Federal Bar Council News

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From The President

Our Second Circuit Judges

By Gerald Walpin

Learned Hand, Augustus Hand, John Marshall Harlan, Thomas Swan, Charles Clark, Jerome Frank, Edward Weinfeld — these are names recognized as Titans of the Bench in the Second Circuit who gave this circuit its reputation of quality and superlative judicial reasoning.

For over 70 years, lawyers working within the Federal Bar Council have had the pleasure and irreplaceable experience of working with these judges on issues of interest to the courts and members of the Bar. We continue to do so with the current successors on the Second Circuit courts.

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Developments

Annual FBC Thanksgiving Luncheon Honors Daniel L. Greenberg And The Legal Aid Society

By Bennette Kramer

The Federal Bar Council conferred the Emory Buckner Medal on Daniel L. Greenberg, president and attorney-in-chief of The Legal Aid Society, in recognition of his outstanding public service.

The proceedings at the annual Thanksgiving Luncheon on November 27 opened with a singing of the National Anthem, after which Luncheon Chair Robert J. Giuffra, Jr. called the gathering to order, noting that this was the 50th anniversary of the Thanksgiving Luncheon. Bettina B. Plevan, Chair of the Nominating Committee, read the list of new officers, trustees and directors of the Federal Bar Council and Foundation.

Activities And Committees

After lunch, newly installed Federal Bar Council President Gerald Walpin made introductory remarks and introduced President Emeritus P. Kevin Castel. Walpin said he was proud to be the president of the Federal Bar Council and hopes to "continue the awesome leadership of those who preceded him." He remarked that we should all take a

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Invitation To Debate

Privately-Funded Seminars For Judges

By Bruce A. Green

As a general rule, judges are free to educate themselves outside the courtroom and are encouraged to do so, at least when they pay their own way. There are some limits, of course. For example, a judge may not preside over a case if, in an educational program or any other setting outside the courtroom, he or she previously acquired personal knowledge of the evidence. But for the most part, judges are encouraged not only to speak, lecture and teach, but also to learn.

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From The President

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Often times, we are so mesmerized by the reputations of giants of the past that we fail to appraise the current incumbents. We are fortunate, however, that they continue the tradition that the Second Circuit judges are the highest quality leaders of the bar who, before assuming the robe, excelled in various other aspects of the legal profession.

Experience And Scholarship

Our current Chief Judge of the Second Circuit Court of Appeals exemplifies the wealth of experience and legal scholarship found in judges in the Second Circuit. He had high public service in the sub-cabinet position of Assistant Secretary of the Treasury. He also was a successful private practitioner as a partner in a prestigious law firm. He has taught at two high-ranking law schools, Yale and NYU. This multi-faceted experience in government service, private practice and education — and the practical knowledge learned from it — has to enhance the quality of judging.

What is defining of the quality of the judges on our Second Circuit — both court of appeals and the district courts — is that almost all have risen to the top of the legal profession before being nominated to be a judge.

Many of the judges have continued the long tradition of having served the country in state and federal positions before joining the bench. The experience of our current judges include one or often more with service as governor of one of our states; attorney-general of another state; United States Attorney; district attorney; chair of a state's consumer protection board; Regional Administrator of the Securities and Exchange Commission; special prosecutor; chair of investigative committees; Attorney-In-Charge for Legal Aid Society; president of the Borough of Manhattan; deputy mayor of New York; president of a Board of Education.

Our judges have shown their continued dedication to promoting excellence in federal practice through education. Among the law schools to which our federal judges contribute their teaching are Yale, Fordham, St. John's, NYU, Hofstra, Rutgers, Columbia, Georgetown, Michigan, Pace, Berkeley, Howard and Touro.

Last, but not least, are the judges who gave up very successful and remunerative private practices to accept a judgeship. This prior experience as practitioners provides the genesis for the practical and sensible approach to litigation issues exhibited by our judges, so valued by practitioners.

FBC Committees

Members of the Federal Bar Council have the wonderful opportunity of working with and getting to know these judges in our mutual endeavor of improving the practice of law before the Second Circuit. Whether in the formal committees of the Federal Bar Council or in the various meet-and-greet events in which communication occurs between the bench and bar, those who have become active in the Federal Bar Council have the rewarding opportunity of talking with these giants of our courts. It is an opportunity in which we invite more of our brethren of the bar to participate.

I invite you to consider joining one or more of our Federal Bar Council committees:

- Second Circuit Committee, which provides a forum for members for discussions, analysis, and reports about federal court issues, practices and procedures;
- Public Service Committee, which administers a pro bono legal clearinghouse for our members, giving individual attorneys the opportunity to practice with more senior members;
- First Decade Committee, which involves younger lawyers — in the first decade of practice — and meshes them into the fellowship of the bar;
- Program Committee, which plans and implements CLE programs for practicing attorneys;
- Historical Committee, which works with the Second Circuit's Historical Committee to present exhibits in the courthouses highlighting Second Circuit history.

Your participation in any of these committees will be a contribution to the bar and the courts while enhancing your practice. I look forward to seeing you at the committees.

Invitation To Debate

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When judges are educated at someone else's expense, however, some additional concerns may be raised. If someone reimburses a judge's expenses to attend an educational program, the judge has accepted a gift. The applicable codes of judicial conduct and other legal provisions governing judicial conduct place restrictions on judges' receipt of gifts. Ordinarily, the most significant question is, who is paying? If the gift is provided by a party that is before the court, or is likely to come before the court, there may be a problem. Judges are not supposed to take gifts from parties because doing so raises the specter that the judges' decisions will be influenced as a result.

Not all "gifts" of education are problematic. Needless to say, judges are encouraged to participate in programs of the Federal Judicial Center and similar organizations which are funded by the government and overseen by judges themselves. Judges also are welcome, even encouraged, to participate on a complementary basis with other lawyers in educational programs sponsored by bar associations, by law schools and by similar not-for-profit organizations that rarely appear as parties in litigation and that do not appear to be promoting a particular litigation objective or partisan viewpoint.

For more than two decades, however, debate has surrounded judges' involvement in expenses-paid educational programs of a wholly different sort: seminars presented at resort settings that are designed exclusively for judges, that are offered by private organizations that arguably seek to promote particular approaches to the decision of litigation, and that are funded by corporations appearing frequently as parties before the courts.

The following "point/counterpoint" between Steven M. Edwards and Doug Kendall continues the ongoing debate. What follows first is a brief description of the history of the controversy and the currently applicable law.

The Origin Of The Debate

The controversy began not long after 1974, when Henry Manne founded the Law and Economics Center (LEC) to provide education regarding law and economics. Two other private institutions, the Foundation for Research on Economics and the Environment (FREE) and the Law and Organizational Economics Center (LEC), were subsequently established, also in part for the purpose of educating judges. Over the years, with the financial support of corporations, foundations and law firms, these three organizations have hosted seminars attended by hundreds of judges relating to law and economics, science and the environment.

One of the earliest expressions of concern about these programs was a 1979 Washington Post article by Jack Anderson that asserted that "[m]ore than 100 federal judges have gone to sunny Florida for a crash course in conservative economics, courtesy of some of the biggest corporate fat cats that will ever appear before them as defendants." The article quoted a confidential memo in the Senate Judiciary Committee that called the seminars for judges "a brazen attempt by the Business Roundtable crowd to influence the enforcement of antitrust laws," and stated that "[f]inancing for the program comes from companies like Proctor & Gamble, IBM and General Electric . . . . Isn't there any question about the ethics of judges accepting, even indirectly, the hospitality of defendants in federal cases?"

In August 1980, not long after the article appeared, the United States Judicial Conference's Advisory Committee on Codes of Conduct issued Advisory Opinion 67, addressing whether judges may attend "seminars and similar educational activities organized by non-governmental entities and may have the expenses of their attendance paid by such entities." The committee concluded that judges may do so. It reasoned that "[p]ayment of tuition and expenses involved in attendance at non-government sponsored seminars" is a gift that judges are specifically authorized to accept under provisions of the federal judicial code that permit judges to accept a fellowship or scholarship "awarded on the same terms applied . . . to other applicants," or to accept any other gift "so long as the donor is not a party in litigation before, and its interests are not likely to come before, the invited judge." The opinion noted the following limitation, however: "It would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics to be covered in the seminar are likely to be in some manner related to the subject matter of such litigation." The opinion further stated that judges have an individual responsibility to satisfy themselves that their participation would be permissible and, if it is and they choose to attend, they "must report the reimbursement of expenses and the value of the gift on their financial disclosure reports."

Days after Advisory Opinion 67 was issued, the Institute for Public Representation petitioned the United States Judicial Conference to provide further guidance. The petition specifically addressed the programs of the Law and Economics Center, then located at University of Miami Law School. The United States Judicial Conference declined, however, to undertake a detailed review of LEC's judicial seminars or to adopt guidelines for judicial participation in privately-funded programs as requested.

Public concerns were renewed in 1993 when the Alliance for Justice issued a report criticizing judges' attendance at law-and-economics programs. The following year, United States District Judge Jack B. Weinstein addressed this report in a law review article dealing in depth with the question of how judges learn. The article specifically reviewed criticisms directed at the judicial education programs of the Law and Economics Center (now located at the George Mason

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University School of Law) as well as criticisms directed at conferences at Yale Law School and New York University School of Law sponsored exclusively by Aetna Casualty and Life. The criticisms directed at the LEC programs included that they are ideologically biased toward advancing corporations' financial interests, and that judges are enticed by the resort locations to take the courses.

Although Judge Weinstein's article suggested ways of reducing concerns about the bias of judicial education programs, he generally dismissed the Alliance's criticisms as "unsound." He took the view that ordinarily "[j]udges should be encouraged to gain as much general knowledge as possible, preferably from sources not tainted by venal or extreme ideological views." Although the Alliance charged that LEC presented biased programs, Judge Weinstein concluded that "[j]udges should not be deterred from attending conferences that espouse a certain viewpoint," and noted that "[m]ature and experienced judges' thoughts can seldom be rechanneled by an instructor's bias." Nor did he agree that the programs necessarily should be held at less lavish settings.

In 1998, questions about federal judges' attendance at all-expense-paid seminars were raised openly in Congress by Representative Zoe Lofgren, who suggested during a committee hearing of the House of Representatives that the federal judiciary, as an entity, ought to provide some guidance to judges. In response, District Judge William Terrell Hodges noted that there are opinions of the Advisory Committee on Codes of Conduct that already are in effect that deal with this very question. Additionally, Judge Hodges indicated that he would ask the committee to reexamine the question. A month later, on July 10, 1998, the committee issued a slightly revised Opinion 67 that adhered to the earlier conclusion.

