Federal Bar Council News

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New Appointments

Carla Craig Is New Bankruptcy Judge

By Stephen L. Ratner and David M. Powers

Carla E. Craig was sworn in as a United States Bankruptcy Judge for the Eastern District of New York on February 28, 2000. Prior to her appointment, Judge Craig spent nearly 20 years in private practice, concentrating in bankruptcy, creditor's rights, corporate reorganization, and commercial litigation.

Judge Craig's desire to assume the bench grew out of her decision to trade her career as a private practitioner for public service. "I had been thinking about the possibility of seeking an appointment for a while," Judge Craig said. "The biggest change, I suppose, is

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Developments

Winter Meeting Focuses On Ethical Issues; Richard Davis Receives Public Service Award

The Federal Bar Council held its annual Winter Bench and Bar Conference at the Phoenician in Scottsdale, Arizona, from February 27 to March 5. Molly Boast chaired the meeting. The panels were organized by a planning committee chaired by Second Circuit Judge Dennis Jacobs with the assistance of District Judges Loretta Preska and Louis Kaplan.

Hazards of Practicing Law

The first panel focused on the hazards of practicing law. Led by Judge Barbara Jones, the panel addressed a hypothetical in which a client, following receipt of a grand jury subpoena, destroyed documents evidencing questionable payments to the wife of a public official and replaced them with false documents. Elliot Peters, in the role of counsel for the client, who was played convincingly by Toby Nussbaum, posed the issue as (1) whether to produce the false documents with an explanation that they may not be authentic; (2) whether to produce them without an explanation; or (3) whether to negotiate a reduction in the scope of the subpoena so that the documents were not called for. In Peters' view, not producing the documents was not an option.

When Peters suggested that his preference would be to produce the

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Judicial Sanctions

The Saga Of Judge McBryde

By Bennette Kramer

For the last five years, the Honorable John H. McBryde, United States District Judge for the Northern District of Texas, has battled with the Chief Judge of his district, the Fifth Circuit Judicial Council, and a Special Committee appointed by the Chief Judge over whether the Judicial Council has the power to investigate and sanction him, pursuant to the Judicial

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that you are looking at problems as a public servant, . . . as opposed to [representing] the interests of an individual client. That is a very big change in focus."

Judge Craig was a partner in the New York office of Brown Raysman Millstein Felder & Steiner LLP from October 1998 through February 2000, where she was the head of the firm's bankruptcy and creditor's rights practice. While at Brown Raysman, Judge Craig handled numerous real estate-related bankruptcies, represented landlords and licensees in bankruptcy disputes over assumption of leases and licenses, and represented foreign aircraft lessors in restructuring aircraft leases with U.S. airlines. Judge Craig's practice also included general commercial litigation matters, including software licensing disputes, "Y2K" litigation, and employment-related disputes.

Prior to joining Brown Raysman, Judge Craig had been a partner of Hertzog, Calamari & Gleason from 1988 to 1998, handling litigation, bankruptcy, and creditor's rights cases. "I had a practice that primarily involved creditor representation in matters having a wide variety of sizes, from large to small, and anything in between," Judge Craig said.

Beginning in 1990, Judge Craig began serving as Freddie Mac's principal New York bankruptcy counsel, a position she maintained until assuming her judicial appointment. Judge Craig represented Freddie Mac in hundreds of cases involving owners of multi-family apartment buildings who had defaulted on their loans in the late 1980s and early 1990s. "I got into court a lot during that period," Judge Craig said.



Photo courtesy Rick Kopstein

The March 22 Reception honoring Judges who have served on the Board of Trustees of the Council and the Board of Directors of the Foundation

From 1983 through 1988, Judge Craig was an associate of Hertzog, Calamari & Gleason. She began her legal career at Milbank, Tweed, Hadley & McCloy, where she was an associate in the litigation and bankruptcy groups from 1980 to 1983.

Judge Craig earned her J.D. from the University of Michigan Law School in 1979. She graduated magna cum laude from Williams College in 1976 with a B.A. in English.

Judge Craig is excited about her new role as judge, and she recognizes the range of responsibilities that are part of being a public servant. "I think being on the bench, you have a unique opportunity to contribute to the body of law by writing well written opinions, and you can have a real impact on people's lives in a concrete way — more so than in a private commercial practice," she said.

Judge Craig has authored articles on bankruptcy and real estate matters for several publications. Most recently, Judge Craig published two articles in the *New York Law Journal*. One, entitled "Court's Ruling on 'New Value' Exception Leaves Questions for Continued Debate," appeared in the May 12, 1999 issue, and the other, entitled "Recent Bankruptcy Filings Raise New Concerns for Investors," was published on November 18, 1998.

Judge Craig is currently a member of the Practicing Law Institute's Bankruptcy and Creditors' Rights Advisory Committee and has been a faculty member for several PLI programs on bankruptcy related issues. Judge Craig is a member of the Committee on Pro Bono and Legal Services, and has served as a member of the ABA Section on Litigation and Business Law. In addition, Judge Craig was a member of the Committee on Bankruptcy and Corporate Reorganization of the

Association of the Bar of the City of New York from 1990 to 1993.

New Appointments

Bernstein Appointed Chief Bankruptcy Judge

By Stephen L. Ratner and David M. Powers

Judge Stuart M. Bernstein has been appointed Chief Judge of the United States Bankruptcy Court for the Southern District of New York.

Before becoming a bankruptcy judge for the Southern District on November 24, 1993, Judge Bernstein was counsel and managing director for Kensington & Ressler, LLC. He began his legal career as an associate at Rosenman & Colin LLP, and thereafter spent four years as an Assistant United States Attorney for the Southern District of New York. Judge Bernstein earned his J.D. from Fordham Law School in 1975, and his B.A. from Queens College of the City of New York in 1972.

FBC News

CLE Program Targets Law Clerks

By Wendy Mirsky

The Program Committee of the Federal Bar Council is developing a continuing legal education program targeted specifically to judicial law clerks within the Second Circuit. The program will be run under the auspices of the Program Committee of the Federal Bar Council. Its goal is to educate clerks in the substantive areas of law that they most often will encounter during their clerkships, so that they can better assist judges in handling cases and caseloads. The program seeks to provide a useful service to the judges' clerks, and through them, the judges and courts within the Second Circuit.

According to Mark C. Zauderer, who is working to put the program together, the concept of the program is two-fold. First, it is designed to expose all judicial clerks within the Second Circuit to substantive and procedural areas of the law that the clerks will confront during their clerkships, but in which they may not have received substantive or practical training while in law school.

