Federal Bar Council News

December 2001 www.federalbarcouncil.org Vol. VIII, No. 5

Focus On:

Judge Weinstein

By Magistrate Judge Steven M. Gold and Peter G. Eikenberry

Those who have litigated before Judge Jack B. Weinstein know the feeling well. His eyes start to sparkle, the corners of his mouth reveal the beginnings of a smile, and you know you are on the legal edge. Judge Weinstein has decided upon a just result and a way to reach it, and principles of law you thought you completely understood are about to be applied in an innovative way that never occurred to you before.

Senior United States District Judge Weinstein celebrated his 80th birthday and his 33rd year on the bench of the

(continued on p. 2)

Developments

Annual Thanksgiving Luncheon Honors The Public Service And Mary Jo White

By Steven Flanders

In a fitting tribute that was both somber and celebratory, the Federal Bar Council conferred the Emory Buckner Medal on Mary Jo White at the annual Thanksgiving Luncheon on November 22. Both the setting and the comments of the distinguished speakers conveyed a message that was the largest possible: Ms. White was honored as exemplar of the central importance of a lawyer's work in the public service in difficult times.

Reflecting everyone's awareness of tragic events this season, the proceedings opened in even more solemn fashion than usual. The National Anthem was magnificently sung by Sergeant Danny Rodriguez of the New York City Police Department, after the colors were presented by a Marine Corps Color Guard. Luncheon Chair Barbara S. Gillers then drew the large gathering to order.

Federal Bar Council President Kevin Castel introduced former FBI Director Louis J. Freeh by reminding the audience of the FBI's anti-terrorism programs developed under his tenure that well positioned our nation to respond to the

(continued on p. 20)

Legal History

Attorneys In The White House

By C. Evan Stewart

Billy Wilder, the brilliant screenwriter and director, was not a good historian. In Wilder's wonderfully funny movie "The Fortune Cookie," shyster lawyer "Whiplash Willie" Gingrich, played by Walter Matthau, utters a classic line: "Lincoln — great president, lousy lawyer."

As readers of this column will know (see *Federal Bar Council News*, February 1998), in my view Lincoln was indisputably a great lawyer (and, of our presidents, the most able trial lawyer).

(continued on p. 14)

Inside:

Second Circuit Tips 2
Focus On: Judge Colleen McMahon 5
New Appointments 6
In Memoriam: Jeffry H. Gallet 7
The USA PATRIOT Act 8
"Adjudicated On The Merits" 10
Criminal Practice Institute 11
1st Decade Committee Holds Program 12
9/11 Relief Fund 13
Science In The Courtroom 14
Judicial Conduct Committee 14
Magistrate Judges In The Second Circuit 24

Judge Weinstein

(continued from p. 1)

Eastern District of New York this year, yet the sparkle in his eyes and the warmth of his smile remain at full voltage. Despite taking senior status in 1993, Judge Weinstein continues to carry a full docket, presiding over some of the court's most complex pending cases, and inspiring his colleagues with his strong moral sense, his creativity, and his prodigious contributions to legal scholarship.

Judge Weinstein received his law degree from Columbia University in 1948, and began his legal career as a law clerk to New York Court of Appeals Judge Stanley Fuld. After a brief stint in private practice, Judge Weinstein joined the Columbia law faculty. Clearly not the type to be content in an "ivory tower" removed from real-world problems, Judge Weinstein served as the chief drafter of the New York Civil Practice Law and Rules and a member of the Advisory Committee that produced the Federal Rules of Evidence.

In 1963, Judge Weinstein took a sabbatical from full-time teaching to serve as County Attorney for Nassau County, where fellow Senior District Judge Eugene H. Nickerson was the County Supervisor. President Lyndon Johnson, acting upon the recommendation of Senator Robert F. Kennedy, appointed Judge Weinstein to the federal district court bench in 1967.

Father's Role

Although he has worked beside noted jurists, leading academicians,

From Circuit Clerk Roseann B. MacKechnie

Second Circuit Practice Tips: Mediation

Every civil appeal in the Second Circuit in which all the parties are represented by counsel is required to go to CAMP (Civil Appeals Management Plan). The Staff Counsel in the Second Circuit (Frank Scardilli, Stanley Bass, and Lisa Greenberg) are impartial mediators who try to promote agreements acceptable to all parties and educate the parties on the law and practice in the Second Circuit. They also encourage each side to understand the arguments, needs, and concerns of the other. In addition, they help to resolve procedural problems informally and issue scheduling orders to promote expeditious case disposition.

Staff Counsel will issue a notice/order of a pre-argument conference to all counsel within a few days after receiving the case. That notice will provide counsel with the conference time and place and the requirements of attorney attendance, preparation, and settlement authority. Conferences are usually scheduled 30-60 days after the case is first docketed in the Second Circuit and well in advance of the date appellant's brief is due, and often before the record on appeal is due. This avoids substantial investment in the appeal that could hinder or preclude a willingness to settle.

About two-thirds of all conferences are held at the Foley Square Courthouse; some are held at other locations within the circuit. The remainder are by teleconference. Initial conferences are generally scheduled for 1 to 1 1/2 hours. Parties do not normally accompany counsel at the initial conference, but Staff Counsel may permit or require their attendance in a given case. Approximately 20% require an additional conference, and most require additional telephone conversations.

At the conclusion of each conference, Staff Counsel may — when they deem appropriate — offer a non-binding advisory opinion on the merits and other aspects of the case, including a recommendation for settlement or withdrawal. The views, opinions, and recommendations expressed by Staff Counsel are their own and do not necessarily reflect those of the court. Parties and counsel are under no compulsion to accept any opinion or recommendation or to reach any agreement or settlement.

All matters discussed at a conference are confidential. They are not reported or otherwise communicated by Staff Counsel to the court or to unauthorized third parties; all other participants are similarly enjoined.

If settlement or withdrawal has been achieved, the parties usually close the case by stipulating to dismiss with prejudice. As appropriate, Staff Counsel may also issue revised scheduling orders, ask for follow-up discussions among counsel, instruct counsel to consult with clients and report the results, or return the case to the Clerk's Office for processing. For questions relating to CAMP, call 212-857-8760.

prominent political leaders, and esteemed members of the bar, Judge Weinstein identifies his most important mentor as his father, Harry Louis Weinstein. Harry Louis Weinstein worked in sales for National Cash Register, and had his office on Atlantic Avenue in Brooklyn. The judge describes his father as a man who worked extremely hard to provide a stable home for his family while maintaining an impish, prankster's sense of humor. To this day, Judge Weinstein revels in the coincidence that, as an Eastern District judge, he serves the same "territory" over which his father had responsibility as a sales manager for NCR.

Judge Weinstein's experience drafting rules of procedure and evidence undoubtedly served him in good stead during his tenure as the Eastern District's chief judge from 1980 to 1988. While serving as chief judge, Judge Weinstein oversaw the issuance of local rules and standing orders designed to encourage practicality and civility during pre-trial proceedings. Some of those rules and standing orders have found their way into the Federal Rules of Civil Procedure, and others remain part of the local civil rules to this day. These include Local Civil Rule 72.2, providing for the assignment of Eastern District civil cases as a matter of course to magistrate judges for all non-dispositive pre-trial purposes, and Local Civil Rules 26.5 to 26.7 and 30.3 to 30.7, governing various aspects of pre-trial discovery.

A Great Teacher

Throughout his career Judge Weinstein has continued to write about the law from an academic as well as a practical perspective, and has continued to teach at Columbia and other law schools. The judge is a great teacher on the bench as well. During a long trial that ended this year, he is reported to have stepped down from the bench to grasp the chalk and utilize a blackboard set up by counsel to chat with counsel and the jury. In the following tribute to his friend, the late Columbia Law School Professor Harold Korn, the judge probably best captured his own teaching style in the courtroom (if you substitute the word "courtroom" for "classroom," the word "judge" for "professor," and the word "counsel" for "students"):

"His style in the classroom was relaxed and charming, full of soft wit as well as profound insights, never overbearing, never putting down his students. If a typology of law teaching were to be devised it might start somewhat this way:

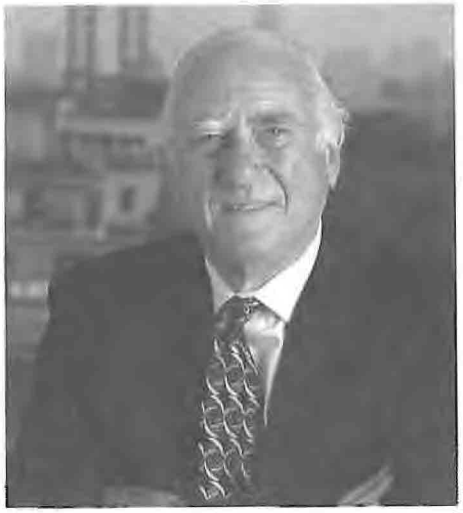
"1. The camp counselor approach, with the professor and the students walking through the legal forest together, admiring their fascinating surroundings and jointly trying to understand.

"2. The hammer and anvil method, with the professor as smithy pounding the students until they see things exactly the right way — his or hers.

"3. The Moses technique, where it is obvious that the Professor either is God, or has the word directly from God and the students' main problem is to suppress awe sufficiently to listen.

"He fell mainly into the first category. Students and professor worked through the difficulties together."

A list of the judge's books, articles, and speeches runs dozens of pages, and includes his highly regarded and widely read treatises on evidence and procedure, as well as articles and speeches on subjects such as managing mass tort litigation with empathy for individual claimants, evaluating the admissibility of expert testimony, ameliorating the harshness of the sentencing guidelines, and reconsidering the wisdom of the "war on drugs."



Judge Weinstein

Judge Weinstein's academic interests have clearly influenced the way he goes about deciding cases. The judge has brought his innovative case management procedures and creative applications of traditional tort principles to such modern problems as compensating the countless victims of asbestos, DES, and Agent Orange, deciding whether gun manufacturers should be held liable for shooting deaths, and determining when tobacco companies should be required to reimburse health insurance providers for benefits paid to insured smokers with lung disease.

An Activist

Some observers have criticized Judge Weinstein's activism, complaining that he is too quick to contort the law to achieve results of his own choosing. The judge has no qualms about his reputation as an activist, and acknowledges that adherence to precedent, while important, is not his first priority. Rather, Judge Weinstein believes that judges should draw upon their life experiences, trust their judgment about right and wrong, and strive to reach just results, even if

(continued on p. 4)

(continued from p. 3)

those results do not readily flow from the most obvious and literal reading of applicable case law.

His philosophical approach is grounded in his scholarly work. For instance, he believes that judges in Vichy France and the Third Reich erred in enforcing the law strictly as written, and he expounded upon this theme in a law review article about such judges. The judge's "activism" is, perhaps, less a reflection of any specific agenda than the product of a deeply held conviction that judges must apply the law with compassion and respect for the individuals involved in their cases.

