# Federal Bar Council News

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## Second Circuit News

## The Architecture Of Cass Gilbert

**By Steven Flanders**

For twenty years, the Federal Bar Council and the Second Circuit federal courts have jointly presented history programs that shed fresh light on important people, events, and issues that otherwise might have been forgotten. In addition to the distinguished series of history lectures on each court and the illustrated history of our courts by Professor Jeffrey Morris, programs and publications have focused on such topics as the Amistad case (lately rediscovered by Steven Spielberg); the extraordinary family of Justice Stephen Field, David Dudley Field and their cousin Justice David Brewer; and

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## Developments

## Council Presents Charles Alan Wright With The Learned Hand Award At Law Day Dinner

The Federal Bar Council's Annual Law Day Dinner, chaired by William Pollard, was held at the Waldorf-Astoria on May 5, 1998. Council President Betsy Plevan introduced Robert MacCrate, who presented the Council's Learned Hand Medal for Excellence in Federal Jurisprudence to Professor Charles Alan Wright of the University of Texas Law School.

In presenting the award, MacCrate quoted Justice Ruth Bader Ginsburg, who has described Wright as a "colossus" who stands at "the summit of our profession." Wright's monumental treatise, *Federal Practice and Procedure*, "daily affects the style and substance of federal judging and judgments across the country," said Justice Ginsburg. MacCrate agreed, stating "he is one of the most productive and influential legal scholars of our age, or of any other."

**University Of Texas**

After graduating from law school, Wright clerked for Judge Charles E. Clark of the Second Circuit. He then moved to teaching, beginning this part of his career at the University of Minnesota Law School and following up with four decades at the University of Texas. During this time, he also was a visiting Professor at Harvard, Yale, the University of Pennsylvania, and Cambridge University in England.

In addition to his academic career, Wright has served as President of the

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## Legal Research

## Websites

**By Nancy Savitt**

The availability of legal resources on the Internet is constantly increasing. This month, we'll highlight three sites: one that collects federal statistics, one that has drafts of uniform and model rules, and another that organizes and links to the primary legal resources on the web.

Lawyers frequently need access to governmental statistical information. In

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the past, they have had to scramble to find the pertinent data. Now, it is all collected in one site, courtesy of the Federal Interagency Council on Statistical Policy.

FEDSTATS (www.fedstats.gov) contains links to the statistical information produced by more than 70 federal agencies. From the Bureau of Labor Statistics and Bureau of Justice Statistics to NASA, OSHA, and the other federal agencies, FEDSTATS has them all. In addition, FEDSTATS contains links to other private and governmental statistical sites, such as a link to the United Nation's site of International and National Statistical Agencies active in the Economic Commission for Europe.

**Uniform Laws**

Need to look up model or uniform laws? Final and working drafts can be found at the official site of the National Conference of Commissioners on Uniform State Laws, hosted by the University of Pennsylvania Law School (www.law.upenn.edu/library/ulc/ulc.htm). The drafts were complete, but did not seem to be searchable. Still, the site makes downloading easy, with links to WordPerfect versions at each document.

The Model and Uniform Laws cover over 20 topics. In addition to the U.C.C, the site contains various versions of, among other documents, the Limited Liability Partnership Act, the Non-Depository Providers of Financial Services Act, the Uniform Arbitration Act, the Uniform Electronic Transactions Act, and several family law acts.

Previous articles have highlighted the legal resources contained and collected at Cornell's Legal Information Institute site (www.law.cornell.edu) and Fedlaw (www.legal.gsa.gov). Just as lawyers must choose among Westlaw, Lexis, and CD-ROMs, legal web-surfers need to find the law-related site(s) they are most comfortable using.

One site that provides similar services to the Cornell Law and Fedlaw sites is Counsel Quest (www.counsel-quest.com). It seems to be geared more for the legally-inclined layperson rather than the practicing lawyer, but it contains links to most of the primary case law and statutory authorities available on the web.

Counsel Quest also has a few links that are especially interesting. It has a topic called "Archaic Laws, Documents and Tribunals," with links to the Federalist Papers and other U.S. historical documents, the Code of Lipit-Ishtar (1868 B.C.), the Code of Hammurabi (1792 B.C.), and Roman Law (50 B.C.).

That topic also contains excerpts from Joan of Arc's trial transcripts, "Lincoln's Infamous Cross-Examination," and the Nuremberg trial summation. There also is an "Employment Resources" topic, with links to sites listing law-related employment, and finally a legal "Humor and Entertainment" section, which requires no description.

## Legal Research

# CourtWeb On-Line

Chief Judge Thomas P. Griesa of the Southern District of New York has announced that the CourtWeb On-Line Rulings Information System has successfully concluded its test period and now is enjoying widespread participation among the legal community and the judges of the Southern District. CourtWeb was designed for the convenience of the bar and litigants to provide information on a judge's decision virtually immediately over the Internet. CourtWeb is now being used by more than 30 Southern District judges. The names of these and any additional judges who choose to participate in CourtWeb will appear on the list of judges in CourtWeb as they are added to the system.

The CourtWeb system can be searched by judge's name or case number. A brief summary of the ruling is included in each entry, in addition to information such as the caption, case number, date, and judge's name. The rulings reports also may be printed from the user's browser for convenient reference.

**Watch List**

The Watch List feature of CourtWeb automatically will notify law firms or practitioners of any rulings entered for cases on their lists. A participating firm or lawyer would enter the case numbers for the Southern District cases they would like to include on their watch list. When a ruling is posted to CourtWeb by chambers, the description automatically will appear on the participant's watch list and an automatic e-mail message will be sent directly to the attorney or firm's contact person. The e-mail message will include all of the information contained in the ruling entry. In addition, programming now is under way to make the full text available for on-line viewing and immediate reference.

For more information on CourtWeb, or to set up a Watch List account, lawyers can visit the Southern District's website at www.nysd.uscourts.gov and select the CourtWeb link from the home page options.

Lawyers also can visit the court's website for convenient on-line reference

to the following features, some of which are also available for download in WordPerfect format: local rules; judges' individual practices and procedures; regulations governing disclosure of pretrial services information; Part I schedule; court reporter transcript rates; holiday schedule; employment opportunities; information about travel to court; directories; and juror information. Some of the additional features planned for the site include the court's fee schedule and standard forms available to view and download.

