Federal Bar Council News

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Focus On:

Judge Peter K. Leisure

By Peter Eikenberry

Judge Peter Leisure's grandfather may have been a farmer in Missouri, but his father settled in New York City, after serving in the First World War as a fighter pilot, and became a prominent trial lawyer. In Judge Leisure's chambers there is a picture of Judge Leisure as a small boy seated on the lap of Clarence Darrow, who was co-counsel with Judge Leisure's father in Darrow's last trial. When Paul Muni played Darrow in *Inherit the Wind* on Broadway, Judge Leisure's father took the young Peter Leisure back stage to meet the famous actor.

The judge's two brothers followed in their father's footsteps as prominent New

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Developments

Federal Bar Council Holds Winter Meeting In Puerto Rico; Bob Fiske Receives Whitney North Seymour Award For Public Service

The Federal Bar Council held its 30th Annual Bench and Bar Conference at the Cerromar Beach Resort, Dorado, Puerto Rico, from February 14 to 21. The panel discussions were organized by a committee chaired by Second Circuit Judge Jose Cabranes, with assistance from District Judge Sidney Stein, Arthur Aufses, P. Kevin Castel, Michael Cooper, George Davidson, Steve Edwards, Joseph Genova, Marc Gottridge, Elizabeth Head, Alvin Hellerstein, Robert Jossen, Jane Parver, Bettina Plevan, Stefan Underhill, and Peggy Brown. In addition to the program, there were snorkeling adventures, a deep sea fishing trip, tennis tournaments, and a golf tournament in which Arthur Abbey made a hole-in-one.

Ethics Panel

New York University Law School Professor Stephen Gillers chaired a panel that addressed ethical issues for litigators. The panel focused on a hypothetical involving New Dakota Governor George Wonder, a potential presidential candidate, and his wife Wanda, CEO of True Wonder Software, a company that produces a software product that automatically writes briefs. The scene opened with Wanda Wonder, played by Millie Hellerstein, seeking advice from her lawyers, Michael Cooper and David

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Second Circuit News

CD-ROM Filings

By George Lange III

The Second Circuit Clerk's Office will receive more than 70,000 individual copies of briefs and appendices this year. Judges and law clerks each will haul around 2,000 or more of these documents in a single term.

But that may be changing.

Recently, the first interactive CD-ROM briefs and appendices were filed with the Second Circuit. Attorney Lisa

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J. Trembly filed the disk on behalf of attorney Daniel P. Levitt, in *Chemical Bank v. Affiliated FM Ins. Co.*, a civil appeal over a $23 million judgment. The disk contained video depositions, among other things.

Winthrop, Stimpson, Putnam & Roberts litigation partner David Keyko also has filed a disk in the case.

Chief Judge Winter is a great proponent of this technology. He recently called a meeting with the U.S. Attorneys and Legal Aid lawyers from the Southern and Eastern Districts of New York to promote CD-ROM briefs and appendices.

CD-ROM filings will not make paper filings obsolete, but they may be able to cut the number of paper documents filed with the court by two-thirds, and will provide electronic links to the text of all cited cases and documents at a click of a mouse. In addition, the ability to make video demonstrations and video depositions (with full audio) part of the record on appeal gives advocates a powerful and persuasive new tool.

Lawyers interested in learning more about CD-ROM filings may contact the Clerk's Office at (212) 857-8500.

FBC Program

Law Day Dinner

The 1998 Annual Law Day Dinner, sponsored by the Federal Bar Council, will be held at The Waldorf-Astoria on May 5, at 6:30 p.m.

Robert MacCrate will present to Charles Alan Wright, Chair in Federal Courts at the University of Texas Law School, the Learned Hand Medal for Excellence in Federal Jurisprudence.

For further information, please contact the Federal Bar Council, at (212) 883-1777.

FBC Program

Products Liability

The Federal Bar Council's Program Committee will be presenting a program on products liability on Wednesday May 6, 1998 at 5:30 to 7:30 p.m. in the Jury Assembly Room on the first floor of the 500 Pearl Street Courthouse.

Panelists will include Sheila Birnbaum, Herb Wachtell, Joe Rice, Fred Baron, and Professor John Coffee. The event chair is Anne Cohen.

Program Committee Chair P. Kevin Castel says that "in our programs, we have tried to steer clear of the 'talking head' format and focus on debate and interchange, often with role play. Given the judicial trend against nationwide products class actions and the *Adchem* decision limiting certain types of class settlements, there will be much to discuss. Thanks to Anne Cohen, the line-up of panelists includes the nation's leading protagonists in this area."

FBC Program

Oliver Ellsworth Plays New York

By Steven Flanders

Following a run in New Haven, the Oliver Ellsworth lecture and exhibit comes to Foley Square on April 22. Co-sponsored by the Federal Bar Council and the Second Circuit, the program was assembled by John Gordon III and Charles Goetsch. The annual lecture will feature Prof. William Casto, author of the program publication, *Oliver Ellsworth and the Creation of the Federal Republic*.

The lecture and opening festivities will take place at 5:30 in the 17th floor courtroom of the Court of Appeals. A reception will follow at 500 Pearl Street sponsored by the ABA litigation section in conjunction with its meeting in New York.

Legal History

William Henry Seward

By C. Evan Stewart

Although little remembered today, William Henry Seward was one of the 19th century's foremost Americans: first as New York's governor, later as its senator, the pre-convention favorite for the 1860 Republican Presidential nomination, and finally Abraham Lincoln and Andrew Johnson's Secretary of State.

In that latter post, historians have judged Seward to be one of the nation's preeminent statesmen: he not only played a crucial role in ensuring that the Confederate States failed to gain diplomatic recognition from foreign nations, he also paved the way for America's expansion into the Pacific with the acquisition of Midway, as well as the purchase of Alaska from Russia for $7.2 million (a/k/a "Seward's Icebox," "Seward's Folly," etc.).

What is even less known about Seward is that he was one of the leading lawyers of his era.

After graduating from Union College in 1820 (he was elected into Union's first Phi Beta Kappa class in his junior year),

Seward read the law in various offices in New York, and quickly established himself as a rising star. Upon passing the bar, he shopped his services throughout the state, ultimately being offered the princely annual sum of $500 to join Judge Elijah Miller as his partner in Auburn, starting on January 1, 1823.

Seward tried all of his own cases from day one, and his reputation quickly grew and more than justified his guarantee by generating large fees to the partnership. And although he did not always find the practice of law in those years to be stimulating, there were off-setting benefits: Seward and Miller's daughter fell in love and were married in 1824.

As Seward's practice grew, so did the firm. One of Seward's new law partners (Nelson Beardsley) recounted a matter with which many of us can identify:

One day, just as [we] were closing [our] labors, a client came in with a case in which success was hopeless unless an injunction could be obtained before eleven o'clock the next morning from Judge Mosely, at Onondaga Hill; and to obtain it would require a review of the entire case, and an analysis of the papers, which his lawyer had told him would occupy at least a week.

Seeing the situation of the affair at once, Seward said "Beardsley, did you sleep well last night?"

"Tolerably well," was the answer; "Why do you ask?"

"Because I think you will have to sit up all night tonight."

Lighting the candles, and closing the doors, the two partners set vigorously to work, Seward drafting, and Beardsley engrossing, until daybreak found them completing the last pages. A hasty breakfast and cup of coffee followed; and then, taking a horse and buggy, Seward drove twenty-five miles to Onondaga Hill, obtained the injunction, and saved his client's case.

Complex Litigation

After two terms as Governor, Seward returned to Auburn and private practice in 1843. While he predicted to his political adviser Thurlow Weed that he hoped to earn $5,000 that year, he also acknowledged "[a]s yet I have no business; but my friends are around me so warm-hearted and affectionate that I have no fears about the future."

One of his first cases came in the form of defending his then political ally, Horace Greeley (editor of the *New York Tribune*), in two libel cases brought on by James Fenimore Cooper. Cooper seems to have been fairly litigious, because Seward was soon defending Weed (also editor of the *Albany Evening Journal*) in a similar action. His approach in such cases was as follows:

I defend slander and libel suits always by delay as far as practicable. There is nothing for a plaintiff . . . like haste; nor is there any advantage for a defendant like time; that diminishes the grievance complained of.

Seward's litigation skills also led him into the new field of patent law. With the burgeoning Industrial Revolution, American inventors were (a) seeking to protect their commercial interests, and/or (b) eager to challenge the legal monopolies of other inventors that blocked those same commercial interests.

In the summer of 1843, James G. Wilson, the owner of a patent on a "planing machine" (a method for processing prepared lumber), heard Seward successfully argue a case in federal court in Albany and offered to retain him to protect his interests in the patent. Seward, overcoming some reluctance due to a lack of experience and general ineptitude when it came to machinery, agreed to represent Wilson.