The judge has found ways of keeping the needs and concerns of individual claimants in mind even when managing large-scale class actions. Speaking at a celebration of his 80th birthday hosted by Brooklyn Law School, Judge Weinstein declared:

"No matter how routine or how massive or complex the case, justice is ultimately measured by how it affects the lives of real individuals as well as institutions. If law cannot make lives better — or at least prevent unnecessary harm — then it has failed . . . . It is possible for disinterested jurists to administer sound substantive and procedural law both efficiently and humanely. When judges and lawyers employ their sensitivity and imagination, the law can have a human face even in mass cases."

Judge Weinstein believes that, during his three decades on the bench, our legal system has had its greatest impact upon society by vigorously enforcing civil rights. He explained that the adoption of the federal rules led to plaintiffs being permitted pre-trial discovery and to having access to class action procedures which acted as a catalyst leading to the democratization of the legal system. The judge believes our legal system's most important contribution has been to promote greater tolerance among persons of different races, ethnic backgrounds, genders, and sexual preferences. According to Judge Weinstein, our system's most pressing goals for the future include reducing the harshness of criminal sentences, increasing funding for lawyers who represent indigent clients, and encouraging foreign and international tribunals to aspire to the principles of due process and equal access to justice that are the hallmarks of the American legal system.

Courteous Demeanor

Although he is in absolute command of his courtroom, he never departs from a splendidly courteous demeanor. In our interview, he told us that in more than 30 years on the bench, he has "never had a problem with a lawyer." He stated that once, when former Chief Justice Burger was voicing some concern about lawyers in the judge's presence, he felt the need to tell the Chief Justice that the only problem with the lawyers was that they were too good at presenting the various issues to be determined — not that they were guilty of misconduct.

His own day to day administration of a demanding docket seems effortless, although he still works very hard. When asked how a new judge could learn to determine matters expeditiously after coming from a world of private practice with hard deadlines — into a judicial position with lifetime tenure and few such deadlines — the judge explained that he, in consultation with his law clerks, sets internal working deadlines for every matter according to its complexity and urgency — possibly ten minutes for one task or matter and one year for another.

Landmark Cases

When Judge Weinstein was asked which of his many landmark cases he considered to be the most significant, he replied that his most important case was always the one "on deck." As his mind turned to the next significant matter on his docket, we saw his eyes start to sparkle, and the corners of his mouth reveal the beginnings of a smile.

Calendar of Events

Science In The Courtroom
500 Pearl Street Courthouse
February 11, 2002

Winter Bench & Bar Conference
Westin Rio Mar in Puerto Rico
February 16-23, 2002

U.S. Supreme Court Admission Ceremony
Washington D.C.
March 4, 2002

Focus On:

Judge Colleen McMahon

By Peter G. Eikenberry

Judge Colleen McMahon of the Southern District of New York started out as a theater major at The Ohio State University in her hometown of Columbus, Ohio. But she quickly calculated that the odds were against steady work in such a career. So she decided to become a lawyer, like her father, a founding member of the Columbus firm of George, Greek, King & McMahon (now merged with Baker & Hostetler). This change of direction altered her curriculum (she ended up majoring in Political Science, and then enrolling at Harvard Law School), but not her plans about where she would live and work. As soon as she graduated from Harvard, she moved to New York City, where she took her first — and only — law firm job, at Paul Weiss Rifkind Wharton & Garrison.

"It would probably be more accurate to say that I moved to Paul Weiss," Judge McMahon remarked in our interview. She became the first woman partner in the Litigation Department in 1984 — elected, she proudly notes, shortly after the birth of her daughter, Katie, the oldest of her three children. While at the firm, Judge McMahon tried securities, employment discrimination, and general commercial cases. She also did a fair amount of work with various bar groups, much of it focused on court reform and the status of women in the profession.

The Jury Project

She believes her most important contribution to the legal profession was her work on The Jury Project, which changed forever the way jurors are called, selected, and treated in the New York State courts. Judge McMahon was appointed by Chief Judge Judith Kaye to chair the project and was the principal author of its acclaimed report, which was released in April 1994. Among the reforms that have been carried out as a result of The Jury Project are the "one day-one trial" rule, which limits the amount of time that jurors spend as members of the venire in all but two of New York's 62 counties, and the abandonment of "permanent qualified" lists from which the same individuals were selected for jury duty over and over again. Another reform, one perhaps less popular with the bar, was the elimination of occupational exemptions, which made lawyers (and lots of other New Yorkers) eligible for jury service. All in all, New York's jury system has become much more juror friendly and much more democratically comprised as a result of The Jury Project.

In 1995, Judge McMahon left Paul Weiss for the state trial bench, where she spent three years in Manhattan's Criminal Term, trying felonies. Her criminal experience in the state courts has proved invaluable since she was appointed to the federal bench in October 1998.

Judge McMahon's brisk demeanor and no-nonsense insistence on adherence to the rules are designed to move cases

(continued on p. 6)

Editors

Editor-in-Chief
Charles C. Platt

Managing Editor
Steven A. Meyerowitz

Editor Emeritus
Steven M. Edwards

Board of Editors

Brian M. Cogan
Steven Flanders
Bennette Kramer
Stephen L. Ratner
Stacey Creem
Bruce A. Green
Kevin J. O'Brien
Nancy L. Savitt
C. Evan Stewart
Peter G. Eikenberry
Stephen M. Kennedy
Marjorie J. Peerce
Hon. Lisa Margaret Smith

Federal Bar Council News (ISSN 1075-8534) is published February, April, June, October, and December for $7.50 per year by the Federal Bar Council, 370 Lexington Avenue, Suite 1012, New York, N.Y. 10017-6503, (212) 883-1777. Periodicals postage paid at New York, N.Y. POSTMASTER: Send address changes to Federal Bar Council News, 370 Lexington Avenue, Suite 1012, New York, NY 10017-6503. Copyright 2001 by Federal Bar Council. All rights reserved. This publication is designed to provide accurate and authoritative information but neither the publisher nor the editors are engaged in rendering advice in this publication. If such expert assistance is required, the services of a competent professional should be sought. Web site: www.federalbarcouncil.org.

(continued from p. 5)

rapidly to disposition. Her mentor on the bench has been Judge Lewis Kaplan, who was also her mentor at Paul Weiss, and she credits him with "a 25 year tutorial that continues to this day." Judge McMahon has adopted Judge Kaplan's rule requiring lawyers to appear for a status conference within 45 days of the institution of a case, and she is pleased with the results. Lawyers who have not previously appeared before her may show up unprepared, but those who know the ropes come ready to talk about the merits and about damages. These "head start" conferences often identify jurisdictional defects or cases that can readily be disposed of on motion. Judge McMahon finds that the early conference leads to attorney cooperation over scheduling, as well.

In the three years since she arrived at the White Plains courthouse, the substantial civil motion backlog has been eliminated, and the resulting civil trial backlog is being dealt with by creative scheduling and "extremely cooperative" lawyers. Lawyers know that they must come to trial prepared to pick their juries, open and put on their first witness, with no "time out" for post voir dire settlement discussions. As a result, most civil cases settle before jury selection — a result the judge favors because she knows from The Jury Project that jurors hate beings used as pawns in the settlement process. Cases that don't settle are tried quickly, "so the jurors can get on with their lives." She generally finds that it takes lawyers about 60% of the time they estimate to try a case in her courtroom.

Judge McMahon says that the best part of her job is "the give and take with well-prepared lawyers." She is happiest while on trial, and while she confesses that she sometimes wants to "jump over the bench and do the cross myself," she contents herself with repartee with counsel and lots of communication with the jurors, for whom she has a special passion. Although she misses daily contact with her many friends in Manhattan, she is delighted with the way she has been welcomed in White Plains and laudatory about the collegial atmosphere in the northern courthouse.

New Appointments

Judge Parker Takes Circuit Seat

By Stacey Creem and Christopher Schwartz

Judge Barrington D. Parker joined the U.S. Court of Appeals for the Second Circuit in October after his nomination by President George W. Bush was approved unanimously by the U.S. Senate. He will fill the seat that was vacated when Chief Judge Ralph K. Winter took senior status. Judge Parker's appointment to the Second Circuit is merely the latest chapter in an impressive legal career.

Judge Parker was appointed to the U.S. District Court for the Southern District of New York by President Clinton in 1994. He has presided over an array of both complex and high profile cases and has earned a reputation as an exceedingly fair judge who works hard to resolve all matters before him with both thoroughness and expediency.

Commercial Litigation

Before taking the federal bench, Judge Parker built a 23-year career as a litigator specializing in general commercial litigation. He was a partner at Morrison & Foerster from 1987 to 1994 as well as with Parker Auspitz Nessemann & Delehanty from 1977 to 1987. He spent seven years as an associate with Sullivan & Cromwell from 1970 to 1977. Prior to his commercial practice, Judge Parker served as a law clerk for Judge Aubrey Robinson of the United States District Court for the District of Columbia.

Judge Parker received his B.A. degree in History from Yale College in 1965 and went on to earn his L.L.B. degree from Yale Law School in 1969. He continues to maintain strong ties with Yale University, serving a six-year term as a successor trustee for the Yale Corporation, the University's governing board, since July 1999.

During his career as a practicing attorney, Judge Parker took an active role in community service. He served as Vice-President of the NAACP Legal Defense and Education Fund and as President of the Board of the Harlem School of the Arts. He has also served as a board member of the Visiting Nurse Service and of the American Arbitration Association. As a member of the board of the New School for Social Research, Judge Parker is the former chair of the South Africa Legal Services and Education Project, the Governance Institute, the Greenwich Academy and the Institutional Policy Committee. In addition, despite his busy schedule as a judge, Judge Parker has served on several judicial committees, including the Judicial Conference Committee on Security and Facilities, the Second Circuit Space and Facilities Committee, and the Southern District of New York Committees on Magistrate Judges, Bar Liaison, House and Space, and the Library.

Family Tradition

Behind his ascension to the heights of the legal profession is an extensive

family tradition in the law. Judge Parker's father, Barrington Parker, Sr., was appointed to the U.S. District Court for the District of Columbia by President Nixon in 1969. Before his judicial appointment, Barrington Sr. practiced law with his own father, George A. Parker. George Parker practiced law, had his own law firm, and, in 1931, founded the Robert H. Terrell School of Law in Washington, a school devoted to providing African American law students with a legal education.

Judge Parker and his wife, Toni Trent Parker, have three daughters — Christine, Kathleen and Jennifer. Ms. Parker is the director of Black Books Galore, a distributor and promoter of African American children's books. She is the daughter of William J. Trent, Jr., one of the founders of the United Negro College Fund, who also served as that organization's Executive Director.

