicial Papers

**By Steven Flanders**

Several years ago an unexpected public controversy erupted in what ordinarily is a thoroughly arcane field of battle: access to the papers of deceased judges. Only two years after the 1993 death of the late Justice Thurgood Marshall, enterprising reporters gained access to internal memoranda of the Justices to one another by perusing his files of judicial papers at the Library of Congress. (Justice Marshall is specially remembered by Federal Bar Council members as a former Second Circuit judge who served as Circuit Justice for most of his Supreme Court career.) News stories focussed especially on the views of Justices concerning each other, including numerous disparaging

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## Developments

### Federal Bar Council Holds Winter Meeting; Attendees Enjoy Panels, Sports, And Banquet

The Federal Bar Council held its annual Winter Bench and Bar Conference at the Four Seasons Resort in Kona, Hawaii, from February 20 through February 27, 1999. A group of approximately 250 lawyers, judges, spouses, and children attended the conference, which included panel discussions, tennis and golf tournaments, cocktail parties, and dinners, culminating in a banquet on the final night at which the Whitney North Seymour Award for public service by a private practitioner was given to former federal Judge Marvin Frankel. By all accounts, the conference — which was chaired by Bob and Julie Anello — was a smashing success.

Mornings were occupied by panel discussions organized by the Planning Committee and chaired by Second Circuit Judge Jose Cabranes, with assistance from District Judges Barrington D. Parker and Sidney Stein.

**Internationalization Of Legal Practice**

Judge Parker moderated the first panel, which focused on a hypothetical involving American and Japanese companies who had engaged in a variety of activities raising antitrust, Foreign Corrupt Practices Act, economic espionage, and extraterritorial enforcement of judgment issues. In the hypothetical, the American company accused the Japanese company of dumping, and the Japanese company,

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## Technology

### Ethics And Websites

**By Nancy Savitt**

As if the technology of the Internet weren't enough for lawyers to deal with, ethics committees are beginning to opine on the ethical consideration involved in setting up a website and related issues. Recently, The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics issued a Formal Opinion concerning legal websites. New York practitioners would be well-advised to read the opinion carefully. Although it is not

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## The Judicial Process

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comments that clearly were meant to be private. The reports drew from memoranda circulated among Justices still serving, as well as those who were deceased or otherwise had left the bench.

Predictably, but quite wrongly, the resulting debate concerning Library of Congress access policies framed the issue as though it were chiefly the privacy interest of individual Justices that was at stake. That was the least of it. What is at stake when internal communications within a collegial court reach the public so soon is the effectiveness and integrity of the judicial process. This touches all citizens and especially all lawyers, not just the mutual obligations of nine of them.

### Papers At Yale

A generation ago the Second Circuit weathered with indifferent success a roughly similar experience to that of the Supreme Court more recently. The papers of the two New Deal judges, Jerome Frank and Charles E. Clark, found their way to the archives at Yale, where they were made available to scholars in the ordinary course. Personal judicial papers of Second Circuit judges have been an unusually rich research resource because they include "voting memoranda," in which individual judges articulate highly personal views about each appeal, ordinarily very quickly. From the Yale archives can be learned not only the substantive views and the instincts of individual judges, but their personal perspectives on each other and the ways they work together.

As Professor Gerald Gunther has recently recounted in amusing detail in his biography of Learned Hand, one can learn from voting memoranda that Clark was regularly referred to in memos by the Hand cousins in terms that were less than respectful. He was referred to (in memos within panels on which he did not serve) as "the GLAPP": the Greatest Living Authority on Practice and Procedure. Arriving at the Second Circuit just a year after completing his work as draftsman and advocate for the new Federal Rules of Civil Procedure adopted in 1938, Dean Clark had a professorial agenda not always appreciated by his new colleagues.

Gunther recounts that "within a year of Clark's appointment, Hand sent Harrie Chase, who sarcastically called Clark 'the great dissenter,' a copy of an opinion referring to 'the new wules' -- Clark apparently thus pronounced his favorite word -- and added:

Dare we construe any wule sans Charles? I submit the following verses:

*There once was a fellow named Clark*
*Who thought it a Hell of a lark*
*To discuss about wules*
*And then call us fools*
*Because we were so in the dark.*"

Clark continued as judge to press the views he had advocated as reporter to the civil rules bodies, including views that had not prevailed, to the vast annoyance of his seniors. Also notable in the Clark papers is his disappointment in Frank, reflecting a perception that he experienced something like disloyalty when his protege failed to defer to his views, on procedure and on many other subjects. The acerbic correspondence between them, with their notably parallel careers from Yale to the Second Circuit, is a striking feature of the papers and of the numerous scholarly accounts that have drawn from them.

Professor Gunther's extended account that is briefly quoted above, with other relatively recent uses of papers deposited a generation or two back, plainly advances our collective understanding of the judicial process, and offers considerable diversion as well. But not all use of Second Circuit papers has been so benign or useful. Clark died suddenly in 1963, apparently transmitting his papers to Yale as a matter of course. They evidently were made available soon thereafter. This seems not to have been apparent to his surviving colleagues until the appearance in 1970 of a study of the Second Circuit — Marvin Schick's *Learned Hand's Court* — that quoted at length from internal memoranda of Clark's colleagues, including those still active on the bench.

### Rambunctious Expressions

It seems safe to assume that if the judges had had in mind the possibility of early scholarly use of their voting memoranda, none of the more rambunctious expressions would ever have been committed to paper. And the

## Calendar of Events

***1999 Annual Law Day Dinner*** ***May 4, 6:30 p.m.***
***The Waldorf-Astoria***

judges' caution would have been heightened had they imagined the experience of Justice Marshall's colleagues: extended treatment in the *Washington Post* — widely reprinted nationwide — based on judicial memos that in some instances were not even addressed directly to him. (He received courtesy copies).

While history would be the loser, the real loss would be the judicial process itself. For excellent historical, political, and jurisprudential reasons, America and most democracies have long established appellate courts as collegial bodies on which a single appellate judge has very little power to act alone. His or her power lies in a capacity to forge majority decisions, preferably unanimous ones.

As readers of the *Federal Bar Council News* well know, the Second Circuit Court of Appeals prides itself on a capacity, not shared by all appellate courts, to hammer out clear law on essentially everything that comes before it. There are fewer dissents and far fewer *en banc* proceedings than in most circuits. And there have long been relatively few major issues on which Second Circuit law is regarded as unclear because of conflicting decisions or plurality decisions. This can be achieved only through the kind of frank exchange that the Library of Congress seemed inclined to jeopardize as the librarian defended the sequence of events concerning the papers of Justice Marshall.

Second Circuit judges have generally cooperated with archivists and researchers, though there has been no specific policy of the court on access. This may have to come, because a court as an institution has rather little capacity as a legal matter to protect itself. Recent bequests of judicial papers have included the papers of Judge Henry J. Friendly, which went to Harvard in 1986, and Judge Irving R. Kaufman, whose papers were deposited with the Library of Congress not long after his death. Exacting restrictions were established in both instances.

