Federal Bar Council News

February 1998 Vol. V, No. 1

Bench And Bar

How To Become A Judge

By Stephen L. Ratner and Stacey B. Creem

Members of the bar may wonder how a particular judge achieved that status. The reasons for that question are beyond the scope of this article, but the procedures outlined below are intended to answer some of the basic questions surrounding the practical steps in the process of becoming a district court, bankruptcy court, or magistrate judge in New York.

Although the President is responsible for the nomination of federal district

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Developments

New York's Chief Judge Judith Kaye Receives Emory Buckner Award At Council Luncheon

The Federal Bar Council held its Annual Thanksgiving Luncheon on November 26, 1997, at the Waldorf-Astoria in Manhattan. Joe Genova served as luncheon chair. Federal Bar Council President Betsy Plevan presented the Emory Buckner Medal for outstanding public service to New York Court of Appeals Chief Judge Judith S. Kaye.

Sweeping Changes

Introducing Chief Judge Kaye, Plevan pointed out that a state court judge had received the Emory Buckner award only once before in its 35-year history, when Chief Judge Charles Breitel received it in 1974 for his accomplishments in improving the administration of the state courts.

Like Chief Judge Breitel, Chief Judge Kaye has brought about sweeping changes in the state court system that have become models for the rest of the country, stated Plevan. Among other things, Chief Judge Kaye has created a series of special courts, including drug and domestic violence parts in the criminal courts, a community court in midtown Manhattan, a teen court in Rochester, and a commercial division in New York County.

Plevan noted that Chief Judge Kaye also has promulgated rules requiring continuing legal education and has developed the concept of the client's bill

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Second Circuit News

Cross-Border Insolvencies

By Steven Flanders

The Bankruptcy Court for the Southern District of New York rounded out 1997 in a position of significant leadership as to world-wide efforts to address the knotty problems of international insolvencies.

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of rights, which now must be posted in all law offices.

In addition, Plevan recounted the achievements of Chief Judge Kaye's jury project, which, among other things, has resulted in the elimination of all exemptions from jury duty, including those for lawyers and judges.

Plevan also emphasized that Chief Judge Kaye "has been a role model for women in the legal profession and a tireless advocate for our collective further advancement." She added: "These accomplishments and many more to come are the product of the intelligence, grace, vision, and dedication of a great public servant."

In accepting the award, Chief Judge Kaye speculated that she may have been present at the Federal Bar Council Thanksgiving Luncheon in 1962, when J. Edgar Hoover received the first Emory Buckner Medal. She noted that, when she was a practicing lawyer, the Thanksgiving Luncheon was a "must attend" event and she most enjoyed the pre-luncheon part, which she called "thronging." She apologized for having missed the luncheons since September 1983, when she was appointed to the Court of Appeals, adding: "I feel that I am in a sense here to account to my friends firsthand — after all, in 14 years I didn't write, I didn't call."



Federal Bar Council President Betsy Plevan and New York Court of Appeals Chief Judge Judith S. Kaye, at the Thanksgiving Luncheon.

Having been in her current position since March 1993, Chief Judge Kaye observed: "It's good — very, very good — to be the Chief Judge." She noted that many wonderful things have come to fill, "and vastly overfill," her plate during her tenure.

One of the main challenges facing the New York State court system, according to Chief Judge Kaye, is its staggering caseload, which now approaches four million filings annually. Nevertheless, said Chief Judge Kaye, "our goal is more than just keeping up; we have been searching for ways to do better, to do more with less, to be modern and innovative."

Cooperation Urged

In addition to the innovations for which she is well-known, Chief Judge Kaye suggested a need for greater cooperation between state and federal jurists. She noted that a State-Federal Judicial Council has been created to provide a forum for matters of mutual concern, and it has recently implemented a procedure whereby federal courts can certify questions of state law to the New York Court of Appeals. Chief Judge Kaye quipped: "As I see it, the federal courts now certify questions of law to us, and we in turn summon federal judges to jury duty to decide questions of fact in state trials."

As far as future cooperation is concerned, Chief Judge Kaye noted that every day the line between the federal and state spheres becomes less clear. There are more than a half dozen new federal crimes in the area of domestic violence, traditionally a matter for state courts. Chief Judge Kaye suggested closer cooperation between federal and state authorities to make their parallel operations run more smoothly.

In addition, Chief Judge Kaye suggested closer cooperation on jury reform. Since the state and federal courts both draw their jurors from the same pool of citizens, there is no reason for them to pursue separate reform agendas. Chief Judge Kaye also expressed concern about the current fashion of open attacks on the judiciary and observed: "Wouldn't we be more effective if we stood together on this issue?"

Chief Judge Kaye ended her remarks by stating:

"One of the many delights of being a judge, I've discovered, is that I can raise questions I have no intention — indeed, sometimes no capacity — to answer. We are facing a whole new world of state and federal court relations, of public perceptions of the legal system as a whole. Asking questions is the first step. Finding answers is the next."

New Appointments

Kevin N. Fox Named Magistrate Judge

By Stephen L. Ratner and Stacey B. Creem

Kevin N. Fox was sworn in recently as Magistrate Judge for the Southern District of New York.

Magistrate Judge Fox has had a distinguished career in the public sector, litigating both civil and criminal cases before state and federal courts and administrative agencies.

Prior to his appointment, Magistrate Judge Fox worked as Assistant General Counsel to the Triborough Bridge and Tunnel Authority from 1994 to 1997. As Assistant General Counsel, he represented the Authority in complex commercial, employment, and construction litigation.

From 1990 to 1997, Magistrate Judge Fox served as Deputy City Personnel Director and General Counsel to the New York City Department of Personnel.

From 1989 to 1990 he worked as Assistant General Counsel to the New York City Transit Authority.

Prior to working for the Transit Authority, Magistrate Judge Fox served as Executive Director of the Governor's Task Force on Bias-Related Violence.

Magistrate Judge Fox began his legal career doing criminal defense litigation for the Legal Aid Society. From 1983 to 1987, he was a senior trial attorney for the Federal Defender Services Unit, where he litigated various white collar crime cases, including commodities fraud, securities fraud, bank fraud, and mail and wire fraud.

From 1981 to 1983 he was a senior trial attorney for the Criminal Defense Division, where he represented indigent persons accused of crimes in the New York City Criminal Court and the New York State Supreme Court.

Magistrate Judge Fox received his law degree from Brooklyn Law School in 1981, and his undergraduate degree from Columbia College in 1978. He has been an active member of the Metropolitan Black Bar Association and the Association of the Bar of the City of New York.

Legal History

Watergate's Reforms And Nixon's Tapes

By Kevin J. O'Brien

Those of us following Watergate in college took it as gospel that, first, President Nixon was behind the cover-up, and second, by stealth or intimidation he would get away with it.

The first of these propositions is true, as the transcripts in *Abuse of Power: The New Nixon Tapes*, edited by Stanley Kutler, make abundantly clear, but the second, fortunately and far more significantly, proved false.

The wonder of it all, in the end, is that this most malevolent and powerful of presidents — who wanted to "kill" his enemies and bend every institution of government to his will — could not prevent the investigation of a "third-rate burglary" from driving him from office.