New Appointments

Lois Bloom A Magistrate Judge

By Stacey Creem and Louis Barragan

Lois S. Bloom has been sworn in as U.S. Magistrate Judge for the U.S. District Court for the Eastern District of New York. Judge Bloom comes to the bench with a distinguished career in the public sector.

Prior to her appointment, Judge Bloom served as Senior Staff Attorney for the Pro Se Office of the U.S. District Court for the Southern District of New York. During her 13 years as Senior Staff Attorney, Judge Bloom oversaw the review of every pro se case commenced in the Southern District. In 1999 alone there were over 2,000 pro se



Magistrate Judge Bloom

cases filed in the Southern District. Judge Bloom also administered the Pro Bono Panel for appointment of counsel in civil cases. Judge Bloom's work in the Pro Se Office has provided her with invaluable experience, particularly in the areas of civil rights, habeas corpus and employment discrimination.

From 1985 to 1988, Judge Bloom served as Staff Attorney for The West Side SRO Law Project, representing indigent tenants of Single Room Occupancy housing both as a litigator and as a lobbyist. Judge Bloom also has lectured in judicial externship programs at New York Law School and Columbia University School of Law and as an adjunct professor for New York Law School.

Judge Bloom was admitted to practice in the State of New York in 1986. She also is admitted to practice in the State of New Jersey and in the Southern, Eastern, Northern and Western Districts of New York. Judge Bloom is a member of the Association of the Bar of the City of New York and was honored by the United States Court of Appeals for the Second Circuit with the court's Merit Award in 1988, 1991 and 1993.

Judge Bloom received her bachelor's degree from the State University of New York at Stony Brook with honors in 1981 and her law degree from the Buffalo Law School in 1985.

Judge Bloom's advice for attorneys arguing in her court is, "Be prepared, and be courteous to the person on the other side of the aisle."

In Memoriam

Jeffry H. Gallet

By Martin Minkowitz

Jeffry H. Gallet died on April 20, 2001. He was my friend; actually many people were proud to call Jeff their friend. I knew him for all of his professional life. Thirty years ago, we co-authored our first book. Jeff would rarely mention "Rent Stabilization and Control Laws of New York" except to note that fortunately he and I probably had the only two remaining copies.

Jeff became a noted authority in cooperative housing law representing a significant percent of the FHA 213 and Mitchell-Lama cooperatives in the City. It was from that practice that he made his big change of life decision to become a jurist from Civil Court to Family Court to Bankruptcy Court; he loved the work and the challenge. He was good at it and everyone knew it. He died a Federal Bankruptcy Judge of the Southern District of New York at the young age of 58.

Respected by the bench and bar for his work as a jurist and his prolific writings, his columns in the *Law Journal* were clever and witty. His text books are educational and authoritative. But I miss the weekly e-mails of assorted nonsense that he sent to his select group of people who were uplifted in the midst of a tedious day by this thoughtful interruption. He once wrote:

(continued on p. 8)

(continued from p. 7)

"As fate would have it, my first trial as a judge was a landlord-tenant case. As a newly appointed Civil Court Judge, I spent my first morning filling out forms and having my picture taken, and in the afternoon was assigned to take over a landlord-tenant trial part from a judge who had been taken ill and gone home.

"With more than a little trepidation, I ascended the bench and instructed my court officer to call the first case. She called a case and the landlord's lawyer entered from the back of the room with his client, followed by the tenant, who was appearing without counsel. Even before he reached his seat, the lawyer began to speak.

"'Judge, I demand a trial. My client has been waiting for his day in court. I won't be put off any further; I am entitled to a trial.'

"'Counsel,' I said, 'you are in luck. This is my first case. I'll give you a trial right now. Call your first witness.'

"He stared. 'Now?'

"'Yes, now.'

"'Judge, could I have a moment with my client?'

"'Certainly.'

"The lawyer and the parties stepped into the corridor outside the courtroom. In less than five minutes, the lawyer returned and announced that, not only had he settled that case, but he had also settled the next case on the calendar and wished to put both settlements on the record.

"I didn't miss the point, and what I learned that day has served me well for all the years I've been a judge: the words which are most persuasive in encouraging a settlement are, 'Counsel, call your first witness.'"

Jeff graduated from Brooklyn Law School where he later was a professor of law. He also taught as an adjunct professor of Political Science at Wilkes University and was an adjunct professor of law at St. John's University. When I asked him to accept a nomination to the Board of Brooklyn Law School's Alumni Association and then, later at one of our lunches, to a nomination as its President, he shyly said there are lots of others who could do it better. He was a great President. He found the time and made things happen. He was proud of his school and made others feel it. When my wife, Carol, and I were visiting with him in the hospital, we told him of the progress the school was making in constructing new dorms two blocks from the school with parking facilities below. Jeff said that was great and we should save him a spot for when he comes back to teach his class. He got people involved as he had done in involving me and many others in the American Jewish Congress, which he served as its President of the Metropolitan Council.

He fell in love and married Bonnie Cohen and began a new family. With her two children, he had three children whom he adored. He could talk endlessly of the virtues of Sarah, his daughter.

Jeff was humble in his way — but not timid. Kind and considerate; it is easy to say he was just a nice guy. He is missed.

Privacy Law

The USA PATRIOT Act

By Nancy L. Savitt

In the wake of the September 11 terror attacks on the United States, Congress adopted the USA PATRIOT Act. A number of changes in law enforcement powers and procedures are contained in the new law, several of which have been criticized by civil liberties groups. These include provisions dealing with electronic and computer-related issues.

Many of the changes brought about by the new statute permit law enforcement officials to obtain information that they could not obtain previously. These changes include, for example, the section of the law permitting investigators to apply for a wiretap order for voice communications to investigate felony violations of the Computer Fraud and Abuse Act (governing hacking, viruses, and computer fraud), whereas previously no wiretap was available. This provision sunsets on December 31, 2005, unless renewed by Congress.

New Rules

The law also permits law enforcement to use less onerous procedures than were previously available to obtain information. It is helpful to first briefly set out a truncated list of possible law enforcement tools. At the top of the hierarchy applicable here is a wiretap order, followed by search warrants, pen register and trap-and-trace orders ("pen/trap" orders), and subpoenas. Wiretap orders are particularly onerous for law enforcement to obtain due to the requirements of the wiretap statute and the judicial scrutiny they engender. Search warrants are relatively easier to obtain, although they still require a judicial finding of probable cause. Pen/trap orders are used for the prospective collection of non-content "traffic" information associated with communications, such as the phone numbers dialed by a particular telephone. In order to obtain such an order, law enforcement simply has to certify to a judge that the information sought is "relevant to an ongoing criminal

investigation," and the order must issue. Finally, law enforcement can issue subpoenas without any prior judicial oversight at all.

One major concern of the public interest sector is that the law moves away from or reduces judicial review in a way they fear could be abused or endanger civil liberties. The government claims that many of the changes simply acknowledge the realities and practicalities of this new digital world in which we are living, where a single communication — such as an e-mail — can pass through several communications providers in numerous judicial districts, or where the type of order that was needed was dependent upon irrelevant distinctions such as the nature of media in which the communications are stored (voice messages stored on an answering machine vs. through a third-party voice-mail system) or the company that provides the communication service (Internet service provider vs. a cable company).

For example, the Cable Act gives protection to consumers' viewing habits, requiring that cable companies give prior notice to consumers whenever law enforcement wants to obtain cable company records related to them. Because of this prior notice provision — very different from the other tools discussed above — law enforcement rarely sought such information during the course of criminal investigations. But in a world where cable companies now provide Internet access and long-distance telephone service, law enforcement felt unduly constrained by the Cable Act's restrictions. The new law clarifies that the Cable Act's protections apply only to traditional cable services, and investigatory tools and procedures applicable to communications services apply with equal effect to cable companies providing those communications (Internet and telephone) services. This provision is not subject to a sunset.

Voice Messages

One provision that addresses similar content in different media involves voice messages. Under previous law, investigators arguably had to apply for a wiretap order to obtain access to voicemail stored with a third party provider. Messages kept on a home answering machine could be obtained via a search warrant, as could stored non-wire communications such as e-mail stored with a third-party provider. Under the new law, investigators can use a search warrant to obtain voicemail and other electronically stored wire communications. This is subject to the December 2005 sunset.

Another search warrant provision permits the issuance of a nationwide search warrant for unopened e-mail less than six months old, rather than having to apply in the judicial district in which the e-mail service provider is located. This, too, is subject to sunset.

Pen/Trap Orders

The new law expands law enforcement authority to use pen/trap orders, particularly in the online world as follows (no sunset):

(1) by clarifying that law enforcement may use pen/trap orders to trace communications on the Internet and other computer networks

The Department of Justice Guidance to field offices states that although pen/trap orders can be used to obtain the to/from address information in an e-mail, they "cannot, however, authorize the interception of the content of a communication, such as words in the 'subject line' or the body of an e-mail." Because the new law itself does not define "content," civil liberties groups are particularly anxious about the application of this provision. They point out that law enforcement could use pen/trap orders to determine the Web sites visited by a particular person, or possibly the search terms that person inputs into search engines.

(2) by giving pen/trap orders issued by federal courts nationwide effect

Previously, the order only applied within the jurisdiction of the particular court issuing the order, necessitating repeated applications across the country to trace a single communication that flowed through numerous providers. Now that will not be necessary, but the orders frequently will not name the subsequent providers that will be subject to the order (since their identities will only become clear during the course of the investigation as the subject communication is traced back to its source). Civil liberties groups deplore the reduced role of the judiciary in this process, as law enforcement officials can proceed on their own to trace back the communication without continuing judicial oversight. They strongly recommend that service providers insist on their new statutory right to obtain from law enforcement a written/electronic certification that the order applies to that provider.

(3) by requiring law enforcement authorities to file a special report with the court whenever they use a pen/trap order to install their own monitoring device (such as the FBI's so-called Carnivore device) on computers belonging to a public provider

The scope of subpoenas also has been expanded by the new law. Law

(continued on p. 10)

(continued from p. 9)

enforcement now can more easily obtain Internet (and other communications service) account information that can be used to identify and trace account holders. Under prior law, subpoenas could be used to get limited information, such as customer name, address, telephone billing records, and means of payment. In the online world, where subscribers often give false identifying information, law enforcement frequently found the subpoenaed information unhelpful. Under the new law, in changes specifically designed to enhance law enforcement's ability to uncover the real identity of users and trace their online activities, law enforcement now can obtain via subpoena credit card or bank account number or other form of payment information for the communications service, records of session time and durations, and IP addresses (this aids in tracing Internet communications). This provision is not subject to sunset.

With respect to voluntary disclosures to law enforcement, the new law permits ISPs and other communications providers to voluntarily disclose customers' content (e.g., e-mail communications) and non-content (e.g., login data) records to investigators in expanded circumstances, such as in emergencies involving an immediate risk of death or serious physical injury to any person, and to protect their own rights and property (without any obligation to review communications to find qualifying disclosures). This is subject to sunset.