Seward's first step was to file an action in the Northern District of New York to solidify Wilson's claim to the patent. In advancing that claim, Seward embraced a new approach to advocacy. Rather than basing his argument strictly on patent law precedents, Seward asked the court to cast its net more broadly, consider the socio-economic policy considerations of the matter before it, and implement the intention of Congress to foster genius and reward merit. Perhaps not surprisingly, this argument neatly coincided with the political philosophy espoused by Seward the politician (and his first mentor, John Quincy Adams):

The American continent, from its icy boundaries on the north, to undefined latitude within the tropics, seems to be rapidly falling under the political sway of our confederacy. The habitations of a hundred million people, and of how many more I dare not conjecture, are to be erected by our artisans. The machine in question reduces, in the proportion of nine-tenths, the labor and expenses of a necessary part of every structure, whether it be raised for use or ornament.

The Wilson case went up to the U.S. Supreme Court in 1846. Consolidated with a number of related cases for purposes of argument, Seward found himself teamed with Daniel Webster as part of the "grand array of counsel"; arguing on the other side was Thaddeus Stevens. Seward found the Court itself to be "a very dignified and imposing tribunal"; at the same time, however, he wrote to Weed that "I have looked upon

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the faces of the [Justices] and they are of clay." Notwithstanding Seward's initial reaction to the Justices, a month later they handed down a decision not only in his client's favor, but also adopting the policy rationale(s) he advocated.

This case and victory led to Seward being retained to litigate patent cases throughout the United States, and made him and his firm increasingly prosperous. One example of how successful Seward's patent practice quickly became is in the form of an affidavit that was filed on behalf of a new client:

On the seventh day of March, one thousand eight hundred and forty eight, personally came before me Samuel F.B. Morse, of Poughkeepsie, Dutchess County, in the State of New York, and being duly sworn, deposeth and saith: That he verily believes he was the original, true and first inventor of the American Electro Magnetic Telegraph, and the improvements in the same, described in the re-issued Letters Patent therefore, bearing date the fifteenth day of January eighteen hundred and forty-six, and the eleventh day of April eighteen hundred and forty-six.



The 1876 statue of William Henry Seward pictured above is in New York City's Madison Square Park. Although the head is Seward's, the sculptor, Randolph Rogers, modeled the body on President Lincoln to save expenses. Photo courtesy Stephen Orel.

Wyatt And Freeman

Not all of Seward's practice was aimed at promoting commercial interests.

In 1846, he defended two black men, Henry Wyatt and William Freeman, each of whom was separately accused of murder. Wyatt, while awaiting trial in Auburn prison, sent a message to Seward requesting help. Seward agreed to represent Wyatt, even though the fact that Wyatt had committed the murder was clear. Believing Wyatt to be insane, Seward planned to assert that defense and retained medical experts to testify in support thereof. After an eight day trial in February 1846, however, the jury rejected the defense; a second trial on the merits was scheduled for June.

In the interim, Freeman was arrested for killing an Auburn farmer and his family; Freeman seemingly had no motive and was said to have laughed when caught. The public's reaction was fever-pitched, with numerous threats of lynching.

The farmer's minister called for Freeman's blood, and warned of the tricks of "adroit counsel" by which "law may be perverted, and jurors bewildered." Rumors quickly grew that Seward, away from Auburn on other business, would represent Freeman — a "fact" that led to

intense anger being directed toward the absent Seward.

In the midst of all this, Seward returned to Auburn and was met at the railroad station by friends who feared for his safety and accompanied him in a quasi-security detail to his home. Against the wishes of his partners (some of whom had assured people that Seward would decline the case), Seward appeared on Freeman's behalf and asserted a plea of insanity.

The second Wyatt trial was initiated at this inauspicious moment, notwithstanding Seward's requests for a change of venue and postponement. Once impaneled, the jury listened to Seward's ten hour legal argument in support of the insanity defense. After the judge's contrary legal instructions, however, the jury found against Wyatt in fewer than thirty minutes. Upon the judge's sentence, Wyatt was subsequently hanged.

Thereafter, the Freeman case proceeded with a preliminary trial to determine the legal issue of sanity or insanity. After two weeks of testimony, much of it by medical experts called by Seward in support of his client's lack of sanity, the jury (after an initial hesitancy, countered by the judge) came back with a verdict that Freeman was "sufficiently sane, in mind and memory, to distinguish between right and wrong." Seward termed the verdict a compromise verdict, "which implied that the prisoner was at least partially insane."

Over Seward's objections, a trial on the merits then began. Seward was allowed to present testimony as to Freeman's sanity at the time of the murders, but was barred from introducing testimony as to Freeman's state of mind at the time of trial, because it had just been determined he was then sane (notwithstanding the fact that Freeman was by this point evidencing "great mental confusion, if not imbecility").

Seward's summation, later termed by Charles Francis Adams as rising "to the uppermost region of eloquence," laid out the insanity defense, while also urging the jurors to reject racial considerations—"he is still your brother, and mine. Hold him to be a man." The jury quickly convicted Freeman, however, and the judge sentenced him to death.

Seward, appealing quickly, won a reversal, based on judicial errors in both trials. A new trial was ordered, but a different court found that Freeman was incapable of standing for the trial. Freeman died in jail in 1847 of consumption, with an autopsy of his brain revealing "the appearance of a chronic disease."

Seward emerged from these cases "exhausted in mind and body, covered with public reproach, stunned with duns and protests." There were also significant benefits, however. The arguments he presented on Freeman's behalf were published in a volume that went through four editions in one year. Seward's arguments have been cited as essential in establishing the insanity defense in American law.

And the attendant publicity further enhanced Seward's political reputation in anti-slavery circles throughout the North and led to an explosion in new legal business to Seward and his firm.

The Fugitive Slave Law

In 1842, an Ohio farmer, John Van Zandt, was sued by a Kentucky slave owner, Wharton Jones, for violating the Fugitive Slave Act of 1793. Van Zandt had been caught transporting ten of Jones's slaves, nine of whom were

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captured; Jones was suing for compensation for the one slave who escaped, as well as for statutory damages allowed by the law. Salmon P. Chase, a young Ohio lawyer and leader of the fledgling Liberty Party (an anti-slavery organization), represented Van Zandt at trial. Van Zandt lost and was assessed $1,500 damages.

Ultimately, the case was appealed to the U.S. Supreme Court, and for that stage Chase sought out Seward to join the Van Zandt team. Chase's reasons were undoubtedly complex: they reflected Seward's growing national reputation as a politician and an advocate, their shared opposition to the "Loco Focos" (a wing of the Democratic Party which espoused radical policies, such as free trade), and Chase's restless political ambition and his attempts to broaden his network of helpful alliances. Seward accepted the assignment, undoubtedly hoping that associating with a rising political figure in Ohio might be of future use to him, as well.

In light of a Supreme Court decision that had shortly before upheld the constitutionality of the Fugitive Slave Act, Seward and Chase had an uphill fight from the outset. Seward's arguments expanded on the policy considerations he had been developing both in legal and political contexts: that the country's economic progress and well-being should not and could not be stunted by outdated laws.

First, he contended that Van Zandt could hardly be held accountable at law for merely providing "shelter, comfort and sustenance" to a slave. "Such exiles have a national right to demand protection and charity. That right is sustained by divine laws."

Seward next argued that slavery was a system at odds with American and technological industrial political economy, citing that slavery existed only in "rude communities" as vestige of "the loss of feudal villenage," and would disappear when "intellectual and moral agencies are fully developed."

Finally, he posited that *stare decisis* "must be abandoned in every case where it is found, upon full and deliberate consideration, under the guidance of practical experience, or upon further development of essential facts, that the decision insisted upon, however time-honored it may be, is erroneous."

Chase's arguments were more rhetorical and pushed farther out the envelope vis-a-vis the political ramifications that underlay the case. Notwithstanding the able efforts of both men, however, the Court upheld the lower courts without much concern for the public policy issues raised. (Van Zandt died before the case was finally resolved, and his heirs ultimately had to pay the judgment.)

Postscripts

Seward's developing philosophy, partly based on his legal practice, had important implications for his political career after he stopped the active practice of law. (When he went to the Senate in 1849, he did continue to handle some matters for his firm, including arguing important cases in the U.S. Supreme Court.)

In the crucial debate over Henry Clay's compromise proposals in 1850 to preserve the Union, Seward rose in opposition. Declaring that "there is a higher law than the Constitution," Seward stated that slavery in the territories would be incompatible with "the security of natural rights, the diffusion of knowledge, and the freedom of industry." By this one speech, Seward became a leader of anti-slavery forces in the North, anathema to pro-slavery forces in the South, and a radical in the eyes of many in the country who wanted some sort of political compromise by which this moral issue could be resolved without turmoil, disunion, and bloodshed. It was Seward's radical image that did much to hurt his chances for nomination at the 1860 Republican Convention.

Seward and Chase became bitter rivals in Lincoln's cabinet (Chase served as Secretary of the Treasury). Wanting to force Seward from his post as Secretary of State (and thus give himself preeminence in the cabinet and a clear run at the presidential nomination in 1864), Chase forced a showdown in 1862. As depicted in David H. Donald's biography of Lincoln, Lincoln brilliantly finessed Chase's Machiavellian maneuverings, got both Seward and Chase to submit their resignations, and then refused them both, with the resulting effect that he was able to moderate their behavior (and excesses) for the remainder of his presidency.