Abnormal Psychology

Part of the reason has to do with the abnormal psychology of the man. Falsely reassured by his courtiers and more concerned with settling old scores than recognizing new ones, Nixon failed to appreciate the vulnerabilities of his situation until it was far too late and then wildly miscalculated the effect of his desperate reactions (such as the Saturday Night Massacre). Nixon was so out of touch with reality that almost until the end he believed the public would forgive him for Watergate once it learned that Lyndon Johnson had bugged his campaign plane in 1968.

In truth, however, no one in Nixon's shoes could have succeeded in the cover-up. The strength of our system of social pluralism and political checks and balances is its complexity; a malfunction in one component will not endanger the system if the other components are working properly. In Watergate, it's fair to say, the other components worked — not perfectly, of course, but well enough. The White House was able to keep a lid on things for more than six months following the June 1972 break-in, which allowed Nixon to be re-elected safely that November. Then the plot began to unravel; there simply were too many independent forces, inside and outside the government, to control.

For example, the Watergate trial judge, John Sirica, although a Republican, was openly skeptical of what Nixon privately labeled the "Liddy scenario" — the initial party line that the burglary was a frolic of G. Gordon Liddy — and his threats of heavy sentences for the burglars produced the first big break in the case: James McCord's public confession in March 1973 that perjury had occurred at the burglars' trial.

Congressional oversight was feeble at first, in part due to White House intimidation, but the investigation by the Ervin committee proved to be a model of its kind.

Press coverage, led by the *Washington Post*, also developed slowly — Watergate was not significant news until 1973 — but even before impeachment proceedings began in late 1973 the steady drum beat of damaging disclosures had turned the public against the President and doomed his televised attempts to "spin" the crisis.

Legal Reforms

Despite these successes, many believed that the system should and could

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have worked better. That was the assumption behind two major post-Watergate legal reforms: the Ethics in Government Act, which established an independent counsel to investigate and, if appropriate, prosecute high-ranking federal officials, and the Federal Election Campaign Act Amendments of 1974, which established stringent campaign contribution limits and reporting requirements.

Subsequently both reforms have been found wanting: the independent counsel statute, for unleashing a self-aggrandizing prosecutorial power against executive-branch officials, often in cases that are ordinary or even petty, and the campaign finance reforms, for failing to curtail the influence of money on campaigns but merely complicating the ways by which this influence is achieved.

If we look back at Watergate, with the benefit of the newly available tapes, neither of these questionable reforms is justified by the events that led to their enactment. Supporters of the independent counsel statute pointed to two signs that the Justice Department's investigation of Watergate had been compromised by politics.

First, it was conducted under the tepid leadership of Richard Kleindienst, the Attorney General, and L. Patrick Gray, the Acting Director of the FBI — two political appointees who had the bad habit of keeping the White House abreast of the investigation and eventually were found to have committed improprieties unrelated to Watergate. (Kleindienst pled guilty to a misdemeanor for not testifying fully before a congressional committee; Gray resigned after admitting he had destroyed sensitive political documents at the request of White House staff.) Second, the Department's investigation seemed unconscionably slow. Not until Judge Sirica's forceful intervention, eight months after the break-in, did the truth of White House involvement in hush money and perjury begin to emerge, leading to the appointment of a special prosecutor by Kleindienst's successor, Elliot Richardson, in June 1973.



President Nixon leaving the White House on August 9, 1974. Photo courtesy UPI/Corbis-Bettmann.

Both these concerns are misplaced.

The first ignores the extent to which dedicated Justice Department professionals working under political appointees did their jobs (as they almost always do). At the FBI, Gray faced a near mutiny from his staff when he attempted to delay early interviews pertaining to the break-in. Eventually both agents and Department lawyer working on the investigation cut certain superiors out of the loop. For example, Kleindienst and his deputy, Henry Peterson, did not learn for several weeks about the critical cooperation of Jeb Magruder and John Dean with prosecutors; Kleindienst was embarrassed to learn of Magruder's confession from the White House. Small wonder that, as early as July 1972, White House aides were complaining to Nixon that "the FBI is not under control because Gray doesn't know how to control them" and that "there are disloyal guys in the U.S. Attorney's Office and in the Bureau."

Nor can it be said that the investigation was significantly delayed, if at all. That it took eight months to "crack" the burglars' cover story is not extraordinary; white-collar cases that must rely on the painstaking process of persuading subordinates to cooperate against their superiors, as with Watergate, usually are slow to develop. (The Watergate special counsel, appointed after McCord, Magruder, Dean, and others had begun

cooperating with authorities, needed another eight months before seeking indictment of the key White House aides.) The Justice Department investigation was notably vigorous in its initial stages, when it was most vulnerable to being choked off. Within two weeks of the break-in, investigators had linked the burglars to Liddy and E. Howard Hunt and these two to the White House, seized incriminating evidence in Hunt's White House safe (which prompted H. R. Haldeman to tell Nixon "we're having problems with the Bureau") and begun obtaining the cooperation of minor players.

Defenders of the independent counsel statute emphasize that public confidence, if nothing else, requires a prosecutor who — because he or she is not appointed by the Justice Department and can be removed only for extraordinary reasons — is not beholden to the branch of government under investigation. This legalistic idea is not the lesson of Watergate. The Watergate special prosecutor (first Archibald Cox, then Leon Jaworski) was a Justice Department appointee who, as Cox discovered when he was fired, served at the pleasure of the President. And Jaworski, who finished the job so effectively, was hardly a pristine model of "independence." He was a close friend of Nixon confidant John Connally and had been head of Texas Democrats for Nixon in 1972; as special prosecutor he used to meet informally with White House aide Al Haig to discuss the status of his investigation, much as Kleindienst had done before him.

Professional Judgment

The kind of independence so effectively on display in Watergate was the product not of abstract procedure but of personal qualities of integrity and professionalism, exhibited not just in the glare of publicity but in countless anonymous decisions by lawyers and investigators in the Justice Department and the special prosecutor's office. Procedure is no substitute for these qualities because politics can infect even the procedures of the independent counsel statute, as the present controversy in Washington reminds us. A troubling question is whether — as Justice Scalia among others has argued — the statute in fact weakens professional judgment and morale by isolating the prosecutorial power from its institutional home and by making it a potential weapon in the political war between the executive and legislative branches. The wayward performance of a number of independent counsels bears out this concern.

Campaign finance reform was spurred by disclosures of the Nixon campaign's secret slush funds, filled and replenished by over a million dollars in cash contributions and used both to finance illicit operations such as the Watergate burglary and to pay hush money to those implicated in these activities.