In July 2000, Community Rights Counsel ("CRC") published a study focusing on judicial seminars relating to environmental law. It argued that the "seminars amount to a veiled effort to lobby the judiciary under the guise of judicial education" and called for a ban on private reimbursement of judges' expenses in attending educational programs. The concerns expressed in the CRC report prompted a spate of editorials criticizing privately-funded judicial education, as well as a program aired by ABC's "20/20," hosted by Barbara Walters, exposing so-called "Junkets for Judges."

The Second Circuit Weighs In

Whether a judge, once having attended a privately funded judicial seminar, is restricted in the ability to hear cases on which the seminars had some bearing, may be a separate question from whether judges may attend in the first place. Recently, the Second Circuit became the first court to examine this question in depth. Its decision, *In re Aguinda*, 241 F.3d 194 (2d Cir. 2000), arose out of a civil lawsuit brought against Texaco by citizens of Ecuador and Peru who claimed that pollution by Texaco had caused environmental damages and personal injuries in their countries. District Judge Jed Rakoff dismissed the lawsuit and, while the decision was on appeal, attended an expense-paid seminar conducted by FREE on environmental issues. Texaco was a contributor to FREE and a former Texaco executive officer spoke at the seminar. After the court of appeals remanded the lawsuit back to the district court, the plaintiffs argued that Judge Rakoff should be disqualified from continuing to preside over the environmental litigation. Judge Rakoff concluded, however, that he was not required to disqualify himself, and the court of appeals agreed.

The Second Circuit addressed the plaintiffs' arguments at considerable length. First, examining Texaco's minor contribution to FREE's funding, the court concluded that a reasonable observer would regard the donation as "too remote to create a plausible suspicion of improper influence." The court compared a judge's attendance at a FREE seminar to a judge's attendance at expense-paid programs sponsored by bar associations and law schools. The court observed that no reasonable person would expect a judge who attended such programs to favor a minor donor to the law schools or bar associations serving as sponsors.

Additionally, the Second Circuit assumed for the sake of argument that the particular environmental seminar attended by the district judge made an unbalanced presentation on policy issues. As a general rule, the court held that the judge could nevertheless preside over environmental litigation. The court reasoned that even if the seminar persuaded the judge that environmental laws are harmful, it would be presumed that the judge would put aside his personal beliefs and carry out the law. Further, it noted that judges have many encounters with writings and talks pertinent to their cases, and inquiry into how all those encounters influence their views would be impractical.

The Second Circuit saw no meaningful difference between attending an expenses-paid seminar sponsored by FREE and attending any other presentation on a debated issue sponsored by an organization that receives funding, even if minor or remote, from a

party or its attorney. Therefore, the court suggested, if attendance at the FREE seminar was thought to create an impermissible appearance of partiality, judges would have to stop attending similar seminars to avoid being disqualified from hearing future cases related to such seminars' subject matter.

The Second Circuit identified particular circumstances, however, where attending an expense-paid seminar might bar a judge from later participating in a case. The first is when a party or its lawyer contributes "a significant portion of [the sponsoring organization's] general funding." Whether a contribution was "significant" must be determined on a case-by-case basis; the circuit court's point was that it raises concerns when a judge accepts "something of value from an organization whose existence is arguably dependent upon a party to litigation or" its counsel.

Disqualification also might be required, the appellate court said, when the judge attended a presentation concerning legal issues material to a claim's disposition or defense in the particular lawsuit or involving parties, witnesses or counsel in particular actions. The court was unable to say with precision when there was a close enough match between the legal issues discussed at an educational seminar and those in the lawsuit to require disqualification. The court did note, however, that when parties or their lawyers fund seminars that bear too closely on a litigation in which they are involved, "the appearance created bears too great a resemblance to an ex parte contact."

The court concluded by taking a swipe at CRC, whose July 2000 report had provided the underpinnings of the plaintiffs' disqualification motion. The court noted that the plaintiffs sought to "benefit from CRC's rather ample access to the media," and observed that the question whether conduct gives rise to an appearance of impartiality must be judged "based on the facts of the presentation involved and not on the amount of publicity partisans on the particular issues can muster."

The Continuing Controversy

In the past two years, battle lines have been drawn over the propriety of the judicial seminars. Senators John Kerry and Russ Feingold have supported federal legislation to bar federal judges from attending private seminars. The Judicial Conference of the United States and the Board of the Federal Judicial Center opposed their bill as did Chief Justice Rehnquist, who defended privately funded programs as "a valuable and necessary source of education in addition to that provided by the Federal Judicial Center."

This year, the ABA sought to weigh in. Its Standing Committee on Ethics and Professional Responsibility, which issues advisory opinions on questions of legal and judicial ethics, drafted an opinion intended to give guidance to judges about when it was proper to attend educational programs at others' expense. However, both the National Conference of Federal Trial Judges and the Administrative

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Office of the U.S. Courts took umbrage upon learning of the draft opinion. The ABA agreed to continue studying the issue.

This summer, Abner J. Mikva, the former Chief Judge of the D.C. Circuit Court of Appeals, published an article in the ABA's *Litigation* magazine titled "Judges, Junkets, and Judges," to which Steve Edwards responds in his contribution to this issue of the *Federal Bar Council News*. As he had in previous fora, including in an introduction to the CRC report, Judge Mikva expressed concern about the appearance that "these seminars are being used by private interests to influence and have access to federal judges." He called on the Judicial Conference of the United States "to emphasize the perception problem" and to "give clear guidance to judges as to what they can attend."

Most recently, on October 9 of this year, the Association of the Bar of the City of New York hosted a panel discussion on this issue. Among the speakers were Judge Thomas Griesa, who defended judges' attendance at LEC seminars based on his long experience in doing so, and explained that from his perspective and that of the other judges who attend, the seminars are not in fact designed to persuade judges to decide litigation in particular ways, but provide a fair and rigorous educational experience. One opposing perspective was offered by Monroe Freedman, the Howard Lichtenstein Distinguished Professor of Law at Hofstra University School of Law. Among his concerns were that when judges attend expenses-paid seminars presented at resort settings by organizations such as LEC and financed by corporations that appear as parties before the court, there is an appearance that the party is paying experts to talk to the judges who attend and that the sponsoring organization is offering the judges a gift to induce them to listen to the experts. The judicial seminars were also criticized by CRC's Doug Kendall, whose perspective, in counterpoint to that of Steve Edwards, is offered in these pages.

Given the past 25 years of debate and controversy, it can be predicted that the issue of judges' attendance at privately-sponsored judicial seminars will not disappear from public and professional discourse. As the debate between Steve Edwards and Doug Kendall reflects, there is room for sharply different viewpoints. For that reason alone, regardless of where one stands on the issue, it may be useful for representative bodies of the judiciary, such as the Judicial Conference of the United States, to collaborate with representative bodies of the legal profession, such as the ABA, to seek a more broadly accepted resolution.

[Editor's note: This article was adapted from Bruce A. Green, May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy, 29 Fordham Urb. L.J. 941 (2002).]

Do Not Prohibit Seminars

By Steven M. Edwards

Former Judge Abner Mikva is at it again. In an article in the summer issue of the ABA's *Litigation* magazine ("Judges, Junkets and Seminars"), he criticizes judges who attend educational seminars sponsored by organizations such as FREE (Foundation for Research on Economics and the Environment), stating bluntly: "judges ought not go to such seminars." Although he claims to be "reluctant" to speak out publicly about this subject, Judge Mikva has become the leading proponent of prohibiting judges from attending educational seminars in exotic locations where all expenses are paid.

There is an important qualification to Judge Mikva's point of view: He would only prohibit judges from attending seminars "sponsored or funded by interests having a stake in litigation." He does not say whether the sponsor or funder must have a stake in specific litigation then pending before the judge attending the seminar, or whether he is concerned about entities that get involved in litigation generally. Given the nature of his concerns, one gets the impression that Judge Mikva would bar judges from attending seminars sponsored or funded by any private interest, because it is the rare company or institution that does not encounter at least some litigation in the course of its activities.

There is a curious inconsistency that emerges from Judge Mikva's argument. He states that he finds the notion that judges are brainwashed by the seminars hard to accept, yet he notes that "clearly the funders of these judicial seminars are getting something for their money." One almost gets the impression that the critics of judicial seminars would prefer judges to be like the "pre-cogs" in the recent movie "Minority Report" — living in a laboratory environment, completely insulated from all external stimuli.

Of course, judges do not live in laboratory environments, and they are influenced by many things. They are influenced by their parents while growing up; by what they learn in school; by their friends. They undoubtedly read newspapers and watch TV, and they may subscribe to periodicals that are less than objective in their coverage of

important issues. They may also attend religious services, belong to political societies or hear speeches at dinners where views on important issues are expressed.

If a judge attended a seminar sponsored by an organization such as FREE in his or her hometown, it is doubtful that anyone would object. It is the fact that FREE conducts the seminars at locations such as ranches in Montana, and pays the judge's expenses for getting there (while providing ample time for recreational activities such as golf), that causes concern. Indeed, I suspect that trips sponsored by organizations such as FREE would cause discomfort even if there were no educational component (i.e., when they say it's not about the money, it's about the money).

No one would dispute the proposition that it is inappropriate for a judge to go on a vacation paid for by a party appearing before that judge. But is it inappropriate for a judge to go on a vacation paid for by someone who will never appear before the judge? Leaving aside an instinctive preference we may have for judges to lead ascetic lives, it is difficult to articulate an analytical basis for prohibiting a judge from receiving something of value from someone who is not, and never will be, a litigant.

It is this thought process that has led to the creation of organizations such as FREE. If the sponsor is a not-for-profit foundation, as opposed to actual or potential litigants, there is no reason to be concerned — or so the thinking goes. The problem, as Judge Mikva points out, is that the Judicial Conference's Advisory Opinion No. 67 requires the judge to take affirmative steps to determine who the funders are (although it is unclear whether the requirement is to identify the funders of the foundation or the funders of the event), and the funders inevitably include companies who have litigation pending before the courts.

Judge Mikva's solution is to use public funds to pay for the expense of sending judges to educational seminars. The U.S. Judicial Conference or the Federal Judicial Center, in his scheme, would provide guidelines as to how the money should be spent. Presumably this would include some judgment as to whether the subject matter of the seminar is acceptable, as well as whether the location is appropriate.