Seward's law firm was a direct predecessor of Cravath, Swaine & Moore. Indeed, much of the first volume of Robert T. Swaine's "The Cravath Firm and Its Predecessors" details Seward's legal and political career and his importance to the development of that firm.

Further Sources

For the definitive biography on Seward, readers should consult Glyndon G. Van Deusen's 1967 book (published by the Oxford Press). An additional source that was most useful for this essay is a Cornell honors thesis written by Rachel L. Greenblatt ("Higher Law and the Legal Career of William Henry Seward").

Legal History

Orange County's Judge John Bright



By Magistrate Judge Mark D. Fox

Only one Orange County lawyer has ever been appointed a United States District Judge for the Southern District of New York: John Bright, who was appointed to the court by President Franklin D. Roosevelt on April 25, 1941, and who served until his death on March 24, 1948.

Judge Bright was born in Middletown, New York, on May 23, 1884. He graduated from Middletown High School and went on to complete Ramsdell's Business School in 1901. Thereafter, Judge Bright was employed as a stenographer in the law offices of Thomas Watts in Middletown, New York, where, as was the practice at that time, he "read law."

In 1906, Judge Bright was admitted to the New York Bar and subsequently became a partner in the firm, later known as Watts, Oakes and Bright. (The firm that Watts began in 1885 continues its uninterrupted practice today as MacVean, Lewis, Sherwin and McDermott.)

The firm's clients included the Town of Middletown and the Orange County Trust Company, which Judge Bright also served as a member of the board of directors. It was the practice of the board to hold its meetings on weekday mornings. After Judge Bright's appointment to the District Court he continued to serve as a director (as was permissible at that time) but he was unable to attend the morning meetings because of his judicial duties in Manhattan. He was held in such high regard by the other board members that they agreed to change the meeting time to Friday evenings so that the bank could continue to have the benefit of Judge Bright's participation as a director.

Judge Bright married Cornelia Denton. They had one son, John Denton Bright, born in 1913, who became an attorney and practiced in Orange County until his retirement in 1978.

Politically, Orange County was a bastion of Republicanism in the 1930s and 1940s. John Bright, however, was a devoted and active Democrat and a friend of prominent Poughkeepsie lawyer John Mack. Mack was a close friend and personal attorney of Franklin Roosevelt. When, in 1941, President Roosevelt asked him to recommend a "Democratic lawyer of good reputation" from Orange County for appointment to the court, Mack proposed John Bright.

Judge Bright decided a number of interesting matters during his seven years on the court, including an infringement claim by the holder of the copyright of the "Acey Ducy Game and Rules," *Chamberlin v. Uris Sales Corporation*, 56 F.Supp. 987 (S.D.N.Y. 1944); a claim of copyright infringement against the noted writer Daphne Du Maurier arising out of her authorship of the novel "Rebecca," *MacDonald v. DuMaurier*, 75 F.Supp. 655 (S.D.N.Y. 1948); and an action for injunctive relief concerning the advertising and distribution of the movie "The Outlaw," starring Jane Russell, *Hughes Tool Company v. Motion Picture Association of America*, 66 F.Supp. 1006 (S.D.N.Y. 1946).

To determine whether the Du Maurier book "Rebecca" infringed on a previously copyrighted novel entitled "Blind Windows," by Edwina MacDonald, which amplified and embellished a previously published magazine story by the same author, Judge Bright had to read both books. His granddaughter, Susannah B. Striphas, was six years old and just learning how to read in 1948 at the time Judge Bright was working on the case. She recalls being fascinated by the sight of "Grandpa reading two books at the same time."

In the "Outlaw" case, plaintiff Hughes Tool Company sought to prevent the Motion Picture Association of America from withdrawing its Seal of Approval from the movie that Hughes had produced. The Association had allegedly threatened to withdraw its approval because the advertising for the film did not meet its standards.

Specifically, it was alleged that one of the ads "showed a man and woman in hay in a compromising horizontal position." Another ad was rejected "because it exposed too much bosom and carried the line, 'What are the two great reasons for Jane Russell's rise to stardom?'" Yet another was rejected for the use of the line "How would you like to tussle with Russell?"

Judge Bright found that it was not necessary for him to determine whether the rejections of the ads were wrong. He held that the decisions to reject were not arbitrary or discriminatory and that "one of the purposes for which [the Association] was organized was to establish and maintain the highest possible

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moral and artistic standards in motion picture production.... I shall not interfere with the carrying out of that purpose, particularly in favor of one whose sole object is a selfish one." He concluded, "[t]he defendant does not here seek to invade the plaintiff's right of free speech and press. It seeks only to deny plaintiff's right to do whatever he sees fit under defendant's seal of approval. If plaintiff insists upon its so-called rights, whatever they may be, it may do so; but it cannot insist that it do it with defendant's approval, or under conditions which the public may believe is with the defendant's approval. . . . I know of no law which authorizes a party to accept the good in a contract and reject what he does not like. It cannot have its cake and eat it too. If it wishes to retain the seal, it must be on the condition that it adhere to the agreement under which it holds and has used it."

Judge Bright made significant contributions during his relatively short tenure on the Southern District bench, applying his legal knowledge with the practicality and common sense gained through his 35 years of legal practice in Orange and the surrounding counties. His family and the bench and bar of Orange County are justly proud to claim him as our own.

New Appointments

Three District Judges Take Office

By Stephen L. Ratner and Stacey B. Creem

Charles J. Siragusa was sworn in as a Federal District Court Judge for the Western District of New York on December 15, 1997.

Judge Siragusa has had a distinguished career in the public sector. Since 1993, Judge Siragusa served as a New York State Supreme Court justice for the Seventh Judicial District, which includes the counties of Monroe, Ontario, Wayne, Livingston, Steuben, Cayuga, and Yates.

Prior to his election to the Supreme Court, Judge Siragusa served as Assistant District Attorney for Monroe County from 1977 to 1992. He was First Assistant District Attorney from 1984 to 1992 and, as such, often acted as District Attorney.

In addition, Judge Siragusa has been active in a number of community programs to control violence and crime and provide assistance to the victims of violent crime. He is an advisory board member of, and speaker for, Friends and Family of Murdered Children and Victims of Violence. He is a member of the Citizen Police Academies of several police departments. He also is a featured speaker for the Park Ridge Chemical Dependency Outreach Program and the Rochester City School District Weapons Diversion Program.

Judge Siragusa has received many awards in recognition of his efforts against crime, including from the Sons of Italy, the Monroe County Magistrate's Association, the Counsul General of Italy, the Greater Rochester Metro Chamber of Commerce, the Rochester Police Department, and the Monroe County Sheriff's Department.

Judge Siragusa received his law degree from Albany Law School in 1976 and his undergraduate degree from LeMoyne College in Syracuse.

Two new district court judges have been sworn in to the District of Connecticut. Christopher F. Droney was sworn in on September 22, 1997, and Janet C. Hall was sworn in on October 14, 1997.

Judge Droney served as United States Attorney for the District of Connecticut from October 1993 until his judicial appointment in 1997. While U.S. Attorney, Judge Droney was a member of the Attorney General's Advisory Committee of U.S. Attorneys and received awards in recognition of his efforts against urban violent crime from the Drug Enforcement Administration, the Hartford Police Union, the Spanish-American Merchants Association, and the Mushaba Force Youth Foundation.

From 1979 to 1993, Judge Droney practiced law in Hartford, concentrating in litigation. He was a partner at the firm of Reid & Riege, P.C.

Judge Droney was elected to the Town Council of West Hartford in 1993,



Judge Siragusa



Judge Droney

and served as Mayor of West Hartford from 1985 to 1989.

Before she became a judge, Judge Hall was a partner at Hartford's Robinson & Cole LLP. Judge Hall was a member of the firm's Managing Committee from 1985 to 1989 and from 1990 to 1992, and the chair of the firm's Professional Responsibility and Ethics Committee from 1990 to 1997.

Prior to working at Robinson & Cole, Judge Hall was a trial attorney in the Antitrust Division of the United State Department of Justice from 1975 to 1979. She was a litigation associate at Boston's Hale & Dorr from 1973 to 1975. Judge Hall received her law degree from New York University School of Law in 1973, where she was awarded the prestigious Root-Tilden scholarship. She received her undergraduate degree in 1970 from Mount Holyoke College.

Judge Hall has been an active member of the Federal Bar Council, where she currently serves as chair of the Board of Trustees. She chaired the 1992 Winter Bench-Bar Conference and helped plan the 1993 conference. In addition, she has been an active member of the Connecticut Bar Foundation, where she served as Director from 1992 to 1997, and the Connecticut and American Bar Associations.

Second Circuit Decisions

Conspiracy Liability

By Charles C. Platt

In the recent case of *Dinsmore v. Squadron, Ellenoff*, Dkt. No. 97-7011 (Jan. 28, 1998), the Second Circuit decided that there is no liability for conspiracy to commit fraud under Rule 10b-5 of the securities laws, even if the alleged co-conspirator engaged in "knowing and willful" conduct. This decision follows the reasoning of the U.S. Supreme Court in *Central Bank of Denver v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439 (1994), which precluded liability for aiding and abetting securities fraud.