The new tapes give details of this scheme and the President's knowledge and approval of it: in July 1972, for example, Haldeman told Nixon that he had on hand $300,000 in "unreported cash" that "we can tap" for "expenses"; the next month, Haldeman reported that the burglars were all out of jail and "taken care of . . . at considerable cost," to which Nixon responded: "It's worth it. . . . That's what the money is for"; in March 1973, as events began to spin out of control, Nixon, Dean, and Haldeman explored obtaining another million dollars for "blackmail" through a Nixon fundraiser who already had proven that "he's able

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to deal in cash"; in the same month, John Ehrlichman, concerned about the upcoming Ervin hearings, explained to Nixon how "we operated a lot of money through [Nixon attorney Herb Kalmbach's] bank accounts for all kinds of activities. . . . [T]his was money that was . . . [l]eft over from a previous campaign or raised in the meantime, and it was sitting there in boxes of cash and there was a lot of it. . . . [S]ome of our extracurricular activities [were] not too savory."

Shocking as these deeds were and are, the election law amendments of 1974 would do little or nothing to prevent their recurrence today.

Although federal contribution limits are now extremely low ($1,000 per individual contributor per campaign), in the wake of *Buckley v. Valeo* and other First Amendment cases there are no limits on expenditures that are "independent" of a campaign, even if they are "relative to a clearly identified candidate." The resulting loophole has been exploited in various ways, most notably by issues-oriented committees that make "independent expenditures" during campaigns, and by givers of "soft money" earmarked exclusively for "party-building" activities. Thus, Nixon's slush funds could be amassed today simply by outsourcing the work so that it is "independent" of the campaign — which is presumably what Kalmbach and other Nixon fundraisers did once the 1972 campaign was over and the Committee to Re-Elect the President disbanded.

For similar reasons, the new law's reporting provisions also would not deter the fundraising abuses of Watergate.

After *Buckley*, meaningful reporting requirements are permissible only for campaign contributions and those expenditures incurred in expressly advocating the election or defeat of a specific candidate. Interestingly, during the Watergate period some campaign reporting obligations existed and Nixon aides took pains to avoid them. In October 1972, for example, Haldeman told an approving Nixon of his idea for routing unspecified funds through the Democrats for Nixon committees, rather than the Nixon campaign committee, in order to escape detection. Current law can be circumvented in basically the same way.

Perhaps it is not as easy now as it was in Nixon's day to raise huge sums of undetectable cash for improper purposes, and we like to think that our politicians and their aides would not engage in conduct as gross as selling ambassadorships for $250,000 and up and using the proceeds to commit crimes. If public morality has improved, however, the improvement cannot be attributed to the 1974 campaign finance reforms or any other piece of legislation. Watergate, by awakening prosecutors, the media, and the public at large to the potential for corruption in high places, dramatically heightened the scrutiny that officials and candidates receive. Today the scrutiny has become so trivialized that political leaders are treated like movie stars or pop music figures. The new Nixon tapes are a vivid reminder that the sea change in public awareness originally was a response to a threat to the public interest.

Second Circuit Decisions

The Commission's "Confirmation Theory"

By Charles C. Platt

The Securities and Exchange Commission keeps pitching insider trading theories in the Second Circuit, and the strike zone keeps getting wider and wider. The latest example is *Securities and Exchange Commission v. Mayhew*, 121 F.3d 44 (2d. Cir. 1997), where the Second Circuit expanded on the so-called "confirmation theory" of insider trading liability.

The Mayhew Decision

The SEC brought a civil enforcement proceeding against Jonathan Mayhew after he traded in the securities of Rorer Group, Inc., for a two-month period beginning on November 16, 1989. Mayhew's trades resulted in a significant profit in early 1990 when Rorer announced the terms of a "contemplated tender offer" and its stock price [illegible] dramatically.

The SEC claimed that Mayhew had made these trades based on inside information, because of a conversation Mayhew had with an outside consultant for Rorer on or around November 16, 1989. Although that consultant was not directly involved in the contemplated tender offer that was ultimately announced, the consultant had received from Rorer a "circumspect" briefing about a "pending business transaction" at Rorer as part of his retention on an executive compensation issue. The consultant in turn had relayed to Mayhew that Rorer "was being pursued and/or was actively pursuing companies" and was in "serious discussions" regarding a potential merger with "a candidate or candidates."

Mayhew's defense was that he only had relied on various media stories that had been written about Rorer prior to [illegible] trades. In one of these stories, Rore[illegible] chief executive announced that he was willing to merge Rorer with the right partner. Other articles contained

predictions from "takeover pros" that the right merger partner for Rorer was in sight, and reports that Rorer had informally talked with two major companies about a possible merger or takeover.

The Second Circuit held that, despite these public reports, Mayhew had violated SEC Rule 14e-3, which was promulgated under §14(e) of the Securities and Exchange Act of 1934. Rule 14e-3 imposes liability on any person who trades on material non-public information in connection with a tender offer, if that person has reason to know that the information came from an "insider" to the transaction.

According to the Second Circuit, Mayhew had received "non-public" information under Rule 14e-3 when he obtained "confirmation" of the media stories from the outside consultant. The court believed that this confirmation transformed the likelihood of such a transaction from one that "was certainly possible at some future time" (as reported in the media) to one that was "highly probable quite soon."

The Second Circuit then found that this confirmation was "material" under Rule 14e-3 because there was a substantial likelihood that a reasonable investor would consider such merger information important in deciding how to invest. The court reached this conclusion even though Mayhew had not been given any specific details regarding the alleged transaction. Mayhew never learned whether Rorer was being acquired or was acquiring another company, the name of the other party to the transaction, when the transaction would occur, or the terms of the transaction.

Finally, the court determined that the outside consultant was an "insider" at Rorer within the meaning of Rule 14e-3, even though that consultant was retained on an executive compensation issue and was not directly involved in the transaction. The court thought it sufficient that the consultant had received a "circumspect" briefing from Rorer about a "pending business transaction" as part of his retention.

Cusimano Continued

The *Mayhew* decision follows the "confirmation theory" advanced last year in *United States v. Mylett*, 97 F.3d 663 (2d Cir. 1996), popularly known as the Cusimano decision. In that case, Joseph Cusimano was convicted of violating Section 10(b) of the 1934 Act when he traded in the stock of NCR Corporation shortly before NCR was acquired by AT&T in 1990.

Cusimano claimed that, when trading, he had relied on a *Wall Street Journal* story that stated specifically that AT&T and NCR were discussing ways to integrate their businesses. However, there was also evidence that, before his trades, Cusimano had received a call from a friend at AT&T who was a vice president of labor relations. That friend apparently predicted, based on some indirect signals he had picked up internally, that "AT&T was going to be attempting to acquire NCR." At the time, AT&T had in fact not yet decided to acquire NCR.

The Second Circuit held that this "confirmation" of the *Wall Street Journal* article was "non-public" information for Cusimano, because it was "substantially more specific than that in the newspaper." The court rejected Cusimano's arguments that the information lacked any specificity because it came from an inside source who had no direct knowledge of the AT&T/NCR discussions.

The Second Circuit also held that this confirmation was "material," because it conveyed a "much higher level of probability than was publicly available." The fact that AT&T had not yet decided to acquire NCR when the prediction was made did not change the court's decision.

Bright Line

Mayhew moves closer to the bright line rule that trading in anticipation of a merger or a tender offer after communicating with an inside source will violate insider trading rules. Even if the "inside information" obtained was from a remote source, and was speculative and indefinite, it still can be a called strike under the "confirmation theory" of liability.