The program also aims to introduce judicial clerks to the work of the Federal Bar Council at an early stage in their careers and to encourage them to become active members of the Council.

The program invites participation by clerks in all courts within the Second Circuit. Although it is targeted towards judicial clerks, it is open to judges as well. Indeed, according to Zauderer, the Federal Bar Council "would be delighted" if judges, as well as their clerks, come to the sessions.

The first of the program's courses will take place in Fall 2000; it will be a pilot program on employment litigation, an area of law that clerks within the Second Circuit often encounter. Clerks can earn mandatory CLE credit by attending.

The sessions will expose the clerks to practitioners who practice in the employment law area, both as plaintiffs' and defense counsel. It will provide the clerks with exposure to the litigation perspective of both sides, allowing them to understand and analyze the challenges that both plaintiffs and defendants face in litigating employment cases in federal court.

The program on employment law will last from two and a half to three hours and will be held at two locations in the early evening. The first session will be held in the Southern District at Foley Square. The program also will be held in Islip, in the Eastern District. The Federal Bar Council seeks participation by clerks from all of the courts within the Second Circuit, and Zauderer anticipates that the sessions of the program will be videotaped.

The Federal Bar Council is co-sponsoring the program on employment law with the Labor and Employment Law Section of the American Bar Association. Wayne Outten, the co-chair of that Section's Subcommittee on Regional CLE Programs, is putting together a panel of speakers for the program.

Zauderer stressed that the program on employment law is only the first of many planned programs. He expects the pilot program to be followed by others during the following year, to aid judicial clerks in better assisting judges within the Second Circuit.

Federal Practice

Electronic Filing

By Wendy Mirsky

The new millennium brings with it technology potentially to free attorneys who are litigating complex cases in federal and state courts from the burden of managing the mounds of cumbersome paperwork that litigation inevitably creates. Although the use of electronic

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filing technology is still in its early stages and no state has yet implemented a statewide system of electronic filing of court papers, a limited, pilot program implemented by the United States District Court for the Eastern District of New York demonstrates the enormous potential of filing and reviewing court documents on line. The Eastern District's prototype program provides valuable insight into what will almost certainly be the wave of the future with respect to the use of computers in federal litigation.

In November 1997, the Eastern District took the lead among the federal courts by announcing its electronic case filing project ("ECF") and adopting Administrative Order No. 97-12, titled "In re Electronic Filing Procedures." The order amended the Eastern District court rules by adding procedures for electronic filing of papers in certain civil cases. The order was intended to be applied and interpreted in connection with the Eastern District's Electronic Filing Procedures Users' Manual, which, together with the order, are collectively called the "Electronic Filing Procedures."

On announcing the EFP, the Eastern District simultaneously established a website (www.nyed.uscourts.gov) with the technological capacity to provide public access to all contents of the site, including all electronically-filed papers, and to permit direct electronic filing of court papers on that site.

Attorney Registration

Through the use of a unique password and attorney registration, the EFP resolves the dilemma of signing papers in compliance with Rule 11 of the Federal Rules of Civil Procedure and Rule 11.1 of the Local Civil Rules of the Eastern District. All attorneys admitted to practice in the Eastern District can register as a "filing user" of the court's website. Each filing user is issued a user identification and a password by the clerk on registration. When a paper is filed in accordance with the methods set forth by the EFP, the filing binds the signatory as if the paper were physically signed and filed and functions as the signatory's signature for purposes of Rule 11.

The Eastern District's electronic filing rules are consensual, not mandatory. The court clerk posts on the court's website a list of the Eastern District judges who permit use of EFP in actions assigned to them. These judges are deemed "Participating Judicial Officers." As of January 2000, Chief Judge Sifton and eight other Eastern District judges are participating in the ECF project: Judges Dearie, Gleeson, Hurley, Johnson, Seybert, Trager, Weinstein, and Wexler. Any individual rules that a judge had in place prior to the installation of the ECF project are still in effect for that judge and some judges do have individual rules dealing specifically with electronic filing. Judge Weinstein, for example, requires hard copies of all motions filed electronically.

It is not always necessary for the judge assigned to a particular case to be listed as a "participating judicial officer" for the case to be eligible for electronic filing. If both the parties and the judge consent to electronic filing, the case may be placed in the ECF program. In that situation, according to Wendy Azreen, the Docket Clerk Supervisor, the clerk's office will work more closely with the case manager to ensure proper case management.

The EFP project has not changed the commencement of civil cases. Indeed, attorneys still must commence all civil cases by traditional paper means and cannot do so via computer. On the filing of the summons and complaint in any action in which the assigned judge is a participating judge, the clerk notifies the plaintiff that electronic filing is available in the particular case. That notice is served on the defendant together with the summons and complaint. Participating judges typically invite counsel to participate in the use of EFP at the initial Rule 16 conference. The parties may apply at any time, however, for an order designating the action as one subject to EFP. If all parties consent to the use of EFP, they sign a joint consent to EFP; if all parties refuse to consent, the judge notes on the initial scheduling order that the action is not to be subject to EFP. If some, but not all parties consent to the use of EFP, the decision of whether to use the electronic filing procedures in the particular case rests with the participating judge. In this situation, according to Azreen, the judge or magistrate judge assigned to the case weighs the merits of the opposing parties' objections; it is in the judge's discretion to determine whether electronic filing will be mandated.

In any case designated as subject to EFP, all papers required to be filed with the clerk must be filed electronically on the Eastern District's website. Electronic transmission of a paper to the website consistent with the procedures set forth in the users' manual, together with the receipt of a notice of electronic filing from the court as set forth in the users' manual, constitutes filing of the paper for all purposes, as well as entry of the paper on the court's docket. It is important to note, however, that the paper will not be deemed "filed and entered" until the parties receive the notice of electronic filing from the court. A paper filed electronically is deemed filed at the date and time stated on the notice of electronic filing.

With respect to service of electronically filed papers, the filing of a consent to EFP constitutes consent to service of all papers as provided by the administrative order as a complete substitute for service pursuant to the federal rules. An attorney filing a paper pursuant to EFP must, within one hour following filing, send by e-mail a notice of filing of the paper to all other parties, who are required to have their e-mail addresses on record. This e-mailed notice, which must provide the electronic docket number and the title of the paper filed, as well as the date and time filed, constitutes service of the papers on persons who have consented to EFP. Service is deemed complete on the date of the e-mail transmission.