While Judge Mikva's solution may solve the perception problem, it also would severely limit the availability and quality of educational seminars for judges. Given the reluctance of Congress to make money available for increases in judicial salaries, it is doubtful that any would be made available for seminars — much less seminars in attractive locations. Furthermore, the intellectual content of seminars approved by a central governing body is likely to be less interesting and varied than seminars sponsored by competing private groups.

Do we really think that judges are influenced by expense paid trips to seminars? If the answer to that question is no, then eliminating seminars seems like a relatively extreme solution to something that may not even be a problem. Nevertheless, the critics of such seminars are persistent and numerous, and their concerns must be addressed.

Perhaps one way to preserve the baby while throwing out the bathwater would be to modify Opinion No. 67 to give judges the option of seeking advice from an independent committee with respect to whether a proposed trip to a seminar creates an appearance of impropriety. This would reduce the potential for self-infection that results from Opinion No. 67's requirement that judges take affirmative steps to determine the sources of funding. It would also provide for a greater degree of consistency and objectivity.

The notion of having a standing committee of judges or lawyers to determine whether there is an appearance of impropriety may be a useful device generally. I have always found it odd that a judge is supposed to do that on his or her own. Often it puts the judge in an untenable position of trying to be objective about something that is inherently subjective, and it does little to convince the general public that judges, in fact, are impartial.

In any event, in dealing with the delicate question of judges attending educational seminars, the issue has to be the funding, not the content. A judge should be wise, and wisdom comes from exposure to ideas — good, bad and ugly. If an independent committee determines that there is no reason to believe that a judge would be influenced by a free trip to a dude ranch, that should be the end of it.

The Problem Needs A Solution

By Douglas T. Kendall

This dialogue is properly framed as a debate: Steven Edwards and I disagree both about the magnitude of the problem stemming from privately-funded continuing legal education (CLE) programs for judges and the specifics of the solution to that problem. Still, the most striking thing about this discussion is that all the participants in it agree that the federal judiciary should do something to address the appearance problems that stem from private judicial seminars.

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The unanimity concerning this important premise is striking only because of how starkly it contrasts to the response to this controversy by the federal judiciary. Despite drawing heated criticism of private seminars by judges, ethicists, members of Congress, editorial boards and others for over two decades, the federal judiciary remains adamantly, indeed defiantly, committed to every jot and tittle of the flawed ethical guidance provided by what is known as Advisory Opinion 67.

This defense has started to border on the absurd. As Bruce Green notes, in a portion of the Second Circuit's *Aguinda* opinion, the circuit court blamed the intense press scrutiny that has focused on the private seminars conducted by the Foundation for Research on Economics and the Environment (FREE) on Community Rights Counsel's "ample access to the media." Please. Community Rights Counsel (CRC) is a public interest law firm with four employees and no press secretary. The media has focused unrelentingly on FREE because the simple, uncontroverted facts about its operation (described below) are outrageous.

An even more disturbing example is the well-publicized memorandum written this summer by Leonidis Ralph Mecham, the director of the Administrative Office of the U.S. Courts, warning federal judges of a "secret" plot between the American Bar Association and CRC to rush an ethics opinion through the ABA's Standing Committee on Ethics and Professional Responsibility and to release this opinion "with great fanfare" at the ABA's August annual meeting. Great story, the only problem being it was almost entirely made up. Here's a portion of the ABA's angry response to Mr. Mecham:

[Y]our Memorandum not only conveys (to a most distinguished group of federal judges) a completely inaccurate and detrimental "description" of what the Standing Committee on Ethics and Professional Responsibility is doing; it also makes statements that reflect adversely on the integrity of ten lawyers who, without compensation, devote, in the aggregate, hundreds upon hundreds of hours each year to producing ethics opinions for the guidance of lawyers and judges.

By starting from the premise that there is a problem, this debate elevates the discussion of this issue to an important new level: potential solutions. After framing the problem from the perspective of an environmental litigator who defends the environmental statutes attacked at FREE's seminars, I devote most of this article to outlining what I think is a promising potential response to the problem. My proposal starts with Steve Edwards' very helpful suggestion that district and circuit courts establish committees of judges to evaluate the propriety of private CLE programs for judges. I expand Edwards' response to address the crux of the problem: the funding of CLE programs by corporate litigants and other interested parties.

The Problem

In July 2000, Community Rights Counsel (CRC) released a 106-page report, "Nothing for Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public's Trust," which explains why the judiciary should reform the rules that govern privately-funded judicial seminars. The report focuses heavily on judicial seminars conducted by the Foundation for Research on Economics and the Environment (FREE).

These are the basic facts about FREE's operation. FREE flies about 40 federal judges a year to Montana resorts to attend five- to six-day seminars on environmental law. FREE pays for the judges' tuition, room, board and travel expenses, a gift worth well over $1,000 per judge. Judges spend 3 to 5 hours each day listening to lectures; the rest of the day is devoted to fly-fishing expeditions, horseback rides, and cocktail hours.

FREE receives about one-third of its funding from a handful of large corporations — including Texaco, General Electric and Monsanto — that regularly litigate environmental cases in federal court. FREE's remaining funding comes mainly from notoriously ideological foundations such as the John M. Olin Foundation, the Sarah Scaife Foundation, and the Charles G. Koch Charitable Foundation, which simultaneously bankroll groups like Pacific Legal Foundation to litigate environmental cases in federal court. FREE's corporate funders regularly send corporate officers to FREE seminars where they lecture, dine with and, in some cases, share a log cabin with federal judges.

FREE seminars deliver two primary messages to federal judges. First, they argue that existing federal environmental laws are inefficient and should be repealed or struck down in favor of the free market, which will produce a more "optimal" amount of pollution. In FREE's words, its seminars "reject top-down, command and control environmentalism" and "promote private property rights, market incentives and voluntary arrangements." Second, FREE seminars instruct judges on Constitutional provisions that can be used to repeal or frustrate existing environmental laws. For example, one frequent lecturer at FREE's seminars

has been James Huffman of Lewis and Clark Law School. Huffman, who sits on FREE's Board of Trustees, is one of the few academic disciples of the extreme views on the Takings Clause expressed by Chicago Law Professor Richard Epstein. Huffman has delivered lectures to judges at FREE seminars on topics such as "Liberty and the Environment: A Case for Principled Judicial Activism," and "Takings: Property, Environment, and the Constitution." In Huffman's words:

The most significant accomplishment of the Reagan-Bush Administrations has been the staffing of the federal courts with intelligent judges. My fear is that the Reagan revolution will come to nothing as these judges sit on their hands in the name of a simplistic theory of judicial restraint.

As a litigator who works for a group that defends in court the environmental protections attacked at FREE's seminars, I find these seminars offensive to the most basic notions of fairness in our adversarial system. I communicate with federal judges only through written briefs, avoiding even casual conversations with the judges I practice before, out of concern over the possible appearance of inappropriate ex-parte contact. Meanwhile, at a dude ranch in Montana, my adversaries are wining and dining the same judges and carefully critiquing environmental laws during fly-fishing expeditions and leisurely horseback rides through Yellowstone National Park.

I am not alone in this outrage. FREE's seminars have been criticized by a long and growing list of commentators that includes: (1) the editorial boards of more than 30 major newspapers from across the ideological spectrum; (2) prominent judicial ethics experts from law schools across the country; (3) members of both the Senate and House Judiciary Committee; (4) former judges including Abner Mikva; and (5) good government groups such as Common Cause and the Center for Public Integrity.

Towards A Meaningful Solution

Steve Edwards proposes an important first step towards reform in suggesting that the judiciary establish committees of judges in districts (and presumably circuits) around the country to evaluate whether or not an appearance of impropriety stems from a private judicial seminar. He's right in pointing out that individual judges lack both the information needed to make this determination and the time to conduct an investigation.

Edwards' proposal falls short, however, because it fails to confront the principal problem with private seminars: the appearance problem and actual conflicts of interest that stem from having interested parties fund and inevitably shape the CLE received by federal judges. Edwards' solution would simply shift to these new committees judgment calls that ought to be eliminated altogether. What, for example, should the committee do if faced, ex-ante, with the fact pattern of *Aguinda* (discussed in some detail in Bruce Green's introduction to this debate)? A district judge decides an important environmental case in favor of Texaco and that case is on appeal. The judge petitions to attend an environmental law seminar run by an organization that receives 6 percent of its general revenues from Texaco. Texaco's former CEO is scheduled to speak at this seminar. Should the committee allow the judge to attend? Plainly, if Edwards thinks the committees he recommends can reach an answer that satisfies both the petitioning judge and the lawyers for Aguinda, he is asking a lot.

A far better solution would be to give the committees Edwards recommends sufficient funds to pay the tuition, room and board for judges who want to attend seminars funded by private organizations. This is precisely what happens with respect to executive branch lawyers who are involved in litigation. If an Assistant United States Attorney wants to attend a CLE program, he or she has the trip approved by a supervisor and paid for by the Department of Justice.

The most significant procedural and substantive objections to this solution can each be addressed.

Edwards raises the major procedural objection: where would the money come from? He doubts that the same Congress that refuses to raise judicial salaries would make available funds for private judicial seminars. This objection misses the nuances of the Congressional appropriations process. Federal judicial pay raises are trapped in the political morass of Congressional pay raises. Pay for judges has been linked to pay for members of Congress and members of Congress are afraid of the constituent backlash that accompanies attempts by Congress to raise their own salaries. For this, judges suffer unfairly.

Outside this unique context, however, Congress generally grants the reasonable appropriation requests of the federal judiciary. There is every reason to believe that if the judiciary requested an appropriation to fund continuing legal education programs for judges, Congress would grant this request. This request would be tiny by federal appropriations standards. Currently, approximately 100 judges attend private CLE programs each year (if this category of activities is narrowly defined to include only multi-day educational programs directed toward federal judges). Even if these seminars

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cost $5,000 a judge (a generous estimate) the total amount of money involved is $500,000. Quadruple this (to pick a number out of the air), to expand judicial education opportunities, and one still is talking about a $2 million line item, not even a full drop in a very large bucket. Although some provision might have to be made to handle the unlikely scenario where sufficient funding is not available to fund a particular trip, generally this should not be a problem.

Substantively, my proposal could be attacked simultaneously as too permissive and too restrictive. Too permissive, some will say, because it could mean that taxpayers would end up funding FREE seminars. Too restrictive, others will argue, because judges would no longer be able to make their own decisions about what expense-paid seminars to attend (judges would of course be free to attend any seminar they choose to pay for on their own).

