Federal Bar Council News

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On Free Speech

War Of The Worlds

By Steven M. Edwards

The following is a debate between two fictional characters: H and G. The initials H and G are chosen as an allusion to H. G. Wells, whose writings reflect a lifelong struggle between his Victorian upbringing and utopian social views. Any resemblance to any other characters, fictional or real, is purely coincidental.

G: It seems to me that if we are going to have free speech, taxpayers should not be required to pay for messages with which they disagree.

H: It seems to me that if we are going to have free speech, the government should not decide what people hear.

G: But isn't that inherent in any government support for the arts? If

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From The Bench

More Recollections After 25 Years As A Judge

By Judge William C. Conner

Editor's Note: After receiving quite favorable comments on Judge Conner's article in the December issue of the Federal Bar Council News, the editors asked for a second installment. It follows.

Every trial judge knows that truth is indeed stranger than fiction. The life dramas played out in court would make priceless material for writers, except that many of them seem too preposterous for a credible story.

Take the case of the Bronx jewelry dealer, whom I'll call Carlos, whose stock of merchandise for sale included a highly profitable line of cocaine. He prospered sufficiently to buy a fleet of luxury cars and a sizable apartment building in Westchester County. When he was arrested, he further demonstrated his business acumen by negotiating with Chuck LaBella and his boss, Rudy Giuliani, the toughest prosecutors around, a plea agreement whereby all of his assets, instead of being confiscated as the proceeds of an illegal enterprise, were placed in trust to support his children. They agreed on an attorney as trustee, to serve under my supervision. But before Carlos had finished serving the federal prison term to which I sentenced him, he was writted into state court to stand trial on a charge of murdering his wife, who had died of a cocaine overdose. He was convicted, largely on the

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E-Commerce Law

Privacy, Contests, And Spam

By Nancy L. Savitt

Attorneys for national corporations long have known that they must be familiar with laws of other states to properly advise their clients. A 50 state blue sky survey is commonplace for securities issues. But with the growth of the Internet, whole new areas of laws — both state and federal — must be surveyed to ensure that clients with websites are not in violation of any laws.

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testimony of his oldest daughter, whom I'll call Maria, and will be a long-term guest of the state.

Maria went on to a college education financed by the trust. Then she applied for additional funds to go on to law school. The trustee, realizing that this expense would so deplete the corpus that there would be too little remaining to finance a college education for the five other children, asked Carlos his views on Maria's application. Carlos, an incredibly forgiving father, gave his blessing to that expenditure. Perhaps he hoped that when Maria was admitted to practice law she would show her appreciation by assisting him on the petition for writ of habeas corpus he planned to file. Maria had other career goals. She is now working as an assistant in the office of the same district attorney who prosecuted her father for murder! She will surely be consulted by the attorneys opposing the petition that Carlos now has filed, and the legal skills she acquired through the generosity of her father could help to keep him in prison. O'Henry would have salivated over that plot.

Defective Product

My own family once played an unexpected role in one of my product liability trials. The plaintiff was a podiatrist who was sufficiently successful to purchase a sizable power boat. To buff the brightwork on the hull, he bought a Black & Decker angle polisher with a lambs-wool bonnet secured on the rotating head by a tie string. He didn't tuck the end of the string beneath the bonnet and it whizzed around like a "weed eater" and sliced off one of his finger tips. He sued, claiming that the product was defective because it did not have a guard to prevent the operator's fingers from extending into the area of danger and because the manual did not adequately warn of the hazard. He testified that, even though he was right-handed and had lost only a quarter of an inch off the tip of the index finger of his left hand, he could no longer perform surgery, and had to give up his practice and go to work in his family's trucking business. He claimed a loss of expected income totaling $5 million, even after discounting to present value.

During the trial, I told my wife, Janice, about the case and she happened to mention it to her sister, Joyce, who lives nearby. Joyce said she knew the plaintiff because she had once taken one of [illegible] sons to him for treatment. She added that the plaintiff had reportedly been convicted of Medicaid fraud. I checked at the clerk's office and learned that the plaintiff had indeed been so convicted some eleven years before and that Judge Whitman Knapp had sentenced him to a prison term of five years, with all but the first two months suspended and replaced by a lengthy period of probation.

This created an ethical dilemma for me. The plaintiff's credibility — as to his asserted but implausible disability to practice his profession — was very much at issue in the case, so that evidence of his fraud conviction was clearly relevant. But I had grave doubt as to whether I, as a neutral umpire, should help the defendant by informing the attorneys of my unsought discovery. I decided to consult Whit Knapp, whose opinion reinforced my own: that I should tell them. So before court opened the next morning, I called the attorneys in and did so. Black & Decker's attorney reacted to the information as he would to an announcement that he had won the state

Calendar Of Events

March 22

Reception honoring Federal Bar Council and Foundation Trustees and Directors who have served as judges, Union League Club

April 5

Program: Litigation In An Electronic World — Jurisdiction, Discovery, And Computer Forensics, Federal Courthouse

April 27 - 29

Federal Criminal Practice Institute, New York County Lawyers Association

May 2

Law Day Dinner honoring Second Circuit Judge Cabranes, Waldorf-Astoria

May 14 - 15

Supreme Court Admissions Program, Washington, D.C.

lottery. But I brought him back into a low earth orbit by emphasizing that I had not yet decided whether evidence of the conviction should be admitted; the conviction was over ten years old and the evidence was caustically prejudicial. In resolving the issue, I resorted to the court's own fount of Delphic wisdom — the judges' lunchroom. At lunch that day, I presented the problem to my assembled colleagues. Usually there are almost as many different opinions as there are judges present, but on this issue the vote was eight to zero to admit the evidence.

The jury accepted the plaintiff's claim that the product was defective, and found that his injuries amounted to $50,000 for pain and suffering but only $40,000 for lost income. They further found that the plaintiff's own negligence was 86% responsible for the accident, and accordingly reduced his recovery to some $12,000, which was scarcely enough to pay his out-of-pocket disbursements for the litigation. The court of appeals affirmed the judgment, including the verdict of the lunchroom tribunal as to the admissibility of the evidence of the plaintiff's conviction.

If that evidence had not been admitted, the plaintiff would surely have gotten a much larger award. One might think that after Janice and Joyce had saved Black & Decker all that money, the least B&D should do is to send them each a complete set of power tools. But it is just as well it didn't, because that would only have created another ethical dilemma.

A Proposal

One of my law clerks unexpectedly got a curtain call in another courtroom drama. One of the passengers on board the American Airlines DC10 that crashed near Chicago was a 25-year-old nurse from the New York area. Her husband brought a wrongful death action against American and Douglas Aircraft. Under New York law, he could recover damages for only the economic loss, but his attorney, the redoubtable F. Lee Bailey, and his economics "expert" displayed amazing creativeness in magnifying that loss. As I recall the figures, the nurse was earning $24,000 a year at the time of her death, and the economist predicted that she would work to age 70, by which time 8% compounded inflation would have increased her annual salary to $400,000. Discounting that income stream to present value at a rate of 6% (as though the market interest rate would ever be below the anticipated rate of inflation!), deducting nothing for her living expenses, and assuming that she would never take time off for child rearing or anything else, the economist computed the present value of her income loss at over $3 million. That was only the beginning. The husband also added the cost of all the meals he would have to eat in restaurants and of all his laundry, since he would have no wife to cook and wash for him. He even put a price on the interior decorating she would have done in their home, and proudly offered in evidence a set of stylized copper ducks that she had "made" and hung on the wall in flight formation (although all she had done was to spray clear lacquer on items she had bought in a craft shop).

The jury's verdict awarded the husband $1.5 million. Not surprisingly, the defendants moved for remittitur. I called the attorneys in and told them I was going to grant the motion but had not decided on the appropriate reduction. I suggested that the case be settled for $600,000. Bailey accepted with an alacrity that cast doubt on the sincerity of his damage claims.

The grieving husband had barely deposited the check for his winnings before he telephoned my female law clerk, a comely blond, and told her that he could now afford to get remarried and would like to have a date with her. Indeed, if his estimate of the monetary value of a wife is anywhere near accurate, no man would long remain single. The law clerk again demonstrated her good judgment by politely declining his invitation.

Another Drama

I refused a supporting role in the sequel to another drama. A 14-year-old girl was riding in a golf cart driven by her 12-year-old brother on the grounds of a resort hotel in Pennsylvania, in violation of the hotel's rule against the operation of carts by children. The cart crashed head-on into a tree and the girl was thrown out, landing on her head and suffering a brain-stem injury which put her into an irreversible coma. Her parents sued the hotel and the cart manufacturer, claiming that the cart's steering mechanism was defective, although it had never malfunctioned before. The case was settled for $1.6 million, an amount sufficient to keep the girl in intensive care for the rest of a long expected life. However, within a week after the money was paid, the girl died! All but the most trusting persons would presume that the plug had been pulled on her respirator.

Shortly thereafter, I received a call from the parents' attorney, Harry Lipsig, a/k/a the "King of Torts." He asked whether I would be willing to sign an order stating that the money received by the parents was intended to belong to them, to cover their anticipated expenses in caring for their daughter. I asked

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whether the parents wanted such an order so they could avoid paying inheritance taxes on the money. With admirable but perhaps unavoidable candor, Lipsig admitted that was their purpose. I told him that it was surely no mere coincidence that the daughter had died within a week after the parents had received enough money to keep her indefinitely in intensive care. Now that they would have no such expense, they had gotten a sufficient windfall without my assistance in tax evasion. He called back the next day to say that the father wanted to come in to see me personally. I presumed he would urge me to sign the order, and perhaps even suggest an appropriate, or rather inappropriate, inducement. Normally a paragon of self control, I exploded, "You tell that guy if he comes into my chambers, I'll punch him in the face!" That was anything but judicious, but it did bring the matter to a swift conclusion.

The Courier

In another case, I thought it was I who was on the receiving end of a chambers confrontation. A gas station owner in Connecticut who apparently ran occasional errands for friends in organized crime was assigned to carry some stolen bonds to a buyer in Florida. Federal officers somehow learned of the mission and intercepted the courier at La Guardia Airport. He pled guilty and I sentenced him to several years imprisonment. At the sentencing, he asked for time to sell his gas station. I told him I would delay his surrender for six weeks on condition that he post $25,000 bail. The next morning, I walked into my secretary's office and found myself standing almost nose-to-nose with the defendant and another man. Each of them weighed over 200 pounds and looked like an all-pro middle linebacker. In my surprise, I could only manage to blurt out, "I'm sorry I had to hit you so hard yesterday." The defendant wrapped his massive arms around me and lifted me until my toes were barely touching the floor. Before this restriction of my respiration had caused any permanent damage, he set me down, saying with a broad smile, "That's okay, judge. In my book, you're the greatest!"