A Remembrance

Judge Nathan R. Sobel

Former Kings County Surrogate Nathan Sobel died several months ago at the age of 91. Among others who spoke at his funeral were Federal District Court Judges Edward Korman and David Trager, Appellate Division Justice William Thompson, and Brooklyn Law School Dean Joan Wexler. Justice Thompson recalled that President Franklin Roosevelt sent Harry Truman to Brooklyn to be interviewed by Nat Sobel before Roosevelt selected him as a vice presidential running mate. There is perhaps no one alive who can testify as to Judge Sobel's influence on judicial and other appointments and state and federal legislation over his career. As a New York Supreme Court Justice, he tried more than 1,000 felony cases to verdict including more than 100 capital cases. In recent

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years — practically up to the date of his death — Judge Sobel worked every day as a volunteer to assist the Kings County Surrogate's Court.

At Judge Sobel's funeral, Dean Wexler recounted Judge Sobel's athletic prowess, recalled his show business friends and his youthful aptitude for the law, and eulogized his seventy year career as a lawyer and judge. Dean Wexler's statement at Judge Sobel's funeral follows:

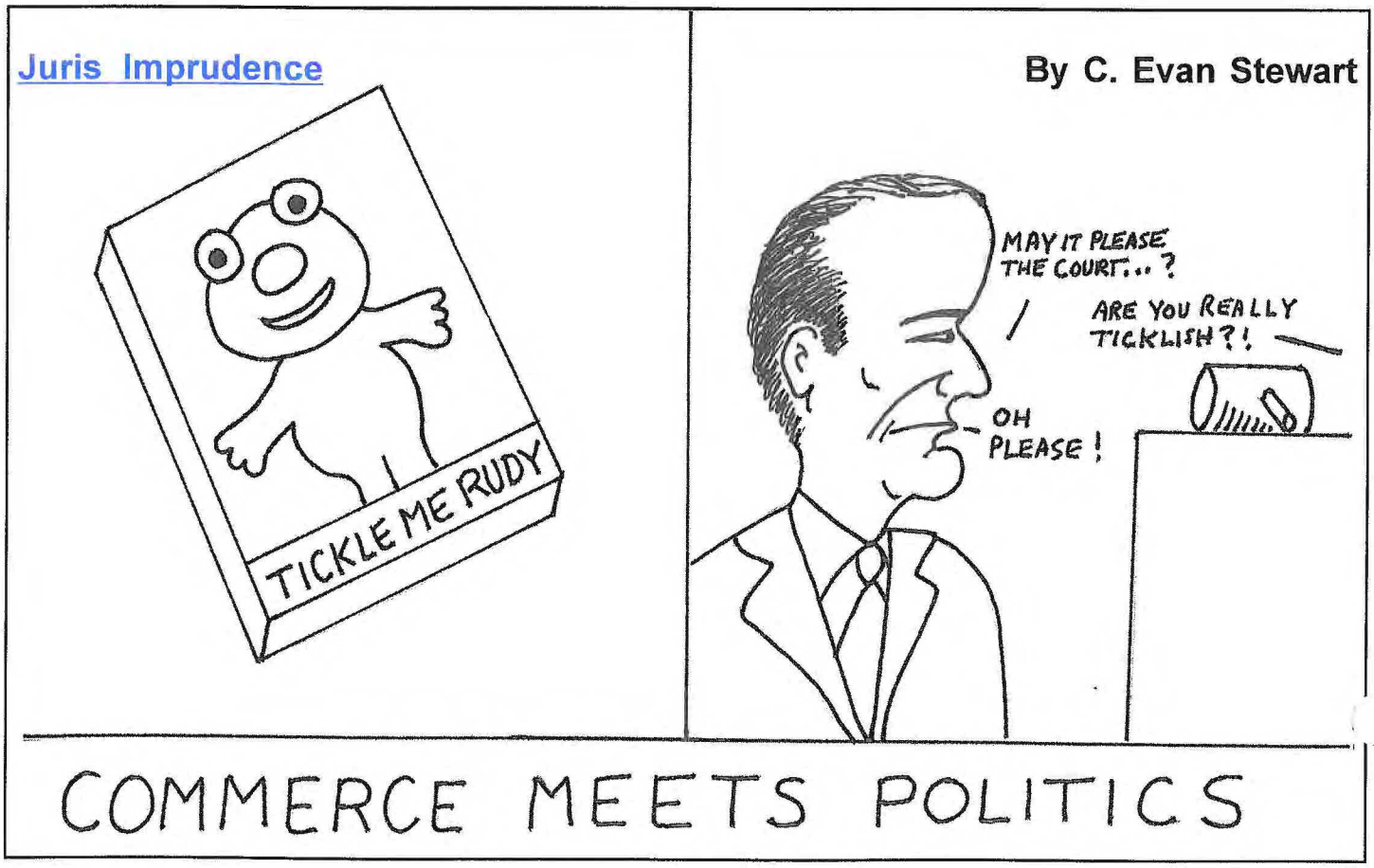
Judge Nathan Sobel was a brilliant scholar, a legal giant, and a true humanitarian. He had a long and distinguished career — spanning seven decades — as a lawyer, public servant, judge, author and lecturer. Judge Sobel led a remarkable life. He was born in 1906 on the Lower East Side, but Brooklyn became his borough when he was a young boy. He grew up in the Borough Park section, and later in Brownsville, and in 1922 he graduated from Boys High School at the age of 16. He entered Brooklyn Law School the following year. College was not a law school prerequisite in those days.

As a young man, Judge Sobel's towering intellect was matched by his athletic prowess. Blazingly fast, and a 135 pound featherweight with a powerful left jab, he excelled as both a sprinter and a boxer.

During his law school days he competed in the Millrose Games, the Penn Relays, and the Drake Relays, and he was a member of the four-man delegation representing the United States in the Toronto International Boxing Competition.

His legal career began during law school with a clerkship at the Wall Street law firm of Black, Varian & Simon. As he recalled, he earned $4 a week at the firm, which was then the going rate. The firm not only had the benefit of his legal talents, but his technical skills as well. He handled the switchboard on his lunch hour. When Judge Sobel graduated from law school he was still too young to sit for the bar examination. It was not until he had completed his five-year clerkship at the firm that he was able to take the exam.

Through his legal work, he became associated with members of the theater community who performed with such companies as the Civic Repertor



Theater and the Neighborhood Players, which later became the Theater Guild. Here the judge met some fledgling actors who would become his life-long friends — Edward G. Robinson, John Garfield, and Eva Legallienne. He also befriended two young Columbia University students named Richard Rodgers and Lorenz Hart.

In 1928, at the age of 22, he was appointed Counsel to the Minority Leader of the New York State Assembly, Irwin Steingut. And at the age of 29, when the Democrats captured the majority, Judge Sobel became the Counsel to Speaker Steingut. During these years, he worked closely with Samuel Rosenman, Governor Franklin D. Roosevelt's Counsel, and Charles Poletti, Governor Herbert Lehman's Counsel.