The Underlying Fraud

This case arose out of a massive "Ponzi scheme" by Towers Financial Corporation to sell $245 million in promissory notes to the public between 1989 and 1993. Towers declared bankruptcy when the scheme was exposed in 1993. Its chairman thereafter pled guilty to criminal charges for his role in the scheme, and was sentenced to serve 20 years in prison.

A putative class of Towers' noteholders brought a class action suit against several "deep pockets" associated with Towers, including the Squadron, Ellenoff law firm. Squadron, Ellenoff had represented Towers and two of its executives during investigations by the Securities and Exchange Commission in 1988, before the alleged Ponzi scheme was developed.

The plaintiffs' theory was that Squadron, Ellenoff had "prolonged" the Ponzi scheme in two ways.

First, according to the plaintiffs, Squadron, Ellenoff had failed to advise prospective Towers' noteholders of what it knew about its client's business, which would have alerted them to the fraud before the notes were purchased.

Second, according to the plaintiffs, Squadron, Ellenoff made "misstatements and omissions" to the SEC about Towers' financial condition during the SEC investigations, which prevented the SEC from discovering earlier Towers' fraud.

Lower Court Rulings

Based on this theory, the plaintiffs claimed initially that, among other things, Squadron, Ellenoff was liable as an aider and abettor of Towers' fraud under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The plaintiffs' claim became inadequate as a matter of law when the Supreme Court issued its decision in *Central Bank* that abolished aiding and abetting liability in private suits brought under Rule 10b-5.

To circumvent the rule in *Central Bank*, the plaintiffs amended their complaint to allege that Squadron, Ellenoff was a "primary violator" under Rule 10b-5. That claim was made even though there was no allegation that Squadron, Ellenoff had any role in preparing or disseminating any of the offering materials for the Towers' notes that allegedly defrauded investors between 1989 and 1993.

In response to Squadron, Ellenoff's motion to dismiss, Magistrate Judge Peck issued a Report and Recommendation concluding in part that the complaint had failed to plead facts sufficient to show a primary violation of Rule 10b-5. In particular, the Magistrate Judge found that the complaint did not properly allege that Squadron, Ellenoff owed a duty to disclose material information to Towers' noteholders; that the noteholders relied on Squadron, Ellenoff's alleged misstatements; or that Squadron, Ellenoff's statements to the SEC were "in connection with" the later sale of Towers' notes to the public.

Notwithstanding these deficiencies, the plaintiffs were permitted by the district court to amend their complaint again, this time to assert that Squadron, Ellenoff conspired to violate Rule 10b-5. Numerous other courts had already

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decided that such a conspiracy claim was precluded as a matter of law by the reasoning in *Central Bank*. However, the district court rejected that precedent, concluding that a conspiracy claim was distinct from aiding and abetting. Specifically, the district court determined that a conspiracy required proof of "knowing and willful" conduct, whereas aiding and abetting only required proof of recklessness.

The district court then denied Squadron, Ellenoff's motion to dismiss this third amended complaint. But it certified the issue for interlocutory appeal.

Second Circuit Ruling

The Second Circuit reversed, and dismissed the complaint. It held that "where the requirements for primary liability are not met, they may not be satisfied based solely on one's participation in a conspiracy in which other parties have committed a primary violation."

In support of this holding, the Court reasoned that:

- the text of Rule 10b-5 does not permit an implied claim for conspiracy, in the same way that it did not permit an implied claim for aiding and abetting in *Central Bank*;
- there is no "Congressional intent" for an implied claim for conspiracy, just as there was no such intent found in *Central Bank* for implying aiding and abetting liability;
- an implied conspiracy claim would eliminate the need to show reliance on the defendants' misstatements, which is an important element of Rule 10b-5 liability;
- the "knowing and willful" element of a conspiracy claim is not sufficient to overcome these deficiencies because, the Second Circuit found, the text of Rule 10b-5, not the level of scienter, was the determinative issue in *Central Bank*.

Conclusion

The Second Circuit's decision further protects legal advisors from being sued under Rule 10b-5 based on theories of secondary liability. To state a claim for relief under Rule 10b-5, plaintiffs cannot simply allege that a law firm zealously represented a client who is later found to have committed fraud. Rather, legal advisors will only be subject to 10b-5 liability if they directly prepared or disseminated misstatements, or committed a manipulative act, in connection with the purchase or sale of a security.

Legal Technology

Cornell's Website

By Nancy Savitt

The Internet has several sites that contain and organize legal material, including Fedlaw (www.legal.gsa.gov), which was discussed in the February 1997 issue of the *Federal Bar Council News*.

This column is devoted to Cornell Law School's Legal Information Institute (LII) website (www.law.cornell.edu). The LII site is not only a well-organized hub of legal information on the net, but it is also one of the primary sources of material to which other legal sites link.

The LII site is an ongoing project to see how collecting and collating legal information on the Internet can be optimized, according to Peter Martin, one of the founders of LII and its current co-director. The site started five years ago, and has over time grown into one of the major legal resources on the web.

The Cornell site is the home of recent and historic Supreme Court decisions and recent opinions from the New York Court of Appeals, as well as searchable versions of the U.S. Constitution, U.S. Code, Federal Rules of Evidence and Civil Procedure, and the Uniform Commercial Code. The site links to other sites that contain lower federal court opinions, as well as a myriad of legal-related information.

Case law and statutes are arranged in two formats: by topic or by type or source. The "topic" index, limited to U.S. law, contains 18 categories, ranging from the Law of Commercial Transactions and Enterprise Law to Family Law to Legal Theory. Each topic is then further subdivided into various subject matters, to make homing in on applicable resources easier. As an example, the Enterprise Law category is subdivided into the separate subjects of agency, antitrust, corporations, joint ventures, non-profit organizations, and partnership. Clicking on corporations leads to a screen with direct links to relevant provisions of the U.S. Code and federal regulations, recent relevant Supreme Court decisions, state statutes and available state decisions on corporations, and links to other references such as the Securities and Exchange Commission's EDGAR corporate filings data base. These "topic" pages are among the most heavily used parts of the site, says Martin.

The other format, labeled "type or source," contains the available information organized under Foreign and International Law, U.S. Law (subdivided into statutes, judicial opinions, administrative law, and links to federal government sites), Law Journals (LII is the home of the Cornell Law Review,

and links to the other journals available online), and other law-related sites such as the American Bar Association, law schools, and law libraries. In addition to case law and statutes, the Cornell site contains a number of "extras."

For example, one can find biographical material on all members of the Supreme Court, with links to the recent opinions written by each Justice.

Currently, there is a thorough site devoted to the events, case, and film of Amistad, complete with analysis and discussion, and links to relevant decisions and the text of John Quincy Adams' argument to the Supreme Court (which is not otherwise readily available).

In addition to the website, LII is engaged in other projects of interest to practitioners. Lawyers can sign up to receive via e-mail the liibulletin, which transmits the syllabi of Supreme Court decisions within hours of their issuance.

A similar service is the liibulletin-ny, which contains a summary and commentary on recent decisions of the New York Court of Appeals. Anyone with an Internet accessible e-mail address can subscribe to these free services. To subscribe to the liibulletin, send an e-mail message to listserv@listserv.law.cornell.edu, with a message (all on one line) reading: subscribe liibulletin [followed by the subscriber's first and last name]. To subscribe to the liibulletin-ny send an e-mail message to the same address, with a message (all on one line) reading: subscribe liibulletin-ny [followed by the subscriber's name].

The Cornell site is constantly updated, and every summer it is given a "stem to stern update and revision," according to Martin. The state statutes and resources available on the web are inventoried and then separated by category for accessibility. The foreign and international material is updated more frequently. The LII continues to work with courts and legal professional groups to expand its content, and make available items that are not otherwise accessible.

Focus On

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York lawyers, but Peter Leisure studied painting at the art school at Yale. He also was a rugby player and when he joined the army in 1953 he played on a championship football team. As the result of attracting attention as a football player, he was asked to act as a prosecutor and defense counsel in court martial proceedings. He found that he enjoyed the trial work and that his reputation was such that he often was requested as defense counsel.

Although a painting of a Paris scene by Judge Leisure appears in the ante room of his chambers, he decided after the army — rightly or wrongly — that he was "not the next Monet." He would attend law school.

In the years after law school he felt that his most formative and rewarding position was as a prosecutor under U.S. Attorney Robert Morgenthau. Morgenthau gave Judge Leisure increasing responsibility and he tried larger and larger matters, which he thoroughly enjoyed.

As a young lawyer he read Clarence Darrow's summations, *My Life in Court* by Louis Nizer, and *The Art of Advocacy* by Lloyd Paul Stryker. His primary advice to young lawyers is that they need to work hard to educate themselves as trial lawyers because a person's natural skills are not adequate.

When he became a judge in 1984, Judge Leisure was mentored by Judge Edward Weinfeld, who came to his chambers to welcome him, and by Judge Lloyd McMahon, who invited him to sit for a period beside him on the bench. Judge Weinfeld was always available to Judge Leisure and other judges to discuss their problems. Judge Leisure also is a strong admirer of Judge William Conner, who now sits in White Plains. His best friends on the bench are Judges Keenan and Duffy, with whom he often has lunch.