There are recurrent suggestions by Second Circuit judges to revitalize and extend the unique tradition of the court by which frank voting memoranda have been circulated immediately after argument concerning each difficult appeal. The practice has lapsed significantly in recent years. Although one reason is the extraordinary increase in the number of cases each judge hears, another contributing cause undoubtedly was sudden circumspection following disclosure nearly a generation ago of memoranda that had been written only a few years earlier. A part of any renewal must be an effort to assure that what is private will remain private.

**Coleman's Role**

Reportedly, Justice Thurgood Marshall was inclined to destroy his judicial papers when he left the Supreme Court. Apparently it was his friend William T. Coleman who persuaded him that their value to posterity compelled preservation. But the handling of the Marshall archive by the Library of Congress in the years immediately following will make it much harder for any successor to Coleman to succeed. Indeed, it is my understanding that some papers of departed judges in this circuit have been destroyed already.

## Technology

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comprehensive, it does deal in broad measures with the retention requirements for websites, the pitfalls of hosting an Internet discussion group, and the problems with offering legal services directly from a website.

**Retaining And Filing**

Under the existing disciplinary rules, lawyers must follow certain requirements for advertisements. Advertisements that are mailed or distributed other than by broadcast or mass media publication have to be filed with the disciplinary committee and retained for at least one year. Broadcast advertisements need not be filed, but must be retained for at least one year.

The first question for the committee was whether a website is more akin to mass media broadcast or to a direct mailed solicitation. The committee determined that a website is more akin to a broadcast, and so it does not have to be filed. However, it does have to be retained. Websites are frequently revised. The committee made clear that each version of a website must be retained for the requisite period, although "the manner of preservation is flexible, as long as it permits review of the contents, including multi-media effects, of the website."

Websites frequently contain links to other websites. For example, an intellectual property firm may link to the Copyright Office site. The committee recognized that websites are not responsible for the content of the sites they link to, and stated that the retention rule did not apply to such sites as long as the law firm clearly indicated that the linked sites are not maintained by the law firm.

**Listserv Discussion**

The committee also commented generally about the propriety of a law

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firm setting up a listserv legal discussion area. Generally with a listserv (also known as a "mail exploder"), people subscribe to the service, which then maintains a list of all the subscribers' e-mail addresses. Mail that is sent to the listserv by subscribers is then automatically "exploded" out to the entire list, so that all subscribers receive all the messages from the listserv. There also can be private discussions directed to just one person's e-mail address. On some listservs, the list is moderated, so that an administrator reviews all submissions prior to their dissemination to the group for tone and content.

The committee pointed to several disciplinary rules and ethical considerations that would regulate such Internet discussions, including the rule that a lawyer cannot accept employment resulting from unsolicited advice to a person, although a lawyer may accept employment resulting from participation in educational activities, as long as he or she does not purport to give individual advice when speaking or writing publicly on legal topics. The committe noted the multi-jurisdictional nature of the Internet and warned against the giving of legal advice or having the discussion area develop into "what may be perceived as advertising . . . or as an impermissible solicitation."

The committee stated that the mere hosting of a listserv does not necessarily imply that the discussion area is an advertisement. Moreover, the committee said it would be permissible for the law firm to privately communicate to a subscriber in need of individual legal advice that he or she consult an attorney, although the firm must stress that it is "an" attorney, not necessarily the answering law firm, that should be consulted.

The committee did state that the law firm's contact information can be provided. However, the committee strongly urged "substantial caution and vigilance" in setting up any discussion area.

**Confidentiality Of Communications**

The committee also opined on whether a law firm could offer to perform a trademark search from its website. The proposed scenario involved having a form at the law firm's website that a person would fill out to request a search. The committee stated that although an entity that is not a law firm could post such a form, a law firm could not, except for established clients. The committee reasoned that a law firm would be unable to conduct the conflict of interest and other inquiries required prior to establishing an attorney-client relationship because such a relationship would be formed by the submission of a completed form.

With respect to the confidentiality of communications, the committee also stated that to the extent such forms are used for existing clients, they can be unencrypted, although the clients ought to be advised that the "security of communications over the Internet is not equal to that of other forms of communication that are generally accepted as secure."

However, the committee found it neither "necessary [n]or appropriate" to make a blanket prohibition against the use of e-mail for client communications.

In the continuing revolution of law firm advertising, communication, and education that the Internet represents, lawyers can look forward to additional instruction from ethics committees on permissible activities — and possibly court challenges if ethical restrictions impinge on First Amendment rights.

## Legal History

# "Marching Toward Justice"

An exhibit entitled "Marching Toward Justice," which focuses on the history of the 14th Amendment to the United States Constitution, will be coming soon to the federal courthouse at 500 Pearl Street in Manhattan.

The exhibit was created by the Damon J. Keith Law Collection of African-American Legal History at Wayne State University in Detroit. The Keith Collection, which is dedicated to recording the history of African-American lawyers and judges, was initiated by Wayne State University Law School Professor Emeritus Edward J. Littlejohn and contains papers and records contributed by the Honorable Damon J. Keith of the United States Court of Appeals for the Sixth Circuit.

## Second Circuit Decisions

# Adequate Disclosure

**By Charles C. Platt**

Two recent decisions in the Second Circuit have considered whether the undisclosed "fees" and "profits" in connection with securities transactions gave rise to a claim for fraud. In both cases, the court concluded that these failures to disclose were not actionable as a matter of law.

In *Press v. Chemical Investment Services Corp.*, the Second Circuit

dismissed a securities fraud claim arising out of undisclosed "fees" that were charged by defendants in connection with plaintiff's purchase of a $102,000 Treasury bill.

Plaintiff Press had alleged in his complaint, among other things, that defendants had failed to disclose that they were taking a $158.86 "markup" that was an "excessive [fee] relative to the bill's yield." Plaintiff also alleged that defendants had a fiduciary duty to disclose the fee they received because they were his securities broker-dealers in the transaction. According to plaintiff, these non-disclosures were material to his decision to purchase the T-bill, and violated the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

The district court dismissed the complaint, and the Second Circuit affirmed. The court held that the defendants' failure to disclose their markup on this T-bill transaction was not actionable unless it was "excessive." Even assuming that defendants had no risk in connection with the transaction, their fee was not "excessive" because of the administrative and procedural tasks they handled as the broker-dealers. Moreover, plaintiff "presented no compelling evidence of a more appropriate fee to be paid when comparing this transaction to other[s]."

The Second Circuit also rejected plaintiff's claim that defendants were under a "fiduciary duty" to disclose the $158.86 fee they received in connection with the transaction. The court concluded that any fiduciary obligation between a broker and a customer that may exist "is limited to matters relevant to affairs entrusted to the broker." Because plaintiff offered no case law supporting the broad proposition that all such fees must be disclosed by a broker, the court reasoned that the markup was not material information relevant to the affairs entrusted to defendants here — the purchase of the T-bill for plaintiff.