## Focus On:

# Judge Raymond J. Dearie

**by Peter Eikenberry**

In supervising a caseload of more than 400 civil and 100 criminal cases, Judge Dearie finds that he is first and foremost a trial judge, despite the fact that in the Eastern District of New York a growing number of lawyers consent to trials in civil cases before magistrate judges. The sentencing guidelines have reduced criminal trial load somewhat ("for better or worse"), but in the past he has gone three and a half years without the opportunity to conduct a civil trial. He describes his Friday civil motion calendar as a "bear." To get his writing completed for motions, Judge Dearie is often at work at 5:30 a.m. He starts his trials promptly at 9:30 a.m. He attends to homework at the end of the day rather than in the beginning, finding less enthusiasm for it at that point. He has a ready civil trial calendar to fill any "hole" that develops when a criminal case "breaks."

When asked for comment on three subjects that the Federal Bar Council's Second Circuit Courts Committee is currently studying — the "forgotten" case, the proliferation of individual court rules, and cameras in the courts — he responded that he:

- is not offended to receive, and indeed invites, a call from counsel if an opinion has not been forthcoming,
- has only one individual rule: that there should be a pre-motion conference, and
- is instinctively against cameras in the courts but finds it harder and harder to defend his position.

**Courtroom Design**

Six years ago, Judge Dearie, at a judges' meeting chaired by Judge Platt, volunteered to "help design a new courtroom." Since that time, he has found himself to be a lobbyist, design consultant, construction manager, bureaucratic watchdog, and public relations manager to oversee the fulfillment of plans for two new federal courthouses in downtown Brooklyn. The new Bankruptcy Court and U.S. Attorney's office will be installed in a renovated historic general post office building originally built as a courthouse with wonderful detail both inside and out. The old Internal Revenue Service facility has just been demolished to permit the new sixteen story Cesar Pelli courthouse to rise on the one-acre site just off the Brooklyn Bridge.

The Eastern District judges compromised their wishes to have their chambers on the same floors as their courtrooms and agreed to permit the magistrate judges to have the higher floors to enhance courthouse design, address community concerns about the bulk of the building, and significantly reduce construction costs. The new construction for the courthouse and the restoration of the post office building for the U.S. Attorney and the Bankruptcy Court should take something over three years from now if the funding is not interrupted.

The judge only has one local court rule because he is sympathetic to the practicing bar. However, by requiring a pre-motion conference, he finds that one-third or more of the motions can be resolved informally. Often the opposing party will consent to a motion for transfer or for remand on a jurisdictional point. Recalling his days as a practicing lawyer, the judge pledged to himself that he would never call sixty or so lawyers to a general calendar call at the same time, but he is finding that he has to at least group several cases for a calendar call at various times throughout the day.

Judge Dearie read Judge Harold R. Medina's "Freshman Years," 69 Judicature 127 (1985), when he was named to the bench in 1986.

Judge Medina served four years on the trial bench in the Southern District of New York and encountered a caseload twice that of any other judge. He says he was disappointed by the limited opportunity for collegiality with other judges, but he was a very gregarious person and did not allow himself to be isolated; he always found some time a couple of times a week to drop in on one judge or another. Judge Dearie inherited a mountain of docket sheets, as did Judge Medina, had limited contact with other judges, and had virtually no preparation for the position — despite his prior experience as a private advocate and U.S. Attorney. Judge Dearie uses his law clerks for sounding boards as did Judge Medina. (One of Judge Medina's first two law clerks was New York attorney Ed Costikyan; Medina liked Costikyan because in discussions he stood up for his position.)

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After twelve years on the bench Judge Dearie finds that, if he has the time, he can master the tasks that he thought would be difficult, i.e., making decisions on substantive motions and sentencing. However, there are other matters that were not predictable that he finds to be difficult and personally "wearing." Essentially he is concerned about situations on the criminal side about which he has no control, because he neither makes the laws nor enforces them.

Judge Dearie feels that society is making no substantial effort to attack the root causes of crime, which he says every police officer knows. He says there is a parade of defendants before him who have had no education, little family support, and face a bleak future. Often these defendants are young men who form their first meaningful relationship with a male adult by bonding with the arresting agent. He feels that the judge's role is too passive in the face of this continuing problem, although he can identify successes that have arisen out of the sentencing and parole process.

He states that one must first be a human being before one can be a good judge. Judge Dearie also is a student of his position. For instance, he references a book on *Realistic Socio-Legal Theory*, by St. Johns Acting Law School Dean Brian Z. Tamanaha. (Clarendon Press, Oxford, 1997). The book is an outgrowth of Oxford University Socio-Legal Studies.

Although Judge Medina's advice, as gained from experience, was pragmatic, for example, resist the impulse to give one's thoughts for publication in the press, Dean Tamanaha's book, by contrast, helped Judge Dearie take some time to reflect on the job that he does every day. From this book Judge Dearie gained insight into the difficulty that any judge has, before formulating a judicial decision, in recognizing the attitudes that he or she has brought to the bench.

Although Judge Dearie is reflective, he has needed to be pragmatic to insure that the new Pelli courthouse will rise from the ground opposite Cadman Plaza Park in downtown Brooklyn. He stated, "Cesar Pelli has given the city and court a responsible and inspired design that will be an impressive gateway to Brooklyn." Recognizing the aggravation and red tape of any government project, he added with a smile, "I hope I live to see it."

## Second Circuit Decisions

# Perjury In Civil Depositions

**By Brian Cogan**

The dismissal of the Paula Jones sex discrimination case has undoubtedly reduced, but has not eliminated, the possibility of a perjury prosecution arising from deposition testimony taken while the case was pending. But how real is the likelihood of prosecution for false deposition testimony in other instances? Conversations with prosecutors within the circuit, as well as comments made by judges confronted with perjurious deposition testimony, show that the crime is taken seriously. It will be prosecuted when the stakes are high enough and the proof is sufficiently clear.

### Recent Caselaw

Prosecutions for giving false deposition testimony are rare in the Second Circuit, but they do occur. And, contrary to some other circuits, the Second Circuit has applied a broad standard to what is usually the most difficult issue in such cases: materiality.

*U.S. v. Kross*, 14 F.3d 1451 (2d Cir. 1994), arose out of a civil forfeiture action. In the forfeiture action, the government asked the defendant at deposition if she had every seen anyone smoking marijuana on the property that was the subject of the action; she denied such knowledge.

On appeal from her subsequent conviction for perjury, she contended that the mere smoking of marijuana on the property was not sufficient grounds for forfeiture, and thus her testimony was immaterial. Analogizing the investigative nature of civil discovery to that of grand jury proceedings, the Second Circuit rejected this argument, holding that "we see no persuasive reason not to apply the broad standard for materiality of whether a truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit." In other words, if information is discoverable — "relevant or calculated to lead to admissible evidence" — it may be material for purposes of a perjury indictment.