As a practicing trial lawyer, Judge Leisure experienced some frustration when encountering a particularly unscrupulous or manipulative adversary in pretrial discovery. Accordingly, as a judge he has attempted to be accessible early in a case to monitor discovery problems. Even when conducting a long criminal trial, he reserves Fridays for civil conferences. He gives counsel the opportunity to cure discovery abuses and turns them over to a magistrate judge for daily attention when they fail to heed his suggestions to mend their ways.

Although he clearly informs attorneys that they have the right to make any motion permitted under the Federal Rules, he requires a pre-motion conference during which counsel must assert their purposes in making motions. His individual rules are very pedestrian — covering page limitations on briefs and fax communications to chambers, etc. He does not favor a proliferation of individual rules. He thinks that the rules should be for the benefit of lawyers, and that having a complex variety of individual rules is a hindrance to any practitioner.

As a lawyer he felt somewhat more rewarded by the criminal cases he handled because of the extra "tension" coming from the responsibility of representing someone "in jeopardy." As a judge, he remembers with satisfaction large and complex cases including the relatively recent Gambino crime family case

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involving an alliance with the Sicilian Mafia importing heroin where the corresponding judge and prosecutor in Italy were murdered, and the antitrust case he had early in his judicial career concerning the United States Football League and the National Football League.

Because of his admiration for the legal skills of his father and his brothers, Judge Leisure feels a huge measure of gratitude to be the one member of the family to become a judge. He enjoys particularly the trial work, the people he meets in the profession, and the opportunity to mentor younger judges and lawyers.

He appreciates, as does every judge, having matters well handled before him, recalling the words of the late Matthew Levy of the New York Supreme Court, who stated, "A judge is only as good as the lawyers before him." All in all Judge Leisure is a person who loves his work. He has only a slight wistfulness in talking about his lost career as a painter.

Developments

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Schaefer, about whether she could destroy a computer disk that contained her competitor's software, which she copied without authorization. Because there was no lawsuit or investigation pending, and she had not used the software for any commercial purposes, the lawyers advised Wanda Wonder that she could destroy the disk, although Fordham Professor Mary Daly suggested that the cases and ethical standards should be carefully checked before proceeding.

Gillers expanded the hypothetical by asking whether it would be permissible for the competitor, Blastoff, to place a mole in True Wonder's organization to determine whether trade secrets were being stolen.

Ed Labaton, playing Blastoff's lawyer, opined that such infiltration was permissible, as did Stephen Krane, who was cast in the role of ethics advisor. Sara Moss, however, expressed concern that a sting operation involved deception. Robin Zablow also suggested that she was "troubled philosophically" by the operation. Columbia Journalism School Dean Tom Goldstein also was uncomfortable conducting an undercover operation.

Gillers then posed the following hypothetical: What if Blastoff's CEO told his lawyers that he was not really concerned about theft of trade secrets, but that he wanted to bring a lawsuit to keep True Wonder from succeeding in the capital markets?

Ed Labaton expressed the view that motivation is not important, so long as there is a good faith basis for a claim; but Magistrate Judge Naomi Buchwald cautioned that there could be a problem under 28 U.S.C. §1928, as well as Rule 11, if the client did not have actual damages. Moss stated that she would question the client carefully about potential damages, but if there was a valid case, she would not be reluctant to put Wanda Wonder in every paragraph of the complaint if that helped the client. Judge Stein observed that it depends on the articulation—if the complaint can be articulated in a reasonable way, it is permissible; if the complaint sounds unreasonable, it probably is unreasonable.

"Would you go to the media?" asked Gillers.

David Schaefer said it was not his style. Arthur Abbey also stated that he would not do that, and Michael Cooper suggested that, rather than speaking to the press personally, he would advise the client to hire a public relations firm. The panelists differed on whether it is advisable to hire a public relations firm in litigation.

Gillers asked whether Wonder would be able to obtain a confidentiality order governing all discovery in the case.

Judge Stein stated that he requires a showing of good cause before entering a protective order, and Judge Buchwald expressed the view that protective orders should be limited to information that rises to the level of trade secrets. In addition to the confidential nature of the information sought to be protected, Judge Stein also said he would be concerned about whether court process was being used for an improper purpose, although he added that he would never seal the pleadings in a case.

The panelists differed on whether they would let Court TV cover the case.

Judge Buchwald voiced her inclination to permit the coverage, because it results in the most accurate story. Judge Stein, however, expressed concern that television coverage can turn a case into a circus. Tom Goldstein disagreed with that, as did Arthur Abbey, who emphasized the First Amendment reasons for permitting television coverage. Michael Cooper expressed a concern that witnesses behave differently when they are on television.

Gillers wanted to know what the panelists would do if an expert report, which was subject to a protective order, were leaked to the press.

Goldstein suggested that he would use the report in a story if he was not subject to the order. Sara Moss would attempt to obtain an order preventing the story from being run, as would Krane—who would seek discovery on the source of the leak. Zablow expressed doubts as to whether the press would be acting ethically under the circumstances, but Labaton noted that under the *Pentagon*

Papers case, the story could only be enjoined if trade secrets were involved.

The panelists also were asked whether they would move to recuse the trial judge if he were in line to be appointed to an appellate court by Wanda Wonder's husband, the governor.

A number of panelists felt that this would not be justification for making a motion to recuse. Judge Stein said he would not be offended by such a motion, and he expressed surprise at how frequently they are made. Given the body of case law that states that judges have an affirmative obligation to hear cases, recusal motions are generally denied, according to Judge Stein, although he might grant such a motion in this circumstance if the governor was likely to be a witness in the case and his potential nomination to the appellate court were on the governor's desk.

Picking up on the advice given at the outset, Gillers asked what the panelists would do if Wanda Wonder denied at her deposition that she had ever copied Blastoff's software.

Virtually all of the panelists agreed that they would insist that the testimony be corrected, or they would withdraw as counsel, but the panelists differed on the steps they would take in reaching that result. In all, this panel demonstrated that there are no simple answers to complex questions, and there is a wide range of advice that can be given in any particular situation.

Technology

With the assistance of Second Circuit Clerk George Lange III and Systems Manager Joel Turner, Chief Judge Ralph Winter of the Second Circuit gave a presentation on technology in the court room. Chief Judge Winter commented that the clerk's office favors CD/ROM briefs because they reduce the amount of paper in the files, and judges like them because hyperlinks permit them to get at source materials — such as transcripts — more easily.

Lange also pointed out that the Second Circuit is now wired for arguments by video conference. More than 150 lawyers have presented oral argument in the Second Circuit by video conference. Consent of opposing counsel is not required if counsel wishes to appear by video.

Judge Winter expressed the hope that district courts would find video conferencing useful for status conferences. He also noted that the district courts are moving in the direction of electronic filing. This would permit all pleadings and transcripts to be filed electronically and then transmitted to the Court of Appeals electronically at the end of the case.

Independent Counsel

A distinguished panel led by Eastern District Judge Denis Hurley discussed the Independent Counsel Statute. The panelists included Lawrence Walsh, who conducted the Iran-Contra investigation; Bob Fiske, who was the original Whitewater special prosecutor; Paul Curran, who investigated various allegations concerning the Carter administration; Ted Olson, who was the subject of an investigation and a party in *Morrison v. Olson*, the case in which the Supreme Court upheld the constitutionality of the Independent Counsel Statute; and David Fein, who served as associate counsel to President Clinton until February 1997.

After discussing the mechanics of the Independent Counsel Statute, the panelists addressed whether it is a good idea.

Judge Walsh pointed out that the statute is based on an old concept, going back to Ulysses S. Grant, requiring disqualification of the Attorney General in the case of a conflict. Although there are a number of provisions in the statute that might be changed, Judge Walsh is in favor of retaining it. An important feature that should be retained, in Judge Walsh's view, is the provision that provides that the Independent Counsel only may be fired by the Attorney General for cause, and in that event he or she is entitled to a hearing.

Curran felt that the Independent Counsel Statute was unnecessary and, in any event, should only be applicable when the Attorney General has a conflict. Curran pointed out that United States Attorneys have demonstrated for decades that they are capable of investigating and prosecuting government officials. Moreover, he believes that under the present statute, the Attorney General's ability to investigate before making a decision is too limited. The Attorney General cannot talk to targets; has no subpoena power; and has no ability to grant immunity. Curran believes this should be changed.

Fiske agreed that it undermines the morale of professional prosecutors to suggest that they are not capable of investigating cabinet officers. "Most prosecutors are dying to make that case," said Fiske. He nevertheless believes that the Independent Counsel Statute should be retained for situations where there are allegations against the President, Vice President, or Attorney General.

Olson expressed amazement as to how the debate over the Independent Counsel Statue had shifted in the last few years. Many lawyers, including President Clinton, were major proponents of the statute. Now they are quoting Justice

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Scalia's dissent in *Morrison v. Olson* and arguing that the statute should not be renewed.