In a civil action that is subject to the electronic filing procedures, when service of a paper is required to be made on a person who has not filed a consent to EFP, a paper copy of the document must be served on the person as would otherwise be required by the federal rules.

In March 1999, the Eastern District expanded the original ECF project. As initially conceived in November 1997, the ECF project allowed for electronic filing only of cases involving defaults of student loans. Because such cases typically involve a minimal amount of judicial intervention and filed documents, it was thought that they would be a good vehicle by which judges and counsel could become familiar with the procedures for electronic filing. By March 1999, the court had found that both judges and counsel were becoming comfortable with electronic filing and that the ECF project was working well. The court therefore enlarged the program to expand the types of cases which could be filed by electronic means. Currently, all civil cases are eligible for electronic filing except pro se cases, prisoner cases, bankruptcy appeals, sealed cases, motions to quash grand jury subpoenas, and contested disbarment cases. Of course, if counsel makes a written request to the judicial officer that a particular case not be subject to ECF and the officer approves the request, the case will not be placed in the program.

As of January 2000, the Eastern District has placed approximately 4,200 civil actions on-line. According to Azreen, the Docket Clerk Supervisor, the program is working smoothly and has received positive feedback from counsel and judges alike. There have been only a small number of instances in which the system has not been available due to technical problems. During those few times, counsel were not penalized for failing to file papers in a timely manner. Some among counsel and chambers staff have commented on the slow delivery time of the system, particularly when attempting to file a voluminous document. In such instances, the court may ask that counsel file the document by paper and then indicate on the electronic filing system that the paper has been filed.

The Eastern District has taken the lead among federal courts in establishing a prototype electronic filing program that aims to take full advantage of advances in technology. The Eastern District's

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program seeks to provide access to information in the courthouse to anyone who has access to a computer and the Internet. The Eastern District's ECF project serves as a model of a system that enables attorneys not only to save valuable time and expense by filing papers in civil actions electronically, but also provides immediate access to opposing counsels' papers and judges' orders at the touch of a keyboard. Electronic filing, as demonstrated by the Eastern District's expanding prototype program, holds the promise of a more efficient practice of law in the twenty-first century.

Legal History

FDR And The Second Circuit

By C. Evan Stewart

Upon his inauguration as President in March 1933, Franklin D. Roosevelt was described by Oliver Wendell Holmes as having a "second-class intellect, but a first-class temperament." Walter Lippman, well before the election itself, had been harsher, declaring that Roosevelt was "a pleasant man who, without any important qualifications for the office, would very much like to be President." By any measure of historical standards, FDR certainly proved them wrong.

Pre-presidential endeavors by FDR make it clear that his talent for dealing with significant and complex problems was well developed prior to his defeat of Herbert Hoover. One such incident is detailed in Herbert Mitgang's recent book, "Once Upon a Time in New York: Jimmy Walker, Franklin Roosevelt, and the Last Great Battle of the Jazz Age" (Free Press, 2000). Mitgang's book examines how FDR, as Governor of New York, dealt with a hydra-headed legal-political-public relations nightmare that threatened to derail his bid for the Presidency.

Mayor Walker

James (Jimmy) J. Walker was an aspiring songwriter in Tin Pan Alley (his biggest hit was entitled "Will You Love Me in December as You Do in May?"), until he turned his considerable schmoozing talents to New York City Democratic politics. Rising up the ranks as a protegé of Alfred E. Smith, Walker was elected Mayor of New York City in 1925 by a sizable plurality; and he was returned to office by a larger margin four years later.

Walker was a very skilled politician, but he cared little for the nuts and bolts of municipal government. Walker far preferred the social whirl (he was called the "Night Mayor of New York"), frequent trips to his tailor, equally frequent trips outside the city to foreign hot spots, greeting visiting dignitaries, and leading parades. Notwithstanding, Walker was immensely popular; he seemed to epitomize the anything-goes style of the city's pre-Depression era.

Walker came from a long line of Tammany Hall politicians best embodied by George Washington Plunkett. Plunkett, who coined the term "honest graft" in the 1880s, believed that a "politician who steals is worse than a thief" because there were "grand opportunities all around" for anyone who kept his eyes and pockets open. Plunkett's everyday philosophy was simple: "I see my opportunities and I take them." Walker lived (and profited) by a similar credo.

The Seabury Investigation

Mayor Walker's high-flying days were threatened in 1930 by a decision by the Appellate Division of the New York Supreme Court to name retired Court of Appeals judge Samuel Seabury to investigate the city's judicial system. In the early stages of his investigation, Seabury's classic examination of Thomas Farley as to how, on an annual salary of $8,500 as sheriff of New York County, Farley had accumulated $500,000 in six years, demonstrated the depth and breadth of municipal corruption:

Seabury: Where did you keep these moneys that you had saved?

Farley: In a safe-deposit box at home(the house.

Seabury: Whereabouts at home in the house did you keep this money that you had saved?

Farley: In the safe.

Seabury: In a safe.

Farley: Yes.

Seabury: In a little box in a safe?

Farley: A big safe.

Seabury: But a little box in a big safe?

Farley: In a big box in a big safe.

* * *

Seabury: When you first drew it, Sheri was the box then crowded or very full?

Farley: Well, it was full and plenty in it.

Seabury: More and plenty?

Farley: Yes.

Seabury: And, Sheriff, was this big box that was safely kept in the big safe a tin box or a wooden box?

Farley: A tin box.

Seabury: Is it the type of tin boxes that are specially manufactured and designed to serve as a receptacle for cash?

Farley: It is.

* * *

Seabury: Kind of a magic box.

Farley: It was a wonderful box.

Seabury: A wonderful box. What did you have to do—rub the lock with a little gold, and open it in order to find more money?

Farley: I wish I could.

With the "tin box" as a recurring headline, it did not take long before the New York State Legislature expanded Seabury's mandate to include every official in the city's government. Walker's lifestyle (and the finances needed to support it) quickly became a target.

Seabury vs. Walker

In Spring 1932, as New York Governor Roosevelt's political machine was going full-tilt to secure the Democratic nomination, Seabury served a comprehensive subpoena duces tecum on Walker. Walker subsequently appeared as a witness for two days before a special legislative committee. Seabury was intent on making a record of Walker's financial history; Walker played to the crowds and the press. At first it appeared that Walker had the upper hand, making wisecracks ("This fellow Seabury would convict the Twelve Apostles if he could"; "life is just a bowl of Seaburys"; etc.), getting favorable editorials, and having 18,000 people turn out for a rally at Madison Square Garden. And, of course, national politics loomed large.