**Non-Disclosure Of Profits**

Similarly, in *Levitan v. PaineWebber, Inc.*, the Second Circuit dismissed a securities fraud claim arising out of the undisclosed "profits" that defendant recognized in her short sale transactions.

Plaintiff Levitan had alleged in her complaint that defendant PaineWebber had violated Section 10(b) and Rule 10b-5 of the securities laws when it "realized profits from collateral securing her short sale transactions and failed to inform her of those profits or remit them to her." In particular, plaintiff suggested that she had state-law property rights in the collateral she posted with defendant, and that she was deceived when defendant secretly misappropriated the interest earned on that collateral after it was posted by plaintiff.

The Second Circuit affirmed the dismissal of plaintiff's complaint. It held in part that a reasonable investor would not have been misled by defendant's failure to disclose that it was earning "profits" from collateral posted in short-sale transactions.

The court did not conclude that the omitted information about "profits" was

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immaterial. Instead, it determined that the omitted information was "so basic that any investor could be expected to know it." The court reasoned that the non-disclosure was really "no more than that money has a time value," and that "the longer a short sale remains open, the more value the investor gives up by losing the opportunity to use the collateral in another way and the more profit defendant can make by using the collateral."

The court concluded its analysis by noting that there is nothing "nefarious" about the "routine practice" of using deposited money to obtain earnings, absent some agreement to the contrary. Because plaintiff had not been promised any return of the "profits" on her deposit, she was "presumed" to know that defendant would earn and keep any profits.

**Conclusion**

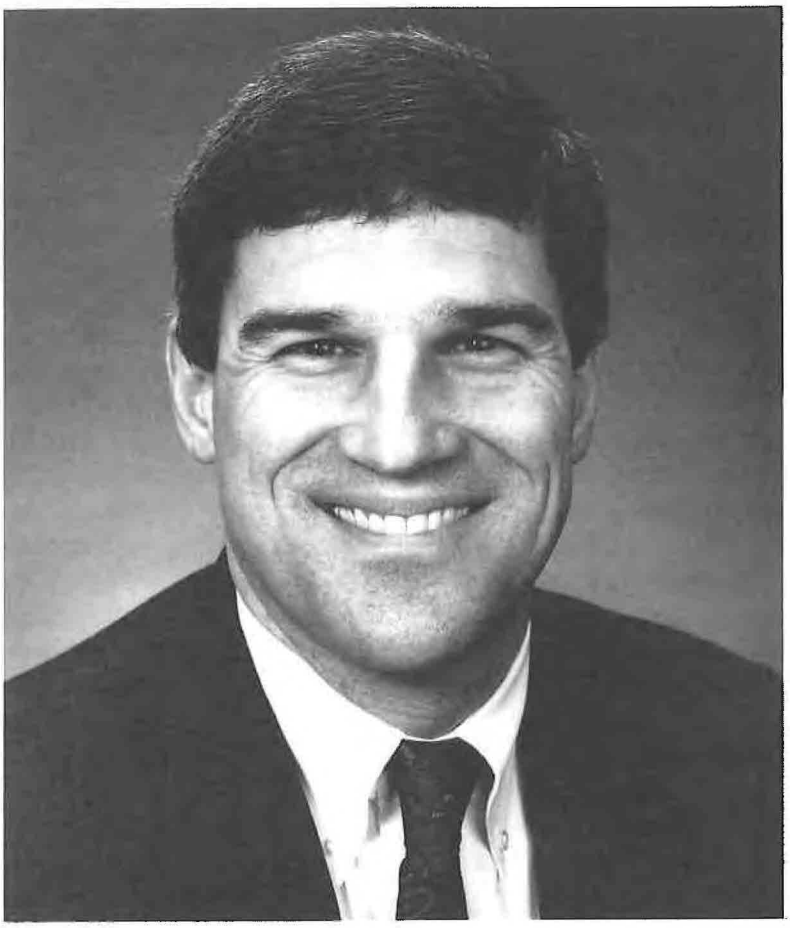
Although neither of these decisions is ground-breaking, they apply some common sense rules in dismissing securities fraud claims as a matter of law. And they give some reassurance to securities brokers that all "fees" or "profits" in connection with a securities transaction need not necessarily be disclosed.

## New Appointments

# New Western District Magistrate Judge

**By Stacey Creem and Stephen Ratner**

William G. Bauer was sworn in as a United States Magistrate Judge in the Western District of New York on January 4, 1999. Prior to his judicial appointment, Magistrate Judge Bauer had a distinguished career in private practice in Rochester, New York.



***Magistrate Judge William G. Bauer***

From 1984 to 1998, Magistrate Judge Bauer was with Woods, Oviatt, Gilman, Sturman & Clark. He began his practice there doing mostly trusts and estates litigation, became a partner in 1991, and chaired the firm's litigation department from 1996 to 1998. During the last several years, Magistrate Judge Bauer concentrated on general commercial and business disputes, including shareholder and contract disputes, covenants not to compete, and corporate dissolution proceedings.

Prior to joining Woods, Oviatt, Gilman, Sturman & Clark, Magistrate Judge Bauer served as a law clerk for United States District Judge Michael A. Telesca from 1983 to 1984. From 1981 to 1983, he was an associate at the Rochester law firm of Affronti, Jesserer, Andolina & Lamb.

It comes as no surprise that Magistrate Judge Bauer, who has had an active federal court practice throughout his career, is especially excited about serving as a judge in the Western District. He considers the court to be "user friendly," and has always been impressed with its active management of a large civil and criminal docket. Magistrate Judge Bauer considers his greatest

challenge as a magistrate judge to be familiarizing himself with the legal issues inherent in the criminal cases with which magistrate judges are enormously involved.

Magistrate Judge Bauer received his law degree from Albany Law School and his undergraduate degree from the State University of New York College at Brockport, where he graduated *magna cum laude* with a bachelor of science degree in political science and history.

Magistrate Judge Bauer has been actively involved in the Monroe County Bar Association, serving as chair of the Federal Courts Committee from 1987 to 1988 and as a member of the Judiciary Committee in 1998. He also has been a member of the New York State Bar Association.

Magistrate Judge Bauer is a lifelong resident of Rochester, where he currently lives with his wife and four children.

## FBC News

# Make That 27

Federal Bar Council member Stephen A. Weiner of Winthrop, Stimson, Putnam & Roberts is a co-author of the ERISA chapter in *Business and Commercial Litigation in Federal Courts*. His name was omitted in the discussion of the book in the February issue of the *Federal Bar Council News*.

## Developments

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after prodding from the Japanese Ministry of Trade and Industry ("MITI"), raised its prices. Antitrust Division chief Joel Klein suggested that the government would prosecute the Japanese and American companies for price fixing in this situation notwithstanding the involvement of the Japanese government. He noted that there is a procedure for resolving dumping claims within the Commerce Department, which must be followed if antitrust liability is to be avoided.