Governor Lehman appointed Judge Sobel as his Counsel in 1937. In that position, the Judge's reputation as a tireless worker was put to the test. In those days, the Counsel personally performed a myriad of functions, including preparation of the annual Message, the Annual Budget and the draft of the Governor's program bills. Judge Sobel did all of this and more. He was responsible for reviewing extraditions, pardons, commutations, and reprieves that passed through the Governor's office.

His extraordinary negotiation skills helped maintain a long era of good feeling between the houses of the State Legislature, both of which were controlled by Republicans, and the Executive Branch, which was led by a Democratic Governor. Many bills were passed, and ultimately signed into law, that ordinarily would have faced an uphill battle in a Republican Legislature, if not for Judge Sobel's mastery of the legislative process.

In 1943, he was elected a judge of Kings County Court. His numerous reported opinions, many on constitutional issues, can be found in Volumes 185 Miscellaneous Reports all the way through 35 Miscellaneous 2d. In 1962, when the County Court merged into the Supreme Court, he became a justice of the Supreme Court.

His political skills proved formidable when he was elected in 1967 to the coveted post of Surrogate of Kings County by a sweeping margin. In his nine years as Surrogate he set precedent on many legal issues, including the inheritance rights of illegitimate children, elective shared trusts, and adoptions. So many of Surrogate Sobel's opinions were deemed worthy of publication that it is nearly impossible to open Volumes 59 through 88 of Miscellaneous 2d Reports without finding one. During his time as Surrogate, the Brooklyn Bar Association awarded Judge Sobel its highest accolade for outstanding service to the Science of Jurisprudence and Public Service.

Judge Sobel's contributions to the law extend beyond his distinguished work as a jurist. While on the bench he wrote several books and law review articles on search and seizure and other constitutional issues. In addition, in 1967, Chief Judge Fuld appointed Judge Sobel to serve as chair and sole member of a committee to draft a set of New York Criminal Jury Instructions. He served on the successor New York CJI Committee, chaired by Justice Lyman Smith, which published a three-volume set of pattern jury instructions. Nearly 30 years after his initial appointment by Judge Fuld, he was still a member of the CJI Committee.

Though Judge Sobel retired from the bench in 1976 at the age of 70, he remained an active member of the legal community, maintaining a practice in the trusts and estates field. In addition to his practice, Judge Sobel gave generously of his time to represent over 20 judges before the New York State Commission on Judicial Conduct, and dozens of attorneys in disciplinary proceedings. True to his character, he performed this work pro bono.

Judge Sobel was a loyal and dedicated friend of Brooklyn Law School. Over the years he was a mentor to many students and he was the moving force behind several major gifts to the school. In 1991, he established both a scholarship and a graduation prize fund. He also recently arranged for the law school to receive hundreds of rare law books from the valuable collection of the "Law Library of Brooklyn," which was established by a group of lawyers at the turn of the century.

His generosity, however, extended beyond the law school. In 1984, he established the Nathan R. Sobel Award, to be presented annually by the Brooklyn Bar Association to outstanding King's County non-judicial court employees "who exemplify the high ideals of professionalism and service to the legal community."

No one met those standards more than Nat Sobel. The Law School community is deeply saddened by his death. Last year, at his birthday party, I referred to him as a living legend. I can no longer do that. But his legendary intellect, humanity, and generosity will live on.

Nat, we will miss you.

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court judges, U.S. senators are authorized to make recommendations to the President. Since 1977, pursuant to an unwritten agreement, New York's two senators have shared the power to make such recommendations, with the senator who is a member of the party occupying

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the White House able to make three out of every four recommendations to fill district court vacancies.

Because New York's two senators, Patrick Moynihan and Alfonse D'Amato, are from different parties, they have each established their own committee or panel responsible for the consideration of federal district court candidates.

The Moynihan Judicial Screening Panel consists of 13 members chosen personally by Senator Moynihan, not all of whom are lawyers. It is chaired by Richard K. Eaton, a partner at Stroock & Stroock & Lavan's Washington, D.C., office. The panel usually meets in New York to interview candidates applying for district court vacancies.

Anyone interested in applying for a district court judgeship must request and complete a questionnaire from the panel. All candidates who complete the questionnaire are interviewed by the panel. Although the entire panel normally interviews each candidate at once, interviews may be conducted by a subcommittee. The panel recommends three to five candidates to Senator Moynihan for every district judge vacancy. Senator Moynihan, in turn, interviews the recommended candidates and sends one name to the White House.

The panel prides itself on being open-minded and unbiased. It looks for candidates who are practicing attorneys with considerable trial experience, academics, and sitting judges, and actively seeks individuals with diverse backgrounds. When considering individual applicants, the panel keeps in mind the guidelines issued by the American Bar Association's Standing Committee on the Federal Judiciary.

Senator D'Amato's Judicial Screening Committee is less formal than the Moynihan panel and has several functions. Like the Moynihan panel, the D'Amato committee processes questionnaires from individuals interested in applying for a district court judgeship, including those applicants Senator D'Amato personally directs to the committee. The committee also actively searches for potential candidates and eventually makes recommendations to Senator D'Amato.

The D'Amato committee consists of approximately 12 individuals, not all of whom are practicing lawyers. Any interested applicant should request a questionnaire from Thomas A. Bolan, Esq., 521 Fifth Avenue, Tenth Floor, New York, N.Y. 10175. The committee interviews candidates when there is a particular vacancy to fill. The interviews may be conducted by one or more members of the committee. The D'Amato committee recommends candidates to Senator D'Amato who, in turn, submits a candidate's name for consideration to the White House.

The President has the authority to request another name if he is not satisfied with the initial recommendation. The White House and the Department of Justice review the applications of proposed candidates and conduct a background Federal Bureau of Investigation check.

The American Bar Association has a formalized role in the process as well. It reviews the candidacy of each applicant and reports to the President on the applicant's qualifications. Although the White House normally nominates only those candidates who receive ABA approval, several candidates who have not been approved by the ABA have been nominated by President Clinton and confirmed by the Senate.

Once the White House has made its decision, it submits the candidate's name to the Senate Judiciary Committee, which reviews the application and sends it to the full Senate for confirmation. Recently, however, there have been a number of instances in which the Judiciary Committee has held up the process by failing to send nominations to the Senate floor for a vote.

Bankruptcy and magistrate judges go through a different process. Bankruptcy judges are appointed by majority vote of the court of appeals, and magistrate judges are appointed by majority vote of the district court.

Bankruptcy Judges

The number of bankruptcy judges is determined by Congress. The Judicial Conference is required to submit recommendations from time to time regarding the number of bankruptcy judges needed. Bankruptcy judges are appointed to 14-year terms and serve on a full-time basis.