The Democratic convention was about to open, and Roosevelt did not have quite enough delegates to ensure his nomination (at that time, the nominee had to achieve a two-thirds total). Al Smith had the largest bloc of non-FDR delegates, and most of them were Tammany Hall men. With one week to go before the opening gavel, Seabury delivered Walker's transcript (with an accompanying analysis) to FDR (who under the state constitution had the power to remove any public official for good cause); Roosevelt sent a copy to Walker, who responded that he would reply after the convention. FDR was thus placed in a difficult spot, as Walter Lippman ruefully noted: "[FDR] has displayed a singular petulance toward everybody who has had any part in putting him in a position where he might have to make a decisive choice between breaking with Tammany and surrendering to it."

At the convention itself, Walker made a point of publicly casting his vote for Smith; but that act had no effect of galvanizing the "Happy Warrior's" prospects. Ultimately a deal was brokered whereby the Speaker of the House of Representatives, John Nance Garner, became FDR's running mate in exchange for the California and Texas delegations. Even with those votes putting FDR over the top, however, Smith's supporters (including Walker) were bitter and refused to make the nomination unanimous.

Walker vs. Roosevelt

On July 29, 1932, Walker submitted to FDR a 27,000 word "answer" to Seabury's "charges"; as noted by many editorial writers, the response addressed little of the evidence, instead focusing on the purported political vendetta directed against the Mayor, and the fact that his enemies (Seabury, et al.) were attempting to reverse the popular will of the electorate. This left the ball squarely in FDR's court. Trapped, he called for a "trial" up in Albany, at which he would preside and pass judgment on the evidence.

When it came time for Walker to testify at the end of August, he left by special train from Grand Central Station, where five thousand people had come to see him off. When he arrived in Albany, he was met by another large crowd, a brass band, and the sight and sound of exploding aerial bombs. When informed that Walker had received this reception, Seabury's tart retort was: "So did [Boss] Tweed."

Knowing the importance of the "trial" to his political fortunes, FDR studiously prepared, working closely with his legal counsel (the most important of whom was Samuel Rosenman). Walker's counsel, while an experienced trial lawyer, ignored Walker's advice (don't get "Frank's Dutch up") and attempted to run roughshod over the proceeding (perhaps assuming that FDR, given his less than imposing legal career, could be placed on the defensive). Roosevelt would have none of that, however, and at one point admonished Walker's lawyer: "Don't try to instruct me about the difference between putting

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a thing into evidence and marking it for identification."

While FDR and Walker's counsel had numerous tussles over legal and evidentiary issues, FDR was scrupulously cool and even-tempered in his handling of Walker himself. Walker's testimony was basically a re-play of his prior testimony. Rather than address squarely questionable transactions by which he and his associates had pocketed large wads of cash, Walker focused on other areas in which he felt more comfortable, such as his long public service, that he was being railroaded, and that he had little direct involvement in or knowledge of the transactions themselves. When FDR asked him about a slew of governmental contracts that had been awarded to dubious entities, Walker gave a lengthy soliloquy on "the executive mind." When FDR probed about a secret brokerage account that had netted Walker $246,000 (this came from a man who was vying for a major municipal contract), Walker tried to obfuscate matters by complaining that he was being put on trial for his use (misuse) of the word "beneficence"! After taking Walker through all the points previously established by Seabury, FDR concluded his examination:

Roosevelt: I think that concludes the direct examination of the Mayor by me.

Walker: What? What direct examination?

Roosevelt: Direct examination of the Mayor by me.

Walker: I never want to be cross-examined if that was direct.

Most observers gave FDR high marks for his impartial and judicious oversight of the hearings. The proof of the pudding, however, still lay in what his decision would be. As noted in *The New York Times*, "the political consequences [are] enormous. If he removes the Mayor, he runs the risk of being knifed by the Democratic machine in New York City. . . . If he does not remove the Mayor, the Republican orators will ascribe his negative act to Presidential politics and picture Mr. Roosevelt as a trimmer and low type of politician."

As FDR mulled over his unpleasant options, the political bosses went to work. Jim Farley, who was FDR's political fixer and would soon become Chairman of the Democratic Party, acted as a middleman between his boss and Tammany Hall; his report back to the bosses was negative — the thing was just too hot a potato and could not be settled quietly. Tammany was thus compelled to make a rational political judgment: power and future patronage were more important than a single officeholder (especially one whose openly adulterous lifestyle was starting to upset the Catholic Church). It was left to Al Smith to give Walker the bad news: "Jim, you're through. You must resign for the good of the party." And so Walker did.

The rest, as they say, is history. Tammany leaders were invited to a friendly meeting at the Executive Mansion in Albany to smooth things over, FDR went off on an historic barn-storming campaign trek via the rails throughout the country, and the Democratic ticket crushed the Republicans in November, losing only six states.

Postscript

Notwithstanding the broad public investigation into municipal corruption, not a whole lot changed in New York City. The Mayor elected after Walker was asked by a reporter who his police commissioner would be. His response: "I don't know — they haven't told me yet."

In 1959, a hit Broadway musical comedy was based on the life and times of another New York City Mayor, Fiorello La Guardia. Entitled "Fiorello!", one of the play's show-stopping songs was "Little Tin Box."

Judicial Sanctions

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Conduct and Disability Act of 1980, on account of his judicial conduct. Judge McBryde, who was appointed to the bench in 1990 by President Bush, contends that it is unconstitutional for other judges to pass judgment on him and that the only remedy is to remove him by impeachment.

Special Investigation

On September 13, 1995, Fifth Circuit Chief Judge Henry Politz appointed a Special Committee of the Fifth Circuit Judicial Council to investigate allegations of misconduct against Judge McBryde. Although the investigation began with five complaints, Chief Judge Politz expanded the scope of the investigation to include others.

During the course of the investigation, Judge McBryde resisted the efforts of the Special Committee by initiating a series of court challenges to the Special Committee's request for a psychiatric examination and its efforts to issue subpoenas. Finally, the Special Committee held evidentiary hearings in New Orleans and Fort Worth in August, September, and October 1997, receiving hundreds of exhibits and hearing many witnesses, including federal district court judges, a Texas state court judge, a U.S.