Former Antitrust Division head Donald Baker observed that, while civil remedies are available to the government, the recent trend has been to conduct criminal investigations in this area so the government can obtain the leverage of the grand jury. He suggested that a practitioner with clients facing issues such as these would have to be concerned about Canadian and EEC enforcement as well as a U.S. prosecution. He noted that Canada has an amnesty program and the EEC has a fine reduction program, which the companies might want to take advantage of here.

In the hypothetical, the American company hires a consultant in Japan who treats a MITI official to a golf weekend and convinces him to pressure the Japanese company to raise prices. While this raises issues under the Foreign Corrupt Practices Act, panelist David Brodsky felt that it would be difficult for the government to prove corrupt intent. He noted that the culture of the foreign country may require people to give gifts, and the size of the gift as well as prevailing custom could have an impact.

Richard Ziegler observed that these types of cases raise interesting discovery questions. Foreign countries often have blocking statutes that make it a crime for foreign entities to produce documents in response to U.S. grand jury subpoenas. United States courts typically will not accept that as an excuse, so often the only way out is to ask the U.S. government to request waiver of enforcement from the foreign government.

The panel next discussed the legal implications of hiring a consultant to obtain documents from a competitor in violation of the copyright law as well as the consultant's contractual obligations. Karen Hagberg stated that the Economic Espionage Act of 1996 would not be applicable unless the theft involved trade secrets. It is very hard for the government to prove a violation of that act because it must demonstrate reasonable efforts on the part of the victim to protect the trade secrets and economic benefit to the defendant in taking them, as well as specific intent. As a result, there only have been eleven investigations since the act was passed in 1996.

Peter Vigeland noted, however, that legal impossibility may not be a defense. As a consequence, the government often takes the position that it does not have to prove the actual theft of a trade secret, so long as it can demonstrate specific intent. Because it is relatively easy for the government to demonstrate economic benefit, this is an area in which companies may be at risk.

On the enforcement of judgments overseas, Richard Ziegler stated that the general rule is that a bank account is located only in the country where it is kept, and every branch of a bank is viewed as a separate entity for purposes of collecting judgments. Therefore, a restraining notice served on a U.S. parent will not reach an account at a foreign branch. Notwithstanding that general rule, the situation often turns on how risk averse the bank is, and some banks will not release funds unless they obtain a ruling from a court permitting them to do so.

Brian Cogan expressed the view that a restraining notice served on a U.S. parent should have the same reach as a

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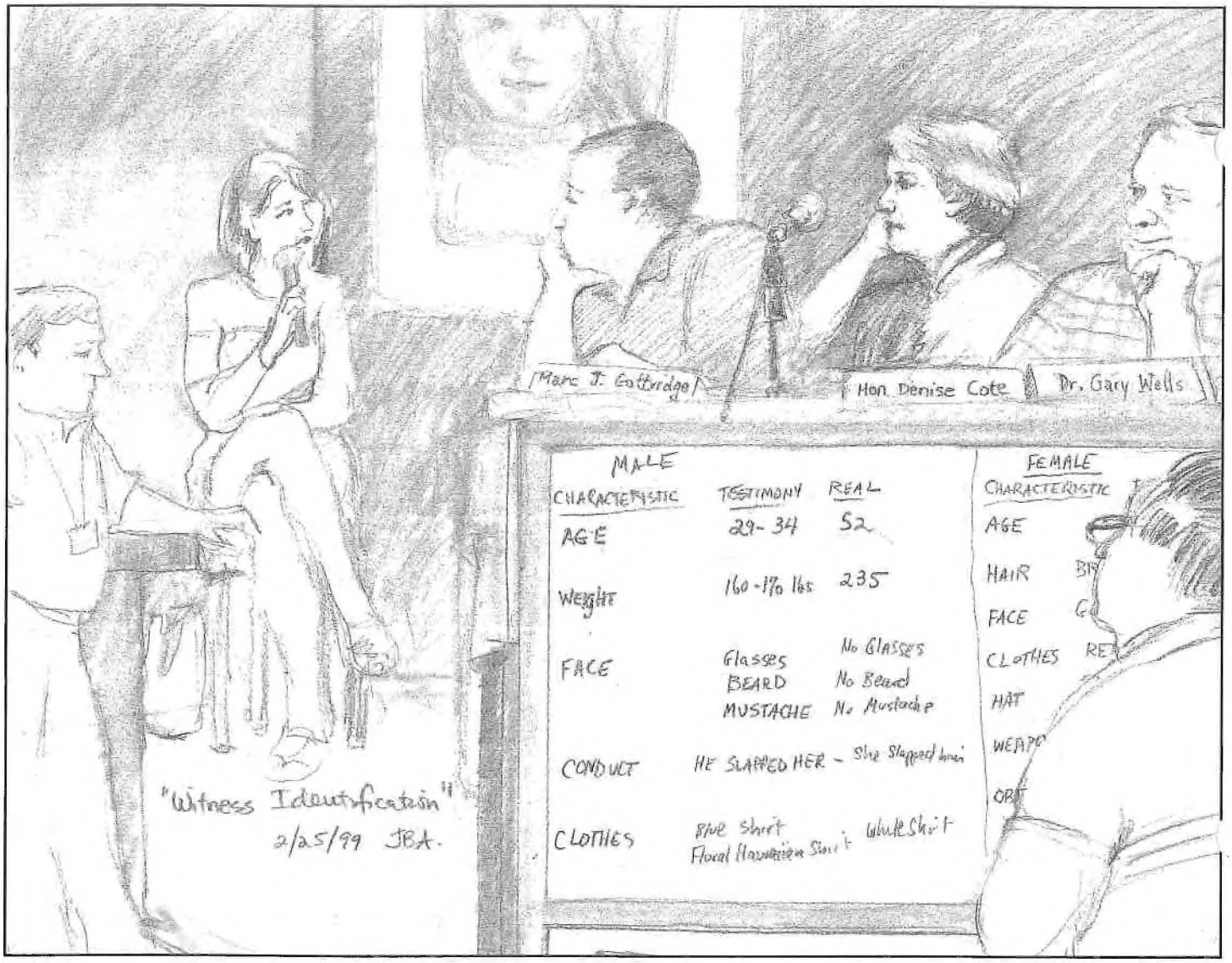
grand jury subpoena. He noted that, given the Second Circuit's recent decision in *Alliance Bond Fund* approving a prejudgment injunction restraining assets overseas, it should be a relatively easy step to obtain that relief in the post-judgment phase. Ziegler pointed out that *Alliance Bond Fund* raised significant issues of comity, which were not argued in the Second Circuit but should play a major role in the Supreme Court's consideration of that case.

During the course of the discussion, Joel Klein articulated the Antitrust Division's current enforcement policies in the international area. He noted that, with the world economy becoming globalized and increasingly deregulated, antitrust is becoming a major form of government regulation. The key is to have consistent enforcement standards from country to country. The United States is trying to play a leadership role in this area, and the Attorney General has created a commission to study this issue. The success of the Archer Daniels Midland prosecution, in Klein's view, has enhanced the government's credibility in this area, making it easier to obtain the cooperation of foreign governments in pursuing investigations of international cartels. He added that the government has 35 grand juries investigating international cartels at this time.