He explained that his brother had come with him to post the bail, but the cashier in the clerk's office would not accept his brother's personal check. I told him to take the check back to the cashier and I would direct him to accept it. Fortunately, I never learned whether the check was good because the defendant appeared on schedule to begin serving his term.

Tax Planning

Some of my most entertaining cases involved those who had devised a clever way to cheat the government but made stupid mistakes which exposed their fraud. One successful lawyer had a large block of stock that had sharply declined in market price. He gave it to a yeshiva on condition that it give him a letter acknowledging the gift, backdated to a time before the price drop, so that he could take a tax deduction on the higher value. Unfortunately for him, the letter was written on a current letterhead that listed the present school officials, and not those of the earlier time.

A doctor who was employed full time on the staff of a mental hospital moonlighted by making, or rather claiming to make, house calls on elderly, bed-ridden patients every night. At best, his story was highly implausible because when the residences of his "patients" were plotted on a map, it was apparent that he would have had to drive over 150 miles every night to visit them all, and there would scarcely be time to do even that, much less to examine and advise the patients. But he made an even more glaring mistake. He was an officer in the Army Reserve, and he billed for house calls to the same patients during the two weeks each year when he was on active duty at Fort Drum, up near the Canadian border! He made another mistake in assuming that the patients were too senile to remember whether he had visited them but the prosecution played videotape depositions of several of them who were impressively bright and alert, and who testified that they had not seen the doctor in years.

There is probably some perjury in almost every case, but it seldom goes as far as it did in a case involving the sheet metal contractor who won the contract for heating and air conditioning in the construction of the new county courthouse in White Plains. There was a jurisdictional strike between the pipefitters and the sheet metal workers as to who should install the reheaters in the ventilating ducts. This delayed installation of the ductwork for several months, during which the plumbing pipes were installed. The plaintiff testified that when he was finally able to install the ductwork, he found that the spaces it was designed to occupy were criss-crossed by plumbing pipes so that he had to scrap all of the original ductwork and fabricate new ductwork designed to fit between and around the pipes. He claimed that this additional cost had bankrupted his company and sought damages from the unions for their illegal strike. At the close of his testimony on a Friday, I asked whether he had drawings of the redesigned ductwork (blueprints of the original ductwork were already in

evidence). He testified that he had, and I asked him to bring them with him to court on Monday. He did so, and when I compared them with the original blueprints, it was clear that substantial changes had been made in the layout of the ducts. I was satisfied. But the defendants were not. The next day, they called to the stand an engineer who testified that the night before he had gone to the White Plains courthouse and had taken down the tiles of the hung ceilings on a number of floors and found that, on every floor he checked, the layout of the ducts conformed to the original and not the revised drawings! I announced that the non-jury trial would resume the next day in the White Plains courthouse and that we would inspect the ductwork on every floor if necessary.

The next morning while I was still in bed at home, the plaintiff's lawyer called and said that the plaintiff wanted me to cancel the on-site inspection because it would be too confusing to be comprehensible. I told him that I had engineering training and was quite experienced in reading blueprints, that we would take all the time necessary to make the situation clear, and that the court would convene in White Plains as scheduled. He called back a few minutes later to say that his client was still worried. I said that I suspected that his client was worried not that I would fail to understand what the inspection showed but that I would succeed. I told him again that I would see him in White Plains as scheduled unless he called me back promptly to tell me that his client was dropping the case. I was not surprised when he did exactly that. It then became obvious that after I had asked the plaintiff to bring in the revised drawings he had worked feverishly all weekend to prepare 20 pages of elaborate drawings of a system of ductwork that would never be built!

It is a free ticket to exciting shows like these that entices practically all senior federal judges to continue sitting, even though they could retire and still draw the same pay. Is this a great job — or what?

New Appointments

Judges Winter and Jacobs Appointed Federal Judicial Conference Committee Chairs

By Stephen L. Ratner and David M. Powers

Chief Judge Ralph K. Winter and Judge Dennis Jacobs of the United States Court of Appeals for the Second Circuit have been appointed by United States Supreme Court Chief Justice William Rehnquist as committee chairs for the Judicial Conference of the United States. Effective October 1, 1999, Judge Winter was named chair of the Executive Committee, and Judge Jacobs was appointed as chair of the Judicial Resources Committee.

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Established by 18 U.S.C. Section 331, the Judicial Conference of the United States is presided over by the Chief Justice of the United States Supreme Court and is comprised of the chief judge of each circuit, the chief judge of the Court of International Trade, and a district judge from each regional judicial circuit. Originally called the "Conference of Senior Circuit Judges," the conference was established in 1922 to set policies and procedures for the administration of the federal courts. The conference also makes recommendations for the creation of new Article III judgeships.

According to the statute, the conference is required to make a "comprehensive survey of the condition of business in the courts of the United States," and to study and evaluate the federal rules of practice and procedure. The conference also may submit recommendations to the courts to promote uniformity of management procedures throughout the federal judiciary. Unless the Chief Justice calls for special sessions, the conference meets twice a year, and the Chief Justice is required to submit an annual report containing the conference's conclusions and suggestions.

Conference Committees

Most of the conference's activities are conducted through its numerous committees, generally made up of circuit, district, bankruptcy, and magistrate judges from across the country. Select committees also include state justices, attorneys, and academics. The conference committees include the Executive Committee and the Judicial Resources Committee, as well as committees concerned with the administration of the bankruptcy system, criminal law, international judicial relations, evidence rules, civil rules, and various other subject matters. Committee chairs play an integral role in the administration of the federal courts, as they are responsible for steering much of the process for developing policy recommendations to the conference. Committees may review issues within their established jurisdictions and issue advice or recommendations to the conference, but cannot make decisions on behalf of the conference unless specifically authorized to do so. The Chief Justice makes all appointments to conference committees, and the members serve at his pleasure.

Executive Committee

The Executive Committee is the senior executive arm of the conference. Unlike the other committees, the Executive Committee is not a policy-making committee. It is responsible for overseeing the jurisdiction of all other committees, and prepares proposed consent and discussion calendars for meetings of the conference. It also is empowered to handle any issues or emergencies that confront the judiciary while the conference is not in session.

"As chair of the committee, I get to say quite a bit about the agenda of the committee, and the problems that arise come to me first," said Judge Winter, who has been a member of the Executive Committee since 1998. "Emergencies are things that arise between conference meetings and might be difficult to handle," including urgent legislative matters that would have a direct effect on the judiciary, or lawsuits brought against the committees or the conference.

One such emergency occurred in 1999, when Article III judges aged 65 and older faced a dramatic and unexpected rise in their insurance premiums under a new group life insurance plan that did not enhance their benefits. Until then, judges had an insurance plan that capped the premium at age 60. The proposed increase "overturned the promises that were made to the judges in a very serious way, . . . and [the conference] had to take a position on it," Judge Winter explained. "Most people signed on for it as a substitute for private insurance because of the promise that the premium would not increase after turning 60." Because the conference was between meetings, the Executive Committee developed a proposed solution, which the conference then adopted, by which the effected judicial budget would be amended to cover the increased cost to the judges rather than attempt to have the judges exempted.

Although pleased with his appointment, Judge Winter does not view his position as a long-term commitment in view of his plan to become a senior judge. "I don't intend to stay on it long. I plan to go senior [status] on October 1st." Prior to joining the Executive Committee, Judge Winter was a member of the Advisory Committee on Civil Rules from 1987-1992 and was named chair of the Advisory Committee on the Rules of Evidence in 1993.

Judicial Resources

The Judicial Resources Committee is responsible for evaluating the human resource needs for the federal courts, including Article III judges, clerks, and administrative staffs, as well as for developing methodologies for assessing human resource needs and allocation. The Judicial Resources Committee also makes recommendations to the conference for the appointment of

additional Article III judgeships. The chair of the Judicial Resources Committee may represent the judiciary on these matters in hearings before the Senate and the House of Representatives.

"The role of the chair is less to promote a personal point of view than it is to elicit and understand the consensus of a diverse committee in order to be able to give the conference the views of the committee as a whole," Judge Jacobs said.

Staffing Needs

According to Judge Jacobs, the committee is striving to ascertain the staffing needs of the judiciary to make accurate recommendations to the nference, and ultimately to Congress. "The major initiative now ongoing is to revamp and update the data on workloads so that we can gauge our own efficiency and assure Congress that the appropriation for the Judiciary is efficiently and wisely spent. . . . The most urgent problem is that a handful of district courts have seen explosive growth and need urgent relief in terms of additional judgeships."

With these increased caseloads, the committee has advocated the creation of new judgeships. "At our meeting of December 1, 1998 we recommended to the judicial conference that 33 permanent and 25 temporary new district judgeships be created, that seven permanent and four temporary new court of appeals judgeships be created, and that one existing judgeship not be filled. The Judicial Conference adopted that commendation in December 1998 and hopes year after year that Congress will pass (and the President will sign) a judiciary bill that acts on those recommendations."

New Appointments

Buchwald Appointed District Judge

By Stephen L. Ratner and David M. Powers

Judge Naomi Reice Buchwald was sworn in as a United States District Court Judge for the Southern District of New York on November 10, 1999. Prior to her appointment, Judge Buchwald served as a Magistrate Judge for the Southern District.

Becoming a district court judge represents a new and interesting challenge for Judge Buchwald. "The greatest difference between the two positions is the increase in responsibility and the increase in authority," she said. "I have found it very stimulating to change jobs, and the greatest challenge to me is to try and continue to give my cases, which have increased by over fifty percent, the same type of personal attention that I used to give my cases when I was a magistrate judge."

Judge Buchwald began her tenure as a magistrate judge on April 3, 1980, and served as chief magistrate judge from 1994-1996. Over the years, Judge Buchwald handled a number of notable cases, including several trials for determining damages in connection with the downing of Korean Air Flight 007. Judge Buchwald called these cases "particularly challenging due to the sophisticated conflict of law issues." In another notable case, *Bensen v. American Ultramar Ltd.*, Judge Buchwald was called on to interpret an undecided question of British law to resolve a commercial dispute. Also while serving as a magistrate judge, Judge Buchwald was a member of the Joint Committee on Local Rules of the Southern and Eastern Districts, which created model rules for trial court judges designed to streamline and simplify case management in those districts.

Prior to assuming the bench, Judge Buchwald was an Assistant United States Attorney for the Southern District of New York from 1973 to 1980. She acted as Deputy Chief of the Civil Division from 1976 to 1979, and was named Chief of the Civil Division in 1979. Before joining the U.S. Attorney's office, Judge Buchwald was a litigation associate at Marshall, Bratter, Greene, Allison & Tucker in New York from 1968 to 1973.