Attorney and numerous assistant U.S. Attorneys, the Director of Enforcement of the SEC, the head of the Public Defender's Office in Fort Worth, and private attorneys who had practiced before Judge McBryde.

The Special Committee issued a 159 page report in December 1997. The report detailed "several alarming patterns of conduct exhibited by Judge McBryde over the course of his tenure on the bench," which it divided into various categories.

First, the Special Committee determined that Judge McBryde had a proclivity to question integrity, which led him to accuse attorneys of lying without taking any steps to verify whether his suspicion of bad faith had any justification.

doing so, the report found, Judge McBryde often used sarcastic and abusive language, belittling and attacking attorneys. In many cases, Judge McBryde threatened contempt or other sanctions or actually issued show cause orders as to why lawyers should not be held in contempt. As a result, in many instances lawyers appearing before Judge McBryde feared incarceration. He also sent attorneys to ethics classes and remedial reading courses. In one example cited in the report, Judge McBryde berated a government lawyer and threatened him with sanctions because the lawyer would not agree to a settlement provision that the enforcement order be sealed.

Second, the Special Committee found that Judge McBryde overreacted to "perceived" violations of his rules and imposed abusive sanctions.

The Special Committee also found at Judge McBryde had an excessive need to control. Judge McBryde consistently refused to listen to attorneys explain why they had not been able to comply with a court directive and treated them in a humiliating and sarcastic manner. As a result of Judge McBryde's conduct, attorneys were fearful of appearing before him. For example, Judge McBryde held a lawyer in contempt of court for failing to promptly initiate a conference call because of a malfunction in his telephone system. In another case, Judge McBryde incarcerated a lawyer because he refused to provide an answer to a question that the lawyer felt might waive his client's rights.

The Special Committee also determined that Judge McBryde's conduct had a negative effect on the legal community. Attorneys felt so intimidated by him and so fearful that he would belittle them before a jury, that they would forego an argument or question against their better judgment. Many lawyers would refuse to accept cases before him and some even left the area to avoid appearing before Judge McBryde.

Finally, the Special Committee found that Judge McBryde behaved in a disrespectful and offensive manner toward other members of the judiciary, including federal and state judges. Judge McBryde imputed bad faith to his peers and refused to extend even the most rudimentary courtesy to them. Some reported that they were physically threatened by him and his verbal attacks. In one instance, Judge McBryde refused even to speak to a state court judge who had come to Judge McBryde's chambers to explain that a lawyer who was expected to appear at a conference before Judge McBryde was involved in a jury trial in state court.

Order Issued

On December 31, 1997, the Judicial Council issued an order that publicly reprimanded Judge McBryde for "conduct prejudicial to the effective administration of the business of the courts." In addition, the Judicial Council sanctioned Judge McBryde by ordering that he be assigned no new cases for one year and that for three years he not participate in any cases involving certain attorneys who had testified during the Special Committee's investigation.

On September 18, 1998, the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States slightly modified but otherwise affirmed the Judicial Council's order.

Judge McBryde filed a complaint in the District Court for the District of Columbia against the Special Committee, the Fifth Circuit Judicial Council, and others. Bob Fiske represents the defendants.

Court Ruling

This past December, Judge Colleen Kollar-Kotelly, of the District of Columbia District Court, upheld the Special Committee's Report and the Judicial Council's order, determined that the act was constitutional and did not violate the separation of powers doctrine, ruled that the act was not unconstitutional as applied to Judge McBryde, and concluded that Judge McBryde's due process rights had not been violated by the investigation and proceedings before the Special Committee.

In her decision, Judge Kollar-Kotelly pointed out that Congress carefully crafted the Judicial Conduct and Disability Act to avoid encroaching on the impeachment power. Judge Kollar-Kotelly noted that the language of the act expressly prohibits removal, providing that in no circumstances may the council order removal from office of any judge

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appointed to hold office during good behavior. As an additional safeguard against encroachment of the impeachment power, she continued, the remedial measures were "narrowly drawn such that they may not effect the removal of a sitting judge from office."

Judge Kollar-Kotelly found that in each situation examined by the Special Committee, the Special Committee focused on Judge McBryde's conduct and treatment of attorneys, not on whether the legal decisions he made were correct. The Special Committee recommended that Judge McBryde be given the choice between resigning and the public sanctions ultimately imposed.

Judge Kollar-Kotelly also rejected Judge McBryde's other arguments, stating that the act does not undermine judicial independence because individual judges do not have unfettered power to bring discredit on the court. Instead, each judicial council has the power to ensure the integrity and orderly functioning of the judiciary as an institution. Judge Kollar-Kotelly similarly rejected Judge McBryde's argument that the act violates the separation of powers, stating that, so long as the rulings of the judge were not at issue, there was no obstacle to a group of judges acting to remedy conduct that interfered with the efficient operation of the courts.

It should also be noted that in her December 30, 1999 decision, Judge Kollar-Kotelly granted Judge McBryde's motion to unseal the records in the case in the interest of allowing Judge McBryde to vindicate his reputation. Judge Kollar-Kotelly stated that Section 372(c)(14) of the act "operated as a prior restraint on Judge McBryde's ability to discuss and to challenge publicly the proceedings that resulted in his censure." Judge Kollar-Kotelly found that Judge McBryde's interest outweighed the need to protect witness privacy and encourage witnesses to come forward in the future. Moreover, the names of 23 lawyers who participated in the disciplinary proceedings had been made public in connection with the order to Judge McBryde to recuse himself from their cases for three years.

On January 5, 2000, Judge McBryde filed an appeal to the District of Columbia Circuit. The dispute is likely to end up before the Supreme Court.

Developments

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documents with an explanation, Nussbaum (as the client) stated that she did not want to give an explanation. Peters acknowledged that he could not give an explanation without the consent of the client, and he suggested that the best course in that case might be to withdraw.

Judge Jones then asked the panel to assume that Peters produced the false documents with no explanation and the prosecutor found out. Stephen Robinson, U.S. Attorney for Connecticut, said he would investigate the matter. He might call a custodian of records to testify before the grand jury to establish the fabrication. He would assign a separate team of prosecutors to investigate the lawyer, and would want to inquire into the lawyer's reputation and what other lawyers would do under the circumstances. He also would consider entering into a plea agreement with the client in return for testimony against the lawyer.