The panel also addressed the interesting question of whether it is permissible to advise a client who is a



foreign national to leave the country if he or she is under investigation. In David Brodsky's view, this is not analogous to destroying a document. A person has a constitutional right to travel, and there is no legal or ethical problem if a lawyer advises a client of that right. According to Brodsky: "Not everything you do that frustrates a government investigation is illegal or unethical."

**Privileges**

Judge Denny Chin led a panel devoted to the subject of privileges, including attorney-client and executive privilege, on the second day. Professor Kate Stith-Cabranes of Yale Law School began the discussion with a lecture on the law of privilege, emphasizing that even though privileges are often narrowly construed, courts in fact have been expanding the scope of many privileges and recognizing new ones. She cited recognition of the ombudsman privilege and the expansion of the work product doctrine in a recent Second Circuit decision as examples. She also noted that last summer Congress created a new privilege for tax advice. In her view, these developments are driven by the importance of the principle of privacy in our country, notwithstanding the general proposition that courts are entitled to every person's evidence.

When the panel discussion began, Evan Stewart, playing the role of general counsel, was asked whether he would permit his deputy general counsel to testify at a deposition about internal discussions with management regarding business negotiations with a third party. Stewart expressed the view that these discussions would be protected under *Upjohn* and *Rossi*, as well as the general proposition that lawyers should not be subjected to deposition absent special circumstances. Playing the role of plaintiff's counsel, Martis Brachtl disagreed and expressed the view that discussions about business negotiations with third parties are "classic business advice." Steven Alm, the United States Attorney for Hawaii, argued that a lawyer wearing two hats is not entitled to claim privilege. Bob Giuffra took a middle ground, suggesting that testimony about the negotiations with a third party would not be privileged but legal advice provided to the client regarding those negotiations would be.

The panel also addressed the question of waiver by inadvertent disclosure in the context of a privileged document inadvertently posted on a company's website. Alm contended that the privilege had been waived because the client had deliberately posted the document, it was not a situation in which the company was producing thousands of documents, and, notwithstanding reasonable precautions, a privileged document had slipped through. Aaron Marcu disagreed and argued that the basic issue is fairness. He noted that, under the circumstances of the hypothetical, the client did not intend to waive the privilege, and he analogized the situation to the *Kidder-Peabody* case, where the client waived the privilege by affirmatively using the report of an internal investigation, but the court upheld the privilege with respect to drafts.

Addressing the issue of internal compliance interviews, Martis Brachtl argued that the self-evaluative privilege would not be applicable because disclosure would not have a chilling effect on the incentive to comply with the law, but she acknowledged that she would be hard pressed to overcome the attorney-client privilege and work product doctrine in that context. Evan Stewart characterized internal compliance interviews as classic *Upjohn* and *Hickman v. Taylor* materials. Bob Giuffra noted, however, that internal compliance interviews should be conducted with a view toward disclosure because often the client will want to use them affirmatively (for example, in the sentencing guidelines context) to demonstrate good faith efforts to comply with the law.

The panel next addressed a hypothetical in which the general counsel of a defendant caused experiments to be conducted in an effort to support the company's defense, and the results actually undermined the company's position. Neil Eggleston felt that, if the company continued to press the defense notwithstanding the results of the experiments, the documents would be subject to production under the crime-fraud exception to the attorney-client privilege. Evan Stewart disagreed, suggesting that the documents would be protected but the people conducting the experiment would not. Martis Brachtl described this situation as "classic funneling." Observing that the law degree of an attorney "cannot be used to create a private sanctuary," she analogized the issue to the Special Projects research conducted by the Tobacco Institute in the tobacco cases, as to which privilege claims have been overruled. Bob Giuffra expressed the view that, in situations such as this, it may be better to turn the documents over without drawing attention to them.

The next issue addressed by the panel was the practice of turning privileged documents over to an adversary pursuant to a non-waiver agreement. There appeared to be consensus among the panel members that the privilege would be waived in that instance. The advantage of such an agreement,

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according to Neil Eggleston, is that the privilege is only waived with respect to the document or documents that are turned over, as opposed to the subject matter.

A final topic of discussion in the attorney-client/work product area was joint defense agreements. Aaron Marcu explained joint defense agreements and emphasized that the existence of a "common interest" is critical. Even though written joint defense agreements are preferable, oral agreements should be enforceable and, in some cases, an agreement can be inferred from the conduct of the parties. Steven Alm expressed skepticism about that, particularly where one or more parties becomes a cooperating witness.

The discussion then turned to executive privilege, and Neil Eggleston — who recently represented President Clinton in the Supreme Court on this issue — explained the law in this area. Executive privilege has two components: a privilege for Presidential communications and a privilege for the deliberative process. The protections afforded to Presidential communications are much higher, but they must relate to advice given to the President. For the deliberative process privilege to apply, the communication must take place prior to making a decision, and it must relate to a policy issue. In both cases, executive privilege may be overcome by a showing of substantial need.

Eggleston noted that President Clinton's invocation of executive privilege had been the subject of one of the proposed articles of impeachment. He pointed out that Judge Johnson had ruled that the invocation of the privilege had been proper, but it had been overcome by a showing of need. He expressed some satisfaction that the House had voted this proposed article down.

Bob Giuffra, who served as chief counsel of the Senate Whitewater Committee, described the operation of privileges in the context of Congressional investigations. As a technical matter, Congress does not recognize the attorney-client privilege; it is a judicial doctrine, not a Congressional doctrine. At the same time, Congress has very limited enforcement powers. While Congress can issue subpoenas, civil contempt requires the vote of a majority of the Senate and criminal contempt must be referred to the United States Attorney for prosecution; therefore, contempt remedies are rarely sought. As a consequence, subpoenas often give way to negotiations, and Congress frequently uses political and budgetary pressure to obtain compliance. In most cases, the executive branch agrees to produce the documents but Congress agrees to treat them as classified.

Eggleston noted that the Supreme Court has now decided that members of the executive branch cannot claim attorney-client privilege for discussions with government lawyers in the context of a grand jury investigation. He recounted the disputes he had with the Office of the Independent Counsel over who could call itself the United States. In the Lindsey case, the President argued that he had the final say on what the executive branch did, but the courts disagreed. This issue will become more interesting if and when the Office of the Independent Counsel is eliminated.

The final topic discussed was the issue of parent-child privilege. Giuffra stated that eight circuits have already ruled that there is no parent-child privilege. Upon a showing of hands by the audience, however, there appeared to be a consensus that there should be a parent-child privilege — at least where minor children are involved.

**Mandatory Arbitration Of Civil Rights Claims**

Judge Janet Bond Arterton moderated a panel on mandatory arbitration of civil rights claims. On the panel were Anne Vladeck, who frequently represents plaintiffs, and Jay Waks, who frequently represents defendants. Professor Leonard Orland played the role of neutral commentator.