In her distinguished career as a lawyer and a magistrate judge, Judge Buchwald has been recognized for her outstanding commitment to the public service. Judge Buchwald received the Robert B. Fiske, Jr. Association's William B. Tendy Award and the Seymour Association Award for Outstanding Public Service, both awarded to former Assistant United States Attorneys who have continued their commitment to public service. She also was awarded the Food and Drug Administration Commissioner's Special Citation due in large part to several notable public-health cases that she handled while at the U.S. Attorney's Office. With regard to one of those cases, Judge Buchwald said she was proud because she "felt that the work [she] was doing was particularly valuable on an issue of public health." More recently, in 1998, Judge Buchwald was honored with the Columbia Law School Class of 1968 Excellence in Public Service Award.

Judge Buchwald earned her law degree from Columbia University School of Law in 1968, where she graduated cum laude. She was an Editor of the

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Journal of Law and Social Problems, and published an article entitled "Abusive Process: Sewer Service." Judge Buchwald graduated cum laude from Brandeis in 1965 with a dual degree in politics and economics.

Judge Buchwald is an active member of the Federal Bar Council. She served as a Trustee from 1976-1982, Vice President from 1982-1984, and again as Trustee from 1998 to the present. She is also a member of the Association of the Bar of the City of New York and the New York State Bar Association.

Judge Buchwald was born on February 14, 1944 in Kingston, New York, and spent most of her childhood in New York City, where she attended Hunter College High School. She and her husband Donald have two children, who currently are attending college.

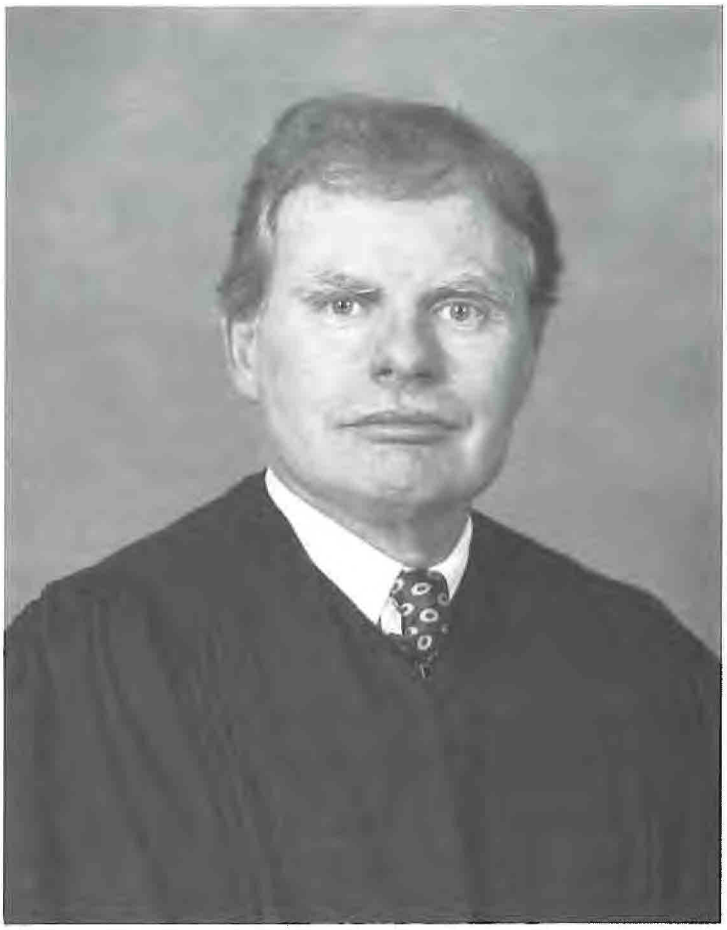
New Appointments

Hurd Takes Office As District Judge

By Stephen L. Ratner and David M. Powers

David N. Hurd was sworn in as a United States District Court Judge for the Northern District of New York on October 15, 1999. Judge Hurd had been a Magistrate Judge for the Northern District since January 18, 1991.

Judge Hurd looks forward to presiding over cases that he could not try as a magistrate judge. "The big difference, of course, is that as a district court judge I am now eligible to hear and try felony cases," Judge Hurd said. "It certainly is interesting and exciting to be involved in the felony aspect of criminal law," he added.



Judge David N. Hurd

As a magistrate judge, Judge Hurd had the opportunity to decide some timely legal issues. In a notable case that he tried, *Cook v. Colgate University*, the women's ice hockey team at Colgate University sued the school for gender discrimination under Title IX, seeking to have its "club" team elevated to varsity status. "I ruled that they had to make it a varsity sport," said Judge Hurd. Although the case was dismissed as moot by the court of appeals because the plaintiffs had graduated before the case was decided, a later class action against the university was settled, and the women's ice hockey team was granted varsity status.

"It was on the forefront of women's ice hockey, which is now a more prominent sport," Judge Hurd said, noting that the United States Women's Ice Hockey Team won the gold medal in the last Winter Olympics. "My secretary kids me that I got the ball rolling," he said jokingly.

Prior to assuming the bench, Judge Hurd was a trial lawyer for nearly 25 years. From 1963 to 1966, Judge Hurd worked as an associate for various law firms in Binghamton and Utica, New York, often taking cases on assignment from the court. "I volunteered to take any case the judge would give to me so long as it would go to trial," he sai adding that he did not want a case if it was likely to end up as a plea.

From 1966 to 1967, Judge Hurd served part-time as an Oneida County

Assistant District Attorney. In 1967 he became an associate at O'Shea, Griffin, Jones & McLaughlin in Rome, New York, and from 1970 to 1991 was a partner of O'Shea, Griffin, Hurd & Stevens, where he was one of the firm's two trial attorneys.

Judge Hurd credits his father, who recently passed away, with being a constant source of guidance and encouraging Judge Hurd to become a lawyer. "If it wasn't for him, I wouldn't have gone to law school."

Judge Hurd earned a J.D., cum laude, from Syracuse University in 1963, where he was an Associate Editor of the Law Review and published two notes: "Wills — Testator's Knowledge Of The Will's Destruction Does Not Prevent Destruction From Being Fraudulent" and "The Imposition Of Sentence Within A Timely Period After Conviction." He was graduated from Cornell University in 1959 with a B.S. in Industrial Labor Relations.

Judge Hurd served on the College Council-SUNY Institute of Technology at Utica/Rome from 1977 to 1994, serving as chair from 1979 to 1994, where he was involved in promoting the school and selecting a campus while the college was in its infancy.

Judge Hurd was a member of the Federal Magistrate Judges' Association from 1991 to 1999 and a member of the Oneida County Bar Association Board of Directors from 1988 to 1990. In 1987 he was elected a Fellow of the American College of Trial Lawyers. In addition, Judge Hurd was a member of the Board of Directors of Rome Hospital in Rome, New York, from 1975 to 1979.

Judge Hurd was born May 9, 1937 in Hancock, New York. He spent his childhood in Camillus, New York, a small village located nine miles outside of Syracuse. He and his wife Connie have four children and two grandchildren.

New Appointments

Marrero Sworn In To The Southern District

By Stephen L. Ratner and David M. Powers

Victor Marrero was sworn in as a United States District Court Judge for the Southern District of New York on December 16, 1999. Prior to assuming the bench, Judge Marrero had a distinguished career as a government official, ambassador, and private practitioner.

For more than three decades, Judge Marrero has been an active member of both the state and federal governments, having held appointments by two United States Presidents, two New York Governors, and four Mayors of New York City. Judge Marrero embarked on a career in public service in the late 1960s, practiced privately from 1986 to 1993 while still holding part-time public appointments, and returned full-time to the public sector when he joined the State Department in 1993. Judge Marrero sees his new role as the continuation of a career deeply concerned with law and policy. "It's an exciting way to cap a career because so much of everything else I have done relates to the challenges I will have as a judge," he said.

Judge Marrero was appointed by President Clinton as an ambassador for the State Department from 1993 to 1999. From 1997 to 1999, Judge Marrero was the Ambassador, Permanent Representative of the United States to the Organization of American States, a policy-making and governing organization consisting of 34 member states from North, South, and Central America, and from the Caribbean.

From 1993 to 1997, Judge Marrero worked under then-Chief Ambassador to the United Nations, Madeleine Albright, as the Ambassador, United States Representative on the Economic and Social Council of the United Nations. The council dealt with economic, social, educational, health, and women's issues within the U.N. member states. "My role was to be the U.S. Ambassador to one of the central organs of the U.N.," Judge Marrero said.

Before joining the State Department, Judge Marrero had a successful career in private practice. From 1982 to 1986, Judge Marrero was a partner at Tufo & Zuccotti in New York. In 1986, Tufo & Zuccotti merged with Brown & Wood, and Judge Marrero became a partner of that firm, heading up the firm's practice in real estate, land use, and environmental law from 1991 to 1993. While in private practice, Judge Marrero served part time as a member of two New York City agencies. From 1983 to 1984 he was appointed by Mayor Edward I. Koch to the New York Conciliations and Appeals Board, and from 1990 to 1992 he served on the New York City Rent Guidelines Board by appointment of Mayor David N. Dinkins.

Prior to entering private practice, Judge Marrero spent 14 years working for New York City and New York State, and for the federal government. In 1979 he was appointed by President Jimmy Carter as the Under Secretary of the U.S. Department of Housing and Urban Development, a position he held until 1982. From 1968 to 1978, Judge Marrero

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held a variety of positions for the New York City and New York State governments, including Commissioner of the New York State Housing Finance Agency, Chair of the New York City Planning Commission, First Assistant Counsel to Governor Hugh L. Carey, Special Counsel to the New York City Comptroller, Executive Director of the New York City Department of City Planning, Assistant Administrator, and Assistant to the Mayor for Mayor John V. Lindsay.

Working for the city, and as first assistant counsel to the governor, Judge Marrero was active in crafting legislation, handling legal and policy issues, and advising the governor during New York City's financial crisis in the mid-1970s. "Many of the issues that I got to become involved in, in one way or another, were issues of law and policy," Judge Marrero said. "There was a very heavy legal dimension to all the issues I was involved in."

Even before going to law school, Judge Marrero was intent on a career in public service. "When I went to law school, my primary interest was less the practice of law and more public service," Judge Marrero said. He began law school in 1964, having been inspired by President Kennedy's commitment to public service. "That was a big influence," he said.