Despite this broad standard, a number of recent decisions in the circuit illustrate that although perjurious deposition testimony is drawing the attention of district court judges, criminal consequences apparently are rare.

In *Rybner v. Cannon Design, Inc.*, 1996 WL 470668 (S.D.N.Y.), Judge Sotomayor imposed sanctions for perjurious deposition testimony, stating that such "conduct can not and should not be condoned." There was, however, no reference to prosecutors.

In *Arnold v. Spanierman*, 1996 WL 139796 (S.D.N.Y), Judge Cote found that perjurious deposition testimony had been given, and recognized that "what is

really at stake with the submission of perjurious testimony at trial is the integrity of the judicial process." Nevertheless, she neither referred the case for prosecution nor imposed sanctions.

And in *Bob's Best Foods, Inc. v. Isabella's Bakery, Inc.*, 1996 U.S. Dist. LEXIS 21168 (S.D.N.Y.), Judge Leisure admonished a party who had submitted a perjurious affidavit of the "serious consequences of knowingly submitting false testimony." Because the party had stipulated to withdraw the affidavit, neither sanctions nor a reference to prosecutors was ordered. But for that stipulation, the judge said he "would not have hesitated to refer the matter to the United States Attorney for the Southern District of New York with the recommendation that an investigation into possible perjury by [the party] be initiated," and cautioned that he "would not hesitate to act swiftly in response to future attempts to mislead the court."

**Prosecutorial Evaluation**

Comments from federal prosecutors in the Second Circuit disclose, not surprisingly, that the most prominent factor in determining whether an investigation will be pursued for allegedly perjurious deposition testimony may be the nature of the underlying civil action.

As Mark Pomerantz, Chief of the Criminal Division of the Southern District's Office states, "if the civil case was one to which the government was a party, the federal interest will be clear." Moreover, it is a short walk from the civil side of a U.S. Attorney's office to the criminal side, and often not much longer from any federal agency.

In contrast, accusations of false testimony between private litigants in civil cases are so routine that, if they are the subject of a complaint to the U.S. Attorney, they may be more indicative of a litigant's perspective or zeal than of a criminal violation. "We do take it into account when a private party who complains about perjured testimony has an axe to grind," says Pomerantz. He confirms, however, that a complaint from a private party of perjured deposition testimony is taken seriously.

Typically, investigations into allegedly perjurious deposition testimony come from a judicial referral, a complaint from a litigant, or a media report. "There must be a referral by someone," says Kathleen Mehltretter, the Chief of the Criminal Division of the Office of the U.S. Attorney for the Western District of New York, because "obviously no one examines civil depositions to see if false statements occur." If the aggrieved party does not bring the matter to the attention of the appropriate federal agency or to the court, it goes unnoticed, uninvestigated, and unprosecuted.

Gregory Waples, who prosecuted the *Kross* case, says that in the District of Vermont, complaints from private litigants are rare. He knows of no other perjury prosecutions regarding civil depositions in Vermont, aside from *Kross*, in the last seven years. If false deposition testimony is as widespread as some lawyers assert, says Waples, "someone is simply not telling the U.S. Attorney's Office."

The assistants interviewed rejected any notion that prosecutors are reluctant to prosecute the crime. "I wouldn't say that such perjury is rarely prosecuted," says Mehltretter. "If evidence of perjury is presented to a federal agency, there is a good chance it will be prosecuted; the difficulty stems from the lack of hard evidence to establish the falsity of the statement."

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In fact, Mehltretter stated, two recent perjury cases were just prosecuted in the Western District of New York; in one case the defendant was sentenced to five months in prison. In the second, the defendant pled guilty to the crime. Although both cases involved perjurious trial rather than deposition testimony, Mehltretter sees no general distinction in terms of the decision of whether to prosecute.

The number of prosecutions for perjurious deposition testimony, according to the U.S. Attorneys, does not reflect the view that the federal government takes such behavior lightly. Rather, the number of prosecutions reflects only the realities of civil litigation: most cases settle; sanctions are available within the civil case to remedy the perjury; and it is rarely in litigants' interest to make a complaint for perjury to the U.S. Attorney.

Waples points out that a prosecutor always must question whether it is a good expenditure of limited resources to prosecute a case where civil remedies are available to the aggrieved party. Similarly, Mehltretter notes that "allowing the court to remedy the situation absolves the need to refer the matter to a U.S. Attorney's office that already is saddled with more cases than it can conceivably handle."

## Second Circuit Decisions

# Attorney Work-Product

**By C. Evan Stewart**

William Allen White, the famed editor of the *Emporia Gazette*, once observed that "[c]onsistency is a paste jewel that only cheap men cherish." Although that aphorism may be true for journalism, judicial consistency is something to value highly.

For a number of years, courts within the Second Circuit had interpreted a key provision of Fed.R.Civ.P. 26 in strikingly different fashions. A recent decision by the Second Circuit, however, has silenced that interpretative dissonance. Indeed, the court has issued a clear and well-reasoned decision to inform litigation planning and corporate behavior.

In *United States v. Adlman*, 1998 U.S. App. LEXIS 2663 (Feb. 13, 1998), a Second Circuit panel headed by Judge Leval ruled that the requisite showing under Fed.R.Civ.P. 26(b)(3) to protect attorney work-product materials prepared "in anticipation of litigation" was just that — whether the materials had been, in fact, prepared "in anticipation of litigation." Although it sounds simple, this result was not self-evident to many.

### Adlman

In 1989, Monroe Adlman, an in-house attorney for the Sequa Corporation, asked the company's outside accounting firm to evaluate the tax consequences of a proposed corporate reorganization. The accounting firm did so in a detailed memorandum, setting forth among other things an analysis of the likely bases of an IRS challenge to a large tax refund claim the company was likely to interpose as a result of the reorganization.

Lo and behold, after Sequa went through with the transaction and claimed the hefty refund, the IRS brought on an audit, which led to a subpoena for documents that included the accounting firm's memorandum. When Sequa and Adlman declined to produce the document, the IRS sought to enforce the subpoena before Judge Knapp in the Southern District of New York.

Sequa and Adlman claimed the protections of the attorney-client privilege and the work-product doctrine. Judge Knapp rejected both, however.

With respect to the attorney-client privilege, he found that Adlman had not consulted the accounting firm to receive legal advice. And, as to work-product, Judge Knapp ruled that that doctrine was not applicable because the memorandum was prepared for litigation that was based on events purely prospective in nature.