Judge Arterton began the discussion by noting that everyone present is either an employer or an employee, or both, and therefore they should have a real life interest in these issues. She reviewed the case law, beginning with *Alexander v. Gardner-Denver*, decided in 1974, where the Supreme Court held that there could be no prospective waiver of a right to bring Title VII claims as a result of a collective-bargaining agreement. In *Gilmer v. Interstate/Johnson Lane*, decided in 1991, the Supreme Court held that an age discrimination claim was subject to compulsory arbitration where the employee had consented to arbitration in his securities registration application. Most recently in *Wright v. Universal Maritime Service Corp.*, decided in 1998, the Supreme Court had an opportunity to reconcile the competing lines of authority represented by *Alexander* and *Gilmer* but declined to do so because the arbitration clause in that case was unclear.

Jay Waks described *Wright* as a victory for employers because it reaffirmed the principles articulated in *Gilmer*, making it clear that with properly drawn arbitration clauses employers can obtain the benefits of arbitration — which he described as avoiding jury trials, saving management time and speeding up the

process. Anne Vladeck took the position that voluntary arbitration is fine but mandatory arbitration is not, and she pointed out that the cost of arbitration in fact may be greater because it is hard to schedule time and some arbitrators have awarded substantial damages to plaintiffs. She noted that many employers are dissatisfied with arbitrations at the present time.

Addressing the advantages and disadvantages of arbitration, Professor Orland expressed the view that it is very troublesome that arbitrators can ignore the law. "The law develops over time as a result of many courts looking at a problem," he stated, "and there are benefits from that." He also suggested that Congress acts as a check on the judicial system, but that is lost in the arbitration context.

Vladeck agreed with Orland, noting that Congress had added the right to a jury trial to the Civil Rights Act in 1991. She observed: "The energies that have been expended developing a judicial system are being wasted in the arbitration context." She added that juries provide "collective wisdom" that often cannot be obtained from an arbitrator.

Waks disagreed, expressing the view that a professional decisionmaker generally will make a better decision than a jury relying on "gut justice." There is no reason why a person cannot waive a jury trial in advance, in his opinion. Waks analogized an agreement to arbitrate to an agreement to have a case tried before a magistrate.



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Vladeck countered that no one is saying that people cannot waive juries. The question is whether there truly is a waiver in many cases. In the employment context, the parties are often in unequal bargaining positions, and there should not be a waiver by an agreement that an individual had no role in negotiating, in her opinion.

Judge Arterton asked why employers fear jury trials. Waks responded by saying that arbitration helps to level the playing field by promoting early resolution and avoiding decisions based on considerations other than the facts. Orland observed that the framers had more respect than that for jury trials when they made them part of the Bill of Rights. He also pointed out that there is an independent benefit to society when proceedings are held in public.

The bottom line, according to Waks, is that arbitration is a very good way of resolving certain disputes, including employment claims. Vladeck responded by stating that there is a role for arbitration, but it should not be mandatory unless the employee specifically agrees.

**Eyewitness Identification**

On the first night of the meeting, a panel chaired by Judge Denise Cote staged an event in which a couple disrupted a speech by Bob Morvillo with an argument over infidelity, which culminated with the woman threatening to kill the man with a spoon. The episode was videotaped, and the meeting participants whose last names begin with the letters A through M were asked to write notes of what they had seen. Throughout the week, various witnesses were then subpoenaed by Marc Gottridge, who played the role of the prosecutor, and asked to identify the couple in photographic line-ups.

The panel discussion began with prosecutor Gottridge presenting the direct testimony of various eyewitnesses and defense lawyer Ron Fischetti cross-examining them. The prosecutor's case began to fall apart as witnesses identified different people in the photographic line-ups. They then testified to descriptions for the male that ranged from 5 feet 8 inches tall, 160 lbs., with a moustache and a Hawaiian shirt, to 6 feet tall, and 230 lbs., with glasses, a blue shirt, and a gray-white beard. The description of the female had her wearing a red shirt with a baseball cap turned backwards, as well as a multicolored mumu and a baseball cap turned frontwards. In fact, the male was 6 feet 2 inches tall, weighed 235 lbs. and wore a white shirt, and he had no glasses, no beard, and no moustache. The female wore a dark green tee shirt and had a gray baseball cap turned frontwards. Even more disturbing, there were 10 positive identifications of the woman and 4 positive identifications of the man in the photographic line-ups, when in fact there were no pictures of either in the arrays. The only encouraging aspect of the demonstration was Christopher Jensen's identification of the weapon as a spoon, as to which he testified: "I wondered how she was going to do him with a spoon."

The presentation was a vivid demonstration of the unreliability of eyewitness identification, which was followed by a lecture by Dr. Gary Wells, a well-known expert in this area. The problem, according to Wells, is that we analogize eyewitness identification to videotape. The analogy is dangerously wrong, in his view. Memory is not a recording. Memory is a construction. We do not view events on a continuous basis, and images are adjusted to place them in context. As Wells put it: "It is not a direct representation of what comes in through the eyes." As a consequence, people overestimate the accuracy of eyewitness identifications, especially because witnesses making such identification often appear to be extremely confident.

The key problem, according to Wells, is "relative judgment" — people will choose the person in a line-up who looks most like the perpetrator. Wells added that there are a number of things that make the problem worse, including making the suspect stand out; allowing the person who is trying to solve the crime to be the person who administers the test; failing to warn a witness that the person who committed the offense might not be in the line-up; and confirming the choice before discussing why it was made. Wells believes that one way to enhance the reliability of photographic line-ups would be to show the photographs one at a time. He noted that the Department of Justice has set up a panel (of which he is a member) to develop national eyewitness identification guidelines.

**Cyberspace**

On the last day of the conference, Judge Stein led a panel that discussed the issues presented by the Internet.

Larry Kantor of PriceWaterhouse-Coopers began the discussion by presenting a brief overview of the Internet. He took the audience through a number of web pages, focusing particular attention on the privacy statements that some web pages have. He also noted that, with modern technology, third parties can determine what web pages you have visited and what you have bought, among other things.

Kantor also addressed the topic of electronic evidence discovery,

emphasizing that almost nothing in computers gets erased. If a party knows what to ask for in discovery, it can probably be found, in Kantor's view. The hard drive in a PC, for example, keeps a comprehensive record of everything the user has done. The only way to delete information from the hard drive is to overwrite it, and that is difficult because the computer will generally go to files that have not been written on before. Something called "file wipe" is available, but most people do not use it and, even when they do, the data may be duplicated on backup tapes.

Among other things, Kantor recommended that lawyers consult experts before obtaining or producing electronic evidence. He also suggested that a preservation of evidence letter be sent out as soon as possible when a litigation begins. In addition, he recommended that backup tapes be collected and reviewed by experts before production.