Rusty Wing, playing the role of the lawyer for Peters, stated that he would advise his client to tell Nussbaum to get another lawyer. He would also not let Peters talk to the prosecutors directly, but would try to persuade them that Peters had done the right thing and that by producing the documents Peters was not making a representation of authenticity. Professor Bruce Green stated that Peters must withdraw from the representation because of the conflict between his own interests and those of the client.

Judge Jones pointed out that the panel was suggesting that Peters' initial choice was either to withdraw or produce the fabricated documents without an explanation, putting himself at risk. She asked: "Where does that leave the right to counsel?" Robinson pointed out that, if the lawyer withdraws, the client will simply get another lawyer who does not know that documents have been fabricated. Peters suggested that thi simply increases the problem for the client and deprives her of an advice of counsel defense.

Bruce Green was asked whether it would be permissible for the lawyer simply to negotiate a narrowing of the scope of the subpoena to avoid producing the false documents. Green stated that the answer is not clear, because obstruction of justice is an intent offense and if lawyers act with corrupt intent, they may be putting themselves at risk. At the same time, he pointed out that a lawyer's job is to prevent discovery of wrongdoing by clients and therefore, in a sense, they always act with corrupt intent.

A member of the audience suggested that a subpoena should always be interpreted as not covering documents created after the date of the subpoena. This does not solve the problem, however, if a subsequent subpoena is served. Green expressed the view that, at bottom there is no safe harbor in this situation.

A panel led by Judge Jacobs reviewed the law of contempt and other sanctions. Marty Glenn gave an overview

of civil and criminal contempt, as well as sanctions under Rule 11, 28 U.S.C. Section 1927, Rule 37, and the inherent power of the courts. The panel then addressed the question whether the new Rule 11 is working.

Judge John Koeltl suggested that Rule 11 has fallen into disfavor because it leads to satellite litigation. If a complaint is truly frivolous, a motion to dismiss is enough. Judge Allen Schwartz observed that he has not had many Rule 11 motions, and has never granted one. The prospect of Rule 11 sanctions are often discussed at motion conferences, and that tends to eliminate frivolous pleadings.

Max Gitter expressed the view that, in this day and age, Rule 11 motions are often driven by clients. He generally advises not to pursue them because they do not accomplish anything and they reduce the civility of practice. An exception would be for frivolous serial law suits.

The panel agreed that sanctions for discovery abuse are more prevalent. There also was a consensus that the threat of sanctions is an important factor in achieving compliance with the rules.

Witness Preparation

A panel on the ethics, tactics, and law of witness preparation began with a film clip from *Anatomy of a Murder*. In

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Drawings accompanying this article courtesy Julia B. Anello

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a famous scene, Jimmy Stewart — playing the part of the lawyer — delivers "The Lecture" to the client, telling the client what his defense can be before the client tells the lawyer the facts. The implication is that the client is being encouraged to tailor the facts to fit the defense, and the question is whether that is ethical.

Led by Larry Pedowitz, the panel addressed that question by exploring a hypothetical of its own in which the controller of a public company — played by Barbara Gillers — engaged in questionable accounting practices and then provided inside information to her daughter so that she could unload her stock. The hitch was that the daughter was deaf and the communication was via a TDY machine. How should the witness respond to the question, "who did you talk to?" Can the witness omit any reference to the TDY communication with her daughter because the discussion was not oral?

Gillers reviewed the law in this area, pointing out that in *Bronston v. United States*, 409 U.S. 352 (1973), the Supreme Court ruled that a non-responsive but technically correct answer did not constitute perjury, even though it was designed to mislead the questioner. She contrasted *Bronston* with *United States v. Dezarn*, 157 F.3d 1042 (6th Cir. 1999), in which the court sustained a perjury conviction of a witness who tried to take advantage of a mistake by the questioner as to the date of a particular meeting.

Professor Bruce Green, appearing for the second time at the meeting, pointed out that perjury depends on intent. Therefore, a literally true answer that is designed to mislead may be perjury. The best way to counsel a client may be not to get close to the line.

The rest of the panel — consisting of Joel Cohen, Pat Hynes, Jon Lerner, Marjorie Peerce, Mark Pomerantz, and Richard Ziegler — debated that issue in the context of deposition testimony in a civil suit, testimony in an SEC investigation, grand jury testimony, and a "queen for a day" interview with prosecutors. The context may make a big difference because the ethical rules only prohibit an attorney from proffering false testimony — which would not cover grand jury testimony, testimony in an investigation or at an interview, or testimony elicited by an adversary. At the same time, it was pointed out that given the likelihood that a misleading answer will be discovered, the best practical advice a lawyer can give his or her client is to tell the truth.

The panel also discussed whether "The Lecture" was a proper tool in witness preparation. The view was expressed that, if "The Lecture" caused the client to testify falsely, the lawyer may have a problem. On the other hand, it is not unethical to use these techniques to teach the client to articulate the facts in the best possible light. Moreover, a lawyer is entitled to assume the client is telling the truth until the lawyer learns otherwise.

Effective Jury Communication

Techniques for communicating effectively with juries was the subject of a panel moderated by Judge Loretta Preska. The discussion began with a film clip introduced by jury consultant Larry Mattson. The clip depicted a college class being told that the course they were about to take could be very long or very short, they would not be permitted to take notes, and they would not be told what the point of the course was until the end. Needless to say, the reaction of the students to this process — which is similar to most jury trials — was quite negative.

Pointing out the most important principles of effective jury communication, Mattson suggested that lawyers should focus on three to five points and try to tell a narrative story. It is also important to focus on the facts that best support the three to five points and to make the story vivid. In addition, he stressed the need to "find" the most persuasive story through a process of trial and error, which should take at least four months and should begin by thoroughly understanding the other side's case.

The panel also addressed the issue of minisummations. Michel Baumeister stated that, as a plaintiff's lawyer, he likes minisummations because any chance to focus the jury and put the case forward is good. Ken Warner observed that defendants should like minisummations as well, because plaintiffs have the advantage of going first and minisummations give defendants a chance to tell the jury the big picture.

Considering the issue of questions from jurors, Baumeister stated that he does not like that technique unless the identity of the juror is disclosed. Warner was of the view that it depends on whether the case is criminal or civil. In a criminal case, questions from jurors are generally bad for the defendant. In a civil case, if a party has a strong case, questions from jurors can be useful; if a party has a weak case, however, questions from jurors can focus attention on the wrong issues.

All panelists agreed that time limits can be useful. Peter Wang cautioned, however, that counsel should not assume that the judge will let them off the hook! Baumeister also pointed out that time limits can pose logistical difficulties in cases with multiple plaintiffs or multiple defendants.