In 1995 (68 F.3d 1495), the Second Circuit partially affirmed the rulings of Judge Knapp. In rejecting the claim of attorney-client privilege, the court found that "the evidence supports the conclusion that Sequa consulted an accounting firm for tax advice, rather than that Adlman, as Sequa's counsel, consulted [th accounting firm] to help him reach the understanding he needed to furnish legal advice."

At the same time, however, the court remanded the case on the work-product issue. The court ruled that whether or not the events had not yet occurred was immaterial to an analysis under Fed.R.Civ.P. 26(b)(3); the proper standard to be applied was whether the memorandum was prepared in anticipation of litigation that could result from engaging in the proposed conduct.

Judge Knapp, with the foregoing guidance, still was not moved. On remand, he again rejected the claim of work-product, and the issue once more went back to the Second Circuit.

### Notable Decision

Judge Leval's decision is notable in at least two respects.

First, he explicitly rejected an intent standard that a number of courts (including within the Second Circuit) have read into Fed.R.Civ.P. 26(b)(3), requiring

the attorneys seeking to assert the protections thereof to demonstrate that the sought-after materials had been generated "primarily," "principally," or "exclusively" in anticipation of litigation. As noted by Judge Leval, "a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of the [work-product] Rule."

Second, Judge Leval gave a renewed boost to the seminal Supreme Court jurisprudence of *Hickman v. Taylor*, 329 U.S. 497 (1947), and *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Based on the important policies underscored in those decisions, Judge Leval termed the IRS's interpretation of Fed.R.Civ.P. 26(b)(3) "untenable."

He said that if "the company declines to make [a candid analysis of litigation risks] or scrimps on candor and completeness to avoid prejudicing its litigation prospects, it subjects itself and its co-venturers to ill-informed decision making. On the other hand, a study reflecting the company's litigation strategy and its assessment of its strengths and weaknesses cannot be turned over to litigation adversaries without serious prejudice to the company's prospects in the litigation." Exactly so.

The Second Circuit then remanded the case back to Judge Knapp for a determination of whether the memorandum was prepared "because of the prospect of litigation" (the proper standard), or "whether it would have been prepared irrespective of the expected litigation with the IRS." Although Judge Leval made it clear that there was "little doubt" that the panel viewed it as falling easily into the former camp, the final arbiter of that will be Judge Knapp.

**Conclusion**

The tangled procedural history of the *Adlman* litigation not only is significant in that it clarifies the law within the Second Circuit as to Fed.R.Civ.P. 26(b)(3), it also demonstrates how companies can prospectively plan to afford themselves the protections of both the attorney-client privilege and the work-product doctrine.

When an attorney similarly situated to Adlman seeks information, advice, or services from an outside person or entity, he or she should make it clear that:

- the person or entity is working for and communicating to the attorney at the attorney's directive and in the attorney's capacity as the company's legal officer, and
- if litigation is present or on the horizon, such retention is done "principally in anticipation of litigation."

The former should address the first *Adlman* decision by the Second Circuit, and the latter should assist the attorney if his or her client is not lucky enough to be sued within the Second Circuit.

## The Legal Profession

# A View From The "Ethics" Front

**By Bruce Green**

In recent years, there has been much debate about the state of legal ethics, especially as it applies to the work of litigators.

Concerns have been fueled by the risks that lawyers will be sanctioned personally or subject to malpractice actions based on allegedly wrongful conduct.

Critics have identified two problems. The first is that there is too little law. The second is that there is too much, seemingly contradictory, law. There is truth to both criticisms.

Consider, for example, the lawyer who receives what appear to be privileged documents from opposing counsel. If several documents received in the course of a large document production are marked "attorney-client privileged" and turn out to summarize interviews of the opposing party, must the lawyer return the documents, or, in the very least, apprise opposing counsel of their receipt?

If the lawyer is appearing in federal court in Manhattan, the lawyer will be governed in part by the New York State Lawyer's Code of Professional Responsibility, as interpreted by the federal courts. But neither the provisions of the New York Code nor decisions of the federal court in the Southern District of New York appear to answer the question of whether the lawyer must return the apparently privileged documents.

Although there is authority elsewhere, it provides no sure guidance, because every jurisdiction is free to develop its own ethical rules and to interpret its rules independently. Besides, the authorities in other jurisdictions are divided.

Some bar association ethics committees would allow the lawyer to make use of the documents, others would require the lawyer to return them, and still others, such as the ethics committees of the ABA and the Association of the Bar of the City of New York, appear to take a middle ground, requiring the lawyer to notify opposing counsel that the confidential documents were received and to refrain from using them until

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opposing counsel has had an opportunity to seek judicial relief.

Four institutions of the legal profession are in the process of addressing the state of "legal ethics" law nationally: the American Bar Association, the American Law Institute, the Conference of Chief Judges, and the Judicial Conference of the United States. Their work, individually and collectively, has the potential to bring both greater clarity and greater consistency to this body of law.

**The ABA**

The ABA has traditionally been the leading player in the legal ethics field. Its 1970 Model Code of Professional Responsibility was adopted, with variations, by every state but California. Its 1983 Model Rules of Professional Responsibility were adopted, also with variations, by the overwhelming majority of states in place of the Code. In states such as New York, which preserved the structure of the Code, revisions have been made or proposed that reflect the substance of ABA Model Rules.

The philosophy of the ethical codes traditionally has been that all the professional rules are of general application. The codes have not addressed issues that pertain to the work of lawyers in particular fields of practice or that do not frequently arise. Further, the rules are framed in general terms. For example, the rules do not specifically address how to deal with apparently privileged material that opposing counsel seems to have produced in error. Any answer must be derived from provisions such as the vague one requiring lawyers to refrain from dishonesty and deceit, and from the general principle of client confidentiality. This is why many different answers to this problem have been given by authorities, each of whom were interpreting essentially identical rules.

The ABA president recently appointed a Commission on Evaluation of the Rules of Professional Conduct to evaluate the ABA Model Rules with an eye toward making recommendations for revisions, clarifications, additions, amplifications, and more effective implementation. The commission is in its early stages, so it remains to be seen whether it will propose substantially overhauling the existing Model Rules, merely tinkering with them, or something in between. Reportedly, there is a range of views among members of the commission on this question.

**The ALI**

After the ABA, the ALI has been at the ethics business the longest. Its process of drafting the Restatement of the Law Governing Lawyers has spanned more than a decade and is now complete. This restatement addresses a range of subjects, including conflicts of interest, confidentiality, the business relationship between lawyers and their clients, lawyers' civil liability, and ethical issues in litigation. It has been cited by courts (although apparently not as often as restatements on other areas of law) and has served as an additional source of guidance to lawyers.