Fein agreed that Justice Scalia's dissent was "stirring, remarkable," and "prescient." He observed that most people in the Clinton administration would agree with Olson's views today. One rationale for the majority opinion in *Morrison v. Olson* was the limited jurisdiction of the special prosecutor, which simply does not work, in Fein's view.

Fiske noted that much of the difficulty with the statute stems from the need to maintain public confidence even if there is a decision not to prosecute. He added that the Independent Counsel is a prosecutor with only one case, making it more difficult to decline prosecution on the basis of prosecutorial discretion. For that reason, Walsh believes the Independent Counsel's report can be of great value. This not only bolsters public confidence, but can be beneficial to the person involved, he noted. Olson, however, criticized Judge Walsh's report on the Iran/Contra scandal for using grand jury material. Having the ability to rebut a partisan report, he said, is of little solace to the officials involved.

Notwithstanding their differences on the wisdom of the statute, all of the panelists appeared to agree that the job should be full-time (at least in the event of an investigation of the President, Vice President, or Attorney General), and there should be no limits on the amount of time required for the investigation. "People can tie you up with subpoenas," stated Curran. Prosecutors "frequently deal with reluctant witnesses," added Walsh. Fiske stressed the need to follow the evidence where the trail leads.

A number of panelists suggested that it would be a mistake to impose arbitrary limitations on the Independent Counsel's jurisdiction. Fiske expressed concern that this would result in parallel investigations in the same area. Olson agreed, noting that the statute states that the Independent Counsel shall investigate the subject matter set forth in the Attorney General's petition and other matters that arise during the course of the investigation. In his opinion, Kenneth Starr could have expanded the Whitewater investigation without authorization from Attorney General Reno. When Starr sought authorization, Reno really had no choice, in Olson's view; the only other alternative would have been the appointment of another Independent Counsel.

Notwithstanding their views on the wisdom of the statute, all of the panelists acknowledged that the Independent Counsel statute is likely to be renewed, and they had a number of suggestions for improvements.

Olsen felt that the statute could be improved by making the collection of attorneys' fees easier. Curran would reduce the number of covered persons, eliminate the report requirement, and give the Attorney General subpoena power in making a preliminary determination. Walsh also would reduce the number of covered persons, and he felt that prior prosecutorial experience is a good idea, noting that Lloyd Cutler has proposed a permanent panel of 20 persons from whom the Independent Counsel would be chosen. Fiske would limit the statute to the President, Vice President, and Attorney General, and would make the job a full-time position. Fein would impose a relatedness requirement on expanding the investigation and would give the Attorney General broader discretion in deciding whether to seek the appointment of an Independent Counsel to begin with.

David Schaefer, who was not on the Panel but as an aide to Senator Ribicoff played a major role in drafting the statute, noted that the statute was the outcome of a three-to-four year process in which hearings were conducted and many constitutional scholars were consulted. He believes that the current statute does a job of balancing competing interests, and he predicted that it would be renewed. He observed that the major concerns relate more to how particular Independent Counsels have done the job, as opposed to the statute itself, and he felt that the statute has strong support from the American public.

Criminal Law

Following up on the Independent Counsel discussion, Judge Lewis Kaplan and a panel of lawyers with extensive criminal experience discussed "Monicagate." The participants included Bob Morvillo, Gary Naftalis, Mark Pomerantz, Audrey Strauss, and Professor Leonard Orland. Charles Stillman served as the moderator.

Stillman began the discussion by asking what the panelists would do if Linda Tripp approached them for advice on whether to tape record conversations.

Strauss said she would advise against it, and if Tripp were looking for a way of proving that she was not part of a conspiracy, she would suggest a conversation with Lewinsky, with a witness present, rejecting the objectives of the conspiracy.

If Tripp ignored Strauss's advice and tape recorded the conversation anyway, Naftalis would attempt to determine, in the first instance, what Tripp wanted to do. He would advise her that she could keep quiet about the recording, or she could go to the prosecutor and try to get immunity. Morvillo was

strongly of the view that he would advise her to stay out of the scandal, go home, and see what happens. He noted that most criminal defense attorneys want to keep their clients out of investigations in the first instance.

Stillman asked Pomerantz, who is head of the Criminal Division of the United States Attorney's Office for the Southern District of New York, what he would do if Linda Tripp came to him with her tapes.

Pomerantz stated that he would attempt to determine her motives, listen to the tapes, and make a preliminary judgment as to whether there is a viable case. He noted that, contrary to popular belief, there are quite a few investigations of obstruction of justice and perjury in civil cases. The U.S. Attorneys want to dispel the perception that the government does not care about those issues, and they have asked federal judges to refer such situations to them, he said. He added that it is more difficult to proceed when the allegations involve someone's sex life — prosecutors would not want to demean the office. On the other hand, the fact that the President is involved is a countervailing consideration. The notion of perjury committed by the nation's chief executive officer is a serious matter, in Pomerantz's view.

Stillman elicited comments about the government's actions in luring Lewinsky to a Virginia hotel, without her lawyer being present.

Morvillo felt that interesting questions were raised by the fact that Lewinsky had an attorney even though the attorney was representing her in the Paula Jones case. He noted that prosecutors frequently rely on the Thornburgh memorandum to justify discussions with represented persons without their counsel, but courts have generally rejected the notion that, under the supremacy clause, government lawyers are not subject to ethical constraints. Pomerantz drew a distinction between undercover investigations and non-undercover investigations, and he commented that the better course would have been to get in touch with Lewinsky's counsel, although given the time pressure, he was not surprised that she was questioned without her counsel present.

Orland responded by suggesting that *Miranda* does not evaporate because of pressing circumstances. Judge Kaplan agreed and stated that he would hold a hearing to determine whether Lewinsky's rights were violated. The issues would be whether she was in custody and whether she was interrogated. In Morvillo's view, if Lewinsky was not a target at the time, no one would think much of it. "These high pressure tactics are used all the time; they are standard operating procedure," he said. Pomerantz agreed that high pressure tactics are used, but only within the context that the Supreme Court permits. "Nevertheless," he added, "a prosecutor has to weigh not only whether it is legal but whether it is wise."

Stillman asked whether the panelists would tape the President.

Pomerantz stated that he would, but Naftalis disagreed. He expressed concern about the chilling effect that this would have on the Presidency, and he thought it would also pose risks for the credibility of the investigation. Strauss felt that it would be a mistake for the Independent Counsel to create the impression that he thinks he is above the President. Citing the example of taking the President's statement at the White House, as opposed to compelling the President to testify before the grand jury, Strauss emphasized the need for the Independent Counsel to treat the President with deference in order to maintain credibility.

Stillman asked the panelists how they would go about negotiating immunity for Monica Lewinsky.

The first thing Morvillo would attempt to find out is what his client wanted to achieve. "If the goal is to avoid prosecution, then she must become a witness, as opposed to a subject or target," he said. To do that, he would start a dialogue with the prosecutor and would eventually propose that the prosecutor meet his client face-to-face. While agreeing that this would be true in most cases, Pomerantz stated that in unusual circumstances he might not waste time and would simply send someone like Lewinsky into the grand jury under a compulsion order. "Use immunity may be a small price to pay under the circumstances," he said. Looking at it from the witness' standpoint, Naftalis observed that he often prefers statutory use immunity to transactional immunity because transactional immunity can be revoked.

Pomerantz indicated that, in the end, his inclination would be not to make a deal — it would be "too tawdry." He stressed the need to get the facts and suggested that giving up a prosecution for lying in an affidavit in the *Jones* case might not be important in relation to the more important public interests at stake. At the same time, he rejected the notion that prosecutors are often out to "get" someone. "The important thing is to find the facts and then to make a reasonable decision," he said.

A number of panelists were critical of William Ginsberg's penchant for publicity in representing Lewinsky. Strauss noted that this was not her style and had the appearance of self-promotion. At the same time, she acknowledged that Ginsberg may be succeeding in obtaining immunity for his

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client by courting public opinion. Morvillo agreed that there may be some legitimacy to Ginsberg's tactics, but he continued: "If the goal is to make a deal with the prosecutor, publicity can be a mistake because prosecutors react negatively and it makes compromise difficult."

Commenting on the apparent grand jury leaks, Pomerantz noted that it is often difficult to find the source. When there are leaks, it is usually the agents, not the attorneys, who are responsible, he said. Judge Kaplan expressed some skepticism about how difficult it is to detect the source of leaks, analogizing the situation to investigating tips in insider trading cases. Morvillo noted that there is little a defense lawyer can do about leaks except to complain in an effort to slow them down, which is what the President's lawyer appears to be doing.

Pomerantz also discussed the issue of returning gifts to the President. He noted that, under the obstruction of justice statute, the fact that a subpoena has not been served does not make a difference. The key is subjective intent. If evidence was destroyed for the purpose of hindering an investigation, the government may prosecute. If evidence is diverted but not destroyed, the case is more difficult, but non-destruction is not dispositive. He noted that the government has brought prosecutions where drug dealers have given drug money to their lawyers.