My answer to the too permissive argument is: "so be it." Taxpayer funding would dramatically alter the market for privately-provided CLE programs for judges. Judges would no longer enter the market seeking handouts, they would enter as paying customers. Providers would compete for judicial dollars by offering the most essential and best-run programs. The availability of taxpayer money should encourage entry into the market of CLE programs for judges. Money should no longer be a serious impediment for any group that believes that judges would benefit from legal education on a particular topic. If FREE survives in this free market, and is sanctioned by the committees recommended by Edwards, there is little basis for objection. Stripped of the stain and bias that stems from its funding by corporations and other interested parties, FREE's seminars would become far less problematic as a matter of judicial ethics.

The too restrictive argument seems unfounded. As mentioned above, taxpayer funding would remove the most glaring and intractable ethical problem that stems from private CLE seminars — the funding of these programs by interested parties. The district and circuit court committees' role would generally be limited to filtering out programs that are run by litigants or are so rabidly one-sided on particular legal issues that they resemble ex-parte communications. The committees should, in general, authorize funding for any legitimate continuing legal educational activity (and, given that these committees would be made up entirely of judges, they can be expected to do so). The availability of public funding should increase the CLE offerings available to judges. I would suspect that the vast majority of federal judges would happily trade a slight amount of freedom in accepting CLE gifts for the insulation that taxpayer funding and committee approval would provide against charges of ethical impropriety.

The problems with private CLE programs for judges, and the flaws with the existing ethical guidance on the topic, have now been documented overwhelmingly. It is time to find a solution to this problem that preserves every legitimate educational opportunity available to federal judges. Steve Edwards makes a valuable contribution to this debate by proposing that decisions regarding the propriety of attending CLE programs be removed from individual judges and entrusted to committees established in district and circuit courts around the country. I have grafted onto Edwards' framework the proposal that the committees be given the resources to pay the tuition, room, and board for any program authorized by one of these judicial committees.

My proposal is painted in broad strokes and is intended only as one potential solution; others can and should be contemplated. My hope is only to demonstrate that, if it chose to, the federal judiciary could solve the problem my organization and others have raised with private judicial seminars (1) on its own, (2) with a minimal expenditure of taxpayer resources, and (3) without any negative effect on the availability of educational opportunities for judges.

FBC News

Council Holds Fall Retreat

By Steven M. Edwards

The Federal Bar Council held its third annual fall retreat at the Hudson Valley Resort and Spa in New Paltz from October 25 to October 27, 2002. Chaired by Robin Zablow, the event was sold out. In addition to the usual receptions and dinners, there were four excellent panel discussions.

Batson

Judge Kevin Duffy chaired a panel discussion on the Supreme Court's decision in *Batson v. Kentucky*, where the Court outlawed the discriminatory use of peremptory challenges in jury selection. Judge John Gleeson explained his view that lawyers should play a limited role in the voir dire process, observing that a short voir dire conducted by the judge is ordinarily sufficient. Barbara Underwood of the United States Attorney's Office for the Eastern District of New York described the scholarly

work she has conducted on the *Batson* decision, focusing on the ambiguities and complexities that courts and litigants confront in implementing the decision. Anthony Ricco offered his views as a defense lawyer on the necessity of retaining the use of peremptory challenges, in part to compensate for the inadequacy of challenges for cause. In addition, Alan Vinegrad discussed his recent experiences as a federal prosecutor with *Batson* litigation and his views on voir dire.

Mediation

Judge Harold Baer led a discussion on mediation. Judge Naomi Buchwald observed that settlement is often the best outcome for the parties and the system. For that reason, she takes a creative approach to settlement and will raise the topic at almost every conference. Professor Harold Abramson of Touro Law Center stated the key is to design a process that gets the parties out of the rights/obligations/win/loss box. He encourages parties to approach a mediation by looking at interests as opposed to positions. Judge Baer discussed the differences between evaluative and facilitative meditators, and he commented that one benefit of mediation is that it gives the parties a chance to vent. He noted that approximately 80 percent of the mediations in federal court are successful.

Humor

A panel moderated by Judge David Trager discussed the use of humor in the courtroom. Panelist Brooks Burdette pointed out the potential risks and rewards of humor in the courtroom, using video clips to illustrate his points and eliciting war stories from the audience. Judge Nicholas Garaufis discussed his recent experience with a sexual harassment suit by a female wrestler, noting that the unusual nature of the case made humor inappropriate in that instance. Kevin Castel suggested that attorneys should not attempt humor unless it works naturally for them, but he added that humor often can be useful for breaking the tension in a difficult case.

Jury consultant Paul Neale noted that mock juries always encourage humor, but it almost never has the impact that the attorney thinks it will have. A jury may react to the use of humor by concluding that the lawyer is trying to hide the weaknesses in the lawyer's case. At the same time, the use of humor can make an attorney likable, and likability almost always has a positive impact on a jury. Peter Eikenberry stated that he usually does not use humor in the courtroom because he is not very good at it, and he emphasized the importance of not making fun of an adversary.

The panel also discussed the use of sarcasm and agreed that, in a criminal case, sarcasm can work for the defense lawyer but not for the prosecutor. Judge Trager suggested that it can be a mistake for a prosecutor to use sarcasm in cross-examining a defendant because the jury is usually eager to hear from the defendant and sarcasm can get in the way.

Philosophy

The last panel, chaired by Fordham Professor Bruce Green, discussed moral philosophy and the practice of justice, focusing on whether lawyers practice justice or practice law, with justice as a by-product. Robin Zablow, who has a Ph.D. in philosophy as well as a law degree, discussed the philosophical underpinnings of morality and justice. Judge John Koeltl suggested that the monopoly that lawyers have on the legal system creates obligations to society. He stressed the importance of an independent judiciary in helping people to resolve differences peaceably, and he observed that incremental decision-making tends to limit the impact of any biases.

Peter Eikenberry spoke about the importance of mentors, and he noted that various mentors had taught him the value of fixing things when we find something wrong, treating others with respect and making a contribution to society. Judge Robert Katzman reviewed various definitions of justice and stated that a judge cannot simply be guided by morality or a theory of social justice but must focus on what the law provides. He added that one can nevertheless revisit an existing decision in a principled way.

Judge Koeltl also emphasized that fairness is important, which is why he hears oral argument on almost every motion and writes long opinions. Professor Donald Zeigler of NYU Law School picked up on this thought, suggesting that fairness is easier to achieve where the court begins the process by gathering as many facts as it can.

FBC News

Reception Honors Judges And Attorneys

By Jeanette Redmond

The Federal Bar Council's Public Service Committee held a reception on October 22 in the Charles L. Brieant Conference Center of the United States Courthouse at 500 Pearl Street to honor

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the judges and attorneys who participated in the 2001 and 2002 Public Service Committee programs.

The PSC, which consists of partners and associates from 25 law firms, as well as the Honorable Denny Chin, United States District Judge for the Southern District of New York, and the Honorable Robert M. Levy, United States Magistrate Judge for the Eastern District of New York, is dedicated to providing both pro bono legal representation and non-legal public service in a variety of areas.

Decades Of Service

Kevin Castel welcomed the judges, attorneys, paralegals and other attendees who filled the conference center and thanked them for their work on the PSC projects. Castel then reflected upon one of the earliest of these projects — the high school mentor program — initiated two decades ago in 1982 and continuing to today. Working in coordination with Debra Lesser, Executive Director of the Justice Resource Center, the members of the PSC provide individual attorney mentors to high school students.

Castel also noted the recent successful efforts of Judge Chin and Anthony M. Radice, a member of Morrison & Foerster LLP, co-chairs of the Court Visits program, in securing funding for an employee to assist in the administration of this initiative, which brings public high school students together with federal judges. (An article by Stephen Young on the Court Visits program appears next in this issue of the *Federal Bar Council News*.)

Castel concluded by thanking Richard A. Rothman, a partner at Weil, Gotshal & Manges LLP and chair of the PSC, and introducing Judge Chin, who has been particularly active in the committee over the past several years, especially in connection with the initiation of the Court Visits program.

The PSC

Judge Chin thanked Castel for his comments and modestly joked that when he and Castel's wife, Patricia McLernon, were co-clerks, McLernon edited all of his work. On a serious note, Judge Chin said he joined the PSC because he was impressed with how it "takes action" with the help of Barbara Nichols, Pro Bono Coordinator at Weil Gotshal. Judge Chin noted that in addition to their work in connection with the Court Visits program, members of the PSC have aided the court by volunteering to represent children in SSI cases.

All of the firms, attorneys and judges who have worked on PSC matters in the past two years received a certificate.

Next, Richard Rothman welcomed the attendees and described some of the PSC's major initiatives, which include — in addition to the high school student mentor program, the Court Visits program and the Children's SSI Benefits Project mentioned above — the World Trade Center Legal Services Program, spearheaded by the PSC with the assistance of Aaron R. Marcu, a partner at Covington & Burling, to represent the families of uniformed officers victimized in the September 11 attacks; and the Homeless Rights Initiative, which deals with various issues relating to the rights of homeless children.

Rothman noted that the PSC has been a successful vehicle for those individuals and firms with good ideas wishing to provide pro bono services to their community. He concluded by thanking all those whose contributions over the past two years have helped the PSC succeed in its objectives, and he commended Debra Lesser and Barbara Nichols, in particular, for their ongoing efforts on behalf of the PSC.

All of the firms, attorneys and judges who have worked on PSC matters in the past two years received a certificate, signed by Kevin Castel and PSC Chair Rothman, in recognition and appreciation of their contribution to the work of the PSC.

In The Courts

Open Doors

By Stephen Young

Heather Harris of the Bronx was in a tough spot. She had walked out of her girlfriend's apartment after overhearing telephone conversations suggesting a drug deal might soon go down there. But despite ample subsequent opportunity, she did not tell the authorities what she knew. By not piping up, she was charged with misprision of a felony.

Had an unknowing stranger walked into Southern District of New York Judge Richard M. Berman's courtroom the afternoon of November 14, that person might have felt enveloped by testimony from the seamy side of life. The rat-a-tat-tat responses of the undercover cop, and the plaintive recollections of the defendant who took the stand, gave rise to tension and apprehension as the young woman's fate hung in the balance.

The realism of the testimony and legal argumentation — and the rapt attention of the jurors — belied the fact

that this was actually a mock trial, with a jury of high school seniors preparing themselves for one of citizenship's most important roles.