To be qualified for appointment as United States bankruptcy judges, nominees must be members in good standing of the bar of the highest court of at least one state, the District of Columbia, or the Commonwealth of Puerto Rico, and members in good standing of every other bar of which they are a member. Unless the judicial council of the circuit determines that special conditions exist, nominees must have engaged in the active practice of law for a period of at least five years, or have experience as a state or federal judge, magistrate, federal court officer, or federal or state agency attorney. A nominee also must

- be competent to perform the duties of the office of bankruptcy judge;
- possess, and have a reputation for, integrity and good character;
- possess, and have demonstrated, a commitment to equal justice under the law;
- be of sound mental and physical health;

- possess, and have demonstrated, outstanding legal ability and competence; and
- indicate by demeanor, character, and personality that the nominee would exhibit judicial temperament if appointed.

At the time of appointment, nominees must not be related by blood or marriage to a judge of the appointing court of appeals, to a judge of the judicial council of that circuit, or to a judge of the district court to be served.

Public notice of a bankruptcy judge vacancy is published in law journals and over the internet, and runs for several weeks. The notice also is filed and posted in the office of the clerk of the bankruptcy and district courts where the bankruptcy judge vacancy exists. Applications are submitted to the Circuit Executive for the Second Circuit.

Each time a vacancy occurs, the Court of Appeals appoints a screening committee to consider applicants and make a recommendation to the court. The screening committee is comprised of approximately six members, which include the Circuit Court Executive, active circuit court judges, and members of the bar. The screening committee reviews the applications, conducts interviews of some of the candidates, and recommends three candidates to the court of appeals. The screening committee makes an effort to identify and give due consideration to all qualified applicants, without regard to race, color, age, gender, religion, national origin, or disability. The screening committee looks for candidates who have demonstrated an expertise in the area. The information made available to the panel in the performance of its duties, including the names of potential nominees and the identities of individuals recommended by the panel, is confidential.

The active judges on the court of appeals then consider and vote on the candidates. The court may, but does not always, choose to interview the three applicants before voting.

The name of the person selected by the court of appeals for appointment is then submitted to the Director of the Administrative Office, who requests background reports from the FBI and the Internal Revenue Service. However, if the nominee has been the subject of such reports prior to appointment to the present position, the requirement for further background reports may be waived on request by the court of appeals.

Magistrate Judges

The number of magistrate judge positions is determined by the Judicial Conference of the United States, based on recommendations of the respective district courts, the judicial councils of the circuits, and the Director of the Administrative Office of the United States Courts. A full-time magistrate judge is appointed for a term of eight years; a part-time magistrate serves for a term of four years.

Magistrate judge vacancies are announced in law journals and on the internet with details regarding the submission of applications. Applications from all qualified persons are encouraged without regard to race, color, age, gender, religion, national origin, or disability. Applicants are requested to submit an application to the Office of the District Court Executive.

To qualify for appointment as a United States magistrate judge a nominee must be, and must have been for at least five years, a member in good standing of the bar of the highest court of a state, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands of the United States. Since 1989, magistrate judges are no longer required to be a member of the bar of the state in which they are appointed. A nominee also must have actively practiced law for at least five years, or have experience as a judge, a magistrate judge or other federal judicial officer, an attorney for a federal or state agency, a law clerk to any judge or judicial officer, or any other legal experience acceptable to the majority of the court. A nominee also must be less than 70 years of age, and not be related by blood or marriage to a judge of the appointing district court.

In addition, a nominee must be

- competent to perform the duties of the office;
- of good moral character;
- emotionally stable and mature;
- committed to equal justice under the law;
- in good health;
- patient;
- courteous; and
- capable of deliberation and decisiveness.

Applications are considered by a merit selection panel. A different merit selection panels exist for each district court. The Southern District has two merit selection panels, one for Manhattan and the other for White Plains. Each merit selection panel consists of lawyers and other members of the community, chosen by a committee of sitting judges of the district court, called the Magistrate Judge Committee. All decisions of the panels are by majority vote of all of the members.

Following initial screening of applications, a merit selection panel, at its discretion, narrows the field and interviews some of the applicants. Interviews may be necessary when members of a merit selection panel have no personal experience with the applicants or their legal work. All

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members of a merit selection panel attempt to participate in each interview.

The members of a merit selection panel meet to discuss the qualifications of the various applicants and designate those five applicants that it finds most qualified to serve as a magistrate judge. The merit selection panel submits these five names to the Magistrate Judge Committee. In the Southern District, the Magistrate Judge Committee interviews all five candidates, and then proposes one name to the full Board of Judges, which includes both active and senior judges within the district.

To encourage the greatest number of applications and to protect the privacy of individual applicants, the regulations of the Judicial Conference impose a requirement of confidentiality on the panel and the court. Neither the names of the applicants nor the individuals recommended by the panel to the court may be disclosed other than as a necessary part of the panel's report to the court.

An appointee is selected by a majority vote of the Board of Judges. The name of the person selected is then submitted to the Magistrate Judges Division of the Administrative Office, which will then request the necessary background reports from the FBI and the IRS. A nominee for a full-time magistrate judge position must undergo an FBI full-field investigation and IRS tax check. A nominee for a part-time magistrate judge position must undergo an FBI file check and an IRS check. All appointments are subject to these background checks.

Second Circuit News

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Through the 1990s and before, in cases like Maxwell Communications and Olympia & York that involved massive assets in other countries, innovative judges and lawyers have hammered out agreements to accommodate the diverse and sometimes conflicting laws of countries where an insolvent entity has important operations.

Now, culminating a process that began in 1994, the United Nations Commission on International Trade Law (UNCITRAL) has created a model law on cross-border insolvencies that reflects that experience in significant part. Early adoption by U.S. lawmakers now seems probable, perhaps setting a pattern for adoption around the globe.

November Symposium

Chief Bankruptcy Judge Tina L. Brozman convened a symposium November 20 at the Bowling Green courthouse that brought together many of the major participants in the UNCITRAL effort and its antecedents.

Noting the wide range of purposes and cultures reflected in the insolvency laws of countries affected by U.S. bankruptcy proceedings, Judge Brozman opened the conference by highlighting an early consensus that was achieved at a March 1994 colloquium in Vienna of lawyers, accountants, bankers, regulators, and judges. "That group concluded after a day and a half of rather heated discussion that too ambitious a project — such as a treaty or convention — would likely not be accepted worldwide, and that what was needed most was cooperation between courts, recognition of foreign proceedings and access to foreign proceedings by estate representatives. The sense of the group was that attempting to influence substantive insolvency law would probably fail and that any project would have to be limited in scope if it were to have any realistic chance of success."

An overview for the Bowling Green symposium was provided by United Nations Under-Secretary General for Legal Affairs Hans Corell, who stressed that the pending model law text was adopted by universal consensus, which "is very important in the United Nations context."

Also notable was the unusually short time in which the project came to fruition, in light of the difficulty and contentious nature of a topic like cross-border insolvency.

Secretary Corell emphasized that because of preparatory work by INSOL, an international insolvency organ whose efforts Judge Brozman had described, UNCITRAL was able to found its work on thorough studies and broadly based consultations that had been carried out to assess what common international legislation is needed and what can realistically be achieved. "Such assessment was particularly important in an area where the experience in other . . . forums indicated that the work by a universal body such as UNCITRAL must be carefully delimited in order to succeed." UNCITRAL, he went on, "has a tradition of scrupulous consideration of proposals before the expensive intergovernmental machinery is set in motion, and before a possibly ill-conceived or too ambitious project acquires its own momentum."