Finally, earlier versions of what became the new law labeled as "terrorism" computer crimes that many policy groups argued were simply garden-variety hacking crimes, with no terrorism connection at all. As a result, the new law as enacted generally does not use the "terrorism" label in this context, but does amend the Computer Fraud and Abuse Act by increasing penalties for hackers who damage protected computers (from a maximum of 10 years to a maximum of 20 years); making clear that a hacker need only intend damage, not a particular type of damage, to violate the statute; adding a new offense for damaging computers used for national security or criminal justice; expanding the statute to include computers in foreign countries so long as there is an effect on interstate or foreign commerce; counting state convictions as "prior offenses" for recidivist sentencing enhancements; and allowing losses to several computers from a hacker's course of conduct to be aggregated for purposes of meeting the jurisdictional threshold. This provision is not subject to sunset.

The way the government uses these new powers and procedures will demonstrate whether there is any cause for the concerns expressed by the civil liberties groups.

Second Circuit Decisions

"Adjudicated On The Merits": From *Schriver* to *Sellan*

By Elizabeth Cronin and Lewis Zirogiannis

The court this year grappled with the issue of what it means for a state court disposition to be an "adjudication on the merits" in the context of federal habeas corpus review and what level of deference the district court is required to give state appellate decisions if they were decided "on the merits."

The issue first arose in *Washington v. Schriver*. In its decision, the court discussed the limitations that have been placed on federal habeas review of state court decisions since the 1996 enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA). The Supreme Court in *Williams v. Taylor*, decided in 2000, clearly stated that AEDPA "placed a new restriction on the power of the federal courts to grant writs of habeas corpus to state prisoners." Prior to AEDPA, federal courts had accorded less deference to state court decisions and would perform a de novo review. For the new, more deferential standard to apply, however, the state court decision on the substantive federal issues must have been decided "on the merits." Such a finding would trigger the more restrictive AEDPA review.

The petitioner in *Schriver* claimed that his federal constitutional claim had not been "adjudicated on the merits" as required by AEDPA because the state court neither cited nor applied federal law. Conversely, the respondent argued that the federal claim had been adjudicated on the merits within the meaning of AEDPA because the issue had been considered and denied by the state court notwithstanding the lack of an explicit reference to the federal constitutional aspects of the claim.

AEDPA changed many aspects of habeas practice, not the least of which was the question of standards of deference to state court decisions. Under 28 U.S.C. 2254(d), federal courts must now apply a higher level of deference when reviewing writs of habeas corpus by prisoners in state custody. But the question that had been left open and now faced the *Schriver* court was how a court should determine whether a state court had decided the case on the merits.

In a nutshell, if the federal court determines that the state court disposition was on the merits, AEDPA deference

applies and a writ of habeas corpus cannot be granted unless the adjudication resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court. If the adjudication was not on the merits, the pre-AEDPA de novo standard of review applies.

So, the *Schriver* court asked whether federal courts must evaluate only the state court result instead of the "reasoning process" or whether the state court must explicitly state the federal law on which it based its decision.

The Second Circuit acknowledged that Congress had sought to reduce federal court supervision of the state process and increase deference to state judicial decisions. In fact, the court noted that the Supreme Court made this point clear in *Coleman v. Thompson*, a pre-AEDPA decision. The *Coleman* Court held that federal habeas courts have no power to tell a state court how it must write its opinions.

But in the Supreme Court's *Williams* decision, the Court expressed the belief that applying AEDPA deference required a thorough explanation by the state court of how it disposed of the federal claim. The *Williams* Court determined, and some circuit courts followed the logic, that efficiency and accuracy, as Congress intended in enacting AEDPA, are compromised when a state court disposes of a case involving federal claims without explanation.

Thus, if the state court offers no explanation, the disposition is not "on the merits."

Outcome Determinative

The Second Circuit in *Schriver* left open the issue of "adjudicated on the merits," because the claim was meritless under either standard, but it took up the issue again this year in *Sellan v Kuhlman*. Unlike in *Schriver*, the outcome in *Sellan* depended on what standard of review the court applied. Sellan's ineffective assistance of counsel claim was determined by the state court to be meritless, but that court relied solely on state case law. Sellan raised the same claim in a federal habeas petition which was denied because the claim did not give rise to a violation of clearly established federal law within the meaning of AEDPA. The district court failed to address whether the state court decision was an adjudication on the merits.

The court affirmed the denial of the writ but held that Sellan's claim did give rise to a violation of clearly established federal law and that the state court did not unreasonably apply federal law.

The court held that despite a failure by the state court to cite to federal cases, Sellan's claim was adjudicated on the merits, and that the court would be ignoring a clear Congressional mandate if it required a state court to explain its decision because AEDPA does not require it. The court noted that the job of federal courts in habeas review is to examine the results of the state court decision, not its reasoning. Therefore, the federal court simply determines if the state court disposition is contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court.

The Second Circuit also stated that it is the law itself, not the specific theory or application of the law argued by counsel, that must be clearly established. In *Sellan*, the specific argument was that trial counsel was ineffective based upon his alleged violation of a state appellate case. The court disagreed with the district court's statement that this argument was not based on clearly established federal law. The circuit court, conversely, applied the *Strickland v. Washington* test for ineffective assistance of counsel, which is clearly established federal law. The denial of the writ by the district court was affirmed based upon a finding that the petitioner did not meet the *Strickland* test for ineffective assistance of counsel.

Conclusion

The bottom line after *Sellan* is that while it would be helpful to the federal court reviewing the habeas petition to have had the state court explain its decision and what federal law it relied upon, the federal courts cannot require it.

Editor's Note: Ms. Cronin is Assistant Circuit Executive for Legal Affairs; Mr. Zirogiannis is a Staff Attorney Law Clerk for the Second Circuit..

FBC News

Criminal Practice Institute

By Marjorie J. Peerce

The February 2000 issue of the *Federal Bar Council News* reported that the Federal Bar Council, in conjunction with the New York County Lawyers' Association, had developed a Federal Criminal Practice Institute designed to provide federal criminal practice training to assist women and minority lawyers in qualifying for the Criminal Justice Act panels of the Southern and Eastern Districts of New York. Although there are numerous female and minority lawyers well qualified to represent criminal defendants,

(continued on p. 12)

(continued from p. 11)

many had experience in state practice and did not have sufficient federal experience to enable them to join the federal Criminal Justice Act panels. Thus, the Institute was developed to assist these lawyers in gaining the necessary experience to qualify for the federal panels.

Qualifying For Membership

Since that article appeared, the Institute has taken place twice, with experienced practitioners and judges from the benches of both courts contributing their time and knowledge in an effort to broaden the diversity of the Criminal Justice Act panels in both districts. The results have been very promising. After the first panel in 2000, several participants from the program qualified for membership on the CJA panels and the hope is that these successful efforts will continue.

The Institute was spearheaded by the Federal Bar Council's own Barrie Goldstein, as well as by Norman Reimer and Marina Hogan of the New York County Lawyers' Association. They worked tirelessly to put together the panels and to coordinate the presentations so that the participants would gain the knowledge they needed to join the CJA panels. In recognition of their efforts, they were awarded the Program Chair's Award for the New York County Lawyers' Association's CLE program, selected out of over 100 programs under consideration.

As Southern District Judge Harold Baer said upon presenting the award to the program chairs, when he first learned that one reason there were so few minority lawyers on the panel was due to a lack of federal experience, he thought that a course in federal practice might make a difference. His dream was to have such a program. Judge Baer added that the award recipients "together assembled a faculty of absolutely first rate practitioners and wove a mosaic that was heralded as a major success by all those who had anything to do with the program. . . . The course drew close to 100 men and women . . . . Had the course simply happened my dream would have been fulfilled. The fact that five men and women from that course were selected by the committee, approved by the judges and added to the criminal justice act panel was astounding."

Both the Federal Bar Council and the New York County Lawyers' Association look forward to the Institute taking place on a yearly basis, in continued efforts to diversify further the criminal justice act panels.

FBC News

1st Decade Committee Holds Program

By Stephen Kennedy

The Federal Bar Council's First Decade Committee recently hosted its first program, which was a panel discussion addressing the topic of "Exercising Good Judgment: Tips for Lawyers in Their First Decade of Practice." The discussion featured three distinguished panel members from the federal judiciary: the Honorable Nicholas G. Garaufis of the Eastern District of New York, the Honorable Loretta A. Preska of the Southern District of New York, and the Honorable Stefan R. Underhill of the District of Connecticut.

The panel discussion was preceded by the opening remarks of Federal Bar Council President P. Kevin Castel, who described the recent founding of the First Decade Committee and its purpose of organizing educational and social programs of interest to attorneys in their first ten years of practice. The discussion was moderated by Gregg Weiner, who asked the panel a series of questions concerning such topics as effective oral argument, brief writing, motion practice, and discovery disputes. The audience also asked questions of the panel.

In his remarks, Judge Garaufis said that in oral argument and brief writing, attorneys always should argue their most persuasive points and address the important issues. Judge Garaufis suggested that attorneys consider oral argument as a discussion with the judge in which they have an opportunity to explain their case. He recommended that attorneys try always to respond directly to a judge's question. He also said that counsel should argue in a professional manner and not seek to get the last word in with the court.

Credibility Counts

Judge Preska advised the audience that attorneys should be careful not to harm their credibility with the court. Judge Preska advised that attorneys at court appearances should be fully prepared and absolutely correct on the facts and the law. She said that attorneys should view questions by the court as an opportunity to help the judge decide in their client's favor. She also advised that attorneys learn as much as they can about judges before they appear in front of them. She suggested that attorneys can do this by consulting the judge's rules, asking colleagues about their experiences with the judge, and observing the judge in other cases, especially at trial.

Judge Underhill said that an effective advocate at oral argument addresses the court's questions directly and recognizes that the purpose of a judge's question is to gain understanding on an issue that the judge believes is important. Judge Underhill said that he frequently was surprised at oral argument by how attorneys get caught up in extraneous issues. He said that attorneys should put themselves in the judge's chair by thinking about which facts and law support their case and will help persuade the judge to decide in their favor. He suggested that when necessary, an attorney should be prepared to distinguish for the court unhelpful facts and law. Judge Underhill advised that attorneys should be careful not to stretch a judge's prior decisions to try to persuade the court to rule in their favor.

Succinct Briefs

Each judge urged the audience to write succinct and precise briefs. They advised the audience to use pinpoint citations to the record and cases. They each suggested that attorneys should never overreach in their briefs because they will lose credibility with the court. As for motion practice, the judges suggested that attorneys make bona fide attempts to resolve their disputes before filing motions. Judge Garaufis stated that he found his practice of having the parties appear for pre-motion conferences helpful in working through procedural and other issues. Judge Preska said that no issue should be raised with the judge that has not been discussed at length with opposing counsel beforehand.