In the area of lawyer conduct, the restatement is not a "restatement" in the sense of a codification of existing law on which courts generally agree. In this area, there are few areas of general agreement. Where the authorities are silent or in conflict, the restatement essentially reflects the policy preferences of its drafters or its membership. This being so, it is questionable whether courts will give much weight to the restatement with respect to controversial questions.

A possible test will be in *Swidler & Berlin v. United States*, a case from the D.C. Circuit that is to be argued next term in the Supreme Court. The question in this case is whether the attorney-client privilege continues after the client's death, notwithstanding a criminal investigator's need for access to the deceased client's otherwise privileged disclosures. In a divided decision, the appellate court said "no." The restatement takes the opposite position.

One challenge identified by the ALI's director, Geoffrey C. Hazard, Jr., has been the restatement's relationship with the states' ethical rules. The ethical rules are designed to give guidance to lawyers and to serve as the basis of professional discipline. They were not drafted, however, with civil liability in mind.

The restatement, in contrast, is designed to be employed by courts in judicial proceedings, including disqualification hearings and malpractice actions, and is based in part on "common law" developed in these settings.

Professor Hazard's answer has been that the problem of integrating the ethical rules and the law that is "restated" in the restatement has generally been more theoretical than real, because there is so much similarity between the two. But there are areas in which the restatement clearly departs from the ethical rules, the common law, or both.

For example, the restatement is far more liberal than either the ethical rules or the case law on conflicts of interest in the large law firm setting. The restatement would allow an individual lawyer who has a conflict of interest to be "screened" in situations where most existing authorities would require the entire firm to be disqualified.

The restatement has the benefit of being substantially more detailed than the ethical codes, such as New York's Code of Professional Responsibility or the ABA Model Rules of Professional Responsibility. Many questions that are unaddressed by the restatement's black-letter principles are discussed in the accompanying "comments."

This is not to say, however, that the thorniest questions are necessarily resolved.

For example, the restatement's "comments" extensively discuss what to do on receiving apparently confidential information from opposing counsel, but still may leave the reader uncertain about how to proceed.

One comment indicates that opposing counsel's inadvertent disclosure of otherwise confidential information will have the effect of unintentionally waiving the attorney-client privilege, unless opposing counsel took reasonable precautions to guard against disclosure.

Another instructs that the lawyer may use the documents if their production did waive the attorney-client privilege but must return them if their production did not waive the privilege. The problem, of course, is that the question of waiver, on which the propriety of the lawyer's conduct turns, will not be resolved until the court rules, based on facts that are probably unknown to the lawyer who has received the documents. Thus, on this question, as on a number of others, the restatement ultimately preserves a fair amount of uncertainty.

**Conference of Chief Judges**

The Conference of Chief Judges, which is comprised of the chief judge of each state's highest court, has spent several years addressing one ethical question in particular — namely, the question of when it is permissible for a lawyer, and especially a government lawyer, to communicate directly with a person who is represented by counsel. After negotiations with the U.S. Department of Justice, a committee of the conference has drafted a proposed amendment to Rule 4.2 of the ABA Model Rules of Professional Conduct, which generally forbids a lawyer from communicating with a represented individual or entity concerning the subject matter of the representation.

***The debate over how Rule 4.2 and equivalent provisions (e.g., N.Y. Disciplinary Rule 7-104(A)(1)) should apply to federal prosecutors was fueled by the issuance of the so-called Thornburgh Memo in 1989.***

The conference's proposal is simply the latest chapter in a story that has been unfolding over the course of the past decade. The debate over how Rule 4.2 and equivalent provisions (e.g., Disciplinary Rule 7-104(A)(1) of the New York Code) should apply to federal prosecutors was fueled by the issuance of the so-called "Thornburgh Memo" in 1989.

The debate continued through 1995, when the U.S. Department of Justice promulgated a federal regulation that provided that federal lawyers engaged in law enforcement were exempt from state and federal rules of ethics governing communications with represented persons and were to be governed by a different, more permissive standard.

The Conference of Chief Judges opposed the DOJ's effort to exempt federal government lawyers from Rule 4.2 but, at the same time, a committee of the conference set to work with the DOJ to develop an alternative to existing Rule 4.2 that would better address the government's concerns.

The DOJ regulation recently was struck down by the Eighth Circuit in *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (1998). Nevertheless, the proposal contains much of the substance of the DOJ regulation.

The Conference of Chief Judges seeks comments from interested entities and individuals before it considers its committee's proposal, either this summer or some time later. No doubt, the ABA will be one group registering a strong, negative response. ABA Formal Opinion 95-396, which interprets the existing rule in the context of criminal cases, reflects the ABA's current view that government lawyers and their agents should virtually never be allowed to contact represented individuals — not even in circumstances, such as in the context of undercover investigations prior to arrest or indictment, where federal case law uniformly permits such communications.

**Judicial Conference**

A committee of the Judicial Conference of the United States has spent the last few years examining what its reporter, Boston College Professor Daniel R. Coquillette, terms "the complex thicket of local rules now governing attorney conduct in federal court."

At the committee's request, Professor Coquillette has now drafted a set of proposed Federal Rules of Attorney Conduct, which would be designed to promote uniformity in the standards of conduct for all attorneys admitted to practice before federal district courts.

The last nine of the proposed rules deal with the issues of professional

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practice that are most frequently addressed by judges in federal cases: conflicts of interest, the lawyer as witness, confidentiality, candor toward the tribunal and third parties, and, lastly, communications with persons represented by counsel. All but the last are modeled on the ABA Model Rules of Professional Conduct and, thus, speak at a level of generality. The last is modeled on the proposal developed by the committee of the Conference of State Chief Judges that is discussed above.

The first proposed rule would provide that, with regard to all other ethical issues, the conduct of a lawyer in federal court will be governed by the rules of the state in which the court sits "unless the district court's rules provide otherwise."

The district court would be free to replace individual state-court rules, as well as to interpret the state-court rules differently from how they are interpreted by the state courts themselves.

At the same time, the text of the applicable rules would be entirely, or primarily, the same in state and federal court proceedings within a given state.

***The law governing lawyers has been the focus of much activity on the part of institutions of the legal profession.***

One other possibility suggested by Professor Coquillette is for the Judicial Conference to adopt only the first proposed rule. Doing so would abandon the idea of having a uniform body of federal ethics law. But the lawyer who practices in the state and federal courts of a single state would not have to learn two separate sets of rules, even though the rules themselves might be interpreted differently.

**Conclusion**

As described above, the law governing lawyers has been the focus of much activity on the part of institutions of the legal profession. Whether any or all of these institutions will bring order out of chaos remains to be seen. But it's worth a try.