Judge Marrero earned his LL.B. from Yale Law School in 1968, where he was an editor of the Yale Law Journal. While at Yale, Judge Marrero published a note entitled "Section 5 of the Clayton Act and the Nolo Contendre Plea." From 1966 to 1967, Judge Marrero studied in England as a Fulbright Scholar at the University of Sheffield School of Law. Judge Marrero earned a B.A., cum laude, with honors in history, from New York University in 1964, where he was Phi Beta Kappa.

Over the years, Judge Marrero has served on many civic, educational, and professional organizations. He is currently vice-chair of the board of the New York Public Library, and was the founder and first chair of the board of the Puerto Rican Legal Defense and Education Fund. Among the numerous other public-service positions he has held, Judge Marrero was the chair of the New York State Chief Judge's Committee to Improve the Availability of Legal Services from 1988 to 1990 and co-chair of the Chief Judge's Pro Bono Review Committee from 1991 to 1993.

Judge Marrero was born on September 1, 1941 in Santurce, Puerto Rico. When he was ten years old, Judge Marrero and his family moved to New York City, where Judge Marrero attended public schools, ultimately graduating from the Bronx High School of Science in 1960. He and his wife, Veronica M. White, have two children.

Focus On:

Interim U.S. Attorney Loretta Lynch

By Steven Flanders

In July 1999, U.S. Attorney General Janet Reno appointed Loretta Lynch as Interim United States Attorney for the Eastern District of New York, succeeding Zachary Carter upon his return to private practice. Ms. Lynch now awaits the anticipated nomination by President Clinton to a regular term of four years and confirmation by the Senate.

A native of Durham, North Carolina, Ms. Lynch, who had joined the office in November 1990, had been Chief Assistant to Mr. Carter since March 1998. Previously she was a litigation associate at Cahill, Gordon & Reindel, following graduation cum laude from Harvard College in 1981 and from Harvard Law School in 1984. Federal Bar Council President-elect Kevin Castel describes her as a "tough as nails litigator" notwithstanding her quiet and self-effacing persona.

Prominent Trials

Ms. Lynch has been involved in a number of prominent trials in recent years, in addition to her increasing administrative responsibilities. As head of the Long Island office she handled several political corruption cases involving the Town of Brookhaven, in which John McNamara was the chief witness. She also served on the team of three that conducted the first trial following the assault upon Abner Louima.

Another particularly searing experience was the proceedings against a Chinese ring called the Green Dragons, notable because the leaders were extraordinarily violent and also very young.

These investigations led to a complex series of international encounters in addition to the Eastern District trials: the leadership was in China, a country with which the U.S. has no extradition treaty. But Lynch and the FBI case agent traveled in the Fall of 1998 to Fuzhou, the capital of Fukien Province in China. Presentation of the case to the Chinese authorities led to what may have been the first trial and conviction in China of a Chinese national on charges that were primarily a result of activities in this country, and a case made by U.S. authorities.

Priorities

Ms. Lynch is particularly pleased that the United States Attorney for the Eastern District of New York has an opportunity to focus resources as she devotes herself to protection of the people of the district. The office is particularly distinguished by its depth of talent, including an unusual number of dedicated long-term lawyers. The office has a strong environmental program to which she attaches a high priority.

Other priorities include Asian gangs, traditional organized crime, and stock market manipulation; the traditional "boiler room" cases seem now to be succeeded by larger and more sophisticated frauds. And the office's traditional strengths in such areas as narcotics and civil rights will continue.

From her days in college, Ms. Lynch was interested either in a career in law or in communications. She was active on Harvard's student-run cable network, running a minority community affairs series called Visions and Viewpoints. This provided a unique opportunity to learn about the city of Boston and the community generally — she particularly cherishes the memory of interviews with perennial mayoral candidate Mel King. She had an internship one summer with CBS in New York.

Ms. Lynch speaks fondly of her family, still located in Durham, where her father is now retired from pastoral duties (he was a Baptist minister), as is her mother from a career as a school librarian. Her younger brother is a Baptist minister and an older brother is a retired Navy SEAL.

Judicial History

Judges' Clerks As Judges

By Bennette Kramer

A number of judges in the Second Circuit have served as law clerks to other judges. Three of them recently shared their clerking experiences with the *Federal Bar Council News*, and compared their experiences with the experiences of their own clerks.

Judge Oakes

Second Circuit Judge James L. Oakes clerked for Judge Harrie B. Chase

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Interim U.S. Attorney Loretta Lynch

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in the Second Circuit twice, in 1947-48 and again in 1949-50. Judge Chase was Judge Oakes' predecessor once removed as the Second Circuit Judge from Vermont. Judge Oakes clerked for one year, then left Vermont to practice in California. He went to San Francisco and soon called Judge Chase and asked him if he could come back for a year. Judge Oakes has been in Vermont ever since. Coincidentally, one of Judge Oakes' present clerks was his clerk in 1996-97. She went to Washington, D.C., then married a Vermont man, and came back to work for Judge Oakes.

When Judge Oakes clerked for Judge Chase, times were simpler. Judge Chase had one law clerk and one secretary, who used a typewriter and carbon paper. Judge Chase sat one week a month, nine months a year, hearing 15-17 cases a week. There usually were three arguments a day and each side had 20 minutes to argue. Neither the judges nor the clerks read the briefs in advance. Following oral argument and without discussing the cases with other members of the panel, each judge wrote a voting memo in which he explained how he voted and why. The law clerks contributed to the voting memoranda. The Friday of the following week, the judges conferred and assigned opinions. Then, each judge went back to his chambers and wrote his opinions. The judges drafted their own opinions, which were handwritten on yellow paper. The law clerks would edit the opinions, make suggestions, and cite check.

In the second year of his clerkship, Judge Oakes drafted five opinions while Judge Chase was in Florida on vacation. Judge Chase was very pleased. When Judge Oakes clerked, the judges on the bench were good friends. Judge Oakes would accompany Judge Chase when he visited other judges to exchange views on cases. In addition, Judge Oakes and Elliot Richardson, who was Learned Hand's clerk, had worked on the Harvard Law Review together, creating a bond between them. The court was smaller and simpler because of the fewer number of people and lighter case load. The judges had time to see and get to know each other. For the most part the cases were simpler, too.

Now, all the judges on a case read the briefs before oral argument and their clerks will do research if the law is not clear so that each judge comes into argument prepared. Arguments are shorter and more directed because the judges are hearing four to five cases a day instead of three. Case conferences with voting and opinion assignment take place right after a sitting because there are different panels every day or two. If a case is complicated or controversial there might be a post-argument memo, but on the whole there is not as much time for consideration of each case as there was 50 years ago.

Judge Oakes' law clerks today do the drafting and the judge does the editing. The huge increase in case load mandated this role reversal. The number of cases docketed each year has risen from 600-800 to 5,000 today. When Judge Oakes clerked there were six judges, now there are 14 active judges and 5 to 6 senior judges, leading to a considerable lessening in the opportunity for social conversation.

Today the judges try to maintain the congenial atmosphere that existed 50 years ago, despite the greater caseload and greater number of judges. The Second Circuit judges get together at court functions, memorial services, and swearing in ceremonies. In addition, the judges have court meetings several times a year, to which senior judges are also invited.

Judge Leval

What Judge Pierre N. Leval remembers most distinctly about his clerkship in 1963-64 with Judge Henry J. Friendly is that Judge Friendly "knew the law." Judge Friendly had such a comprehensive and integrated command of the United States Code and Second Circuit case law that he was able to decide an issue quickly and sit down and write an opinion by hand. Judge Friendly wrote opinions on a pad using each line from paper edge to paper edge, making few corrections. If he needed to verify a quote that he would write from memory, he would go to the Federal Reporter and pull the correct book from the shelf. According to Judge Leval, the other judges would say that there was not a lot for Judge Friendly's clerk to do. As Judge Friendly's clerk, Judge Leval would read his opinions, cite check them, and raise questions. For a judge with such a powerful command of the law, Judge Leval disclosed that Judge Friendly was very open to questions and comments, would consider them, and either change the opinion or not as he quickly determined was best.

Judge Leval's clerks today have a more traditional clerking experience than his clerkship with Judge Friendly. Judge Leval's clerks do initial research and drafting and then Judge Leval and his clerks pass the opinions back and forth. Both the judge and his clerks participate in the drafting. Aside from the extraordinary abilities of Judge Friendly, Judge Leval attributes his need for assistance from his clerks to the increase in the caseload, which does not allow the judges time to draft their own opinions. In addition to a volume increase, Judge Leval attributed the increase in work to the proliferation of federal statutes that are longer and more detailed than statutes

in the past. Judge Leval stated that in trying to provide all the answers so that the judges have nothing to interpret, Congress has created more ambiguities. Judges know how to deal with the ambiguities, but now have more work.

Judge Batts

Judge Deborah A. Batts clerked for Judge Lawrence W. Pierce in 1972-73 when he was a District Court Judge of the Southern District of New York. Judge Batts described Judge Pierce as one of the most organized and methodical persons she has ever met. He knew the status of each of his cases and followed all his cases through a pin system on a large bulletin board. Judge Batts was in Judge Pierce's second set of law clerks, so she believed he developed his organizational skills working as Chair of the New York State Narcotics Addiction Control Commission and Director of the New York State Division for Youth.

Judge Batts said that Judge Pierce viewed the clerkship experience as a learning experience. Thus, the clerk assigned to a particular case would be involved with every facet of the case, accompanying the judge at all times in the courtroom at a hearing or trial or motion argument. Judge Batts drafted opinions as a clerk and then she and the judge exchanged them back and forth until they were polished. The clerks typed opinions, which were marked up by the judge and then typed by the judge's secretary. Judge Batts describes Judge Pierce as fair, effective, and efficient with his law clerks, and as a wonderful model that she strives to emulate. Judge Batts describes her clerkship as valuable for everything she subsequently has done as a lawyer and as a judge.

In her own chambers, Judge Batts strives to give her clerks a similar experience by involving her clerks in every aspect of a case. All her clerks are in and out of her office and she is always ready to confer with them. There is a lot of back and forth in polishing opinions. Often, Judge Batts will discuss issues with all three of her clerks, creating a collegial exchange of ideas. She has three clerks and no secretary because today everyone, including the judge, uses the computer. As a result, each clerk has a lighter caseload, but each has to finalize opinions and answer the telephone. Judge Batts even takes notes in court on a laptop.

FBC News

Council Develops Criminal Practice Institute

By Barrie L. Goldstein

The Federal Bar Council, together with the New York County Lawyers' Association, has developed a Federal Criminal Practice Institute, a 2 1/2 day program of instruction, geared to equip candidates with the skills necessary to qualify for the Southern District's CJA panel. The targeted participant group is experienced women and minorities who currently practice criminal law, but primarily in the state courts. The Council has worked closely with the court's CJA and equal opportunity committees, chaired by Judge John G. Koeltl and Judge Harold Baer, Jr., to create the Institute.