Act Professionally

In their concluding remarks, the judges advised the audience to act professionally when advocating their clients' cases. Judge Garaufis said that a significant part of attorney professionalism is to be on time to court and advise the court in a timely manner when that is not possible. Judge Preska reiterated that attorneys should always remember to maintain their credibility with the court. Judge Underhill urged the audience to be professional, prepared, and polite.

The panel discussion on "Exercising Good Judgment" provided an excellent opportunity to understand what attorneys should do to best represent their clients in court. It was a promising beginning to the work of the First Decade Committee.

FBC News

9/11 Relief Fund

By Bennette Kramer

As reported in our October issue, shortly after September 11 the Federal Bar Council formed the Federal Bar Foundation 9/11 Relief Fund and former New York City Police Commissioner Robert J. McGuire agreed to become chair of the fund. Mr. McGuire is especially qualified to take on this responsibility, having a long history of public service.

$30,000 Received

The fund has received $30,000 from about 50 contributors, including large law firms, small law firms, individual lawyers, and judges. The board of the Federal Bar Foundation will make the final determination on distribution of the fund, based on Bob McGuire's recommendation. Although the fund appears small compared to many funds established after September 11, Bob McGuire aims to contribute the money in the fund in a way that will make a difference to an entity or individuals whose needs have otherwise been overlooked.

Factors To Consider

Prior to reaching his recommendation, Mr. McGuire will consider a number of factors. He hopes to find a niche where the money will satisfy specific needs without duplicating the efforts of other organizations. He also will focus on the most efficient delivery of resources, to ensure that the fund reaches those in need.

Although he is in the process of gathering information about prospective recipients, Mr. McGuire has recognized several categories of potential recipients. For example, he has determined that the counseling needs of the families of firefighters, police officers and medical technicians will require a long term effort. He has investigated a program established by two psychiatrists, who are coordinating efforts by volunteer psychiatrists, psychologists and social workers to provide counseling to the emergency worker community and their families.

Second, he is aware that many small business organizations in the World Trade Center area are in danger of going out of business and may not receive adequate funds from other sources. Finally, many families of emergency workers have specific and immediate need for medical treatment that is not otherwise being met. Certainly, there are other potential deserving recipients and Mr. McGuire may recommend them.

We will continue to report on the status of the fund and the plans for its distribution.

FBC News

Science In The Courtroom

There is an upcoming CLE program on science in the courtroom entitled "Scientists on Science: A Primer for Judges on Epidemiology and Engineering." It will be held on Monday, February 11 from 4:30 to 6:00 p.m. at the ceremonial courtroom at the 500 Pearl Street courthouse in Manhattan. The program will cover *Daubert* issues and the presentation of scientific evidence in the courtroom. It is being held for judges, law clerks, and practicing attorneys. Planning committee members for this program include Southern District Judge Loretta Preska and Magistrate Judge Lisa Margaret Smith, as well as Federal Bar Council members Beth Kaufman of Schoeman Updike and Kaufman, and Joanne Gray of Goodwin Procter, LLP.

FBC News

Judicial Conduct Committee

A Committee on Judicial Conduct was formed last year by The Association of the Bar of the City of New York and the Federal Bar Council. Its mission is to receive confidential written complaints from members of the bar regarding the conduct (as opposed to the merits of the decisions) of Second Circuit judges and Eastern and Southern District judges and, where appropriate and with the approval and *ex officio* participation of the presidents of both bar associations, to address such complaints in a constructive, confidential and effective manner.

Persons wishing to submit complaints to the committee should send them in writing to the Committee on Judicial Conduct, c/o President, The Association of the Bar of the City of New York, 42 West 44th Street, New York, New York 10036-6690. All complaints must be signed, but the identity of any person submitting a complaint will be kept confidential and will not be disclosed to anyone other than the members of the committee and the presidents of the bar associations without that person's consent. The committee will review all complaints submitted to it, and may make such inquiries and take such action as it deems appropriate in the circumstances.

The current members of the committee are Zachary W. Carter, Barry Kamins, Bettina B. Plevan, Audrey Strauss, Guy Miller Struve, and William E. Willis. The rules of the committee may be found in the *Second Circuit Redbook* at p. 1066.

Legal History

(continued from p. 1)

But what about our other presidents who were also lawyers? Out of 42 presidents (including the current president), 25 were admitted to the Bar (with five more who studied law, but decided not to pursue a legal career). Which lawyers were great presidents, and which presidents were great lawyers?

Lawyers As Presidents

To answer the first question, we can look to two surveys. The first was conducted by Arthur Schlesinger in 1996, the second was conducted by the Federalist Society and the Wall Street Journal in 2000; their methodologies were essentially the same—polling prominent scholars and collating the responses. Set forth below are the two surveys, with our legal brethren highlighted:

1996 SURVEY

Great:

1. G. Washington
2. **A. Lincoln**
3. **F. Roosevelt**

Near Great:

4. **T. Jefferson**
5. **A. Jackson**
6. **J. Polk**
7. T. Roosevelt
8. **W. Wilson**
9. H. Truman

Above Average:

10. **J. Adams**
11. **J. Monroe**
12. **G. Cleveland**
13. **W. McKinley**
14. D. Eisenhower
15. J. Kennedy
16. L. Johnson

Average:

17. J. Madison
18. **J. Q. Adams**
19. **M. Van Buren**
20. **R. Hayes**
21. **C. Arthur**
22. **B. Harrison**
23. **W. Taft**
24. **G. Ford**
25. J. Carter
26. R. Reagan
27. G. Bush
28. **W. Clinton**

Below Average:

29. **J. Tyler**

30. Z. Taylor
31. **M. Fillmore**
32. **C. Coolidge**

Failure:

33. **F. Pierce**
34. **J. Buchanan**
35. A. Johnson
36. U. Grant
37. W. Harding
38. H. Hoover
39. **R. Nixon**

2000 SURVEY

Great:

1. G. Washington
2. **A. Lincoln**
3. **F. Roosevelt**

Near Great:

4. **T. Jefferson**
5. T. Roosevelt
6. **A. Jackson**
7. H. Truman
8. R. Reagan
9. D. Eisenhower
10. **J. Polk**
11. **W. Wilson**

Above Average:

12. **G. Cleveland**
13. **J. Adams**
14. **W. McKinley**
15. J. Madison
16. **J. Monroe**
17. L. Johnson
18. J. Kennedy

Average:

19. **W. Taft**
20. **J. Q. Adams**
21. G. Bush
22. **R. Hayes**
23. **M. Van Buren**
24. **W. Clinton**
25. **C. Coolidge**
26. **C. Arthur**

Below Average:

27. **B. Harrison**
28. **G. Ford**
29. H. Hoover
30. J. Carter
31. Z. Taylor
32. U. Grant
33. **R. Nixon**
34. **J. Tyler**
35. **M. Fillmore**

Failure:

36. A. Johnson
37. **F. Pierce**
38. W. Harding
39. **J. Buchanan**

[Note: The terms of W. Harrison and **J. Garfield** were so brief that they were not ranked.]

Presidents As Lawyers

In assessing the legal skills and careers of our former political chief executives, they seem to fall into four basic categories. They are as follows:

I. Admitted, but with little or no law practice because of their political careers.

Into this category go presidents Jefferson, Monroe, Tyler, Polk, Fillmore, Pierce, Buchanan, Coolidge, and Clinton. Wilson, who left the practice of law after one year to pursue a Ph.D., should also be placed in this group.

II. Admitted, but with a small hometown practice that served as the basis for their political careers.

Into this category go presidents Van Buren, Hayes (the first president to graduate from law school), Cleveland, McKinley, and Ford.

III. Studied law, but were never admitted.

Into this category go presidents Madison, T. Roosevelt, Harding, Truman (he went to the Kansas City School of Law while a sitting judge!), and L. Johnson.

IV. Presidents who had distinguished legal careers (or who did some interesting things as lawyers).

Into this category go presidents J. Adams, J. Q. Adams, Jackson, Lincoln, Garfield & Harrison, Arthur, Taft, F. Roosevelt, and Nixon. Because Lincoln and Nixon (see *Federal Bar Council News*, June 1997) have previously been featured, the other presidents' legal careers will be highlighted below.

John Adams

Adams was admitted to the Massachusetts Bar in 1758, and soon built up a thriving practice. In 1769, for example, he successfully defended John Hancock against charges that he had illegally smuggled wine into Boston. Adams' most famous case, however, was in representing British soldiers in the aftermath of the Boston Massacre.

On March 5, 1770, British soldiers stationed in Boston were being taunted by an angry mob; the taunting escalated, with multiple objects being picked up and thrown. As tensions became acute, one British soldier suddenly fired his gun, and others followed suit. Three Americans were killed, with eight wounded.

The British soldiers were arrested and charged with murder. Finding a colonial lawyer to defend them proved problematic, until Adams stepped forward and agreed to be their trial counsel. He did so knowing that he would be heavily criticized by his friends

(continued on p. 16)

(continued from p. 15)

and neighbors, and notwithstanding his publicly articulated criticisms of British rule.

The soldiers' commanding officer was tried first, and separately. This proved fortuitous because Adams was able to demonstrate at trial that the soldiers had fired spontaneously without any orders or directive from their officer. Adams thus won his acquittal.

Next came the soldiers, who were tried in mass (eight in all). Adams' skill in jury selection resulted in all prospective jurors from Boston being excused; they were replaced by a jury panel consisting entirely of men from rural Massachusetts who were not as enflamed about the "massacre." Adams countered the prosecution's case by painting a lurid picture of the mob: "a motley rabble of saucy boys, Negroes, and mulattoes, Irish teagues and outlandish jack tars . . . shouting and hazzaing [sic] and threatening life . . . whistling, screaming and rending an Indian yell . . . throwing every species of rubbish they could pick up in the street." And he asked the jurors to stand in the shoes of the soldiers who had been subjected to all forms of verbal and physical abuse — "You expect he should behave like a stoic philosopher, lost in apathy?" After Adams was finished, the jury acquitted six of the soldiers, and found the other two guilty of manslaughter (for which they received brandings on the thumbs and were then released).

Adams, in standing up for a basic tenet of our profession, was vilified by many. For his services at both trials, he received a total of forty guineas.

John Quincy Adams

Adams, upon being admitted to the Massachusetts Bar in 1790, opened a law office in Boston. Unlike his father, he attracted few clients and was not a rousing professional success. Fortunately, because of his political activities and his political lineage (his father was vice president at that time) he left the law by dint of his appointment as Minister to the Netherlands (1794-97).