Judge Stein introduced a discussion of jurisdictional issues by quoting the Woody Allen line, "space is nature's way of making sure everything doesn't happen to you" and adding that "in cyberspace you don't have any space between you." Michael Bamberger and Kenneth Wilson discussed the issue of minimum contacts in cyberspace. They noted that it is difficult to develop rules because website providers have little control over where their message is received.

According to Bamberger and Wilson, the best way to conceptualize the issues is to think of them as a spectrum, ranging from a passive website to an interactive website. The general rule is that a passive website does not create a basis for jurisdiction in every place it is received. There may be some exceptions to this rule, however, especially where the website is located in a jurisdiction where it is difficult to litigate (such as the Bahamas) or the website is engaged in activity that society may consider harmful, such as pornography. Next on the continuum are bulletin boards and chat rooms, where courts will find jurisdiction in any location from which a contribution is made. Then there are targeted activities, where courts frequently apply a *Calder v. Jones* intent-based analysis. Finally, there are passive websites where access is followed up by a telephone call; courts generally will find that the user who has received a telephone call can sue in his or her home state. Over the long term, Bamberger and Wilson feel that courts will embrace an intent-based analysis — i.e., they will ask whether the website provider intended to do business in a foreign state — and clients may be able to obtain a measure of protection by stating on their website that they do not intend to do business in particular states.

The final topic of the panel was regulation. Ellen Agress and Andrew Shapiro discussed whether a top down approach — adapting existing laws and regulations to the Internet — or a bottom up approach — devising new regulations for the Internet — would be best. Agress noted that the Internet is a unique medium involving voice, data, music, and print — all of which are available using various delivery systems, each of which is regulated differently. She cited the AT&T/TCI merger as an example. Is it a cable service, largely free from regulation, or is it a telecommunications service, which is subject to strict regulation by the FCC?

Agress noted that regulation in this area is very difficult, and she cited the Children's Online Privacy Act, passed last fall, as an example. That act provides that a website cannot collect information

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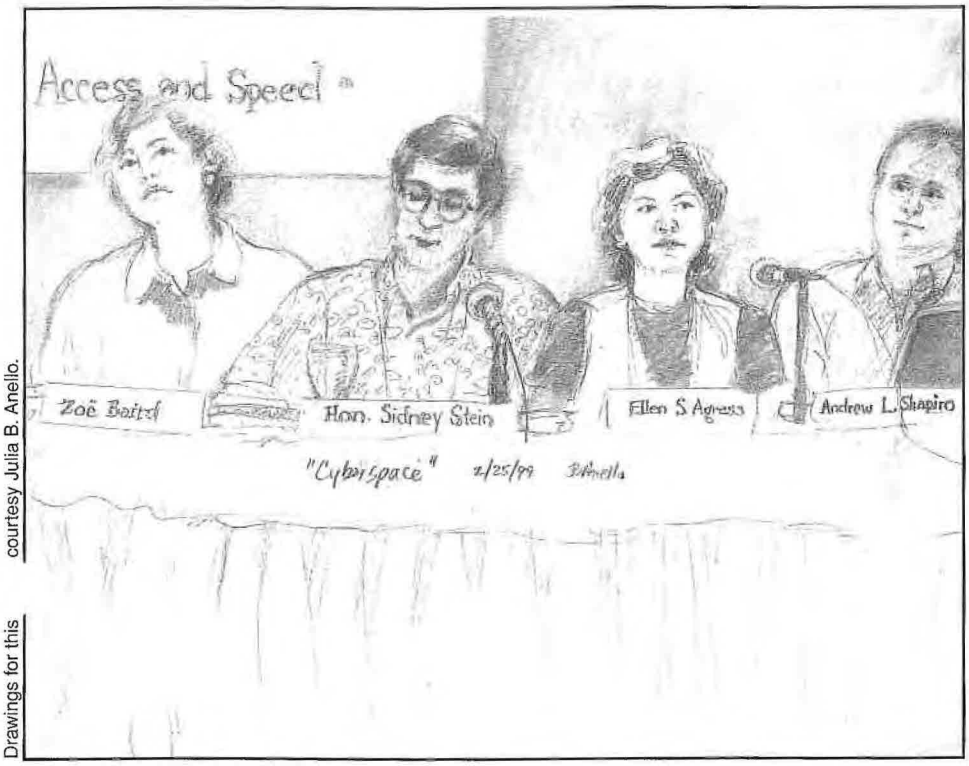


courtesy Julia B. Anello.

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from a child without verifiable consent, and the FTC has stated that verifiable consent requires a piece of paper with a signature on it. This is having an adverse impact on children's websites, because children either do not provide consent, lie about their age, or simply go to an adult website. Companies with websites are trying to convince the FTC that there are better ways of protecting children, and they are developing a system of self-regulation, where websites that follow the rules will receive something similar to the Good Housekeeping seal of approval.

Andrew Shapiro of the Aspen Institute discussed the various regulatory approaches. He advocated a balance of self-regulation, application of existing law, and creation of new law. He noted that the privacy issues are really nothing new, but the Internet gives people access to far more information at greater speed than ever before. He also referred to the developing market for privacy, where vendors are developing and selling approaches that users can employ to protect their privacy. In particular, he mentioned code regulation, by which digital certificates may be placed on information to prevent its dissemination without a user's consent.

**Presentation Of Seymour Award**

On the final evening, Federal Bar Council President Steve Edwards presented the Whitney North Seymour Award for outstanding public service by a private practitioner to Marvin Frankel. He noted some of Judge Frankel's achievements, including having served as editor-in-chief of the Columbia Law Review; Assistant to the United States Solicitor General; a partner at Proskauer Rose; a professor at Columbia; a United States District Judge; a Director of the Civil Rights Institute of the NAACP Legal Defense Fund; a consultant to the law page of *Time* magazine; chairman of the Lawyers Committee for Human Rights; co-chair of the Commission on Law and Social Action of the American Jewish Congress; a name partner of Kramer, Levin, Naftalis and Frankel; and author of many books and articles. In addition, Judge Frankel has argued more than twenty cases in the Supreme Court and tried literally hundreds of other cases throughout the country.

Edwards traced Judge Frankel's career from his law professorship at Columbia through his thirteen years on the bench and his success as one of the country's top litigators.

He also noted that, throughout his career, Judge Frankel has not hesitated to stand up for what he believes in. Among other things, Edwards cited Judge Frankel's work in Chile for human rights; his efforts to monitor the response of the Marcos government to the assassination of Benigno Aquino; his work for the Haitian Refugee Center in its efforts to stop the Reagan administration from seizing boatloads of refugees and returning them to Haiti; his arrest in Kenya for taking notes at an inquest into the death of a Kenyan human rights activist; and his examination of the conditions in which Palestinian prisoners were being kept in Israel.