Lori Ann Wagner, who represented plaintiffs in the Exxon Valdez case, discussed the proper use of visual aids, including blow-ups, breakout boards, scanned images with zooming techniques, and videotapes. Each of these techniques has advantages and disadvantages, depending upon the exhibit in question. For example, a large blow-up can be advantageous because its physical presence is always there and it can be taken into the jury room. If a document is difficult to read, however, the breakout board may be the best technique. In addition, in using videotapes, Wagner suggested that lawyers should audition the vendor and ensure that the audio is adequate. She also noted that, when audiotapes are used, it is helpful to have a transcript on a screen.

Peter Wang presented an animation he used in a trial involving construction delays at the Marriott Marquis. He gave a number of helpful tips in using animation including (1) it must be accurate and non-argumentative, (2) it does not have an audio track, so a witness is needed to narrate it, (3) it is important to "keep it snappy," (4) it is important to remember

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that things go wrong, (5) lawyers should not assume that they will be able to demonstrate the animation without expert help, (6) the animation should not be too slick, and (7) before spending money, lawyers should determine whether it deserves to be alive.

Ken Warner echoed the importance of not being too slick. Technology should not get in the way of effective communication; sincerity and simplification are the most important things. Judge Preska also observed: "Pictures are images, directly entering the bloodstream, bypassing the brain."

The panel on effective jury communication concluded by interviewing people at the meeting who had served on juries. Among the points that were made were that an undeserving plaintiff may not win regardless of the merits of the claim; it is important to fill in the story because the jury will hold the missing pieces against the lawyer who does not do so; and a defendant confronted with a plaintiff with a real injury must express compassion for the plaintiff in presenting the defense.

A Historical Perspective

A panel of three law school professors, moderated by Judge Alvin Hellerstein, discussed the historical development of the law in a number of areas. Judge Hellerstein began the discussion by talking about the importance of studying legal history. All law is history in a sense, he observed, because we rely so heavily on precedent. By studying the history of law, we can understand its origins, and by studying different legal systems, we can understand better the choices we have made in our legal system.

Professor Jonathan Rose of Arizona State began the discussion with an analysis of the development of the legal profession in the twelfth and thirteenth centuries. Lawyers originally were divided into two categories — serjeants and attorneys, the precursors of the solicitors and barristers of today. From the outset, the profession was concerned with "ambidexterity," or conflicts of interest. The first attempt to regulate the profession was the statute of Westminster, which was adopted in 1275. It provided for disbarment, among other things, if a lawyer was guilty of deceit or collusion. Rose noted that lawyers have always been treated differently and have been subjected to harsher standards than other professionals. He also stated that he had no evidence of the existence of female serjeants or attorneys in medieval times.

Suzanne Stone of Cardozo Law School, an expert on Jewish law, observed that Jewish law does not recognize lawyers as such. Judges are seen as carrying out all the functions that lawyers perform, including making the best case for the parties. The basic notion is that the parties should face the judge directly, and the truth is best ascertained by a direct approach to the judge. In the case of women, however, it is considered to be an imposition to require a woman to appear in court, so women are represented by attorneys-in-fact. Written pleadings are also barred in the Jewish tradition because they are considered to be an unnecessary expense and they hide the truth.

Richard Helmholz of the University of Chicago, speaking about the Canon law tradition, pointed out that in the year 1000 there were no lawyers and no appellate courts. The system of proof was primitive and often involved a trial by ordeal, which was considered to be a direct appeal to God. The punishments were also mechanical, with a specified price for an arm, a leg, or a life.

Helmholz also discussed the development of family law in the Canon law system. Although people often think of Canon law as a series of rules, there was substantial room for local custom in the year 1000. Local custom eventually evolved into a series of rules, promulgated by the Church, as the law began to regulate the most intimate aspects of life.

Stone expressed the view that Jewish family law was actually ahead of its time until about 40 years ago. Jewish law traditionally viewed marriage and divorce as matters of contract. Although only the husband could initiate the divorce, the wife could go to court and get an order compelling the husband to do so. Jewish law also prohibited polygamy at an early stage, which tended to equalize the rights of men and women.

Stone also discussed the death penalty under Jewish law. Jewish law neither condemns the death penalty nor condones it. The same word is used to describe murder and killing in Hebrew. This reflects an ambivalence in Jewish law toward the death penalty, and the tension between the sanctity of human life and the need for atonement and deterrence.

Judge Hellerstein concluded the discussion by pointing out that the issue in all systems is how to reach the truth. The common law system tries to get to the truth through a profession that represents the interest of both parties. The common law system recognizes that there are two sides to every story.

ADA

The final panel, on the Americans with Disabilities Act, was moderated by Judge Fredric Block, who described

several cases he has tried under the statute. Professor Samuel Estreicher of N.Y.U. Law School then provided a detailed overview of the act and explained the extent to which it goes beyond Title VII in requiring accommodation for certain disabilities and banning certain practices. Julian Birnbaum discussed the most recent Supreme Court decisions in this area: *Sutton v. United Airlines, Inc.*, 119 S.Ct. 2139 (1999); *Murphy v. UPS*, 119 S.Ct. 2133 (1999); and *Albertsons v. Kirkingburg*, 119 S.Ct. 2162 (1999). The essence of these decisions is that in deciding whether someone is disabled, courts must look at that person in his or her corrected state — if the disability can be corrected, then the person is not disabled.

Paul Salvatore discussed *Cleveland v. Policy Management Systems, Corp.*, 119 S.Ct. 1597 (1999), which attempted to harmonize the differing definitions of disability under the Social Security Act and the ADA, as well as cases that deal with the question of what is a "major life activity" under the act.

The panel then dealt with a hypothetical in which a senior associate in a law firm, who was one of the most effective lawyers in the firm, also had a bi-polar disorder that was exacerbated when she was on trial.

The general consensus of the panel was that the employer would be well advised to deal with the problem early in an effort to reach agreement with the employee on a reasonable accommodation — otherwise the employer may be accused of engaging in retaliation or imposing a less attractive alternative. It also was pointed out that there is a tension between the ADA, which requires confidentiality, and the possible ethical obligation of the law firm to disclose the accommodation to the client.