The session ended with a discussion of parental privilege. Naftalis observed that, legally, there is no parental privilege, but that that does not mean it is a good idea to call Monica Lewinsky's mother as a grand jury witness. Pomerantz agreed that it was a difficult tactical decision. Judge Kaplan noted that, while the Monica Lewinsky case presents difficult facts, no one would suggest that discussions John Gotti, Jr., had with his father are privileged. He emphasized the need for neutral principles that would accommodate both situations.

Affirmative Action

A panel headed by Judge Dominic J. Squatrito of Connecticut discussed affirmative action. Gerald Walpin spoke against affirmative action and Robert Joffe spoke in favor of it. He was joined by Harry Reasoner of Houston, Texas, who represented the University of Texas in *Hopwood v. Texas*, a case in which the Fifth Circuit recently declared an affirmative action program unconstitutional.

Joffe began his defense of affirmative action by describing his involvement in *Martin v. Wilks*, in which he represented black and women firefighters in Birmingham, Alabama. In that case, white firefighters challenged a consent decree that had resolved a discrimination suit by the Department of Justice in the 1970s. After securing the decree, the Justice Department changed sides and argued that the decree was unconstitutional. The Eleventh Circuit agreed, and the Supreme Court affirmed. In Joffe's view, the key issue is whether antidiscrimination laws provide adequate protection to minorities. Given the need to protect past imbalances, he believes they are not sufficient. Quoting Justice Stevens, he stressed the theme that an interest in consistency does not justify treating differences as though they are similarities.

Reasoner expressed the view that empirical evidence is key. "If we focus on LSATs and grade point averages only, our elite schools will be resegregated," he said. He cited a study suggesting that, when consideration is limited to LSATs and grade point averages, only 300 blacks and Hispanics nationwide fall within the top 85% of candidates. Reasoner noted that it is politically unacceptable to have elite state schools that are segregated. As a result of the *Hopwood* decision, he predicted, state schools in Texas will abandon standardized tests as a criterion for acceptance. "Ironically, universities will be forced to eliminate meritocratic admissions procedures in order to achieve racial diversity," he observed.

Walpin stated that affirmative action is dead, except for those who wish to fight a losing battle. He acknowledged that the issue is charged with emotion, and rightfully so, but he expressed the view that the Constitution should be color blind. He also questioned whether affirmative action helps society. He stated that today, as a result of affirmative action, a City College diploma is suspect, and he suggested that affirmative action destroys the value of achievements of minorities who could make it on their own. "The bottom line," said Walpin, "is that racial equality cannot be achieved through racial discrimination." He suggested that those who are interested in solving the root causes of the problem should focus on helping people based on economic need rather than race.

Free Exercise vs. Establishment

Judge Harold Baer moderated a panel on the relationship between the free exercise and establishment clauses of the United States Constitution. The First Amendment states that Congress shall make no law respecting an establishment of religion or prohibiting its free exercise. The difficulty, according to Judge Baer, lies in achieving equilibrium between these conflicting propositions; today the balance seems to rest on the side of free exercise. Judge Baer

illustrated this tension by posing a series of hypotheticals to his two panelists — Marvin Frankel, who represented the anti-establishment point of view, and Paul Crotty, who served as the proponent of free exercise.

The first hypothetical dealt with a Christmas creche and the efforts of a city to avoid constitutional difficulty by interjecting secular symbols.

Noting that "this is a field in which logic takes a beating," Frankel expressed the view that creches should be unconstitutional. Even where a creche includes secular symbols, it is seen by some as "a way of reminding everybody who is boss and what America is all about," said Frankel. Crotty was of the opinion that an open public forum should be available for all expression, including religious expression. "A variety of messages can be delivered in a public forum," he observed, "why should we exclude religious expression?" In Crotty's view, allowing expression on public property does not constitute an endorsement of that expression.

The next hypothetical dealt with the *Agostini* case that Crotty, as New York City's Corporation Counsel, argued successfully last year in the Supreme Court.

Crotty noted that the Supreme Court's opinion in *Agostini*, in which the question was whether public school teachers could provide remedial education in parochial schools, went further than he had sought, permitting enrichment programs as well as instructional assistance. The next key battle will be school vouchers, according to Crotty, and he hesitates to predict the outcome. Frankel indicated that he does not feel passionately about *Agostini*, but he strongly opposes vouchers. He quoted from James Madison, who said that it would be unacceptable to give even "three pence" to the support of religious schools. It is his feeling that, while government may give money to individuals to use as they wish, government support of parochial schools is a "core violation" of the establishment clause.

Frankel said he is currently involved in litigating this issue in Cleveland and Wisconsin, and he stated that the strategy is to try to win those cases on state constitutional grounds so the day of reckoning in the Supreme Court, as to which he is somewhat pessimistic, can be postponed.

Crotty suggested that the GI Bill of Rights provides a good analogy to school vouchers and that we will see an increase in vouchers for public charter and private schools, which should be indistinguishable from parochial schools.

Prayer at public events was the subject of the next hypothetical posed by Judge Baer, and the issue was whether students could vote in favor of a student-led, nonsectarian invocation.

Judge Frankel thought not, describing this situation as "not simply a slippery slope, but a jump into the pit that the Supreme Court prohibited in *Engel v. Vitale*." There is no such thing as nonsectarian prayer, in his view. "People who really care about their religion don't regard it as nonsectarian," he said. Crotty, on the other hand, questioned whether a meaningful distinction can be drawn between a high school graduation and a presidential inauguration. According to Crotty, "there is nothing wrong in invoking the higher powers in ceremonial events." He expressed doubt that atheists believe that their views are called into question when the President swears on the bible to uphold the Constitution. In response, Frankel commented: "I do not worry about pleas to God at inaugural ceremonies because I do not think for a minute that politicians are influenced by religion; they are happy to be elected." Children are different, he added.

The final hypothetical dealt with the conflict in the law's approach to ritual circumcision of men and women.

Crotty observed that ritual circumcision of men was a religious practice, whereas ritual circumcision of women appears to be a tribal custom, which would not be protected by the Constitution. Frankel suggested that there is a compelling public health interest in prohibiting female circumcision, which would override any religious intent.

In concluding the discussion, Frankel observed that, "This is the most religious society in the world. Opportunities for religious expression are not restricted in this country. Why do we need to make it part of governmental activity? You defile religion and demean government to mix the two. Mixing the two has been destructive throughout the history of the species."

Crotty stated that the United States has done a better job than any other culture in protecting religious freedom. On the other hand, he noted that governmental institutions are there to help people lead a moral life. It is hard to separate religion and morality, although he acknowledged that there is a tension between the establishment and free exercise clauses. Crotty expressed the view that, as the Supreme Court works its way through these issues, Justices O'Connor and Kennedy will be critical. They are trying to find a way of drawing a line, as opposed to erecting a wall, between the free exercise and establishment clauses.

Award Presented

On the final night of the meeting, Council President Betsy Plevan

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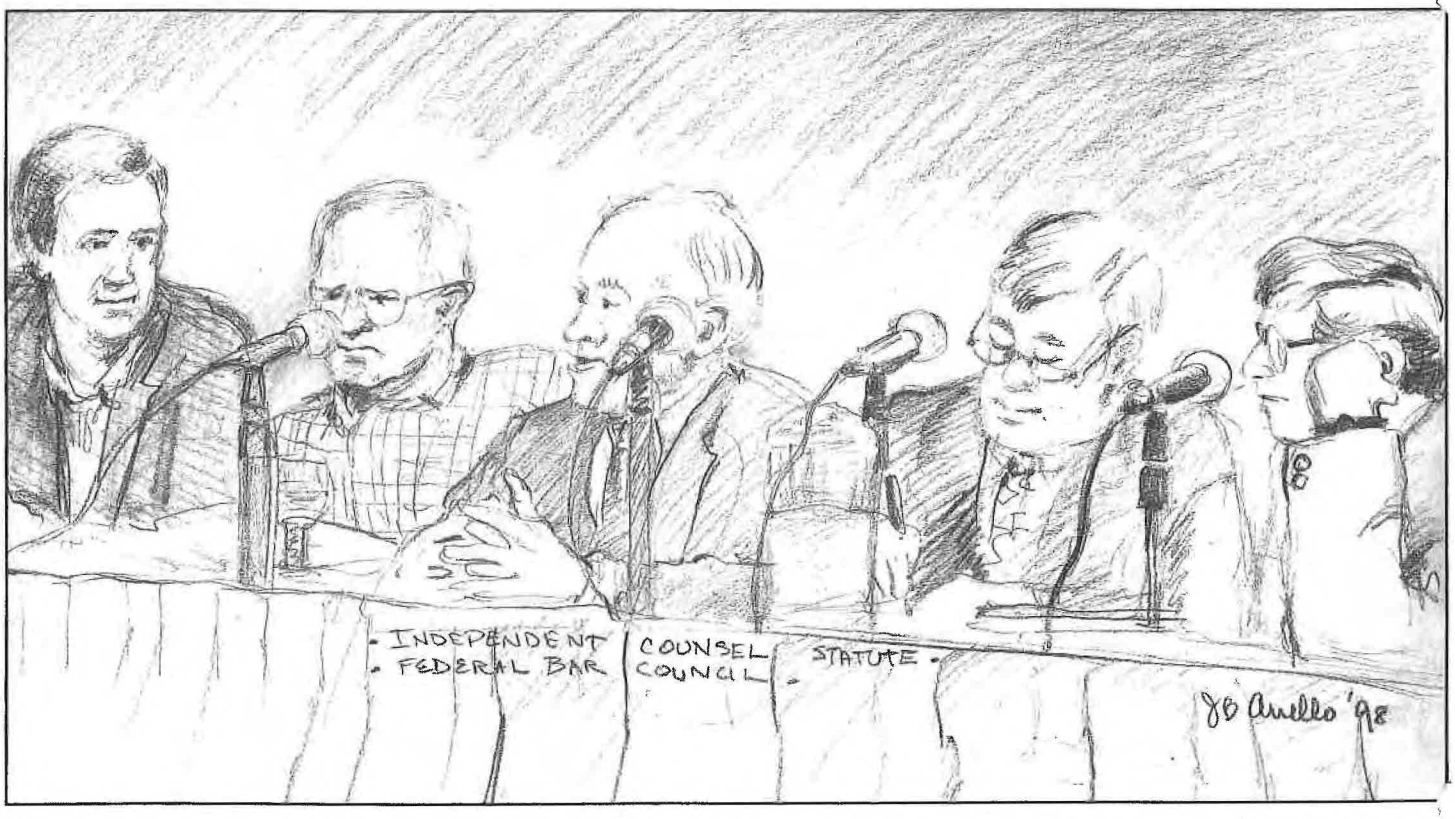
presented Bob Fiske with the Council's Whitney North Seymour award for public service while in private practice.