The Institute, to be held at the New York County Lawyers' Association, will begin on Thursday evening, April 27, and will continue on Friday and Saturday, April 28 and 29, 2000. Judges Baer and Koeltl will introduce the program, and Judges Colleen MacMahon and Patricia Anne Williams will provide an overview of the contents of the course. A reception to mark the commencement of the Institute will take place on Thursday, from 7:15 to 8:30 p.m. Judges of both the Second Circuit and Southern District of New York have been invited to attend.

Creates Opportunity

The Institute is an effort to implement a finding of the Report Of The Second Circuit Task Force On Gender, Racial, And Ethnic Fairness In The Courts, which was issued on November 21, 1997. The task force found "low numbers of women and minorities on CJA panels." Although empirical data was not available, the task force noted that it had received suggestions that there were women and minority lawyers who practiced in the state courts and wanted to join the CJA panel, but were unfamiliar with federal law.

The Institute creates the opportunity for women and minorities, skilled in state criminal law, to develop a federal expertise, which must exist for applicants to compete successfully for a seat on the CJA panel. Consisting of ten panels and luncheon discussions, the program will run the gamut of the areas of federal criminal law — initiation of the proceeding, pre-trial and trial issues, ethics, sentencing, evidence, and appeal considerations. Magistrate Judge Kevin Fox will moderate the pre-trial panel. Two panels will be devoted to the subject of sentencing guidelines. Judge Deborah A. Batts has agreed to participate in the morning program on sentencing guidelines, and Judge Denny Chin will provide his expertise during the second session in the afternoon. Finally, Judge Jed Rakoff and Magistrate Judge Frank

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Maas will lead a discussion concerning RICO during a luncheon panel.

The panel participants include Elkan Abramowitz, Robert Anello, Susan Brune, Zachary Carter, Douglas Jensen, Lewis Liman, Robert Morvillo, James A. Moss, Marjorie Peerce, William Pollard, III, Henry Putzel, III, Lee S. Richards, John Siffert, Charles Stillman, Jeremy Tempkin, and John Wing.

Institute's Goals

The goals established for the Institute are consonant with the first priority for the CJA panel: assuring the quality of the participating members. Although a two-day program will not automatically qualify a candidate for admission to the CJA panel, the CJA panel likely will view a participant's completion of the Institute as an important factor when it reviews the participant's qualifications.

Second Circuit Decisions

A Judge's Recusal

By Steven M. Edwards

The Second Circuit recently issued a decision in *United States v. Bayless*, holding that Judge Harold Baer, Jr., had not erred in failing to recuse himself in a case that drew considerable media attention some months ago. In a first for the organization, the Federal Bar Council filed an amicus brief supporting Judge Baer's position. The case raised interesting and difficult questions concerning the circumstances under which federal judges should recuse themselves as a result of public criticism.

Bayless was stopped by police officers in Washington Heights who had observed four men placing two large duffel bags in the trunk of her car. With Bayless' consent, the police opened the trunk and found drugs. At a suppression hearing, the government claimed that the police had reasonable suspicion to stop Bayless' car because the four men, on seeing the police, had run away.

In his initial opinion granting the motion to suppress, Judge Baer observed that, given the perception in the neighborhood of police officers as "corrupt, abusive, and violent," it would be hard to characterize the actions of the four men as evasive. This decision drew heavy criticism from the press and various politicians, including more than 200 members of Congress who sent a letter to President Clinton asking him to join them in calling for Judge Baer's resignation. When asked about the letter at a press conference, a presidential spokesperson stated that the President would defer deciding whether to call for Judge Baer's resignation until the judge ruled on the government's motion for reconsideration.

Judge Baer granted the government's motion for reconsideration and, after hearing additional evidence, vacated his previous order suppressing the results of the search. After Judge Baer reversed himself on the suppression issue, Bayless made a motion to recuse, which Judge Baer denied. Judge Baer then requested that the case be transferred to another judge. The case was transferred to Judge Robert Patterson, and Bayless pleaded guilty subject to a stipulation that she be allowed to appeal the outcome of her suppression motion.

On appeal, Bayless contended that Judge Baer should have recused himself sua sponte prior to deciding the government's motion for reconsideration. Relying on 28 U.S.C. Section 455(a), Bayless argued that, as a result of the public criticism, an objective observer could reasonably question Judge Baer's impartiality, even though Bayless had no proof that he was actually biased. The linchpin for Bayless' argument was that various commentators, including *The New York Times*, expressed the belief that Judge Baer had bowed to the criticism — therefore, she reasoned, it must have been the case that an objective observer could reasonably question his impartiality.

Writing for the court, Judge Calabresi held that the standard of review was "plain error" and Judge Baer's alleged failure to recuse himself did not rise to that level. The court found that Bayless had made a "strategic decision" not to move to recuse Judge Baer prior to his ruling on the government's motion for reconsideration and expressed concern that reversal in this case would encourage similar strategies by future litigants. While observing that "[t]he circumstances under which criticism of a judge from political figures or from the media might be grounds for recusal under Section 455(a) are anything but clear," the court noted that numerous cases have found that such criticism is not grounds for recusal.

The court also expressed concern that interpreting Section 455(a) to mandate sua sponte recusal in cases such as Bayless might "confer on legislators the power to remove judges from particular cases simply by criticizing them violently." If that were so, the court reasoned, Section 455 — which is intended to maintain the public image of an impartial judiciary — might render the judiciary less impartial by giving politicians and the press an effective means of manipulating it. The court also suggested that: "Such a reading of the statute would create a moral hazard by encouraging litigants or other interested parties to maneuver to obtain a judge's disqualification."

Finally, the Second Circuit emphasized that Bayless' failure to move for recusal had "deprived Judge Baer of any facts or reasoned arguments that Bayless potentially could have presented to aid him in his task of putting himself in the shoes of a disinterested but informed observer." The court was careful to state that it expressed no opinion on whether Judge Baer would have been required to recuse himself if a timely motion had been made. It also stressed that "there may well be circumstances" in which no recusal motion is made but the appearance of partiality is such that recusal is warranted.

Council's Position

Although the result was the one advocated by the Federal Bar Council as amicus, the court passed up an opportunity to provide district judges with practical guidance on how to deal with this difficult situation. The implication of the court's opinion is that, if Bayless had made a motion to recuse, Judge Baer might have been obligated to withdraw. Recognizing that waiver (which the government argued) was a weak ground on which to base its decision — because the appearance of impropriety obviously should result in recusal regardless of whether it is raised — the court suggested that Judge Baer had not committed "plain error" because Bayless had given him insufficient information.

In its amicus brief, the Federal Bar Council suggested a number of objective standards that a district court might consider in determining whether to recuse itself as a result of public criticism.

First, assuming that the judge honestly believes that his or her decision is not going to be affected by the criticism, there should be a strong presumption against recusal as a result of adverse public comment. Any other result would be inconsistent with the notion that, as a result of safeguards built into the Constitution, the judiciary is capable of acting independently. To put it differently, if the Second Circuit is not convinced that constitutional safeguards are sufficient to enable the judiciary to withstand public criticism, how can one expect the general public to be convinced of that?

Second, the decision whether to recuse should be made before the court considers the matter before it. The whole point of Section 455 is to insulate the decision on the merits from the effects of adverse publicity. If a court considers the impact of a decision on public opinion and the merits of the decision together, there is a substantial risk that the very thing the law is designed to guard against — public opinion compromising a judge's impartiality — will occur.

In the *Bayless* case, the defendant obviously felt that there was no reason to doubt Judge Baer's impartiality before he decided to vacate his suppression order. That is why she did not move to recuse him at that point. Since Bayless apparently felt comfortable with Judge Baer, it would have been highly unusual, if not illogical, for him to recuse himself sua sponte on the theory that an objective person would question his impartiality.

Even if Bayless had moved to recuse Judge Baer in a timely fashion, the relevant question would not have been whether some members of the public would question his impartiality if he reversed himself. The relevant question would have been whether an objective person, viewing the situation as it existed at the time the recusal motion was made, would reasonably question his ability to decide the issue on the merits. If, notwithstanding the intense public criticism, Judge Baer had not in fact made up his mind, that would be persuasive evidence that he was in a position to decide the issue impartially and that an objective observer should see it that way as well.

This illustrates the difficulty inherent in using the after-the-fact criticism of the media as a surrogate for the objective observer. Commentators frequently suggest that the well-reasoned decisions of judges, including some of our most esteemed jurists, are the product of hidden agendas and biases. No one would suggest, however, that this means that their "impartiality might reasonably be questioned" as that phrase is used in 28 U.S.C. Section 455(a).

The fact of the matter is that Section 455(a) was not designed to deal with public criticism. It was designed to deal with situations in which financial interests, relationships and inappropriate conduct affect the appearance of impartiality. Those factors are objective, and if they exist, even to a slight degree, they are grounds for recusal because they automatically create an appearance problem.

As the Second Circuit recognized, public criticism is not necessarily grounds for recusal. The court's opinion suggests that whether public criticism should cause recusal in a particular case is a matter of degree. Such a subjective standard places district judges in an untenable position, where they have to speculate about how much is too much, and worry about whether an appellate court will disagree with them.

It would be better to hold that public criticism, standing alone, can never be a basis for reversing a decision not to recuse. That would preserve the ability of judges to recuse themselves if they conclude that public criticism has actually affected their impartiality or created the

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appearance of partiality. At the same time, it would avoid the unseemly specter of an appellate court questioning the truthfulness of a trial court's conclusion that public criticism has not affected its impartiality from an actual or appearance standpoint.

It might be easier if a federal judge could ask a third party to determine the appearance question, but the case law requires the judge who is on the hot seat to make that decision for himself or herself. The case law also states that judges have an affirmative duty not to disqualify themselves if at all possible. Given these parameters, judges should be given broad discretion to decide the appearance question and should only be reversed in egregious cases — presumably cases in which there is some reason to question the decision on the merits.

Public criticism can be a valuable tool for improving the performance of the judiciary. The judicial branch should be cognizant of the extent to which the public believes it is properly performing its role. If we are going to encourage public criticism of judges, however, they should be given guidance on how to deal with it.

Conclusion

As the Second Circuit recognized in *Bayless*, the circumstances under which public criticism might be grounds for recusal "are anything but clear." Unfortunately, the Second Circuit did not use *Bayless* as an opportunity to clarify the situation. Perhaps the court was concerned about adopting what might appear to be a self-preservation mechanism in a case that had already engendered considerable public criticism.