Seymour Award

At the final banquet, Federal Bar Council President Steve Edwards presented Richard Davis with the Whitney North Seymour Award for outstanding public service by a private practitioner. Edwards described Davis as "living proof that nice guys can finish first." After describing Davis' educational background, Edwards moved on to Davis' early career, which included a stint with the U.S. Attorney's Office, service as a Watergate Prosecutor, and the position of Assistant Secretary of the Treasury, where he was instrumental in negotiating the release of the hostages in Iran in 1981.

Edwards went on to point out that Davis has served the public interest in many ways, including as Chair of the Randall's Island Sports Foundation, Co-Chair of the Pier Park and Playground Association, member of the Citizens Task Force on the Use and Security of Central Park, Director of the Parks Council, Director of the Harbor for Boys and Girls, Director and Vice President of the Legal Aid Society, Founder and Co-Chair of the Lawyers Committee Against Violence, and Vice-Chair and a board member of the Citizens Union. Edwards also noted that Davis has spent considerable time on police and community relations and has distinguished himself as Chair of the Mayor's Commission to Combat Police Corruption, a member of the Task Force on Police-Community Relations, a member of the Joint Justice and Treasury Department Panel on Waco, and a member of the Philadelphia Police Study Task Force. Davis has been a frequent commentator on the Diallo and Louima cases on television, and appeared as a witness for President Clinton in the House Impeachment Hearings.

In accepting the award, Davis noted that the occasion had caused him to reflect on the public service experiences he has had. Jokingly, he observed that his public service career began as an elevator operator in the Senate office building. On a more serious note, however, he emphasized that this experience, which came in the middle of the national debate over the war in Vietnam, highlighted what he views as most rewarding about public service — "the ability to be exposed to extraordinary people and challenging problems."

Davis observed that most of his public experience has been in three areas: law enforcement, parks, and children. "While to some these may appear to be somewhat disparate interests," he stated, "for me, they are very related because they are all in their own ways integral to having a secure environment in which all our citizens can live."

Davis paid tribute to the influence that Lonnie Williams, the long-time Executive Director of Boys Harbor, had on him. Williams and he had worked together on a task force appointed in the aftermath of the Central Park jogger rape to review security in the park. Williams urged, and the task force ultimately concluded, that a successful security program required participation of the community, and facilities and programs for young people, in addition to the police.

"To the extent people feel that they have a stake in society, they will want that society to succeed," Davis noted. He added: "As essential as strong and smart policing is, if on an ongoing basis we want a safe society, another challenge is how — whether it be through better parks and physical spaces, educational and career opportunities, or other steps — to give more people the sense that they have such a stake."

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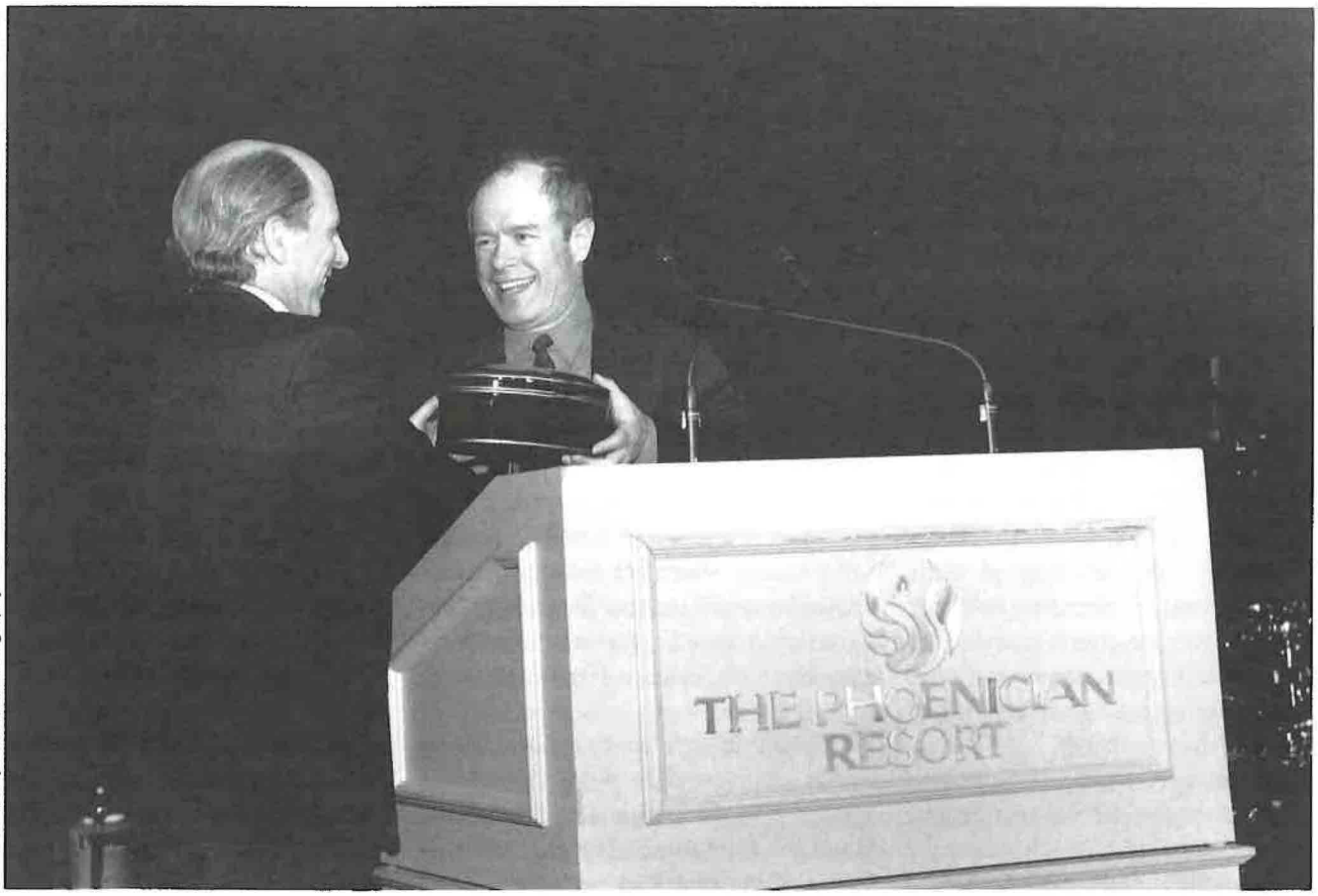


Photo courtesy Randall Photography

Richard David receiving the Whitney North Seymour Award from Council President Steve Edwards at the Winter Bench and Bar Conference

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