Edwards noted that Judge Frankel's most important accomplishments may come from the books he has written. In 1972, he wrote *Criminal Sentences: Law Without Order*, which is widely credited as the genesis of the sentencing guidelines. In 1977, Judge Frankel and Gary Naftalis wrote *The Grand Jury — An Institution On Trial*, in which they examined the difficult question of whether the grand jury should be abolished as an anachronism and made numerous suggestions for reform. In 1980, Judge Frankel wrote *Partisan Justice*, in which he analyzed the strengths and weaknesses of the adversarial system. In 1989, he wrote *Out of the Shadows of Night: The Struggle for International Human Rights*, in which he reviewed the history of the modern human rights movement. His most recent book is *Faith and Freedom*, in which Judge Frankel argues eloquently for the preservation of the "wall of separation" between church and state.

**Celebrating Scottsboro**

In accepting the award, Judge Frankel observed that Whitney North Seymour had argued more than 50 cases before the Supreme Court, and had assisted in the landmark case of the "Scottsboro boys" (*Powell v. Alabama*) followed by his own equally famous civil rights argument in *Herndon v. Lowry*. After the case of the Scottsboro boys, Seymour and his colleagues went to Harlem to celebrate by "stomping at the Savoy" — an option that Judge Frankel wistfully noted does not seem to be available any longer.

Citing a number of details, Judge Frankel undertook to portray the appealing human qualities of Mr. Seymour, both at work and at play. He noted that, even though Seymour was a conservative Republican, and he is a liberal Democrat, they both agreed on basic things — both things to be conserved and others to be liberally ma available for everyone. Judge Franke suggested that we must continue to find that common ground as we work for a better society in the future.

## The Back Page

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On the eve of World War II, the record-breaking Hapag-Lloyd liner *Bremen* was the subject of an intense stalling effort by United States Customs officials to delay her sailing. Port clearance papers were withheld and the vessel was inspected for contraband armaments. *Bremen* had arrived in the port on the morning of August 28, 1939, and was preparing to return to sea the following day. In an attempt to stop her, officials ordered a full lifeboat drill followed, that night, by a complete search of the vessel's 'tween decks. She was finally permitted to sail at 6:30 p.m. on ugust 30.

Well aware that British cruisers lay in wait off Nantucket Light, *Bremen's* master dropped a decoy lifeboat complete with a transmitting radio beyond Ambrose Light before racing eastbound well off her anticipated track. She proceeded north about Iceland and, completely evading the Royal Navy, arrived safely in her home port of Bremen after an extraordinary four-month crossing. She was subsequently sunk by the RAF in 1941.

Her sister ship *Europa* was taken over intact in Kiel immediately after the war and, with a prize crew under command of Captain Benjamin Perry, was brought into the port of New York where she was seized by the United States Marshal. As a legitimate prize of war, she was used to carry American troops home from Europe before being presented to the French. After a long conversion at St-Nazaire, she would sail for years as flagship of the French Line, *Liberté*.

*John Maxtone-Graham is President of The Ocean Liner Museum. Theodore Cunningham is the chair of the Federal Bar Council's History Committee.*

## Courthouse Exhibition

**By Theodore S. Cunningham**

A maritime exhibition, entitled *Blue Ribband: The Quest For Speed Across The Atlantic*, will open May 6, 1999 at the federal courthouse gallery at 500 Pearl Street in Manhattan. The exhibition is sponsored by the United States Second Circuit Committee on History and Commemorative Events, the Federal Bar Council, the Maritime Law Association of the United States, and the Ocean Liner Museum.

The exhibition will feature models, paintings, artifacts, mementos, audio-visual displays and ephemera that will conjure up life aboard the incrementally faster ocean liners that conquered the North Atlantic for a century and a half.

Also included within the exhibit will be a track chart and audio-visual devices that dramatize the transatlantic struggle. Moreover, on display will be the wheel of the *Normandie*, showing the scars of her fiery end; a half-empty bottle of Chartreuse from the ship's bar; carved mahogany paneling from *Mauretania's* smoking room; a brass Chubb door lock salvaged from the wreck of the *Oregon*; and an empty gun-metal watch case brought up from *Lusitania*, its crystal clouded by sea water.

A wealth of ephemera will evoke aspects of transatlantic travel from early sailing steamers right up to turbine-driven giants of the mid-20th century. These include a cablegram sent by *Lusitania's* Captain William Turner to a mother, promising to look after her son during what proved the vessel's and, tragically, the young man's, last crossing; a set of notebooks belonging to Lloyd's Surveyor G. Demarest, scrupulously documenting construction of *Mauretania* from first rivet through delivery; a rendering of a *Queen Mary* ballroom that was never executed; a congratulatory letter to Commodore Manning of the *United States* from vanquished *Queen Mary's* Captain Donald Sorrell; and a note from film star Joan Crawford to Manning requesting that he slow his ship down to help alleviate her seasickness.

In addition, related items of a legal nature will be displayed. One of these is the silver oar that was placed by English tradition until the Revolution in all New York courts sitting in admiralty and had been created in 1715 by one of the greatest silversmiths of colonial America.

At the opening of the exhibition, Sir David Steel, Admiralty Judge of the United Kingdom and a member of the High Court of England, will be present at the invitation of the Maritime Law Association and will speak concerning British history. The other principal speakers will be the Southern District Judge Charles S. Haight and Mr. John Maxtone-Graham, the maritime historian and President of The Ocean Liner Museum.

Complimentary catalogues will be available at the opening. After the speeches, commencing at 5:00 p.m., the Maritime Law Association will host a reception for all attendees.

The exhibition will run through the Summer of 1999.

## The Back Page

**By John Maxtone-Graham and Theodore S. Cunningham**




Throughout the night of August 29, 1939, the German ship is thoroughly if fruitlessly searched. *Photo courtesy Frank Braynard Collection.*

New York was the western terminus of the great ocean liners sailing from old world to new, port of choice for the disparate human cargo that disembarked on the banks of the Hudson to enrich this extraordinary city. As once was suggested by historian Walter Lord, a trustee of the Ocean Liner Museum, "The ocean liner was to New York what the riverboat was to New Orleans."

Despite a multiplicity of dangers — fog, gale, and icebergs — the North Atlantic carried more tonnage than all the other oceans of the world combined. Small wonder, then, that vessels crossing to New York were floating superlatives, the largest, fastest, and, always, the most sumptuous. The swiftest flew the figurative Blue Ribband, a mythic but coveted prize recognizing fastest passage time between Europe and America. The first winner was the little paddle steamer *Sirius* that, in 1839, steamed and sailed from Britain to America in 18 1/2 days, averaging six knots. Over a century later, in the Summer of 1952, the *United States* thundered across in 3 1/2 days at the astonishing speed of thirty five knots. Between these two vessels, each an engineering miracle of its day, a roster of transatlantic immortals fought for the prize in fiercely contested competition, among them *Teutonic*, *Campania*, *Lusitania*, *Bremen*, *Rex*, *Normandie*, and *Queen Mary*.

Blue Ribband winners, like every vessel entering the port of New York, were prone to accident and lawsuit. Sometimes the legal proceedings were of national significance.

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