## Developments

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American Law Institute and as a representative in the American Bar Association's House of Delegates. He has argued many cases before the Supreme Court and served as counsel to Richard Nixon during the Watergate investigation. Most recently, Wright represented the University of Texas Law School in the *Hopwood* case, where he defended the school's right to engage in affirmative action.

Wright also is a member of the NCAA and serves as chair of its Committee on Infractions. He is athletic director of the Legal Eagles, a touch football team, and serves on the boards of the Lyric Opera, Choral Union, and Symphony Orchestra of Austin, Texas. In addition to his treatise and hornbook, Wright has written many articles, including more than 50 book reviews for "The Fictional Lawyer" in ALI-ABA's periodical, *The Practical Lawyer*.

**"Big Footsteps"**

In accepting the award, Wright commented that, "unlike the Colossus of Rhodes, I am not ready to be bronzed." He observed that he was following "big footsteps," noting that the first recipient of the Learned Hand Medal was Professor James William Moore. Wright took civil procedure from Moore at Yale Law School, and he said that his grade in that course was the lowest in his three years in law school.

Wright noted that Moore also had worked for Judge Clark, who wrote the Federal Rules of Civil Procedure. At one point, however, Clark and Moore had a falling out. The argument was over a fee application in a case, where Clark thought that $32 an hour for partners and $11 an hour for associates was too much, and Moore thought that Clark was "out of touch with reality." After this dispute, Wright said, Clark and Moore never spoke again.

According to Wright, Learned Hand is quoted more often in opinions than Marshall, Cardozo, or Brandeis, demonstrating his continuing vitality. He cited the recent D.C. circuit opinion in the case involving Vincent Foster's notes, which quotes from Hand, as an example. Wright also recalled having lunch with Hand with the other clerks of the Second Circuit. During that lunch, Hand stated: "Anyone can be a killer, but only a jury can make a murderer." Wright still uses this quote with his students today.

"Hand remains the ideal of what a judge is and the way a judge should function," said Wright. Among other things, he described Hand's involvement in the drafting of the Model Penal Code, which initially had a provision outlawing homosexuality. Hand argued against that provision, contending that a criminal law that is not enforced is worse than having no law at all. Wright quoted Hand as saying, "I think it is a matter of morals, a matter very largely of taste, and it is not a matter that people should be put in prison about." Hand's view carried the day.

In closing, Wright noted that one of his favorite Supreme Court opinions is *Barnette v. West Virginia Board of Education*, where Justice Robert

Jackson stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein." Hand expressed a similar view, according to Wright, when he described the spirit of liberty as "the spirit which is not too sure that it is right."

## FBC Panel

# Products Liability Litigation

**By Jeanne Thelwell**

Despite widely varying opinions on the meaning of the term "mass tort litigation," speakers at the May 6 Federal Bar Council program on "Products Liability Litigation: Emerging Trends and Practical Tips" agreed that the most difficult issues faced by parties attempting to settle product liability class actions concern the rights of future plaintiffs.

The focus of the discussion was the implications of the recent U.S. Supreme Court opinion in *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (1997), which held that settlement classes must meet the same requirements of Rule 23(b) as adjudicatory classes. The Court invalidated a settlement class of future plaintiffs and found that it failed to meet the standards for adequacy of representation and predominance of common questions of law and fact.

Frederick Baron, counsel for the objector-respondents in *Amchem*, described the creation of the class of future plaintiffs in that case as a "reverse auction for the purchase of *res judicata*" because the defendants, who were willing to pay for the case to be filed, agreed to settle all pending cases but wanted the settlement to cover all future cases as well. According to Baron, *Amchem* spells the demise of mass tort class action claims except in "single occurrence" cases, such as airplane crashes, because in most product liability suits plaintiffs have different issues as to liability as well as to damages.

Judge Jack B. Weinstein agreed with the Supreme Court that the Amchem settlement was unacceptable; however, he said, cases involving settlement classes with proper subclasses could be created. "Rule 23 is still available and should not be abandoned," he stated.

The panelists were split on the practicality of nationwide federal class actions, which require the law of 50 different states to be applied to various plaintiffs. Judge Weinstein disagreed with Judge Posner's analysis in *In the Matter of Rhone-Poulenc Rorer Inc.* (dealing with HIV-infected blood transfusions to patients), stating that the parties can stipulate to accept a single state's law.

Elihu Inselbuch, who serves as counsel to the Special Panel of the Manville Trust, agreed with Judge Weinstein, pointing out that 50 states do not necessarily have 50 distinct sets of laws and that subclasses that appropriately group plaintiffs from states with similar laws and standards can reduce management and adjudicatory problems. However, Sheila Birmbaum challenged the right of a class representative to make such a stipulation for absent class members.

### Bankruptcy Proceedings

The panel was sharply divided over the benefits of bankruptcy proceedings over class action litigation for resolution of tort claims.

Stengel suggested that where liability is clear, as in the Manville case, bankruptcy proceedings can work. He noted that although a bankruptcy judge cannot adjudicate liability issues, the bankruptcy court can work in tandem with a willing district court judge to resolve them.

Inselbuch, however, questioned the availability of resources in the bankruptcy courts to manage mass tort litigation. In that case, Judge Weinstein said, the bar should insist that appropriate resources be provided; he noted that special funds are available to provide additional clerks, experts, or special masters in appropriate cases.

## Second Circuit News

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the signal contributions of Yale Dean and Second Circuit Chief Judge Charles E. Clark.

By now there have been over 30 major exhibits and nearly 20 major publications. Cooperating institutions have included the United States Supreme Court, the Ninth Circuit, and the Northern District of California, and diverse academic and public and private organizations. Most programs have drawn attention to important but largely forgotten figures such as Chief Justice Oliver Ellsworth, whose exhibit in the Foley Square lobby opened last month, and Egbert Benson, the first Chief Judge of the Second Circuit.

### America's Architect

Over the next year or so, in what will be by far the most ambitious and extensive efforts to date, the Federal Bar Council

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and Second Circuit will celebrate the life and career of Cass Gilbert, who was described by *The New York Times* when he was awarded the commission for the Foley Square courthouse as the most important American architect of the day.

Local institutions that are participating include the National Museum of the American Indian, the Downtown Alliance, the New-York Historical Society, the New York County Lawyers' Association, and the owners of such important Cass Gilbert structures as the Woolworth Building, the Brooklyn Army Terminal, and the Broadway-Chambers Building.

***Events begin the first week of October with a series of exhibit openings and lectures, capped by a walking tour of downtown sites.***

Participants elsewhere include the United States Supreme Court, Oberlin College, the Minnesota Historical Society, and the public bodies responsible for operating the capital buildings of Minnesota, West Virginia, and Arkansas.