Secretary Corell noted that member states approach insolvency very differently. "The Model Law covers an area of law that touches upon sensitive governmental policies regarding such issues as preservation of employment, avoiding unnecessary disruption as a result of insolvencies, and protection of local interests. The Model Law also touches on national judicial systems, national laws of procedure, and traditional principles of cross-border cooperation."

Later speakers included lawyers Richard Gitlin, of Hartford, Connecticut (at one stage the effort had been known as the "Gitlin initiative"), Donald Bernstein of New York, and others from London, Toronto, and the University of Texas, among other places. Each emphasized from diverse perspectives the challenges attending a law-making effort "facing an enormous gulf in insolvency cultures," as Bernstein put it. "In the United States we have long had a concept that there could be an honest debtor. That concept is not intuitive in much of the world."

Rescue Culture

Judge Brozman articulated this difference as that between a "rescue culture" and an insolvency system directed primarily or exclusively to liquidation. Other challenges include such differences as:

- systems that grant broad equitable powers to judges, as contrasted with the constrained judicial discretion of civil law jurisdictions;
- the principle of territoriality, known colloquially as the "grab rule" as to assets and proceedings in each country, as contrasted with the principle of universality;
- the fact that the concept of debtor-in-possession seems foreign, even immoral, in many places; and
- the question of creditors' rights as contrasted with the automatic stay, and implications as to due process.

The model law accommodates these differences by limiting its scope to what must be dealt with internationally. As its preamble states, "The purpose of this law is to provide effective mechanisms for dealing with cross-border insolvency so as to promote the objectives of:

(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

(b) greater legal certainty for trade and investment;

(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) protection and maximization of the value of the debtor's assets; and

(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment."

Bankruptcy Judge James L. Garrity, Jr., described the value and the limitations for the protocols that have been the prime mechanism to date for addressing differences the Model Law is intended to accommodate as it is adopted in each place, with suitable adaptation to each country's statutory framework. "A protocol is an agreement among parties to an international insolvency which is approved by the courts in each nation state. A protocol necessarily is case specific and one very positive aspect of a protocol is that the parties and courts can fashion it to address specific concerns unique to their particular case." However, accomplishing all this can be quite costly, and so *ad hoc* a solution "can only be as effective and encompassing as the parties determine it can be."

Model Law

Pursuant largely to efforts of such symposium participants as Professor Jay Westbrook of the University of Texas, the Bankruptcy Review Commission adopted the Model Law unanimously and enthusiastically. Because most of the other recommendations that this U.S. statutory body has sent to Congress were far more controversial, there is now significant interest in possible early passage of this and other non-controversial provisions, a possibility that could help provide an impetus for early adoption in other countries. Senator Charles Grassley of Iowa, who chairs the relevant Subcommittee of the Senate Judiciary Committee, is working on a "fast-track" bill. Pursuant to the initiative of Bankruptcy Judge Burton Lifland, Congressman Jerrold Nadler seems to have sparked corresponding interest on the House side.

The next meeting of UNCITRAL will be held at the United Nations in New York June 10-11. It seems possible that significant progress achieved by that date can be a basis for continuing successful efforts to sort out cross-border insolvencies.

The Back Page

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simple-minded man would soon wake up with his back in a ditch." In addition to his developing forensic skills, Lincoln built a reputation among his peers of absolute honesty. And by that reputation he became known as "Honest Abe" (or by his younger colleagues "Honest Old Abe").

Especially in the decade before he was elected President, Lincoln was one of the leading corporate litigators in Illinois; indeed, in David Herbert Donald's magnificent biography, Donald describes Lincoln as being "at the head of his profession in [his] state." A review of some of Lincoln's leading cases—which interweave with his two unsuccessful bids for the Senate (in 1855 and 1858), his crucial role in the development of the new Republican Party in the aftermath of the Kansas-Nebraska Act, and his second place finish for the Republican

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nomination for Vice President (in 1856) — confirms his prominence within the Illinois Bar (although perhaps not elsewhere).

Railroad Law

Lincoln was retained by the Sangamon Railroad to enforce commitments of capital made to the railroad for its expansion by certain subscribers. *The Collected Works of Abraham Lincoln*, edited by Roy P. Basler, document Lincoln's meticulous efforts to demonstrate (i) that the railroad had been properly organized and had complied with its internal corporate procedures, (ii) that the individual obligations had been undertaken legally, and (iii) that the company was within its rights to enforce by legal means the capital commitments. The case went up to the Illinois Supreme Court, where Lincoln and his client's position was upheld. The case served as an important landmark in corporate law, and quickly established Lincoln at the forefront of one of the then most complex areas of corporate practice: railroad law.

Hurd v. Rock Island Bridge

The Rock Island Bridge Company built and owned a bridge that spanned the Mississippi River; the bridge's purpose was to carry the tracks of the Chicago, Rock Island and Pacific Railroad. Rock Island was sued by the owner of the steamboat "Effie Afron," which had struck part of the bridge and had gone up in flames. Because the case put in conflict the navigation interests of St. Louis (and the other port cities) against those of Chicago and the railroads, this was a landmark piece of litigation featuring some of the leading lawyers in the West; Lincoln was Rock Island's trial counsel.

Lincoln's papers contain a detailed summary of Lincoln's two day summation to the jury, in which he not only gave a bravura marshaling of the evidence in support of his client, but stressed the larger political vision of which he had been an exponent since his days as an acolyte for Henry Clay ("[T]here is a travel from East to West, whose demands are not less important than that of the river. It is growing larger and larger, building up new countries with a rapidity never before seen in the history of the world.")

The jury came back deadlocked at nine for the bridge and three for the plaintiff, and was discharged. Litigation went on in other forms for a number of years, culminating in 1862, when the Supreme Court set aside an order of the district court to remove part of the bridge.

McCormick v. Manny

Cyrus McCormick, who had invented the reaper, filed a patent infringement action against John Manny, who was building similar machines. Given the economic importance of breaking McCormick's legal monopoly on this vital agricultural machine, many key industrial concerns funded Manny's defense. With such a war chest, he went out to hire the country's best patent lawyers.

As lead counsel, Manny chose George Harding, who was a prominent Philadelphia lawyer. When it seemed likely that the case would be tried in the federal court in the Northern District of Illinois, Harding sought out local counsel.

Lincoln was not Harding's first choice, but he nonetheless was hired at a $400 retainer, with the ultimate fee set at $1,000. Lincoln clearly misunderstood the limited role envisioned for him, however, because he quickly attempted to learn all he could about the record (even though his attempts to gain pertinent documents from the Manny defense team went unheeded). When the case was transferred to the federal court in Cincinnati, no one even contacted him as to when the matter was to be heard.

Undeterred, Lincoln hopped on a train to Cincinnati, and on arriving called on Harding (whom he had never met). The meeting was not fruitful. Harding sized up Lincoln as "a tall rawly boned, ungainly backwoodsman, with coarse, ill-fitting clothes." Another defense team member, Edwin Stanton, was even more incredulous; he harangued Harding with: "Why did you bring that damned long armed Ape here . . . he does not know anything and can do you no good."