Jury Service

The occasion was "Open Doors to Federal Courts," an annual exercise promoted by the Administrative Office of U.S. Courts in Washington to demystify the Third Branch for those soon coming of age. Every Autumn it presents a new theme, and this year's was "Jury Service — A Rite of Passage." Thus it was, inspired by the A.O.-supplied materials, that the convicted drug supplier, Jason Friend of Brooklyn, his equally convicted girlfriend, Tanya Wilson of Manhattan, and undercover NYPD cop Rocky Mailer of Bayonne, joined Heather in the melancholy scenario that provided grist for the prosecution. The Assistant United States Attorney was played by Second Circuit Court of Appeals Director of Legal Affairs Elizabeth Cronin — herself a former prosecutor in the Westchester County District Attorney's Office. The accused was defended by Andrew Rubin of Mancuso, Rubin and Fufidio in White Plains. Officer Mailer was played by Matthew McCauley and defendant Harris by Siomara Martinez, both of Cronin's staff.

But the students played themselves — seniors who shortly will be eligible for real jury pools. They were 59 strong: 31 from Forest Hills High School, and 28 from Brooklyn's James Madison. They arrived at the courthouse already infused with strong ties. Forest Hills is the alma mater of Judge Berman, as well as of Second Circuit Court of Appeals Judges Robert Katzmann and Dennis Jacobs. (Judge Jacobs and Chief Judge John M. Walker, Jr., visited with the students at lunchtime.) James Madison High boasts Justice Ruth Bader Ginsburg among its alumnae. Their two schools are among dozens in New York City that offer legal education curricula. The students had studied court-related materials and were prepared for their exercise. Thus no aspect of the day's activities was alien to them — except they had no information about the case they would judge. Undaunted, they jumped right in and performed as required, without hesitancy or feelings of intimidation. They raised their right hands with alacrity as Carolyn Purwin, Judge Berman's intern, swore them in as members of the jury pool soon after their courthouse arrival. Then they got down to empaneling a grand jury, its members picked randomly from among them, and having it hear the prosecution's case.

True Bill

No rubber stamp, this grand jury: it retired to evaluate carefully what it had heard from Cronin and Officer Mailer. In the end it voted a True Bill, saving Cronin the embarrassment of having to file an Information with the district court in order, literally, to save the day. Now the stage was set — after a pizza lunch in an upper floor reception room — for the denouement of the exercise. The students took the elevators and filed into courtroom 706 where once again the jurors were sworn to their duty, this time by courtroom deputy Rose Dickson.

All rose as Judge Berman entered. Then the judge, after explaining the basic contours of the case, conducted his voir dire. It was so realistic that two potential jurors were excused by the judge when they indicated their life experiences might compromise their ability to be fair.

As time parameters were one of the few factors impinging upon the verisimilitude — the students had to leave by 2:00 p.m. — each side limited itself to one witness. Yet the testimony was rich in detail, with each witness — Officer Mailer again for the prosecution and Harris in her own defense — responding on direct and cross with detailed descriptions of a complicated scenario. The jurors had to master and be able to recapitulate and argue about a complex fact situation without benefit of notes. They then had to reach a conclusion — a unanimous one if possible — in the short time imposed by the artifice of the program. As a result, their attention was riveted on the testimony, and upon retiring to the jury room, they took every last minute available to them behind the closed door to reach their verdict.

Not Guilty

In the end the jury acquitted Harris, an outcome that was not officially confirmed until Dickson had solemnly polled each juror. Post-trial comments indicated their verdict was reached primarily because they had reasonable doubt as to whether Harris had actual knowledge that a serious crime had been committed — a requisite for conviction of this offense.

Interestingly, the non-jury members in an informal poll had simultaneously reached the same conclusion, though not quite unanimously; while in the morning a similar "shadow" grand jury had voted to indict, just as their sworn compatriots had done.

When, in the brief remaining time Judge Berman discussed the day's events with the students, their energy level was higher than ever. Their hands flew in the air, as they eagerly sought to tell Judge Berman how they reached their conclusions. They had taken the

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law into their own hands. And they liked the feeling.

Focus On:

U.S. Attorney Roslynn Mauskopf

By Marjorie J. Peerce

Even though Roslynn R. Mauskopf was sworn in as the United States Attorney for the Eastern District of New York on September 3, 2002, she still pinches herself to assure herself that she is "not dreaming." As she will tell you, "it is an unbelievable privilege to be U. S. Attorney." But she knows that it is more than just a privilege. Sitting in her office with a sobering view of where the planes struck the World Trade Center 14 months ago, the weight of the office that she assumed and the awesome responsibility that comes with it are always in the forefront of her mind.

As a triple major in French, psychology and linguistics at Brandeis University, she did not foresee her career in the criminal justice system. But from her first day of criminal procedure at Georgetown University Law School — taught by a professor after whom (in this author's experience) Professor Kingsfield from "The Paper Chase" might well have been modeled — Roz Mauskopf, a child of Holocaust survivors, found herself fascinated with criminal law. She knew that she was going to spend her career as a prosecutor.

During the summer after her first year of law school, she did an internship with her criminal procedure professor. The following summer, she worked at the U.S. Attorney's Office for the Southern District of New York. Upon her graduation in 1982, she joined the New York County District Attorney's office. Over the next 13 years she rose through the ranks, serving as Deputy Chief of the Special Prosecutions Unit and Chief of the Frauds Unit.

Inspector General

In October 1995, she was tapped to serve as the Inspector General for New York State.

Over the next year and a half, Ms. Mauskopf restructured the Inspector General's Office, creating a system in which Deputy Inspectors General report directly to the Inspector General, as opposed to agency heads. She hired experienced investigators and lawyers to staff the agency, and was instrumental in the adoption of an executive order that required agency employees to report corruption, imposed sanctions on those who fail to report corruption and increased whistle blower protection. She also withdrew all of her affiliations with political parties, believing that as Inspector General, she should remain apolitical.

Initially, her goal as Inspector General was a simple one: figure out who did what. Soon, however, she added another goal, one that made her position far more gratifying: figure out why the conduct occurred and ensure that it is not repeated. This dual role was extremely satisfying to her because it enabled her to "seek[] justice and . . . fix the system too."

In her short tenure as U.S. Attorney, Ms. Mauskopf has continued her pursuit of these goals. Referring to recent charges brought by her office against individuals who allegedly lied about their credentials or criminal records to secure employment at the city's airports, she noted that different agencies and companies use inconsistent procedures in the hiring process, which allows for faulty hiring. She and her office are now assisting the various agencies in implementing hiring procedures to ensure that these problems do not occur again.

The "Weed and Seed" program is another area in which she can put experience at the Inspector General's Office to good use. This program, overseen by the Department of Justice and the local Offices of the U.S. Attorney, provides funds to help revitalize neighborhoods that need assistance. By developing relationships with these communities, she hopes to further such law enforcement initiatives as Project Safe Neighborhood, which aims to remove guns from the street.

Priorities

When asked what she views as her office's priorities, she said that "everything is a priority in the district — of course terrorism is the number one priority, not just reacting to it but proactive initiatives to prevent it."

The district's two airports, which she describes as "gateways to the United States as well as overseas," present particular issues for the office. To succeed in pursuing terrorism, she advocates a strategy that is preventative as well as reactive and firmly believes that her office needs to work closely with other federal, state and local authorities to attain that goal.

Combating white collar crime is another high priority of hers. "The EDNY is home to a broad array of businesses in the high tech world in Long Island," and she plans to actively pursue corporate fraud. She is one of seven U.S. Attorneys from around the country to serve on the President's Corporate Fraud Task Force, which, along with the SEC/CFTC and other federal agencies responsible for

enforcement and regulation of businesses, seeks to develop a national strategy for combating corporate fraud.

Among Ms. Mauskopf's other priorities are combating crime committed by street gangs that plague both the city and Long Island, prosecuting immigration-related offenses and pursuing gun and narcotics traffickers. Finally, "the EDNY has been the leader in prosecuting traditional organized crime and there is a sustained effort to combat traditional organized crime as well as the emerging non-traditional organized crime."

Since her appointment, Ms. Mauskopf has attempted to speak with as many people as she can and gain as many perspectives as possible about the office. One of the groups she is most interested in hearing from is the defense bar, because although "it is the main priority of a prosecutor to do justice, it does not mean that one prosecutes to the hilt, but instead it means that the end result must be a just one on the facts and circumstances of the individual case." She therefore is interested in an open and healthy dialogue to learn about any concerns among members of the bar so that she can determine how to alleviate them.

Fresh Perspective

As U.S. Attorney, Roz Mauskopf brings a fresh perspective to things, having worked in the state system for the past 20 years. Although she only has been in office a short while, she already questions why things are done the way they are, and whether there is a better, fairer way to proceed. "Justice cannot be administered through hard and fast rules, but I need to have a healthy and open dialogue on the issues." As a result, when she is considering a particular prosecution, the law is not the first thing she looks to. Instead, she considers the facts concerning the person and the conduct. She then tries to determine what the interests of justice require, particularly in terms of sentence. As she notes, "the law is flexible, and it captures the essence of justice." She perceives the Federal Sentencing Guidelines as flexible, and thus they allow her to "achieve [her own] internal sense of justice that [she has] learned in the last 20 years, what's right and fair."

In the end, Roz Mauskopf is humbled to have been appointed United States Attorney for the Eastern District of New York, and she intends to serve us well.

New Appointments

Two Magistrate Judges Reappointed

By Stephen L. Ratner and Andrew L. Lee

The Board of Judges for the Southern District of New York recently reappointed U.S. Magistrate Judges Andrew J. Peck and Lisa Margaret Smith to eight-year terms. The reappointment process begins a year before the end of a magistrate judge's term; it includes interviews of the magistrate judges and of attorneys who have appeared before the magistrate judges, as well as a vote of all active non-senior district judges in the Southern District.

Magistrate Judge Peck

Magistrate Judge Peck first was appointed in 1995, after having practiced at Paul, Weiss, Rifkind, Wharton & Garrison since 1978. He clerked for United States Circuit Judge Paul Roney of the Fifth Circuit during the 1977-78 term. Magistrate Judge Peck's affiliations include the American Bar Association and the Federal Magistrate Judges Association; he has served on the Mediation Panel of the Southern District of New York and as an arbitrator for the American Arbitration Association. Magistrate Judge Peck's community services have included serving on the Board of Directors of Berkshire Hills Emanuel Camps (a non-profit summer camp for children and senior adults — Judge Peck was a counselor there during his college years at Cornell in the early 1970s), and on the Board of Directors of the New York and national chapters of the Mystery Writers of America (Magistrate Judge Peck has written a Sherlock Holmes reference book).

Magistrate Judge Peck's advice to lawyers: First, "read the rules" — including the local rules and individual practices. Next, "follow the rules." Also, "be prepared" and "be reasonable with your adversary." As "a lot of petty discovery disputes could be resolved if the parties would talk to each other," Magistrate Judge Peck recommends the "Rifkind Rule" (a throwback to his days at Paul, Weiss): "All phone calls need to be returned by the end of the day or, at worst, within 24 hours."