Maybe it will have another opportunity in the future.

Second Circuit Decisions

Survey Sufficiency

By Charles C. Platt

The recent Second Circuit decision in *Schering Corp. v. Pfizer, Inc.* provides a thorough analysis of whether scientifically conducted surveys should be admitted as evidence over a hearsay objection. The court concluded that two surveys could be admitted to show a "present state of mind." Three others were remanded for review under the residual exception to the hearsay rule.

Scientific Surveys

The case arose out of a 1996 settlement agreement between plaintiff Schering and defendant Pfizer regarding prescription antihistamines. Schering is the leading seller of an antihistamine, Claritin, that does not cause drowsiness. Pfizer's competing antihistamine, Zyrtec, lacks such a feature, but Schering had gathered evidence that Pfizer was falsely advertising the "somnolence levels" of its product. The settlement agreement prohibited Pfizer from misrepresenting, explicitly or implicitly, that its antihistamine was "non-sedating or essentially non-sedating."

To monitor Pfizer's compliance with the settlement agreement, Schering hired two marketing firms to conduct three surveys of physicians. Those surveys were designed to determine whether Pfizer's sales agents were continuing to make misrepresentations. The three surveys were conducted by contacting a random sample of physicians, and asking them how Pfizer's antihistamine had been described to them. A large majority of the respondents stated that Pfizer's antihistamine had been described as non-sedating or low sedating.

After Schering sought to enjoin Pfizer's continued "false advertising" under the Lanham Act, it discovered that Pfizer had also conducted a marketing survey in the ordinary course of business that contained similar results. Schering then commissioned yet another survey, using one of Pfizer's own outside marketing specialists. This last survey confirmed again that Pfizer's antihistamine was being sold as non-sedating or low sedating.

Hearsay Objections

When Schering sought to introduce all five surveys (four of its own, and one of Pfizer's) in support of its motion for a preliminary injunction, Pfizer objected that all the surveys were hearsay and thus inadmissible under Rule 802 of the Federal Rules of Evidence.

The district court agreed, excluded the surveys, and denied Schering's motion. The district court ruled that the surveys could not be used to show what Pfizer was "literally" saying to physicians while selling the Zyrtec antihistamine.

The Second Circuit reversed in a decision that highlighted the difficult, and not always apparent, issues surrounding the introduction of surveys into evidence.

Beginning with some background, the court pointed out that even though surveys are frequently admitted in trademark disputes, "the case law does not support a general rule allowing surveys into evidence for all purposes." It also identified an "ongoing controvers[y]" within the circuit as to whether a methodological error precludes the admission of a survey or simply goes to its weight.

The Second Circuit then proceeded to the hearsay issue raised in the district

court. It noted that, historically, there were a number of different rationales for allowing surveys:

- surveys are not hearsay at all;
- surveys are hearsay but are within the recognized exception to the hearsay rule for statements of present state of mind;
- surveys are properly admitted under the residual hearsay rule; and
- surveys are best admitted as the bases for expert testimony.

In this case, the court concluded that two of the surveys were admissible under the "present state of mind" exception to the hearsay rule. In particular, it believed that Schering was offering the surveys to show that Pfizer's sales presentations to physicians were, regardless of their truth, leaving the false impression that Zyrtec did not cause drowsiness. That showing was permissible in the context of a Lanham Act claim. Any issues regarding the methodology of the surveys went to the weight, not the admissibility, of the evidence.

The court also remanded the case to the district court to determine whether the remaining surveys should have been admissible under the residual hearsay rule. In particular, the district court was advised to consider whether the surveys were reliable or trustworthy given that they tended to corroborate each other, and were performed shortly after Pfizer's sales presentations. The Second Circuit rejected the premise that all "memory surveys" were per se untrustworthy.

The district court was further advised to consider, for purposes of the residual hearsay rule, whether there was other evidence that might be reasonably obtained to establish the same fact as the surveys. The prospect of calling numerous physicians as witnesses did not seem to the Second Circuit to be a reasonable alternative, and might create its own statistical issues.

The *Schering* decision offers a helpful analysis of the issues to consider when introducing survey evidence. It is particularly instructive in the event a hearsay objection is raised to such evidence, and should provide practitioners with more precise linear and angular measurements on the subject.

E-Commerce Law

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This is particularly true of websites that request information from users, hold online contests, and send e-mail — in other words, almost every business site.

Privacy

The big issue for the Internet decade is privacy. People want to be consulted before their personal information is taken from them, and they hate the "big brother" feeling that websites are tracking their every online move.

But this can be in conflict with the business models of many sites. Most sites are free — they get their revenue through advertising. Many also sell demographic information about their users to marketers. Increasingly, marketers want browsing information — where did the user go, how long did he or she stay, where did he or she go next. Those sites that require membership or otherwise have a way of identifying particular users can gather such information and sell it to marketers. The more information about the practices of a particular user, the more valuable it is to the marketer — and the more objectionable it may be to the user. And no site wants to be the subject of an exposé claiming that it is secretly tracking where users go.

If a website has a privacy policy, it must disclose accurately and completely what information it collects and what it does with that information. The Federal Trade Commission can take action against any unfair or deceptive disclosure. So attorneys must thoroughly debrief both the business people and the website design team to discover exactly what information (1) can be gathered, (2) is being gathered, and (3) is being disclosed to third parties. Then that information must be disclosed in the privacy policy.

This has the added virtue of keeping users from claiming they were unaware that their habits were being tracked.

Right now, there is no federal law that prevents the collection and dissemination of such information, except where children are concerned. But states are beginning to take action, and several have proposed privacy laws that may curtail some of these practices.

Children And Privacy

Children under the age of 13 fall into a special protected category for privacy purposes. The Children's Online Privacy Protection Act (COPPA) prohibits the online collection of personally identifiable information from children without prior verifiable parental consent. Under COPPA, personal information includes e-mail addresses, and "collection" includes the use of any interactive elements of websites, as well as online forms. Moreover, parents must be given the option to prevent the disclosure of their children's information to third parties, while still permitting their children to use the website at issue.

Among other consequences, failure to comply with COPPA can result in the bringing of an enforcement action by the FTC and the imposition of civil penalties.

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The statute applies both to websites directed at children as well as to general audience sites that have actual knowledge that they are collecting information from a child. Most children's sites are aware of COPPA and the need to retain knowledgeable counsel to make sure they are in compliance. But general audience sites are by and large still not aware of the reach of this legislation.

Any general audience site that asks for information that will disclose the age of its users, and also has interactive services such as chat, e-mail, or message boards, must comply with COPPA as to users under 13. Any general audience site that is informed by a parent that his or her child is using the site's services must comply with COPPA.

In addition, more general audience sites are building children's areas, unaware that knowledge they obtain about the identity of users in the children's area is chargeable to them in the operation of the general audience section. For example, many general audience sites have message boards, where users can post comments about the topic at hand. Under COPPA, a child cannot be permitted to use a message board without prior parental consent. If the children's area of a site lets children sign up for a newsletter or a contest (which under COPPA requires notice and an opt-out option for the parents), that site now has a list of e-mail addresses that are presumed to belong to children — and the main site must take action to either get full-blown verifiable parental consent or to bar those e-mail addresses from posting in the message boards.

Counsel should debrief their general audience and business Internet clients about their websites, see what information they are collecting from users, and if any of it is age-related, know that COPPA applies.

Contests

To drive traffic to their sites (and increase advertising revenues), many sites are offering contests. "Win a T-shirt!" "Win a gift-certificate!" "Win $10,000!" Most web operators do not realize that there are laws that apply to even the most innocuous contest, and that, because of the reach of the Internet, they must comply with all the myriad contest laws in the world.

Because that's far too cumbersome to deal with, the first thing web operators should know is to limit their contests to the United States; that will leave a more manageable number of laws to deal with. And the contest has to comply with all of them, or make clear that residents of a particular jurisdiction are not eligible to participate.

The first rule is that there must be official rules for contests. Each state has its own requirements for what those rules must contain. The site must comply with all of them. If only one state requires that a particular statement, such as "no purchase necessary" be in bolded-12 point capital letters, then on the Internet, that statement better be in that form.

Some states require that if the prizes given away in aggregate total over $5,000, the operator must register with the state and post a bond.

The main fear if website operators do not retain knowledgeable contest counsel is that they may end up not running a contest at all, but rather an illegal lottery. Generally speaking, a lottery requires three elements: a prize, chance, and consideration. Requiring someone to register at the site to enter a contest may be deemed consideration. At a minimum, all Internet contests need to offer a free alternative method of entry.

Contests may be a great marketing tool, but lawyers need to educate clients about the legal pitfalls and the need for counsel, even if they simply are giving away T-shirts to every tenth registrant.

Spamming

Another marketing tool is e-mail. Spam, formally known as unsolicited commercial e-mail, is direct marketing brought online: a website operator buys a list of e-mail addresses, and sends out a massive mailing for people to come visit the site.

Spam is also the device of choice for pornographic sites. Such sites often send out e-mail with misleading "subject" lines, and fake return e-mail addresses, flooding the services of e-mail providers as well as the mailboxes of the recipients. Because of these abuses, several states have enacted anti-spamming legislation. But that legislation applies to legitimate businesses as well. And it may not apply simply to "bulk" e-mail.

The anti-spamming laws generally fall into two categories. One type prohibits spam that has a false origin or a false or misleading subject line. Even the best intentioned website can run afoul of these laws. For example, a site that lets users send e-mail postcards to friends, and shows the user's address in the "from" line, but routes "replies" back to the website itself, has just used a "false origin."

The second category of anti-spamming laws simply limits the sending of spam to that which is allowed by the terms of service of e-mail service providers. This second class of laws is frighteningly broad, and probably unenforceable at the extremes.

E-mail service providers generally have policies prohibiting the sending of "bulk" e-mail. But several of the states with laws in the second category do not contain any requirement that there be

any particular quantity of unsolicited commercial e-mail before the statute applies. So conceivably, an e-mail service provider could prohibit the sending of any unsolicited commercial e-mail in whatever quantity.

Several of the statutes define "unsolicited" as an e-mail neither requested by nor consented to by the recipient, or where there is no existing relationship with the recipient. So a site that has a service where a user can supply a friend's e-mail address so that friend can receive some e-mail from the website is "unsolicited" e-mail and may violate some state's anti-spam legislation.

Most of the legislation applies to e-mail that are routed from, through, or to e-mail service providers located in their ate. Because website operators typically do not know where their e-mail recipients are actually located, they cannot take the risk of ignoring any of the state statutes.