Events begin the first week of October with a series of exhibit openings and lectures, capped by an ambitious walking tour of downtown sites sponsored by the Downtown Alliance.

On Monday, October 5, at 4:00 p.m., the centerpiece exhibit of the series, "Building For New York and the Nation: the Architecture of Cass Gilbert," will open. The event will feature a major lecture on Gilbert's significance in courthouse design.

The exhibit, which is intended to be capable of traveling to other Cass Gilbert sites on a visiting basis in future years, will be the work of architect Frank Greene and architectural historian Barbara Christen, who this year is working for the courts and the Smithsonian Institution as the part-time Executive Director for Cass Gilbert Projects.

**Woolworth Tower**

At noon on October 6, an exhibit at the Woolworth Building tentatively entitled "The Making of the Woolworth Tower" will open.

Possible events include a tour of such non-public spaces as the observation tower, and a lecture on the extraordinary relationship between Frank W. Woolworth and Cass Gilbert. A notable episode concerns the tower, which Gilbert ardently wished as part of the project, in part because it made the building the tallest in the world for nearly 20 years. He persuaded Woolworth that it would be worth the cost by making the unlikely claim that the observation tower would be such a draw that, at 50 cents a head, its throngs of visitors would pay for the tower. This claim had a special appeal to the head of the five-and dime empire, who actually paid for the lavish building entirely in cash. Gilbert delivered: the additional cost of the tower was about $5 million of the $13 million cost of the building; by 1930 the observation tower had taken in close to $8 million.

Wednesday, October 7, will feature the noon opening of the County Lawyers' exhibit, tentatively entitled "NYCLA's 90th and Its Architect." The building and its site are owed in large part to William Nelson Cromwell, Association President at the time, who obtained the land (and paid for it in significant part) from the Astor family, whose hotel occupied the adjacent site on Broadway.

The next day will feature multiple events at the Alexander Hamilton Custom House at Bowling Green. The United States Supreme Court will open a major exhibit on its building in Washington, which Gilbert designed at the same time he was working on the Foley Square Courthouse. (The two designs have dozens of major features in common as a result, including their wonderful spiral staircase, the ceiling designs in courtrooms and hallways, and their use of marble in ceremonial public spaces.) The exhibit will be entitled "'As Pure in Style As I Can Make It:' Cass Gilbert's Supreme Court Building."

A separate exhibit will open at the same time entitled "From Site to Insight: The Design and Renovation of the United States Custom House." The opening and lectures will take place in the Collectors' Office, a remarkable room on the main floor that normally is closed to the public.

The week's festivities will conclude with the 1998 walking tour of the Downtown Alliance on Sunday October 11. This distinguished series has drawn thousands each year to a tour of lower Manhattan that takes place on the Sunday of Columbus Day weekend. This year's event will focus on Cass Gilbert.

**Brooklyn Army Terminal**

For the first time, this tour will extend beyond lower Manhattan: the Alliance has arranged for ferry service that will provide easy access to the Brooklyn Army Terminal, constructed in South Brooklyn in 1918 as the Army Supply Base, the major embarkation point for troops heading for Europe in the Great War. Including this Gilbert engineering feat — the largest concrete structure in the world at the time it went up, in only 14 months — offers a novel dimension to figure associated, to the extent he is known at all today, with an ornate and elaborate style that once seemed effete and anachronistic to many, between

Gilbert's eclipse in the 1930s and his gradual rediscovery since about 1975.

Possibly the high point of the Gilbert festivities this fall will occur November 13-14: a national symposium at the Custom House on most or all dimensions of the architect's career. Although it is too early for the exact program to be known as yet, a stellar cast is hoped for. Judge José A. Cabranes has invited Senator Daniel Patrick Moynihan to give a keynote address, an event that may offer New Yorkers a timely reminder of Senator Moynihan's pivotal role in bringing excellent design back to the architecture of federal courthouses.

Pursuant to the Senator's initiative, the new federal courthouse on Pearl Street was the result of a design competition that referred to Gilbert specifically: architects were required by the enabling legislation to employ the existing Gilbert building as an explicit frame of reference for their designs. This effort was successful not only at Pearl Street but in the subsequent designs of countless courthouses all across the United States. Thanks in large part to Senator Moynihan's efforts in referring to Gilbert and similar efforts that followed, the depressing "functional" designs of new courthouses built in the 1950s through the 1970s have been replaced by a remarkable series of designs since Moynihan began his service as Chair of the Senate Committee on Environment and Public Works, which ended a few years ago.

**French's Sculptures**

Linking the October and November events will be a series of mid-day programs of the Smithsonian's National Museum of the American Indian. On Tuesdays and Thursdays throughout this period, the Museum's cultural interpreters will conduct lunch hour programs on the magnificent sculptures of Daniel Chester French and similar artistic and architectural details of the remarkable Custom House building, shared by the Museum and the United States Bankruptcy Court for the Southern District of New York.

Other likely speakers at the November symposium include Professor Geoffrey Blodgett of Oberlin College, who is completing the first full biography of Gilbert; Professor Gail Fenske of Roger Williams University, who is publishing a major study of the Woolworth Building and its origins; Professor Sharon Irish of the University of Illinois, who is publishing an illustrated volume on Gilbert and his works; and Ford Peatross, Curator of Drawings at the Library of Congress, who presides over the magnificent Gilbert collection housed there.

***Possibly the high point of the festivities will be a national symposium on November 13 - 14 at the Custom House.***

In response to a call for papers that closed May 31, submissions were expected concerning Gilbert's domestic architecture, his interior designs (including furniture and lighting), his considerable importance as a city planner, and such other dimensions of a remarkably varied career as his work with Saint Gaudens, Daniel Chester French, and other artists.

**Upcoming Books**

Out of town events are anticipated in Minnesota, where Gilbert began his career and possibly had his most palpable impact, and in Ohio; Washington, D.C.; West Virginia; and other places. An architect who all but disappeared from the American consciousness as a result of being overtaken by the Bauhaus and the modernist movements is finally to be recognized. Notably, by two years from now there probably will be five major books out on Gilbert alone. There have been none until now. Especially notable, Rizzoli International, possibly the premier architectural publisher, has expressed interest in publishing the symposium proceedings.

Later events will include a major exhibit at The Museum of the City of New York on the illustrations of Hughson Hawley that will likely feature several Gilbert buildings. There also will be a show in late 1999 at the New-York Historical Society, which holds the bulk of Gilbert's papers, especially those from his New York practice.