Magistrate Judge Peck graduated from Duke Law School in 1977 with honors and was an editor of the Duke Law Journal. His new term begins in February 2003.

Magistrate Judge Smith

Magistrate Judge Smith was also first appointed in 1995. At the time, she was an Assistant United States Attorney for the Southern District of New York — a job she began in 1987. After graduating from law school in 1980,

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Magistrate Judge Smith joined the Kings County, New York, District Attorney's Office, first as an Assistant District Attorney and ultimately as Supervising Senior Assistant District Attorney. After serving as Assistant Attorney General in the Appeals and Opinions Division at the New York State Department of Law in 1985 and 1986, she returned to the King's County D.A.'s Office as Supervising Senior Assistant District Attorney.

Magistrate Judge Smith's advice to lawyers: "Be prepared and behave appropriately."

Magistrate Judge Smith is a member of the Board of Editors of the *Federal Bar Council News*, and of the Federal Courts Law Review, an on-line journal of the Federal Magistrate Judges Association. She is a Director at Large for the Westchester County Women's Bar Association (a chapter of the Women's Bar Association of the State of New York) and also is active in the Westchester County Bar Association, the New York State and National Association of Women Judges, the Federal Magistrate Judges Association, and Judges and Lawyers Breast Cancer Alert (JALBCA). Magistrate Judge Smith recently helped to coordinate "Science in the Courtroom," a program co-sponsored by the Federal Bar Council and the American Bar Association.

Magistrate Judge Smith's advice to lawyers: "Be prepared and behave appropriately." Magistrate Judge Smith notes that "most judges appreciate counsel who can be collegial and professional at the same time that they are being advocates." Magistrate Judge Smith graduated from Duke Law School and earned her B.A. degree with honors in political science from Earlham College in Richmond, Indiana. Her new term begins in March 2003.

Careers

From Law To Movie Making

By Bennette Kramer

Former Federal Bar Council President Alan J. Hruska has made the transition from the practice of law to a career as writer and director of film. His first film — "Nola" — has reached the final post-production stage and will be ready for distribution soon. Hruska describes the film as a romantic comedy set in New York.

Following graduation from Yale College and Yale Law School, Hruska spent 44 years practicing law at Cravath Swaine & Moore as a litigator. During that time he represented clients in antitrust, First Amendment, white collar, patent, securities and tax matters in what he describes as the "most interesting civil cases in the latter part of the Twentieth Century." Always present in this successful litigator's mind, however, was the idea of writing. Although he majored in economics at Yale, he took and audited many English and writing courses, and really wanted to be a writer and to make movies. However, realizing that he would one day need to support a family, in his senior year Hruska talked to the dean of the law school and was admitted. Following graduation he went to Cravath, where he remains today as Senior Counsel.

Hruska began his writing career in the mid-1980s when Doubleday published his first novel, "Borrowed Time." He wrote the first three chapters during a long trip back from Philadelphia or, as Hruska says, "the chapters wrote themselves." Following the publication of his novel, Hruska yearned to continue his writing career, but was totally involved in the practice of law.

Now, with the opportunity to retire from the active practice of law, Hruska has turned to making movies. Hruska, an avid movie goer, has wanted to make movies since he was ten. He has participated in every phase of "Nola," beginning with writing the script, and his enthusiasm for the process of creating "Nola" is infectious. The movie is a romantic comedy about a precocious 18 year old girl from Topeka, Kansas, who comes to New York to find her father. The story takes place mainly in New York with brief scenes in Kansas. All the filming was accomplished in New York, and all five boroughs were used. Hruska considers the City of New York a character in the movie. They filmed East Village scenes in Williamsburg, Brooklyn and Astoria, and the Bronx Supreme Court substituted for the New York Federal Courthouse. Even the Kansas scenes were filmed in New York — in Staten Island. The production used a location expert who was able to find locations that gives this low budget movie an expensive look.

Hruska began his efforts to transform his screenplay into a film about a year ago by looking for a producer. He found Jill Footlick and Rachel Peters (granddaughter of Irving Berlin) through a Cravath partner who is Jill's brother-in-law. Jill read Hruska's screenplay and agreed to work with him. Pre production activities included scouting locations, interviewing and hiring crew

members such as the director of photography, production designer, art director, editor, script supervisor and casting. Next, during the pre-production process the crew scouted locations, blocked scenes and listed all shots of all scenes. As a first time film-maker, Hruska threw himself into all aspects of the process. He soon became aware of the importance of each of the players in transforming his screenplay into a film.

Pre-production occurred in January and February 2002, followed by five weeks of shooting for 12 to 16 hours per day, six weeks of editing and many weeks of post-production. In total the film, about to be completed, has taken ten to eleven months.

Hruska found the casting world particularly fascinating. He saw Emmy Rossum, the young woman who plays the main character in "Nola," in "Songcatcher" and knew immediately she was the woman for the role. He contacted the producers who watched "Songcatcher," and they agreed with him that Emmy was perfect for the role. So they contacted her agent, sent the screenplay and she agreed to accept the part. Other actors in the film include Mary McDonnell, who appeared in "Dances With Wolves"; Steven Bauer, who appeared in "Scarface" and "Traffic"; and James Badge Dale, son of Anita Morris. Hruska and the other production members auditioned 15-18 actors for the part of the young man in the film, and all agreed that Dale was the right one.

Another job that Hruska found fascinating was that of script supervisor. Michael Taylor, the script supervisor, made sure that the shooting was faithful to the script, i.e., the costumes were the same from one shot to the next or the same amount of food was on a plate. Taylor determined whether each shot contained what the script required.

The editors — Peter Frank and his assistant Mark Laub — transformed the daily product of takes into a tape of all shots from the prior day. The production team looked at it the next day to make sure they had gotten all the shots they needed. Frank then put together a composite rough edit. The final edit performed by Frank, Laub and Hruska took six weeks and reduced 2 hours 35 minutes of film into a 93 minute movie.

The post-production manager, composer, sound editor and looping editor, each performing his or her separate tasks, have worked together to put the film into its final form. The four people in the "loop group" provide background noises, line up the dialogue for extras and otherwise put in missing dialogue. Some of the actors redid lines during the post-production period. Also, the sound mixers integrated 75 separate tracks to provide a sound track containing a balance of sounds, none of which drowns others out. The last step will be to transfer the edited tape into a reel of tape and digital numbers, which will then be converted into a negative and cut into frames. Finally, the negative is sent to the technicolor processor, which will print a positive frame by frame. At that point, the 35 millimeter film will be ready to show to distributors. Hruska has been fascinated by the complexity and organization of the film making process, remarking that each participant has an assigned job and stays within the boundaries of that job.

Hruska has written eight screenplays, and hopes to begin production on the next one in April 2003. His assistant director — Amanda Slater — is working on setting up a tentative shooting schedule, preparing a budget and starting to cast. Hruska's transition from lawyer to filmmaker appears to be off to a solid start.

The Judiciary

Hiring Law Clerks

By Magistrate Judge Lisa Margaret Smith

In recent years, the hiring of federal judicial law clerks has taken place earlier and earlier in the school career of the prospective law clerk. It typically occurs in the beginning of the law student's second year, but sometimes occurs during the summer before, or even during the first year of study. The clerkship in these cases generally is expected to commence in the fall following the student's law school graduation, so hiring could take place two years or more before the start of the job in the judge's chambers. This pattern of early hiring of future law clerks has now changed, at least for most federal judges. In March 2002, an ad hoc committee of federal appellate judges, made up of at least one representative from each court of appeals in the United States, overwhelmingly voted in favor of a new plan for hiring law clerks. The plan includes three components: (1) a moratorium on law clerk hiring during fall 2002; (2) future hiring of law clerks will occur no earlier than the fall of the third year of law school; and (3) future hiring of law clerks will focus on third year law students and law graduates. See "The Law Clerk Hiring Plan" at www.cadc.uscourts.gov/lawclerk/.

The Law Clerk Hiring Plan was considered by more than two hundred federal appellate judges, and was either supported or not opposed by 92 percent of those judges. It also has been

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considered and generally approved by district judges in at least 40 of the 94 federal district courts. (The number of approving district courts is undoubtedly higher than this number reflects; there are 37 district courts listed on the Web site as approving the plan, and upon inquiry to the districts in the Second Circuit, an additional three districts indicated that they have approved the plan; no effort was made to check with district courts outside the Second Circuit.) The district courts' actions range from unanimous approval, endorsement or adoption by a district's judges to more guarded statements such as "while we understand the guideline to be not binding, we intend to follow it in principle." See District Court Endorsements at www.cadc.uscourts.gov/lawclerk/.

At least 32 law schools, including every law school commonly ranked in the top ten, have adopted the proposal.

In our region, the proposal has been approved by district judges in the District of New Jersey ("all who responded [to a poll for comment on the proposed uniform law clerk hiring policy] support this proposed policy"), the Eastern District of New York (Board of Judges "unanimously agreed that, commencing this year, we would only interview law clerk candidates with at least two years' law school experience, and that we endorse [the] proposal on law clerk hiring"), the Southern District of New York ("Board of Judges has passed a sense-of-the-board resolution endorsing [the] proposal on law clerk hiring"), the Northern District of New York (the Chief Judge reports that the district's judges are encouraged to follow the policy), the District of Vermont (the Chief Judge reports that the district's judges will follow the policy), and the District of Connecticut ("District Judges and Magistrate Judges have agreed to accept law clerk applications from law students entering their final year of study or law school graduates. Applications will not be accepted prior to September 1 of the student's final year of law school").

The Chief Judge of the Western District of New York reports that although the district's judges have not endorsed the plan, most judges in that district hire law graduates, and would be unlikely to hire second year students for a future clerkship.

Law School Support

The plan also has been endorsed by the American Law Deans Association, the Association of American Law Schools, and the National Association of Law Placement, all of which have recommended that their member schools abide by the plan. See Law School Support and Endorsement Letters at www.cadc.uscourts.gov/lawclerk/. At least 32 law schools, including every law school commonly ranked in the top ten, also have adopted the proposal, agreeing not to cooperate with any student's attempt to start the application process before the third year of study.