That appointment led to a succession of increasingly important posts: Minister to Prussia (1797-1801); Massachusetts State Senator (1802); U.S. Senator (1803-08); Minister to Russia (1809-14); Chief Negotiator of Treaty of Ghent (1814); Minister to Great Britain (1815-17); and, Secretary of State (1817-25). In that latter position, Adams was undoubtedly one of our country's most distinguished leaders (e.g., he was the author of the Monroe Doctrine).

Following his controversial election as president in 1824 (see *Federal Bar Council News*, February 2001), Adams' presidency itself was not a great success (witness his ranking), notwithstanding his superb preparation. After losing the rematch against Andrew Jackson in 1828, he went home to Massachusetts. In 1830, Adams became the only former president to be elected as a U.S. congressman (Tyler was elected to Confederate congress). He served with great distinction until he collapsed on the floor of the House in 1848 (he died two days later).

Adams' principal leadership came in the fight against the "gag rule," which had been adopted in 1836; the gag rule tabled without debate any petition critical of slavery. After an unrelenting eight year battle by Adams, the rule was repealed in 1844.

As part of that effort came Adams' most significant contribution as a lawyer. Adams was persuaded to argue before the Supreme Court on behalf of slaves who had mutinied on a Spanish ship (the Amistad) that was transporting them from Africa; the ship ended up on Long Island. Abolitionists took up their cause in opposition to the Van Buren administration, which maintained that the slaves had to be returned to their Spanish owners under the provisions of a 1795 bilateral treaty.

A trial was held in federal court in New Haven (the slaves had been taken to New London, Connecticut). While much of the pretrial maneuverings had been over procedural issues (e.g., if the alleged mutiny took place in international waters, did the U.S. court have jurisdiction), the district judge ruled at trial that the slaves had been born free in Africa, that they had been kidnapped, and therefore they were not "legally" slaves who could be returned as Spanish "property." After that ruling was (basically) upheld by the court of appeals, the Van Buren administration sought review by the Supreme Court (a majority of its justices were, or had been, slave owners).

At that point, Adams (together with a future Connecticut governor, Roger Baldwin) argued for the appellees. Baldwin argued in support of the technical merits of the trial court's ruling, with Adams painting on a broader canvass. More specifically, Adams undertook to ridicule the geo-political basis of the administration's position, especially its interpretation of the 1795 treaty. He also used passionate language (invoked a decade later by Seward and Lincoln in the political arena) to suggest that the Declaration of Independence could not be reconciled with a result of finding against the slaves.

The Court, in contradistinction to its abominable decision in 1856 in the Dred Scott case, issued a narrow ruling (7-1) in favor of the slaves (40 U.S. 518 (1841)). The linchpin of the Court's

ruling was that the 1795 treaty did not define property to include human beings; as such, under international law, the United States had no obligation to return the slaves to Spain.

In November of 1841, the slaves sailed back to Africa (the trip was financed by abolitionists). The Spanish government sought, and continued to seek, compensation from the United States until 1860, when the election of Lincoln made the issue moot.

Andrew Jackson

When Jackson was reading the law in the office of Spruce McCay in Salisbury, North Carolina, he got a reputation as "the most roaring, rollicking, game-cocking, horse-racing, card-playing, mischievous fellow that ever lived in Salisbury." One example of his mischief was his invitations to the town prostitutes to attend the town's Christmas ball — a "joke" for which he received a severe reprimand. Notwithstanding, Jackson was admitted to the North Carolina Bar in 1787, having been adjudged to be of "unblemished moral character." A year later he became the public prosecutor for the western part of the state, before moving on to neighboring Tennessee where his political career flourished. He became Tennessee's first congressman in 1796, and was later elected by the legislature to the U.S. Senate.

Jackson, however, missed his wife and was bored by the pace of the upper body; he resigned after five months. The legislature then appointed him to the Tennessee Superior Court — the state's highest court. Despite his mercurial nature (duels and threatened duels were a regular part of his life at this point), as well as his non-classical education, Jackson proved to be a highly effective and widely-praised jurist over his six year tenure (1798-1804). Besides writing opinions (only five of which have survived), Jacksonian justice on the frontier came in many forms. On one occasion while he was "riding the circuit," an indicted man refused to submit to being arrested, and the sheriff was too intimidated to force the issue. Jackson adjourned court for ten minutes. He went outside and found the man, who was vowing to kill anyone who attempted to take him in. Jackson walked up to him with a pistol in each hand and said: "Now, surrender, you infernal villain, this very instant, or I'll blow you through." Thus confronted, the man relented: "It's no use, I give in." Days later when asked why he had given in so meekly to Jackson after holding off the sheriff and his posse, the now-prisoner said: "Why, when he came up, I looked him in the eye, and I saw shoot, and there wasn't shoot in nary other eye in the crowd; so I says to myself, says I, hoss, it's about time to sing small, and so I did." While on the court, Jackson was elected major general of the Tennessee militia; and that provided the segue into the military career that ultimately placed him in the White House. When he did become president, a Salisbury woman was incredulous: "Jackson? Andrew Jackson? . . . Well, if Andrew Jackson can be president, anybody can!"

James Garfield & Benjamin Harrison

Garfield was admitted to the Ohio Bar in 1860 (while president of a college — the Western Reserve Electric Institute); Harrison was admitted to the Indiana Bar in 1854. What each man shares is a role in the important Supreme Court case of *Ex Parte Milligan*, 71 U.S. 2 (1866).

During the Civil War, Union army officers in Indiana arrested Lambdin Milligan (and other prominent antiwar Democrats), charging a conspiracy to seize munitions and free Confederate prisoners. The defendants were tried before a military commission and found guilty; they were sentenced to hang.

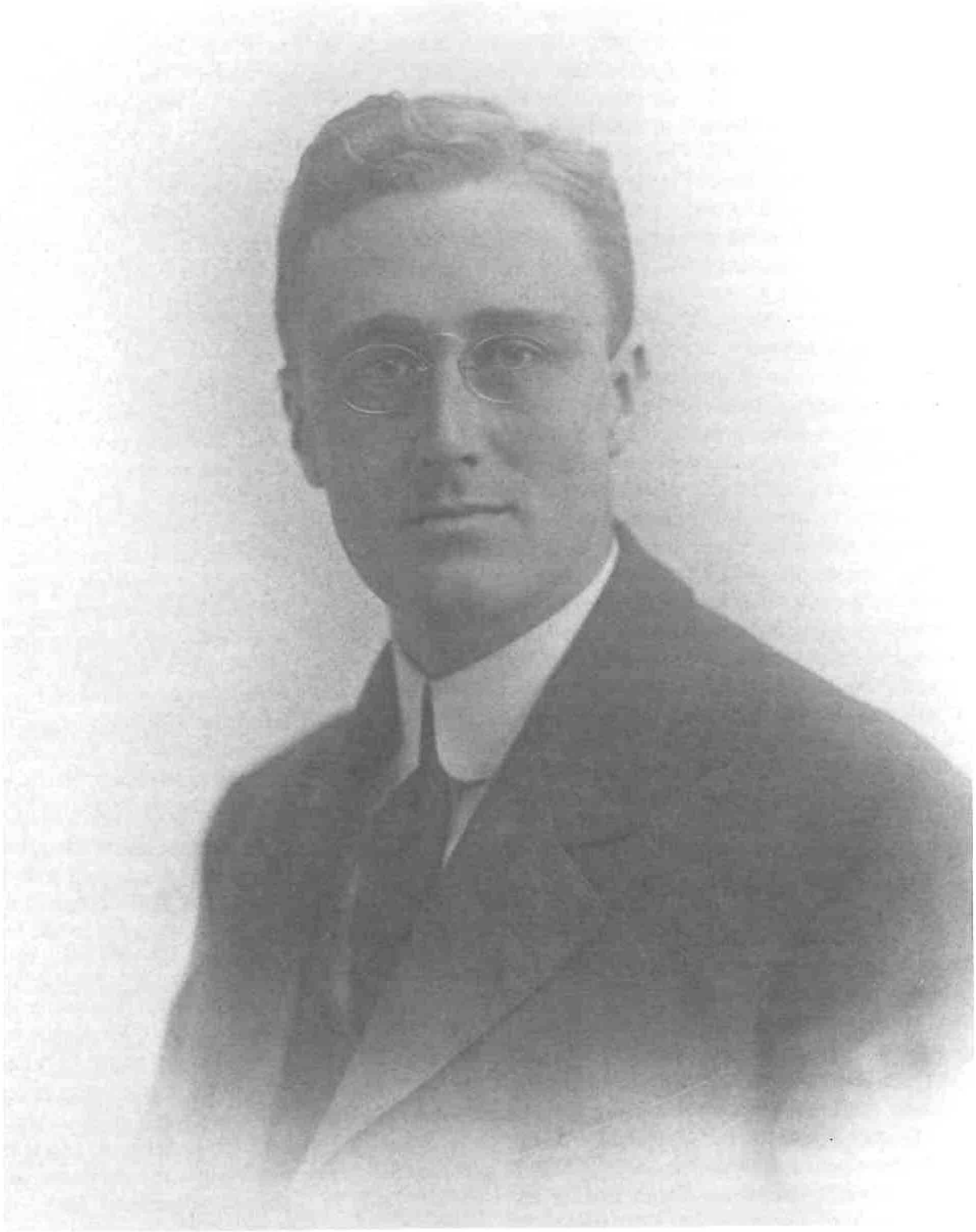
On appeal to the Supreme Court, Milligan was represented by Garfield (then a congressman); it was Garfield's first case in any court, and he was the first lawyer to argue his first case before the Court. And he won! All nine justices (for a host of disparate reasons) agreed that the military commission lacked jurisdiction, and that any prosecution should have proceeded in federal civil court. Milligan et al. were thus freed. (This was a controversial decision in the Reconstruction Era, especially with respect to ensuring the civil rights of ex-slaves in the Southern States.)

In 1871, President Grant appointed Harrison as counsel to the army personnel who were being sued by Milligan in light of the Court's 1866 ruling. With liability issues already established, Harrison was left to challenge Milligan's entitlement to money damages. As a result of his persuasive advocacy, Harrison limited Milligan's award to $5 (out of $100,000 sought).

Chester Alan Arthur

Arthur was admitted to the New York Bar in 1854, joining the firm of Culver & Parker (he read the law under Erastus Culver). Mr. Culver was a well known lawyer, particularly because he was one of the principal advocates in the "Lemmon" case. In 1852, Mr. and Mrs. Lemmon had arrived in New York on a ship along with eight slaves, whom they planned to transport from Virginia to Texas. Culver argued on a petition for a writ of habeas corpus that their presence

(continued on p. 19)



Franklin D. Roosevelt in 1907, soon after passing the New York bar. Photo courtesy Franklin Delano Roosevelt Library.

(continued from p. 17)

in New York rendered them free from bondage, and the trial judge agreed. This controversial ruling was clearly at odds with a key tenet of the Compromise of 1850 — the Fugitive Slave Law — by which the southern states expected the northern states to return runaway slaves.