She noted that Fiske has served as U.S. Attorney for the Southern District, independent counsel to conduct the Whitewater/Madison Guaranty investigation, president of the American College of Trial Lawyers (and president of the Federal Bar Council), chair of the American Bar Association Standing Committee on the Federal Judiciary, chair of the Second Circuit Judicial Conference Planning and Program Committee, and as a member of the First Department Disciplinary Committee.

In accepting the award, Fiske suggested that it is important for a person not to be too carried away with his own importance. "Whenever that happens to me," he said, "I always think of the story about Admiral Farragut," which he recounted as follows:

Admiral Farragut was the Commander-in-Chief of the Atlantic Fleet. His flagship was the Battleship Pennsylvania. He was steaming along one dark night when directly ahead they saw a light. He said to the signalman: "Send a signal: Change course 20 degrees port." There was a few seconds' pause and then back came a signal, "you change course 20 degrees port." Admiral Farragut said to the signalman: "Send that message again: Change course 20 degrees port — repeat — change course 20 degrees port." After a few seconds back came the signal again: "You change course 20 degrees port." At this point, Admiral Farragut drew himself up and said: "Signalman, send the following message: This is Admiral Farragut, Commander-in-Chief of the Atlantic Fleet. I am on board the Battleship Pennsylvania, flagship of the Atlantic Fleet. Once again: Change course 20 degrees port." After a few seconds back came the signal: "This is seaman second-class Jones. This is a lighthouse."

Fiske reminisced about many of the past Federal Bar Council winter meetings he has attended, including a meeting in 1981 at Cerromar, when he was president-elect of the Council. He commented that the Federal Bar Council winter meeting "is the best of its kind among all of the professiona



Some of the members of the panel that discussed the Independent Counsel Statute are depicted in the drawing above, by Julia B. Anello. From left to right, they are David Fein, Bob Fiske, Lawrence Walsh, Paul Curran, and Ted Olson.

organizations that I have been associated with; it has the most interesting programs, the best panelists, and the most collegial and diverse, but harmonious, group of lawyers."

Fiske also noted that the award "has a very special meaning" to him because Whitney North Seymour was a man whom he knew and admired. Fiske called Seymour the "quintessential example of a person who rendered extraordinary public service while in private practice."

Quoting from the Cromwell Foundation book entitled *A Visit with Whitney North Seymour*, Fiske observed that Seymour was known for his fearless and courageous advocacy; dedication to active and diverse public and community service; and strong belief in the brotherhood of the bar.

He also said that Seymour was very down to earth, and he recalled the first time he met Seymour as a young lawyer in the 1960s: "I introduced myself to him and said I am Bob Fiske. He said, 'I am Whitney Seymour. I will call you Bob and you should call me Whit — I want anyone who I call by their first name to call me by my first name.'"

In closing, Fiske expressed his appreciation to a number of people who were instrumental in getting him involved in public service, including Judge J. Edward Lumbard, Fred Nathan, Paul Williams, Hazard Gillespie, and Harold Tyler. Fiske described his four years as a United States Attorney for the Southern District of New York as "extraordinary" and he observed that, among the Assistant United States Attorneys who served with him from 1976 to 1980, there are six United States District Judges, four present and former magistrate judges, one bankruptcy judge, two state court judges, the current United States Attorney for the Southern District, the current Chief and two former Chiefs of the Criminal Division in that office, the current Chief of the Civil Division, three present and former high-ranking officials of the Justice Department, and many others who have gone on to lead successful careers. He also thanked his partners at Davis Polk and his wife, Janet, stating:

"As somebody once said, 'if you see a turtle on a fencepost, you know he didn't get there by himself.' For 43 years she has been an extraordinary bedrock of support and encouragement. It is an understatement to say that I could not have done what I did without her."

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Dr. King quickly discerned that Wachtel was a lawyer with a penetrating, analytical mind; he especially appreciated Wachtel's skill in developing scenarios that included a careful weighing of the pros and cons of various options. Most of all, Dr. King appreciated Wachtel's passion for fairness and justice, and his directness in presenting his views.

Wachtel performed many services for Dr. King. He established the Gandhi Society for Human Rights as a tax-exempt organization to facilitate Southern Christian Leadership Council fund raising and expenditures for nonpolitical activities. Within a few months, J. Edgar Hoover was using the F.B.I. to wiretap Dr. King and his aides, and was inquiring who this lawyer Wachtel was.

In addition, Wachtel played key roles in organizing meetings between Dr. King and Presidents Kennedy and Johnson, and helped to extricate Dr. King from a Selma jail.

Wachtel's last face-to-face meeting with Dr. King took place on March 25, 1968 — just days before Dr. King's assassination. Wachtel had arranged to have his friend, Fred Scheiner, fly Dr. King, Andrew Young, and himself to the Catskills for a meeting of a Rabbinical Assembly.

Wachtel helped Dr. King address growing concerns among some Jews that black militants were becoming anti-Semitic and were hostile to Israel.

With respect to Israel, Dr. King said at the assembly that "we must stand with all of our might to protect its right to exist."

On the matter of anti-Semitism, Dr. King told the rabbis, "You cannot substitute one tyranny for another. Whenever we have seen anti-Semitism, we have condemned it with all our might."

The meeting that Wachtel had arranged was fraught with potential difficulties, but he and Dr. King had done so well that the rabbis gave Dr. King a warm response, even serenading him with a version of "We Shall Overcome" in Hebrew.

Wachtel died last year, at age 79. To honor the work of Harry Wachtel and Dr. King, the Wachtel family has been working with Long Island's Hofstra University to establish "The Harry H. Wachtel Distinguished Teaching Professorship for the Study of Nonviolent Social Change." Once it is fully funded — the goal is by this June — the Wachtel professorship will continue in perpetuity and will help to make Hofstra and Long Island a point of reference for nonviolent endeavors for peace, civil rights, and social justice.

For further information about the Wachtel Professorship, please contact Professor Michael D'Innocenzo at the Hofstra University History Department, 115 Hofstra University, Hempstead, New York 11550; (516) 463-5604. Contributions to the "Wachtel Fund-Hofstra University" are tax-deductible and would be most welcome.

Dr. King's New York Lawyer

ByMichael D'Innocenzo



Harry Wachtel and Dr. Martin Luther King, Jr., pictured above at a meeting on Long Island. Photo courtesy Hofstra University Archives.

Harry H. Wachtel grew up in Brooklyn, the son of a peddler. He attended City College at night, worked hard, and graduated at age 19. His nearly straight "A" average earned him admission to Columbia University Law School, where he excelled and made law review.

As a New York City lawyer, Wachtel developed a sophisticated corporate and real estate practice. White and Jewish, he had homes on Fire Island and in Great Neck, Long Island.

In 1962, Wachtel met Martin Luther King, Jr., and Wachtel's life changed.

From their initial meeting, Wachtel spent more and more time with Dr. King. He traveled with him, spoke with him on the phone, wrote position papers for him, and advised him on activist and legal strategies. In fact, Wachtel essentially abandoned his lucrative legal practice to serve as Dr. King's close friend, confidant, chief lawyer, and straight-talking adviser. Harry and his wife, Lucy, were the only white people whom Dr. King invited to accompany him when he went to Oslo to receive the Nobel Peace Prize in 1964.

In his biography of Dr. King, *Let The Trumpet Sound*, historian Stephen Oates offered this account of the developing relationship between Wachtel and Dr. King: "King found Harry immensely likable . . . . There was something about Wachtel that made him easy to confide in and he and King became fast friends."

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