The guidelines established by the federal appellate judges are, however, only guidelines; they have no binding authority on any particular judge, and have little or no applicability to the thousands of state judges across the country who hire law clerks. In recognition of that reality, the National Association of Law Placement has issued an open letter to its member law schools on implementing the guidelines; the letter is available at www.nalp.org/schools/jc_open_letter.pdf. NALP takes the position that law schools are in the best posture to insure the success of the guidelines that have been put forth. To that end, participating law schools are asked to discourage early application by students and graduates, in part by providing assistance in the preparation of a clerkship application and supporting documents only for clerkships beginning in that or the following calendar year. Law school faculty and staff are asked to refrain from submitting letters of recommendation, or providing telephone references to judges, on behalf of any student or graduate unless the clerkship in question begins in that or the following calendar year, and in any event reference letters are to be mailed no earlier than the Tuesday following Labor Day. The open letter gives similar guidance for law students and graduates to follow in the timing of their applications for clerkships. Finally, the NALP Guidelines urge employers to follow the same rules when submitting letters of recommendation or providing telephone references for any student or graduate applying for a clerkship, thus refraining from providing such assistance to the applicant until the Tuesday following Labor Day.

Additional Information

The advantages of the proposed hiring plan include the availability of additional information about the prospective law clerk, allowing the hiring judge to assess competing applicants more fairly. A student in the third year of law school will be able to provide grades from four semesters of law school study; writing samples from seminar courses, internships, or summer employment; information on law journal selection,

publications, and election to a journal editorial board; information on moot court competitions and election to moot court boards; information regarding experience in clinical courses, public interest endeavors, and summer jobs; references and recommendations from law professors, summer employers, internship employers, and others with whom the student may have developed a professional relationship during two full years in law school; and information on selection or election to positions in student government. All of this information augments the student's ability to persuade a prospective employer — whether a judge or some other employer — of the student's ability to succeed under pressure and over time, not only during college and first year law school classes, but also in seminars, writing and moot court competitions, clinical opportunities and in employment situations.

One drawback, however, is that other prospective employers are not likely to adjust their hiring in a parallel fashion.

Delaying the selection process also permits the law student to assess whether or not he or she is truly interested in clerking, or can afford financially to accept a clerkship rather than a more lucrative position with a private law firm. The law student has additional time to build a successful law clerk application, and, in the process, to benefit fully from the law school experience. One drawback, however, is that other prospective employers are not likely to adjust their hiring in a parallel fashion; employers thus may find a slight increase in the number of students asking for a deferment of an employment offer, even after it has been accepted, in order that the student may accept a clerkship offered in the fall of the student's third year. A few students who have accepted offers from law firms during their second year, or during their summer employment, may feel uncomfortable pursuing a clerkship during their third year, although that is not foreseen as a major problem with the system. Plenty of qualified students will undoubtedly continue to pursue clerkships, even in the face of accepted offers of employment.

A recently published book, *Behind the Bench: The Guide to Judicial Clerkships*, by Debra M. Strauss, an adjunct professor of law and co-director of the Federal Judicial Extern Honors Program at Pace University School of Law, gives students and law graduates significant guidance in how to negotiate the process of applying for a clerkship. Successful negotiation of the process includes mastering the timing of an application. The guidelines that have now been recommended for use by federal judges will make it much easier for law students to do so. Additional information on the time when an individual federal judge will accept applications for any given clerk position is available through the Federal Law Clerk Information System, which may be accessed through www.uscourts.gov/employment.html.

Editor's Note: In the interest of full disclosure, Magistrate Judge Smith notes that she was a contributor to Behind the Bench: The Guide to Judicial Clerkships, but that she has no financial interest in its sales.

Developments

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moment to reflect on the purpose of the Federal Bar Council to uphold the rule of law through our activities and committees, which are a vehicle to work with judges to enhance the quality and fellowship of the bench and bar. Walpin urged those present to join the Federal Bar Council and work on committees, as participation in Federal Bar Council activities enhances the quality of the practice and allows lawyers to contribute back to the profession. During his tenure, Walpin wants all members to feel a part of the Federal Bar Council and urges all to contact him with ideas and suggestions.

Walpin observed that the ability of the Federal Bar Council to move in a positive direction in the past two years resulted from the leadership of Castel, who has increased membership, the number of activities, attendance at programs and retreats, committee membership and amicus briefs filed. Presenting a token of appreciation to Castel for his service to the Federal Bar Council, Walpin described him as a cross between a good judge and a good diplomat.

Castel attributed his successes as president to the hard work of people on committees, including Judge Denise Cote (heading the Inn of Court), Judge Denny Chin (the most active member of the Public Service Committee), and Judge Pierre Laval (chair of the Program Committee for the Winter Meeting). In addition, many judges have been panelists for Federal Bar Council programs.

Turning to his introduction of Daniel Greenberg, Castel observed that Greenberg had grown up in Brooklyn, five blocks from Ebbets Field, as an avid Dodgers' fan and a "loyal supporter of perennial underdogs." After graduating from Brooklyn College and Columbia Law School, Greenberg began his career at MFY Legal Services. At MFY, Greenberg learned the importance of

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climbing inside an adversary's head. For, example, while representing a poor woman about to be evicted, he asked the landlord, an Orthodox Jew, for a stay of the eviction. The landlord refused to consent, so Greenberg told him that he would have to work through the Sabbath to complete the papers requesting a stay. The landlord capitulated and granted a stay.

After 14 years at MFY, Greenberg followed his wife Karen Nelson to Boston, where he became the head of the clinical programs at Harvard Law School. In 1994, he was lured back to New York to become president and attorney-in-chief of The Legal Aid Society, where he has been ever since. Castel observed that Greenberg's skills as a consensus builder had served well to end the labor strife at the Legal Aid Society. Castel noted that while the Legal Aid Civil Division emphasizes negotiation and quick resolution, its lawyers are tenacious when necessary. With fewer lawyers than Skadden, The Legal Aid

From Circuit Clerk Roseann B. MacKechnie

Second Circuit Practice Tips: Amendments To The FRAP

A number of amendments to the Federal Rules of Appellate Procedure (FRAP) took effect on December 1, 2002. Please check the court's Web site at www.ca2.uscourts.gov for a complete review of all the changes. The most significant revisions affecting Second Circuit practice are outlined below.

FRAP 4 Appeal as of Right

4(a)(1)(C) Time for Filing a Notice of Appeal -- This is a new section which provides that appeals from an order either granting or denying a writ of coram nobis will be treated as a civil appeal, thereby requiring that a notice of appeal be filed within 30 days (60 days where the government is a party).

4(a)(5) Extension of Time to File a Notice of Appeal -- A motion for an extension of time to file a notice of appeal can be filed before the expiration of the original deadline to file or may be filed within 30 days after the original deadline, as long as the party demonstrates good cause or excusable neglect.

4(b) Appeals in Criminal Cases -- The filing of a motion in district court under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction. The revision makes clear that the time to appeal continues to run even if a motion to correct a sentence under Rule 35 has been filed. If the district court corrects a sentence as a result of a Rule 35 motion, the time to appeal will begin to run from entry of the corrected judgment.

FRAP 5 Appeal by Permission

5(c) Form of Papers; Number of Copies -- This amendment imposes a 20 page limit, exclusive of the disclosure statement, proof of service, and the accompanying documents required by FRAP 5(b)(1)(E), on petitions and cross petitions to appeal, and answers to those petitions and cross petitions.

FRAP 21 Writs of Mandamus and Prohibition, and Other Extraordinary Writs

21(d) Form of Papers; Number of Copies -- This amendment imposes a 30 page limit on a petition for mandamus, prohibition or other extraordinary writs, and any answer to such a petition.

FRAP 26 Computing and Extending Time

26(a) Computing Time -- With this revision, computing time under FRAP now conforms with computation practices under the Civil and Criminal Rules. Intermediate Saturdays, Sundays and legal holidays will not be counted if the time permitted to act is less than 11 days, unless the period is specifically stated in calendar days. Deadlines of 11 days or more will include intermediate Saturdays, Sundays and legal holidays.

FRAP 26.1 Disclosure Statement

26.1(a) -- This amendment requires a non-governmental corporate party who has no parent corporations and at least 10 percent of stock not owned by any publicly held corporation to inform the court of this fact.

26.1(b) -- Parties are now required to file supplemental disclosure statements whenever there is a change in the information required to be disclosed after the original statement has been filed.

Society each year represents 200,000 criminal defendants, is law guardian to 48,000 children and represents 40,000 civil clients. Castel stated that Greenberg uses his vast array of talents to run The Legal Aid Society—he "cajoles, praises, installs guilt and appeals to virtue."

Castel pointed to the excellence of the Federal Defender Division in protecting the constitutional rights of The Legal Aid Society clients as representative of the excellence that permeates the Society. For example, since September 11, The Legal Aid Society has been locked out of its offices at 90 Church Street and the staff has continued to represent both criminal and civil clients, initially entering the building with flashlights to obtain files. In spite of this, Greenberg has worked with the government to develop alternate food stamp and Medicaid programs, employment benefits and other methods to meet the needs of clients following the disaster. The Legal Aid staff has stepped in to

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26.1(c) -- An original plus three copies of the supplemental statement must be filed.

FRAP 27 Motions

27(a)(3)(A) Response -- This amends the time for filing a response to a motion. Parties must now respond within eight days after service. Because the time period in which to act is less than 11 days, the term is eight business days (intervening weekend days and holidays are not counted). See FRAP 26(a). Three calendar days are added if service was not by hand. See FRAP 26(c).

27(a)(4) Reply to a Response -- The time for filing a reply to a response has also been shortened to five days. (Remember: because the time limit is fewer than 11 days, do not include in the count an intervening Saturday, Sunday, or legal holiday).

27(d)(1)(B) -- Motions do not require a cover page, but if a cover page is included, it must be white.

FRAP 28 Briefs

28(j) Citation to Supplemental Authorities --Legal argument is now permitted in 28(j) letters, although the revised rule now places a limit of 350 words on the length of the letter.

FRAP 31 Serving and Filing Briefs

31(b) -- This rule makes clear that briefs must be served on each unrepresented party, in addition to counsel for each represented party.

FRAP 32 Form of Brief, Appendices and Other Papers

32(a)(2) Cover -- Supplemental briefs should have a tan cover.

32(a)(7)(C) Length -- This rule encourages (but does not require) litigants to use the new Form 6 as a way to comply with the Certificate of Compliance requirement. (The new Form 6 is posted on the court's Web site).

32(c)(2)(A) Form of Other Papers -- Should a party elect to include a cover page which is not required, the cover must be white. (Examples of elective cover pages include petitions for panel or in banc rehearing).

32(d) Signature -- This provision requires that every brief, motion or other paper filed with the court be signed by the attorney or unrepresented party who files it. Only the original copy of every paper must be signed. An appendix filed with the court does not have to be signed at all.