Arthur shared Culver's political views, and was thus excited when a group of African-American men retained the firm in 1855 to represent the interests of Lizzie Jennings. Ms. Jennings had been forcibly removed from a Brooklyn streetcar upon the vociferous demands of a white passenger. The case was put in Arthur's hands, and he brought suit against the streetcar company for the actionable conduct of the streetcar's conductor, who had been principally responsible for her actual removal and the injuries she sustained thereby. Arthur won a verdict in which his client was awarded $500 in money damages. More important, the case became the impetus for the desegregation of public transportation throughout New York City.

William Howard Taft

Taft graduated from the University of Cincinnati Law School in 1880 and was admitted to the Ohio Bar in that same year. He became the assistant prosecutor of Hamilton County in 1881, and assistant solicitor of that same county in 1885. Taft's ambitions (and aptitude), however, lay in the judicial arena.

Taft was appointed judge of Cincinnati's Superior Court in 1887, U.S. solicitor general in 1890, and a judge on the U.S. Circuit Court of Appeals for the Sixth Circuit in 1892 (while a Sixth Circuit judge he also served as a professor of law and dean at the Cincinnati Law School).

Although Taft seemed primed to fulfill his life-long ambition of serving on the Supreme Court, his wife had other ideas. Nellie Herron Taft was fiercely ambitious for her husband, but in the political arena. Taft left the bench in 1900 to become Commissioner and then Governor-General of the Philippines; while in those important posts, he twice declined offers from President Roosevelt to be appointed to the Court. In 1904, he agreed to succeed Elihu Root as secretary of war; and during the four years of Roosevelt's last term, he also served as acting secretary of state for a time (during John Hay's illness), as well as declining again a Supreme Court appointment.

With the 1908 election looming, and TR not a candidate, Taft was backed by TR (and Nellie). One night in the White House library, Roosevelt pretended to fall into a trance, saying: "I am the seventh son of a seventh daughter and I have clairvoyant powers. I see a man weighing 350 pounds. There is something hanging over his head. I cannot make out what it is .... At one time it looks like the presidency, then again it looks like the chief justiceship." Nellie's prompt response ("Make it the presidency") was quicker than Taft's ("Make it the chief justiceship").

So Taft became TR's successor, had an unhappy four years in office, was challenged by his former friend, and ultimately came in third in a three way race for re-election in 1912. Taft rebounded quickly, however; he was appointed the Kent professor of law at Yale, where he lectured and taught for eight years.

And in 1921, President Harding appointed Taft chief justice, with the next nine years being the happiest professional period he experienced. Among his numerous opinions (he wrote approximately one sixth of all the court's decisions during his tenure) was *Myers v. United States*, 272 U.S. 52 (1926), which struck down the Tenure of Office Act of 1867 (the principal basis for the impeachment of President Johnson). And his dissent in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), foresaw the Court's tortuous relationship with the New Deal legislation coming a decade later. The majority had struck down a minimum wage provision for women in the District of Columbia; Taft's dissent forcefully asserted that "it is not the function of this court to hold Congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound."

Franklin Delano Roosevelt

Instead of going to the Harvard Law School (as did his father), FDR enrolled at the Columbia School of Law at the request of his mother ("You ought to be in your own city and get to be known among the best men, also be nearer to Hyde Park."). He did not enjoy studying law, was frequently absent, and had few friends (outside of those he already knew from Groton and Harvard). And his academic record reflected all of the foregoing. One of his law professors many years later offered this evaluation of FDR: "[He] was not much of a student and nothing of a lawyer afterwards.... He didn't appear to have any aptitude for law, and made no effort to overcome that handicap by hard work."

In the Summer after his second year, FDR took the New York State Bar exam. Before he learned he had passed (the following February), he had decided not to finish up at Columbia; FDR thus never got an LLB degree.

Besides his general boredom with law school, FDR had a growing family and thought he needed a job. With the intervention of his mother, he was offered a position at the venerable firm of Carter, Ledyard & Milburn (one of the senior

(continued on p. 20)

(continued from p.19)

partners was an old colleague of FDR's father). The offer letter was typical for that day: the first year would be "without salary," the second year's wages "would necessarily be rather small."

Carter Ledyard was handling a number of major antitrust cases on behalf of American Tobacco Company and Standard Oil of New Jersey. FDR, as the most junior lawyer in the firm, had nothing to do with those cases. His status was reflected in that he sat with the other junior clerks in one large room, which was notable principally for the presence of a large, stuffed seal — a litigation exhibit from a long prior dispute involving Bering Strait sealing rights.

After his first year, which constituted little in the way of practicing law, he was promoted to managing clerk and was paid ten dollars a week. At that point FDR started to go into the municipal courts, mostly representing American Express on various small claims disputes. The principal benefit from these experiences seems to have been that FDR was exposed to the ethno-cultural diversity of New York City for the first time. His most significant work came on a pro bono criminal case assigned to him by the court, arising out of an assault in the mostly German-American neighborhood of Yorkville; FDR won the case on a directed verdict.

The practice of law, however, was not for Roosevelt, and vice versa (Mr. Ledyard had already informed his mother that "it was of no use"). Fortunately, at about the same time FDR's long-term plan to enter politics kicked in — the Democratic nomination for a seat in the New York State Senate representing Hyde Park was available and he leapt at it. This was consistent with what he had already previously shared with his fellow law clerks (who included Grenville Clark) as part of his plan to become president: first he would get elected to the state legislature, then be appointed Assistant Secretary of the Navy, and then become governor of New York (this proposed career path, of course, traced TR's, his distant cousin). After that, he had explained: "Anyone who is Governor of New York has a good chance to be President, with any luck."

Nineteen years later (in 1929), then-Governor Roosevelt (having served in the legislature, and having been Assistant Secretary of the Navy) was honored as the guest speaker at the Columbia Law School's alumni dinner. During the dinner Columbia University's President, Nicholas Murray Butler, said to FDR that he would "never be able to call [himself] an intellectual until [he came] back to Columbia and pass[ed] [his] law exam." FDR laughingly tossed his head back in his famous fashion and replied: "That just shows you how unimportant the law really is."

Developments

(continued from p. 1)

events of September 11. Comparing the Director's international work in recent years to the earlier events before 1776, such as Bunker Hill, he noted that when Mr. Freeh had been introduced five years ago as he received the Buckner Medal it might have seemed that there were four different honorees. But the Director, Judge, trial lawyer and FBI agent were one and the same.

Mr. Freeh, introducing Ms. White, continued the international theme, saying, "I can't think of anyone I'd rather be in a foxhole or a courtroom with." He described, for one example, an essential meeting he and Ms. White had held with case agents, trial attorneys, and the attorney general, only revealing at the end of the story that the attorney general in question was that of Kenya, and the case that of the bombing of the embassy in Nairobi.

Mary Jo White opened her comments by saying, to laughter and applause, "Venue, venue, venue." "We are at the center of the universe, right?" This followed Director Freeh's gentle concluding observation that he enjoyed working with her on many important cases, "even those not appropriately brought in the Southern District of New York!" (He also said that often he had tried to bring cases to the Southern District.) In a more serious vein, she drew repeated attention of the assembled members of the Federal Bar Council to the several tables of young assistant United States Attorneys, of both the Eastern and Southern districts, as the representatives for today and the future of the tradition of public service that was the theme of her remarks.

Ms. White placed particular emphasis on the leadership demonstrated by Buckner and other mentors, including Henry Stimson (Buckner's own mentor as an Assistant United States Attorney), and her own special mentors: Bob Fiske, John Martin and Andy Maloney. "It is impossible to overstate what it means . . . what it does to your moral compass, your instinct for doing justice. It is truly a gift." Buckner, she said, had this to say to the AUSAs who worked for him in 1925:

"Since the government is our client, it follows that we are trustees for the government. Civil office in time of peace is the greatest honor which can be conferred upon a citizen by his country. . . . Our client and our ward, the government, is deaf and dumb. However real, it cannot express itself. . . . When it is our duty to speak and we do not speak, the government is betrayed by our silence. When it is our duty to act and we do not act, the government is betrayed by our sloth or timidity or personal ambition,

because it cannot act for itself.... Public opinion is not the government."

Ms. White went on to say that, "of all the Emory Bucknerisms, the one that most resonates with me was Buckner's insistence that those in public service hold themselves to the highest possible standards, at least as high as the most exacting standards in the private sector. He believed that every matter immeasurably benefits from an extra 10% of effort that should be put in after you think you've exhausted every conceivable avenue of investigation, every line of precedent."

Ms. White also offered warm comments about Director Freeh. "All of us in New York can proudly claim Louis Freeh as our own." She went on to describe briefly the programs to combat global terrorism that his FBI had begun long before September 11. "Director Freeh saw the danger and threat of international terrorism long before others did and almost single-handedly built the infrastructure necessary to combat it."

In conclusion, Ms. White asked, "how do we adequately measure or reward the sacrifices of... Judges Duffy, Mukasey and Sand, who have presided over the long and difficult World Trade Center and East African Embassy terrorist trials? The answer is we can't and we don't. They would each say that they were just doing their jobs. And so they were. And as they did so, they brought high honor to the American criminal justice system."

In the view of this writer, the successive presentations on November 22 made clear that it is increasingly appropriate, as years pass and the name of Emory Buckner is less known even to New York lawyers, that this Federal Bar Council program carries his name. The fact that he is unknown to most as we move into the 21st century (even though the firm he helped to found, Dewey Ballantine, remains a major force in the legal life of the city) provides the recipients of this medal with a rich opportunity to reflect upon the importance and the rewards of comparatively anonymous government service in the distinguished institutions that Buckner helped to make into what they are.

The Back Page

(continued from p. 24)

district court or courts he [or she] serves." When an action is filed, the clerk of the court is to notify the parties of the availability of a magistrate judge to exercise consent jurisdiction. See 28 U.S.C. 636(c)(2). The rule specifically provides for "procedures to protect the voluntariness of the parties' consent."

Within the Second Circuit, there are (as of May 1, 2001) 46 magistrate judges. This number includes one part-time magistrate judge in the Southern District of New York and one part-time magistrate judge in the Northern District of New York, as well as one recalled retired magistrate judge in the Western District of New York. The distribution of those magistrate judges among the various districts is shown in the following chart; also included in the chart is the number of authorized district judgeships in each district, as well as the senior district judges in each district who maintain a chambers staff and carry a caseload:

Dist.	Conn.	EDNY	NDNY
MJs	5	13	6*
DJs	8	15	5
Sr.DJs	4	7	2

Dist.	SDNY	Vt.	WDNY
MJs	15*	1	6**
DJs	28	2	4
Sr.DJs	22	0	3

* In both the SDNY and the NDNY one magistrate judge is part-time.
** One of the WDNY magistrate judges is a recalled retired judge.