Lincoln, who gamely remained in Cincinnati for the entire hearing, was little more than a spectator. He was so unhappy at his treatment that he initially refused the balance of his fee, keeping it only after a second check had been sent with the insistence that he had earned it. It is evidence of Lincoln's famed stoicism that only to his junior partner did he even hint at this blow to his professional pride, saying just that he had been "roughly handled by that man Stanton."

Charter Challenge

The Illinois Central Railroad's state charter, which exempted it from county taxes, was challenged by McLean County. Lincoln believed that this litigation posed "the largest law question that can now be got up in the State," and was determined to be involved.

After doing what lawyers today would call a conflicts check with a similarly situated county, Lincoln offered his services to the railroad and was retained.

The case worked its way up to the Illinois Supreme Court, where it was twice argued over successive terms.

Ultimately, the court ruled for Lincoln and his client.

Although his retainer ($250) had been modest, Lincoln believed the case (and result) to be of such significance (saving the client a half a million dollars a year in taxes) that he asked the railroad for $2,000.

In rejecting Lincoln's request, one Illinois Central official was dismissive: "This is as much as Daniel Webster himself would have charged. We cannot allow such a claim."

Not easily put off, Lincoln consulted a number of his peers about the relative value of his services in relation to the result achieved, and then submitted a revised bill for $5,000.

When that request went unheeded, Lincoln filed suit for the amount. He not only prevailed, but the railroad continued to retain him on important matters!



John Todd Stuart, Abraham Lincoln's first law partner. On April 12, 37, a newspaper in Springfield, Illinois, announced that "J.T. Stuart and A. Lincoln, Attorneys and Counsellors at Law, will practice conjointly in the courts of this Judicial Circuit Office No. 4 Hoffman's Row upstairs." Photo courtesy Illinois State Historical Library.

Three Postscripts

The foregoing is only a brief glimmer of Lincoln's legal career. Let me add three postscripts.

Edwin Stanton later served Lincoln as his second Secretary of War. Shortly before he was assassinated, Lincoln put his hands on Stanton's shoulders and told him: "You have been a good friend and a faithful public officer." And it was Stanton who had not only brought some measure of order to the chaos that reigned in the hours as Lincoln lay dying, he also was the one who gave the memorable eulogy after Lincoln was pronounced dead: "Now, he belongs to the ages."

Not all of the Lincoln-Douglas debates in 1858 focused on the great issues of the day (popular sovereignty, etc.). Douglas and his supporters suggested that Lincoln was under the thumb of large corporate interests, usually citing the Illinois Central Railroad and the "big fee" he received from the *McLean* case. As a result, Lincoln in numerous stump speeches had to explain the details of the case and the fact that he had had to sue the railroad for his fee. As he concluded before the people of Carthage on October 22, 1858: "This is the whole truth about the fee, and what tendency it has to prove that I received any of the people's money, or that I am on very cozy terms with the [railroad], I do not comprehend."

Finally, there is still much important archival research into Lincoln's legal career currently being done at the Lincoln Legal Papers in Springfield, Illinois. In addition to that important, ongoing work, readers seeking additional material would be well served to consult John J. Duff's, *A. Lincoln: Prairie Lawyer.*

Lincoln's Legacy

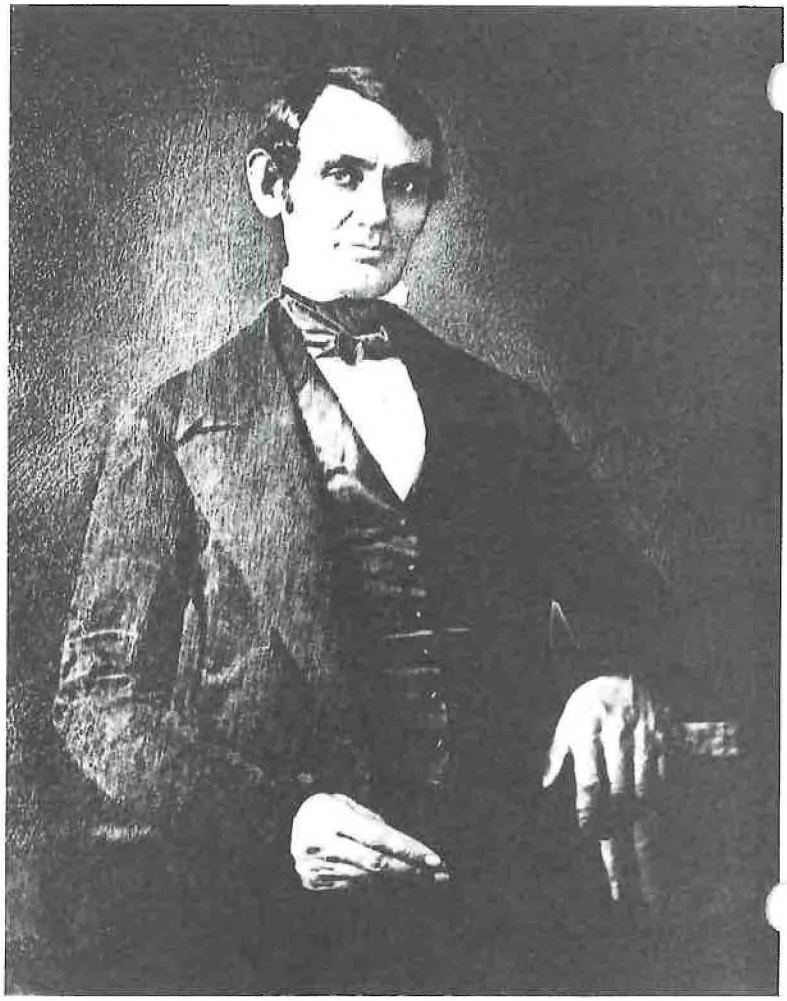
By C. Evan Stewart

To the extent most Americans have a picture of Abraham Lincoln's professional life as a lawyer, it has been formed by John Ford's 1939 film, "Young Mr. Lincoln," starring Henry Fonda. Lincoln is portrayed as a naive and idealistic advocate, with Fonda uttering the classic line: "I may not know so much of law, . . . but I know what's right or wrong." Besides the fact that the "facts" depicted by Ford are either wholly false or widely inaccurate, the overall image conveyed of Lincoln and his legal practice is simply at odds with the far more complex (and interesting) historical truth.

Honest Abe

It is true that Lincoln came from poverty and had a very limited education. As such, after he read the law in John Todd Stuart's office and was admitted to the Illinois Bar in 1837, he was not immediately a skilled professional. Notwithstanding, he quickly developed into a shrewd opponent; as one who rode the Illinois circuit with Lincoln observed: "Any man who took Lincoln for a

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This is the earliest known portrait of Abraham Lincoln. The photograph of the daguerreotype is believed to have been made in 1846 by N.H. Shepherd in Springfield, Illinois. Photo courtesy Illinois State Historical Library.

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