As with contests, unsolicited commercial e-mail must comply with the laws of the most restrictive states. Does only one state require that the word "advertisement" appear in the subject line? Then all such e-mail must contain that statement.

This is truly an area where federal legislation is needed. But until such time as it is enacted, counsel must be aware of the existence of the myriad state laws that affect their clients' online businesses.

War Of The Worlds

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ere is only a limited amount of support available, the government must decide who is deserving and who is not.

H: Maybe there should be more money for the arts.

G: Maybe there should be no government support for the arts.

H: If we take that approach, then many worthwhile artistic endeavors will dry up.

G: That may be; but if the alternative is to place people in a position where they must support speech that they find abhorrent, maybe it should be left to the private sector.

H: Wait a minute; are you telling me you would support government funding for a baseball stadium but you would not support government funding for the Metropolitan Opera?

G: Well I guess to the extent that art is neutral I would support it.

Madame Butterfly

H: Who decides what is neutral? Besides, some of the best operas — Madam Butterfly for example — have political overtones.

G: But they are not vulgar — if it offends general standards of decency, then I don't think the government should be required to fund it. That's what the Supreme Court decided in *NEA v. Finley*.

H: The Supreme Court in *Finley* only said that general standards of decency could be considered, not that they could be dispositive.

G: What's the difference? Are you saying that they can be considered but not relied upon? That doesn't make any sense.

H: If the Metropolitan Opera puts on a performance of Rigoletto in which the characters are depicted as Mafia members (as it actually did in 1984, using NEA funds) does that offend general standards of decency?

G: Probably not, but putting elephant dung on the Virgin Mary does. We have laws that prohibit doing certain things in public. Those things do not become acceptable simply because someone puts them on a canvas and calls it art.

H: Is it protected speech?

G: It may be protected speech, but it does not automatically qualify for a government subsidy.

H: I agree, but once you agree to provide a subsidy, you can't take it away simply because the money is used to support speech that you find offensive.

Public Schools

G: If funds have been allocated for the public schools, and the school board decides that the curriculum should emphasize the advantages of fascism, are you suggesting that the funding agency would be powerless to do anything about it?

H: No, but schools are different. The government traditionally exercises control over educational content.

G: But school boards have first amendment rights. In any event, let's take museum grants — are you saying that the city could not refuse to fund an exhibit that depicts Hitler as a hero?

H: You are ignoring the distinction between a decision to fund and a decision to revoke funding.

G: What's the difference? In both cases, the city is simply refusing to fork over the money.

H: One situation is before the fact; the other is after the fact.

G: Why should that make any difference? What is the constitutional principle that says if you come to me and ask for funding for Hitler I can say no; but if you don't tell me it's for Hitler, and I later find out that that's what you're using it for, I can't do anything about it?

H: We're getting off the subject here. There's a difference between a controversial work of art and an exhibit

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that depicts Hitler as a hero.

G: What's the difference? You are simply distinguishing between two types of speech — both of which would be protected by the First Amendment — and deciding one deserves government support while the other does not.

H: You can't punish the exercise of free speech simply because it's controversial; some of the greatest works of art were considered quite controversial in their day. Manet's art was rejected by the established French salons because his paintings were considered too erotic.

Drawing Distinctions

G: The issue is who draws the distinction between art that is merely controversial and art that is offensive to general standards of decency, and how is it drawn.

H: I can answer the first question — the entity receiving the funding should make that decision, that keeps it in the private sector.

G: Isn't that precisely the kind of thing the government should do? In other words, isn't it better to have those decisions made by people who are accountable to the taxpayers, as opposed to elitist museum directors who are only accountable to their boards or themselves?

H: If you let the government decide these things then government subsidies become a vehicle for promoting the government's point of view.

G: If you exercise no control, then government subsidies become a vehicle for promoting speech that is unacceptable to the people who are paying for it, and ultimately those people will decide not to pay for it. Is it your goal to eliminate government support for the arts?

H: Absolutely not; government support for the arts is important, but so is the principle of free speech.

G: As between government support for the arts, with some allowance for considering general standards of decency, and no government support for the arts, which would you choose?

H: That is not the issue, the issue is one of principle, and the choice is between censorship and free speech.

G: The issue is a practical one. Do you want government funding for the arts or not? If you want government funding, you have to accept some control — at least to the extent of permitting consideration of general standards of decency.

H: What are general standards of decency? That standard is so vague, it is just a smokescreen that permits the person in power to impose his or her own view on others.

G: General standards of decency are no more vague than artistic merit. Look — any standard can be abused, but if the government is smart, it will interpret general standards of decency in a way that encourages continued public support for the arts.

H: Well, if we have no choice but to take general standards of decency into account, we need to find a principle that permits us to reject Hitler and accept Manet.

G: Manet seemed to do O.K. in the long run.

General Standards

H: Maybe the answer is that the government should be permitted to consider general standards of decency, so long as it does not discriminate against a particular viewpoint.

G: But how do you make that distinction? Some people look at elephant dung on the Virgin Mary and see a viewpoint; others see a tasteless affront to general standards of decency.

H: If it has a viewpoint, then that should be the end of the inquiry.

G: Everything has a viewpoint; if you are saying that the mere existence of a viewpoint is dispositive, you are eliminating the ability to consider general standards of decency.

H: Maybe these principles need to be weighed, and a court should determine which one predominates.

G: Now you are turning the courts into art critics — God help us all.

H: Perhaps you were right to begin with; maybe there shouldn't be government funding for the arts.

G: But where would we be if the Medicis had not supported Michelangelo and Prince Leopold had not supported Bach

H: If I have to make a choice between the practical and the principle, I would choose the principle. I would adhere to the principle that the government should not exercise content control, and if public support for the arts dries up, so be it.

G: I would rather opt for the practical. I am willing to accept some flexibility in order to ensure continued funding for the arts.

H: Sometimes you have to stand up for the principle regardless of the consequences; that's what it means to be a leader.

G: Where have I heard that before? Sometimes you have to be prepared to compromise to get things done.

H: You're being a hypocrite. You're in favor of government control over content so long as you are exercising that control.

G: You're being a hypocrite. You're against government control so long as the message is consistent with your view.

H: There has to be a middle ground.

G: You're right, there has to be a middle ground — but what is it?

H: I don't know.

The Back Page

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On April 1, 1975, the case went to trial before Judge George L. Hart, an Eisenhower appointee. The empanelled jury was comprised of seven women and five men; nine were black, three were white; all were at or below moderate income means (three were unemployed; two were retired).

The technical quality of the tape evidence was quite poor, and Judge Hart refused to let the jury use the prosecutors' transcript thereof. This had the effect of neutralizing the tapes, and putting the burden on the only witness who was prepared to give direct evidence against Connally.

The Dairy Lawyer

Jake Jacobsen was a lawyer for the dairy industry lobby, and a long-time hanger-on in Texas Democratic politics. In 1974, attempting to mitigate criminal exposure, Jacobsen had cut a deal with the government, telling the Watergate grand jury that in 1971 he had given Connally $10,000 in exchange for his influence.

Jacobsen's direct testimony took little more than an hour. *The Wall Street Journal* observed that the prosecutor "seemed at times to be a bit ashamed of his key witness, rushing through his testimony as a result." Other observers described Jacobsen during the trial as "peering warily, cowering almost," and as "an astonished lizard." As Williams' cross-examination demonstrated, he had good reason to be so described.

Williams' cross-examination is a classic, more in its restrained completeness, rather than in its histrionics. As Connally admiringly put it: "[Williams] was not a flamboyant questioner, as some trial lawyers are. He didn't win his cases by theatrics in the manner of Perry Mason. He won them . . . with a tireless attention to detail."

Williams had been handed an enormous amount of detailed ammunition as a result of the fact that over several years Jacobsen had been interviewed repeatedly by prosecutors (and their notes had been produced to the defense), that Jacobsen had testified and submitted sworn statements in prior civil proceedings, that Jacobsen's proffer to the Watergate Special Prosecutor had been produced to the defense, and that Jacobsen's numerous grand jury appearances (both before and after his deal with the government) had been produced to the defense. From this dense web of information Williams proceeded to demonstrate methodically that Jacobsen had repeatedly modified or altered prior testimony and statements in an attempt to have his bribery accusation against Connally hang together in a somewhat coherent fashion.

Williams' Cross

Williams started his cross with a long series of procedural questions relating to the times Jacobsen had met with prosecutors since he struck his immunity deal in March 1974. Williams took Jacobsen through each of the 17 meetings, and emphasized that the preparation centered on "inconsistencies or possible inconsistencies in your testimony," with the prosecutors pretending to be Williams and asking Jacobsen "a lot of hard questions."

Williams then went into Jacobsen's extremely complicated business connections with a series of Texas banks. After leaving a low-level staff position in the Johnson White House, Jacobsen had been "deeply in debt," but subsequently became a senior officer and/or director at a number of banks and had, at one point, 15 separate bank accounts and numerous safe deposit boxes. At the start of 1972, Jacobsen had listed his net worth at $3 million dollars; by mid-1972, however, his net worth was a minus $8 million. Williams took Jacobsen through his bankruptcy petition in June 1972, and various sworn statements he had made at that time (including averments that certain safe deposit boxes, where he subsequently testified he stashed various amounts given to and from Connally, had been empty for two years prior to the bankruptcy).

Jacobsen's February 6, 1974 indictment by a federal grand jury in Texas was then fully aired in front of the jury. When Jacobsen professed not to be "familiar with the indictment," Williams was allowed to go through each of the seven felony counts that addressed the alleged four year bank fraud conspiracy, and to ask Jacobsen about each; these charges, for which the punishment was 35 years in jail, were dropped as a result of a formal agreement reached with the Watergate prosecutors on May 21, 1974.

Williams then took Jacobsen through the second of two indictments returned against him in February 1974: that which was returned in Washington on February 21, 1974 (this was a perjury charge, based on his testimony that he had not touched the money provided by the milk lobby from his receipt thereof until January 1974).

Jacobsen's Meetings

Williams then was ready to move to the "substance" of the case against Connally: Jacobsen's meetings with Connally in March 1971 regarding the Nixon Administration's position on price

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levels for milk. Williams developed a great tempo that undercut the notion that a bribe (of any amount) was necessary:

"Q. You thought, did you not, Mr. Jacobsen, that he was the only person in the Nixon Administration who understood the dairymen and the cattlemen and the farmer to whom you could talk?

A. To whom I could talk; yes sir.

Q. There was no one else to whom you had access who would understand this problem as did Secretary Connally?

A. No, sir.

Q. And you knew, did you not, from your association with him that he had been sympathetic over the years to the plight of the dairyman and the cattle farmer?