The variations between the districts can be seen at a glance, and range from a four-to-five ratio between active district judges and active full-time magistrate judges (Western District of New York), to a two-to-one ratio between them (Southern District of New York and District of Vermont). If the senior, recalled, and part-time judges are considered, the ratios range from a two-to-three ratio between district judges and magistrate judges (Western District of New York) to a ten-to-three ratio (Southern District of New York).

Each of the district courts within the Second Circuit utilizes its magistrate judges in a different fashion, but in all of the districts a significant number of cases are disposed of by magistrate judges upon consent of the litigants under 28 U.S.C. 636(c). In the year ending September 30, 2000, 741 cases in the district courts of the Second Circuit were resolved by magistrate judges on consent, an increase of 8.7% over the previous year. Of those 741 cases, 580, or 78.3%, were resolved without trial; 119, or 16.05%, went to trial with a jury; 42, or 5.65%, went to trial without a jury. National statistics for magistrate judges exercising consent authority show that for the same time period 88.7% of consent cases were resolved without trial, 6.5% were resolved through trial by jury, and 4.8% were tried without a jury.

In addition to their civil case responsibilities, which are the focus of this article, the magistrate judges in the Second Circuit handled over 20,000 criminal matters in the year ending September 30, 2000. These included issuing 2,653 search warrants and 2,470 arrest warrants, conducting 5,980 initial

(continued on p. 22)

(continued from p. 21)

appearances, 3,739 post-indictment arraignments, and 1,734 grand jury sessions, as well as disposing of cases for 270 misdemeanor defendants and 1,103 petty offense defendants.

District of Connecticut

In the District of Connecticut each magistrate judge is paired with two or three district judges, from whom a magistrate judge receives referrals in civil cases. Most but not all of the magistrate judges are in the same courthouse as the district judges with whom they are paired. For the most part the magistrate judges in Connecticut do not supervise routine discovery in civil cases, but they handle discovery disputes and motions, conduct large numbers of settlement conferences, and supervise evidentiary hearings, including inquests, as well as handling their own docket of consent cases.

Consents to trial before the designated magistrate judge may be obtained by the district judge during pretrial conferences or as a result of the initial order to the parties, or the issue may arise during the magistrate judge's supervision of discovery or other pretrial matters. During the year ending September 30, 2000, the five magistrate judges in Connecticut resolved 90 cases upon consent of the parties, with 24 jury trials and 10 nonjury trials. The consent cases make up approximately 3.5% of the civil cases in the district.

Eastern District

In the Eastern District of New York a magistrate judge is designated at the time of filing the complaint, and except for Social Security and habeas corpus cases, the magistrate judges supervise all non-dispositive pretrial matters. In the Brooklyn courthouse one of the magistrate judges is designated to handle all the pro se cases, although pro se cases continue to be distributed to the magistrate judges in the Central Islip courthouse. In addition to the non-dispositive pretrial matters supervised by the magistrate judges in the Eastern District, they also do a large number of settlement conferences, and reports and recommendations of dispositive motions to the district judges in non-consent cases. Other types of hearings, including inquests and preliminary injunction hearings, are also frequently referred to the magistrate judges, with a slightly greater proportion of preliminary injunction hearings handled by the magistrate judges in the Central Islip courthouse.

During the year ending September 30, 2000, the magistrate judges in the Eastern District of New York, of whom there are 13, resolved 107 cases upon consent pursuant to 28 U.S.C. 636(c), 25 by jury trials and 20 by bench trials. This number of consent cases reflects approximately 1.25% of the Eastern District's civil cases filed during the period.

Northern District

In the Northern District of New York a magistrate judge is assigned to the case at the time it is filed. In general, the assigned magistrate judge is located in the same courthouse, or the same geographic region, as the assigned district judge. By local rule, all prisoner complaints alleging a cause of action pursuant to 28 U.S.C. 1983, all state habeas petitions, and all social security cases are automatically assigned to a magistrate judge for report and recommendation. Because of the large number of state prisons that are located in the Northern District, the first two categories make up a significant part of the magistrate judges' workload. The remainder of the civil cases are supervised by the assigned magistrate judge from the initial filing until dispositive motions are filed or the case is ready for trial. The magistrate judges also conduct a fair number of settlement conferences.

At the time a complaint is filed, the plaintiff receives a civil management filing packet which contains all case management information and forms, including a consent form with instructions for filing the consent with the district judge. The consents can be entered at any time during the process. Differences in the availability of a district judge (there are four district judges located in Syracuse and only one in Albany) means that there is a slightly higher percentage of consent cases in the Albany courthouse.

The five full-time magistrate judges in the Northern District of New York resolved 35 cases upon consent of the parties in the year ending September 30, 2000, with 9 jury trials and 4 bench trials. This represents approximately 1.5% of the civil cases filed in the Northern District of New York during the preceding year.

Southern District

In the Southern District of New York a magistrate judge is randomly designated at the time a district judge is selected. The plaintiff is provided with a consent form, containing instructions, at the time of filing, and is supposed to provide a copy of the form to all other parties. The form contains instructions on filing the form with the clerk in the event that all parties sign it. The case is referred to the designated magistrate judge at the discretion of the assigned district judge. Consent to permit a magistrate judge to enter judgment in the

case may be obtained by the district judge, or may be raised during a magistrate judge's supervision of pretrial matters. The magistrate judges in the Southern District handle a significant amount of pretrial discovery supervision, including discovery motions, as well as conducting large numbers of settlement conferences and issuing reports and recommendations on dispositive motions in non-consent cases.

Under the Local Rules for the Division of Business Among District Judges, cases will be designated for assignment to a district judge either in the Manhattan Courthouse or the White Plains Courthouse, and the designated magistrate judge will be at the same courthouse as the assigned district judge. There is a higher percentage of consent cases in the White Plains courthouse than in Manhattan.

During the year ending September 30, 2000, the 14 full-time magistrate judges in the Southern District of New York resolved 381 cases upon consent of the parties, 52 by jury trials and 7 by bench trials. This number is approximately 3.7% of all civil cases filed in the Southern District of New York during the year.

District of Vermont

In the District of Vermont all social security, habeas corpus (state and federal), and Section 1983 cases brought by prisoners challenging their conditions of confinement are automatically referred by local rule to the magistrate judge for report and recommendation. The local rules also provide that every tenth civil case (other than those listed in the previous sentence) is automatically referred to the magistrate judge as a consent case. The necessary forms are provided to plaintiff at the time of filing. If the parties in that case do not consent, then another consent case is assigned in its place. The magistrate judge also handles occasional referrals for specific pre-trial matters, including supervising discovery and conducting settlement conferences. The magistrate judge in Vermont, who is located in Burlington, handles referrals from both the district judge in Burlington, and the chief district judge in Brattleboro.

During the year ending September 30, 2000, the single magistrate judge in the District of Vermont terminated 44 cases upon consent pursuant to 28 U.S.C. 636(c). Of those cases, one was resolved by jury trial. This is approximately 8.6% of the number of civil cases filed in the District of Vermont in that year.

Western District

In the Western District of New York, each case is randomly assigned to a district judge as well as a magistrate judge. After issue has been joined, a case is referred to the designated magistrate judge for pre-trial supervision. The referral order includes a paragraph describing the consent procedure, and encouraging the litigants to consent. The Rule 16 notice sent also requires the litigants to state whether they consent to the jurisdiction of a magistrate judge.

Pursuant to the local rules each case is designated for assignment either in Buffalo or in Rochester. Each case is randomly assigned to a district judge within the designated courthouse for that case, and to a magistrate judge in the same courthouse. The caseload of the magistrate judges includes a large number of settlement conferences and mediations, in addition to supervision of pretrial matters and their consent docket. The magistrate judges in Rochester handle fewer dispositive motions in non-consenting cases than do their colleagues in Buffalo.

The six magistrate judges in the Western District of New York, one of whom is on recall status after retirement, resolved 84 cases upon consent of the parties in the year ending September 30, 2000, 8 by jury trials and 1 by a bench trial. This is approximately 4.4% of the civil cases filed in the District during the preceding year.

Conclusion

The utilization of magistrate judges in the courts of the Second Circuit has mirrored their utilization nationwide, with an increasing number of cases every year handled by magistrate judges for all purposes, including judgment, on the consent of the parties. Although there is a slightly higher percentage of consent cases in the smaller courthouses around the circuit, there appears to be a general acceptance of their abilities to conduct trials throughout the district courts. The use of magistrate judges nationwide was reported by the Administrative Office of the United States Courts in the year 2000 Report of Judicial Business in the United States Courts: "As growth in filings continues to outpace increases in judicial resources, magistrate judges' contributions to caseload management become ever more critical.... Magistrate judge adjudication of civil consent cases continues to figure prominently among courts' efforts to make the greatest use of limited judicial resources."

Author's note: My thanks to many of my fellow magistrate judges across the circuit who generously assisted me with information about their districts. The statistics cited in this article were obtained from the Statistical Division of the Administrative Office of the United States Courts.

The Back Page

Magistrate Judge Utilization In Civil Cases In The Second Circuit

By Magistrate Judge Lisa Margaret Smith

In 1968 Congress established a system of magistrates as part of the federal courts, in order to "reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice." H.R. REP. NO. 1629, 90th Cong., 2d Sess. 11 (1968). The newly created position of magistrate was directly based upon the 175-year-old system of United States commissioners, and granted each magistrate "all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts." 28 U.S.C. 636(a)(1). In 1979 Congress authorized magistrates, among other things, to conduct trials and dispose of civil cases where the parties to the case gave their consent. Federal Magistrate Act of 1979, P.L. 96-82. This authorization, which permitted magistrates to take cases to judgment upon consent, provided civil litigants with an alternative to waiting for a trial to be scheduled before the assigned district judge, whose calendar was frequently booked with criminal trials and older civil cases.

The increasing acceptance of magistrates as trial judges is apparent from the numbers: in 1990 there were 4,958 civil matters on consent before magistrates nationwide; in 2000 there were 11,481 such consent cases, an increase of over 230% in ten years. In 1990, 1,008 of the consent cases went to trial, and in 2000 there were 1,300 trials before magistrate judges across the United States. In 2000 there were 529 magistrate judges nationwide, of which 466 were full-time, 60 were part-time, and 3 were combination magistrate judge/clerk of court positions.

On December 1, 1990, the title of the position was changed from magistrate to magistrate judge. Judicial Improvemen Act of 1990, P.L. 101-650, 321. The statutory provisions that govern magistrate judges are found at Title 28, United States Code, Sections 631 through 639. The provision that allows for litigants to consent to the jurisdiction of a magistrate judge is found at Section 636(c), which states, in part:

"Upon the consent of the parties, a full-time United States magistrate . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the

(continued on p. 21)

Federal Bar Council
370 Lexington Avenue
New York, NY 10017

Periodicals
Postage Paid
New York, NY