FRAP 44 Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party

44(b) Constitutional Challenge to State Statute -- Counsel or an unrepresented party is required to notify the court if there has been a constitutional challenge to any statute of a State, if that State or its representative is not a party. The clerk is responsible for certifying that fact to that state's attorney general. (The former rule imposed such a requirement only when a federal statute was the subject of a constitutional challenge).

FRAP 45 Clerk's Duties

45(c) -- The clerk may now use electronic means (e-mail and facsimile) to serve notice of entry of a summary order or judgment on parties who have consented, in writing, to such service. (The court has already contacted many of you who have cases pending in the court asking whether or not you wish to receive orders or decisions by electronic service. If you have not heard from us, have at least one case pending in the court, and wish to receive decisions by electronic means, please complete and send in the form that is posted on our Web site.)

For further information, please feel free to contact me. My direct line is 212-857-8585.

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do what is necessary to represent the interests of many victims of September 11.

Calling the 126 year old The Legal Aid Society one of the "shining jewels of the City of New York," Castel presented the Buckner Medal to Mr. Greenberg.

Standing Up

In accepting the Buckner Medal, Greenberg accepted the award in his personal capacity, but stated that the award was for the work done by The Legal Aid Society. He noted that although The Legal Aid Society had obtained icon status by its mention on the Sopranos, now is a hard time for defense lawyers. In today's climate, it is increasingly important to maintain the freedom to stand up to the government and to understand the importance of interposing a lawyer between defendants and the government. He pointed with pride to the lawyers who, having obtained files by flashlight, refused to adjourn cases on September 12, stating that they "would not allow the great writ to be suspended." He talked about a panel with judges and prosecutors where he believed he was expected to talk about technical matters concerning the Fourth Amendment. Instead, he stated that "when one looks as a student of history at what has happened in and from Attila to Alexander to Hitler, genocide, apartheid, Kosovo, it has always been government in the name of the people who have committed the greatest atrocities." It is the lawyer who "stands up in defense and imposes her body and says I will not let you take away the freedom of my client, allow you to send her to jail, allow you to take her child away, allow you to execute her, unless you do it beyond a reasonable doubt in an open courtroom with counsel attaching with competent evidence." He emphasized that we must provide these protections going forward in this country, pointing to many threats to the rights of defendants, including the Sarbanes-Oxley Act and antiterrorism laws.

Concerning the civil lawyers at The Legal Aid Society, he proudly stated that they are part of a great consortium of services — a model multi-service law center. Following September 11, staff lawyers spent every day at FEMA offering a great range of services to provide disaster victims all they needed. The model developed has the greatest potential since the society was begun. Now, with the new city administration, Greenberg hopes to work with Michael Cardozo to develop solutions to problems, even if they do not always agree.

Next, he pointed to private bar support as essential to The Legal Aid Society, noting the assistance in obtaining a permanent home in Harlem at 128th Street and Madison Avenue. He considers the support of the great law firms as responsible for the success of The Legal Aid Society.

Family And Freedom

Although The Legal Aid Society handles many thousands of cases during a year and many small details can seem overwhelming, the lawyers also manage to see the large picture. For them, no case is routine. Quoting the poet Ann Michaels, Greenberg said that while one cannot control the small details, one can assert the largest order, the largest human values daily, which is the only order large enough to see. He said that the extraordinary Legal Aid Society staff practices this every day.

For Greenberg, family defines what is important. In conclusion, he noted that within 24 hours we would all be sitting down with people we most care for in the world to celebrate Thanksgiving. He asked that we all remember that the pilgrims — the first boat people — needed to flee their country and come to this country. They would have perished without the kindness of native Americans in that first year. Thus, he wishes that all freedoms prevail and that we be kind and generous to those who have less than we do.

The Back Page

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the Justice Department's Criminal Division to one of his colleagues, and took over day-to-day control of the Antitrust Division. There he met Ralstone R. Irvine, a recent graduate of the Corne Law School and one of the country's leading antitrust experts.

Donovan and "Shorty" Irvine brought on 65 cases in four years; a number of them were landmark prosecutions (e.g., the *Trenton Potteries* case). Each of the six cases litigated up to the Supreme Court were argued by Donovan, and in each the government prevailed.

The Rise Of Herbert Hoover

When President Coolidge announced that he did not choose to run for re-election in 1928, Herbert Hoover became the inevitable choice to lead the Republican Party. Donovan, at one point, received a "boomlet" for the vice presidential slot. His main contribution, however, was in the background, as one of Hoover's principal advisers. Donovan, for example, was the sole architect o Hoover's acceptance speech to the Republican Convention, and he and

Hoover thereafter planned the campaign together on a five day fishing retreat in Oregon. For all this work — a quid — there was an explicit quo: that Donovan would be elevated in a Hoover Administration to the position he had de facto occupied for much of the Coolidge Administration — that of Attorney General.

Hoover won a massive victory in November, overwhelming New York Governor Al Smith by an Electoral College margin of 444 to 87 (the popular vote was 21 million to 15 million). The issues were both economic — peace and prosperity under eight years of Republican leadership — and ugly — Smith was a Catholic, and the religious bigotry that was unleashed against the first Catholic to head a national party ticket was truly grotesque. This latter fact would play a critical role in Donovan's career ambitions.

In the period between the election and Hoover's inauguration on March 4, 1929, Donovan's promotion was floated out as a political trial balloon. Public opposition, however, was quickly interposed against Donovan. Why? Because he, like Smith, was a Catholic, and how, it was contended, could a Catholic Attorney General enforce Prohibition (since everyone knew that all Catholics were "wets" — i.e., against Prohibition). This "argument" was made in the face of Donovan's enforcement of Prohibition as U. S. Attorney earlier in the decade.

Notwithstanding, a number of Protestant ministers, senators and congressmen, and just plain wackos, publicly weighed in on the unsuitability of Donovan for such an important post. And while many prominent people weighed in strongly on Donovan's behalf (Emory Buckner, for example, then the United States Attorney for the Southern District of New York, issued a ringing endorsement of Donovan's capabilities), the political well had been poisoned.

Sticking In The Knife

On January 7, 1929, Hoover had a brief audience with Donovan, telling him that he could not make him Attorney General, but promising him a place elsewhere in the Cabinet. The position that seemed likely, and the one discussed, was that of Secretary of War.

Donovan was then called out to Santa Fe, New Mexico, on government business. In late February, a Hoover aide contacted Donovan and asked him to return to Washington immediately. Upon arriving, Donovan went directly to Hoover's Georgetown home. Hoover did not beat around the bush, telling Donovan that the job he wanted him to take was that of Governor-General of the Philippines. Donovan's immediate reaction was categoric and negative: "It is impossible." Hoover responded by pointing out that that post would be most useful "for [his] political career" (i.e., William H. Taft, Leonard Wood and Henry Stimson had all held that post). Donovan was unmoved, however, and asked about the War Department. Hoover's reaction was terse: "You could work there, but I wouldn't suggest it."

Donovan was growing increasingly agitated and stated he was going to head back to Santa Fe. Hoover, in the hopes of averting a total break, suggested that he meet with some of Hoover's advisers before doing so. Those interviews did nothing to change Donovan's mind, however. Justice Stone even visited with him, attempting to make Donovan face, and come to terms with, the less than pleasant side of politics. Donovan would have none of it, finally asking Stone to tell Hoover: "I expected nothing from him but honesty, and that I have not received."

Justice Stone did arrange for Donovan to meet with Hoover one last time before the inauguration. Donovan did not go quietly: "I am used to dealing with equals.... If I have any use at all, it is to stay here in America and deal with my equals,... you will need someone to stay here who can pull the sword for you." Dismissive of such talk, Hoover replied: "I don't think so, Bill." And that was that.

With his political career seemingly in shambles, Donovan resigned his post in the Justice Department, effective March 2, receiving (by Coolidge's standards) an effusive letter in response. Then he headed off to New York City to form a law firm of the first rank. Donovan attracted prominent alumni from Emory Buckner's U. S. Attorney's office — George Leisure, Carl Newton and Edward Lumbard — to become name partners in the new firm. And when Lumbard went into public life (he ultimately became Chief Judge of the Court of Appeals for the Second Circuit), the firm's name was changed to Donovan Leisure Newton & Irvine.

Postscript

Hoover's double-cross of Donovan was well-known among political insiders. Indeed, in 1939 when Franklin Roosevelt was contemplating bringing Donovan into his administration (ultimately Donovan became head of the Office of Strategic Services), FDR specifically referenced to Frank Knox (FDR's Secretary of the Navy) that he wanted Donovan ("an old friend of mine") "not only for his own ability, but also to repair in a sense the very great injustice done him by President Hoover in the Winter of 1929."

The Law Firm Of "Wild Bill" Donovan

By C. Evan Stewart

Great law firms can begin for any number of reasons. One such firm (which, regrettably, is no more) had its origins in a political double-cross. That firm was Donovan Leisure Newton & Irvine.

A War Hero

Colonel "Wild Bill" Donovan led New York's 69th Regiment (the "Fighting Irish") in World War I. And in so doing, he received not only his nickname, but also the Medal of Honor, the Distinguished Service Cross, the Distinguished Service Medal, a Purple Heart (with two Oak Leaf Clusters), the Légion d'Honneur and Croix de Guerre (with Palm and Silver Star), and the Croci di Guerra. When the regiment marched up Fifth Avenue after the war, a band played "Gary Owen," and the mayor honored Donovan and his men, proclaiming: "History will tell of your gallantry and uncalculating indifference to life...!"

Not surprisingly, returning as a famous, highly-decorated veteran helped first to attract prominent clients (e.g., J. P. Morgan) to Donovan's Buffalo, New York, law firm, and thereafter push him into political life. With respect to the latter, the first stop on that ladder came when Donovan was appointed United States Attorney for the Western District of New York. And in the early 1920s, the main priority of Donovan's office was to enforce Prohibition, which he did with skill, enthusiasm and vigor (even raiding a private club in which he was a member — much to the displeasure of his fellow club members).

The Department Of Justice

In 1924, Harlan Fiske Stone was appointed Attorney General by President Coolidge. As Dean of the Columbia Law Schoo Stone had taken a personal interest in Donovan when he had been a law student there; and now he asked his friend of two decades to join him as his deputy, in the post of Assistant Attorney General.

Stone's tenure was a brief one; he was sworn in as a Supreme Court Justice in March 1925. Succeeding Stone was John Garibaldi Sargent, a modest man, who was frequently absent from Washington; this had the effect of often leaving Donovan in the position of being acting Attorney General. Given wide sway to pick his priorities, Donovan delegated responsibility for

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