A. Yes, sir.

Q. And the agricultural community in this country? Is that right?

A. Yes, sir.

Q. ... [y]ou didn't have any problem in convincing Connally of the fact he should help, did you?

A. No, sir.

Q. He didn't resist in any way?

A. No, sir.

Q. He expressed his willingness to help in any way that he could?

A. Yes, sir."

Having established the basic facts surrounding the March meetings, Williams proceeded to demonstrate that Jacobsen's direct testimony regarding the purported bribe made thereafter was at odds with a plethora of statements made and testimony given prior to Jacobsen's plea agreement.

With respect to Connally's reaction(s) to Jacobsen's alleged proffer of $10,000, Williams took Jacobsen through some specific grand jury testimony that pre-dated the plea agreement:

"Q. Then what did you do with it?

A. Well, then I left it there and talked to Secretary Connally about whether or not he wanted to give money to someone or what he wanted to do with it and he said he didn't have anybody he wanted to give any money to, so he didn't use it."

* * *

Q. Are you saying on the second occasion you asked Secretary Connally if he wanted the money?

A. Yes.

Q. And again he said no?

A. That is right."

Ervin Committee

Having admitted to that prior testimony, Jacobsen then was forced to concede that he had given a consistent account of Connally's refusals to lawyers for the Senate Watergate Committee (the Ervin Committee). And in the course of this testimony Jacobsen also allowed, as he had previously testified under oath, (i) that he had received only $10,000 from the milk lobby (and not any subsequent funds), (ii) that he had changed the $100 bills himself into smaller denominations ("thinking that a lot of people don't like to take the big bills"), and (iii) that he had never reported back to the milk people that Connally had not accepted the $10,000 but instead had himself kept the money for over three years!

After the lunch break, Williams went right back to prior Jacobsen testimony, highlighting first that Jacobsen in a 1972 civil deposition had been insistent that Connally had never taken any milk money. Jacobsen's 1973 testimony before the Ervin Committee was next, focusing on the following facts: (i) that Connally's refusal to take money was consistent with other pre-agreement recountings ("He did explain why, I think. Briefly he said I am a Democrat in a Republican Administration and I do not want to be giving money to Democrats since I am in a Republican Administration, and I do not want to be giving money to Republicans since I am a Democrat, so I would just rather not give anything."), (ii) that Jacobsen had previously changed the $100 bills himself (without any involvement by Connally), and (iii) that Jacobsen had procured $10,000 from the milk lobby only once for such purposes.

Williams next moved on to Jacobsen's January 1974 grand jury testimony. Taking Jacobsen through that testimony, Williams put before the jury (i) that Jacobsen pre-agreement (and prior to his dual indictments) had freely testified (once again) that Connally had not accepted the money proffered, (ii) that Jacobsen had himself changed the money into smaller denominations, and (iii) that he had never made any use of the money in the intervening period, but (iv) that he had never returned the money to the milk lobbyists ("I was just very negligent.")

The Interview

Williams next reviewed an interview Jacobsen had had with lawyers for the milk lobby on February 7, 1974, the day after Jacobsen's first indictment. Once again, Williams elicited from the witness that he had explicitly stated that Connally had twice refused him ("I was never a party to giving any money whatever to Secretary Connally and I have no knowledge of milk money going to Secretary Connally.")

Having now repeatedly shown to the jury Jacobsen's words pre-plea agreement, Williams turned to what Jacobsen testified to on his direct examination, as well as in his post-plea grand jury testimony and his 17 interviews with the prosecutors. Williams then

reviewed Jacobsen's proffer to the Special Watergate Prosecutor's Office, which was in material disagreement on key points with his direct testimony at trial; this elicited the incredible and unbelievable response that what his lawyer put in the proffer was not based on information provided by Jacobsen! ("Q. But your testimony here in court is that you never told Mr. McNalie, your lawyer, that? A. No, sir. Q. You never mentioned that to him? A. No, sir.")

Williams then reviewed twice given testimony, once before the grand jury and then before the Ervin Committee, in which Jacobsen had stated without qualification that he had not received an additional $5,000 from the milk lobby in the fall of 1971. But after the plea-agreement prosecutors had shown Jacobsen that he had received $5,000 on November 10, 1971. When confronted with that, Jacobsen had been quoted by the prosecutors in their notes as saying he now had "an inkling" of an additional $5,000 payment to Connally. Unable to resist, Williams then spent three full pages of trial transcript using the "inkling" to full use, ridiculing Jacobsen's evident attempts to make this square peg fit into a round hole.

Houston Meeting

A vivid part of Jacobsen's direct testimony related to his visit to Connally's Houston law offices in October 1973, a few days after Jacobsen was subpoenaed to appear before the Ervin Committee. In prior post-plea agreement testimony he had described Connally bringing the money to Jacobsen in a cigar box with a rubber glove on top; at trial, however, he testified that it was "a rubber or rubber gloves." Williams honed in on why the change. Jacobsen explained that it was "[j]ust this logic of it being gloves instead of glove." Again, Williams had fun at the witness' expense, making Jacobsen explain to the jury how "the logic of it" had revealed itself to him (and, again, allowing the jurors to reach their own conclusions).

The Age Of The Money

Another key issue was the age of the money itself. Much had been made (albeit in a most confusing fashion) about whether money was taken out, first replaced with money that post-dated Connally's tenure as Secretary of the Treasury, and then hurriedly replaced later, with money that would be consistent with a 1971 bribe. Williams not only muddied these waters so totally that no juror could possibly have followed (beyond a reasonable doubt) the dated-money trail (while making Jacobsen look like the political bag man he was by making him count each of the 280 bills in front of the jury, so as to determine that 49 post-dated Connally's tenure), he then had Jacobsen explain to the jury how he had thereafter kept the $10,000 in cash in "a little nightstand" by his bed from November 1973 until after his indictments in February 1974.

With Jacobsen's credibility in complete ruins, Williams ended with a nice touch:

"Q. Do you remember, Mr. Jacobsen, that in April of 1972 you said to Secretary Connally that it occurred to you that you had never really expressed your gratitude to him and that doing so was exceptionally difficult for you, that in all your life you had never had anyone in high position treat you as kindly as he did, and you said to him there was no possible way for you to express your real gratitude, although you knew when you talked to him he must feel it, and that the purpose of this communication was to tell how deeply grateful you are to him, and express the hope that in some small way you could merit his kindness and friendship? Do you remember saying that to him?

A. I don't remember saying that, but I may have said it.

* * *

Q. I hand you Defendant's Exhibit Number 19, and I ask you whether that is a letter written by you on April 28, 1972, to Secretary Connally, signed by you, and whether it does not state precisely what I asked you in my question.

A. Yes, sir.

Q. Is that your signature?

A. Yes, that's my signature.

Q. And you wrote the letter?

A. Yes, I did.

Q. And you sent that letter?

A. Yes I did.

Mr. Williams: I have no further questions, Your Honor."

A Character Witness

Williams' cross-examination was not the only thing that helped the jury return its verdict in six hours. He also made skillful use of character witnesses, such as Lady Bird Johnson, Congresswoman Barbara Jordan, and Reverend Billy Graham, whom Williams had to be talked into using. The initial interchange between Williams and Graham is a classic:

Williams: "What is your work at the present time, sir?"

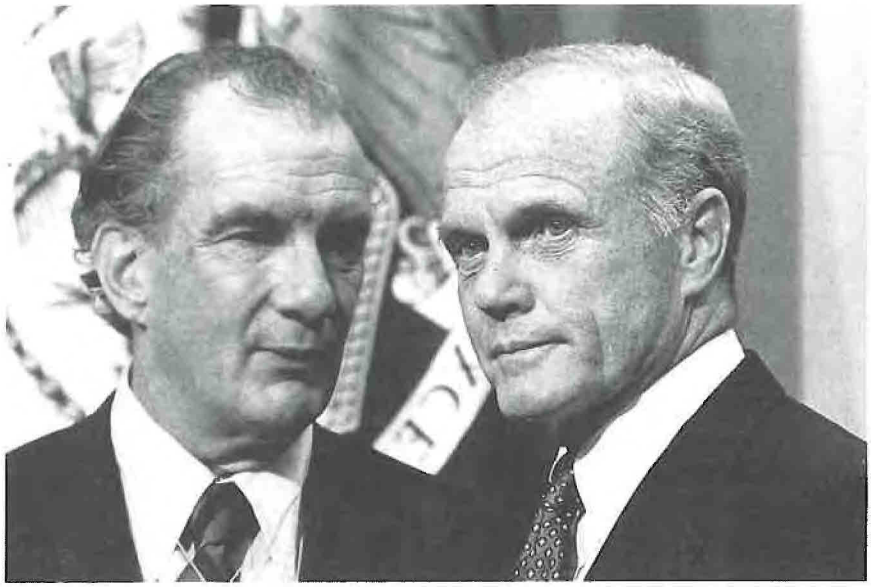
Graham: "I am an evangelist, preaching the gospel of Jesus Christ all over the world."

As soon as Graham gave his answer, an elderly black woman in the jury box (who had once carried a Bible into the courtroom) said in a voice that carried throughout the courtroom: "A-a-men." Williams later allowed to reporters: "I thought that 'A-a-men' was a good sign."

The Back Page

Jacobsen's Cross

By C. Evan Stewart



Edward Bennett Williams and John Glenn at the Democratic National Convention the year after the Connally trial. Photo courtesy Archive Photos.

Edward Bennett Williams was, without a doubt, one of the 20th Century's greatest advocates. As detailed in Evan Thomas' definitive biography ("The Man to See"), Williams had unsurpassed forensic skills in the courtroom, which he exercised on behalf of a wide range of clients (e.g., Joe McCarthy, Frank Costello, The Washington Post, Jimmy Hoffa, and Michael Milken). Williams' last great trial was his 1975 defense of John Connally, who was charged with accepting a $10,000 bribe in his capacity as Secretary of the Treasury in the Nixon Administration, in exchange for advocating higher price supports for the milk industry.

The case was brought by the Watergate Special Prosecutor's Office, and Connally was at great risk of being caught up in the same eddy that had consumed a coterie of Nixon men. Connally's indictment was handed up barely a week before President Nixon resigned. And some of the evidence the prosecutors believed to be highly probative were some tape recordings from the Oval Office, purporting to display Nixon and Connally cryptically talking about the benefits that would flow to the 1972 reelection effort from raising the price support levels. Lastly, the trial was to take place in Washington, D.C. — not thought to be favorable ground for a conservative Democrat who had recently switched to the Republican Party in a fairly transparent attempt to succeed his most recent political mentor, Richard Nixon.

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