Circuit Judge José A. Cabranes has recently turned over the chair of the Second Circuit Committee on History and Commemorative Events to Circuit Judge Pierre N. Leval. Judge Cabranes will remain a member. Co-chairs of the Committee on Cass Gilbert Projects are Southern District Bankruptcy Judge Jeffry Gallet and John Haworth of the National Museum of the American Indian, in addition to the present author. Former Federal Bar Council President John Kenney, who assembled twelve years ago a memorable exhibit on the Foley Square Courthouse, has taken the lead in the delicate effort to involve the Woolworth Corporation, which is currently changing its name and is in the process of selling its landmark building. New York State Justice Stephen Crane heads the Committee on History of the New York County Lawyers Association and serves as the liaison to the Association's activities. The United States Supreme Court is represented in these projects by Curator Gail Galloway and her assistant Franz Jantzen.

## The Back Page

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That report does not reflect any response to the Special Rapporteur's appeal about Governor Pataki, but President Clinton favored Cumaraswamy with a written response to his letter about Judge Baer. The President stated that the Executive Branch was "contest[ing] [a] judicial decision with which it disagrees" by "challenge . . . in the courts." After receiving the President's response the Special Rapporteur expressed the view that:

*"harsh, public criticism of a judicial decision by the Executive Branch, particularly in a politically charged environment in which prominent legislators and politicians are calling for the resignation of the particular judge who has rendered a controversial decision, can have a chilling effect on the independence and impartiality of the judiciary."*




***The corner of Wallenberg and Sharansky, also known as First Avenue and 43rd Street.***

**Northern Ireland**

On April 1, 1998, in Geneva, he released a comprehensive report primarily on the restrictions on legal advice and the absence of safeguards to prevent the abuse of lawyers in Northern Ireland. His report on Northern Ireland occurred after an eleven day fact finding mission during which he met with the Lord Chief Justice of England and Wales, several Ministers of State, a member of Parliament, the Director of Security and Prison Services, the Chief Constable of the Royal Ulster Constabulatory, and dozens of other officials, lawyers, and human rights representatives. He also visited prisons, prisoner holding areas, and legal visits areas.

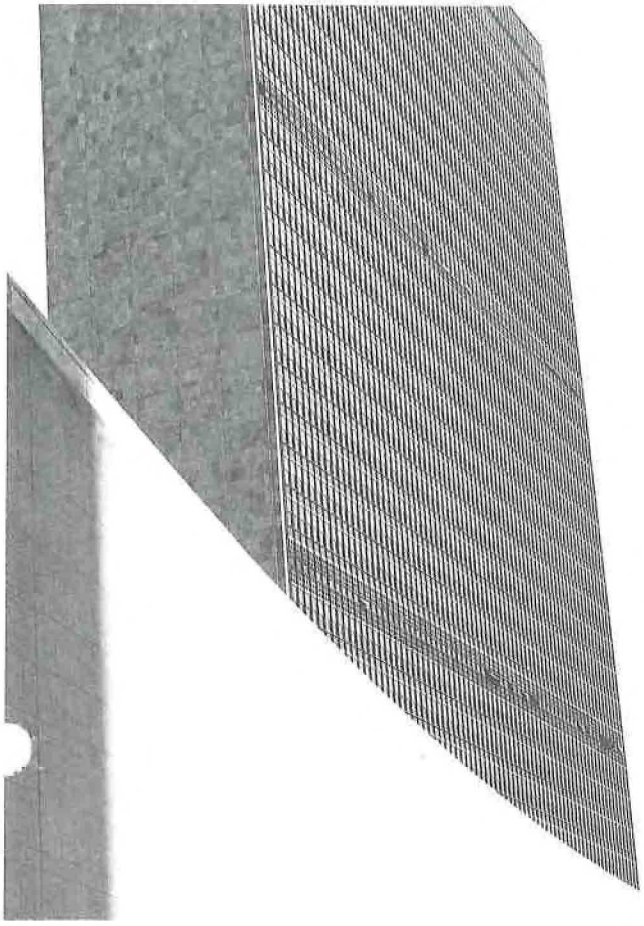
His 1998 recommendations on Northern Ireland concerned the right to counsel, protection of lawyers, investigation of the murder of solicitor Patrick Finucane, and the reinstatement of various rights including the right to remain silent, the right to a jury trial, the abolishment of the admission of coerced testimony, the creation of a police ombudsman, and training programs for judiciary on international human rights standards.

**Other Countries**

All told, the Rapporteur's recent reports detail questionable practices affecting the independence of lawyers and judges in Australia, Bahrain, Belarus, Belgium, Bolivia, Botswana, Brazil, and Burkina Faso, to name just a few jurisdictions, with descriptions of visits, interviews, findings, communications to governments (and corresponding responses), together with recommendations for reform concerning all the various worldwide situations affecting the independence of lawyers and judges.

Cumaraswamy, who was a lawyer in Malaysia, has not shrunk from criticism of an alleged "judge shopping practice" in Malaysian courts. After being interviewed by an author of an article on the alleged practice in the publication *International Commercial Litigation*, Cumaraswamy himself was sued for libel (for a total of US$78 million) in the Malaysian courts. Pursuant to the Convention on the Privileges and Immunities of the United Nations, to which Malaysia has been a party since 1957, Cumaraswamy claims immunity, to date unsuccessfully, from suit for "words spoken or written down in the course of the performance of [his] mission." Despite his own embroilment in the independence issue for which he is responsible worldwide, Cumaraswamy remains active in speaking out.

Annual and special reports of the Special Rapporteur, including his recent report on Northern Ireland, are all available on line at the web site of the United Nations High Commissioner for Civil Rights (www.unhchr.ch/). Other UN documents, such as one entitled *Basic Principles on the Independence of the Judiciary*, also are easily accessible there.





*On the left, the United Nations; above, a new addition to the U.N. sculpture garden, donated on behalf of Arab women; below, a guided tour group looking at a Norman Rockwell painting in the U.N. General Assembly building.*



# Param Cumaraswamy

**By Peter Eikenberry**

Most American lawyers and judges might be surprised to know that the United Nations has an official, known as the Special Rapporteur, who is charged with looking out for their independence. The position of Special Rapporteur was established as a part of the Commission on Human Rights of the United Nations in 1994.

Since then, the Special Rapporteur, Param Cumaraswamy, has been active.



***The United Nations Security Council Chamber is pictured above. All photos accompanying this article are courtesy of Stephen H. Orel.***

**American Complaints**

In 1996, Cumaraswamy forwarded an urgent appeal to the U.S. government about Governor George E. Pataki allegedly pressuring Bronx District Attorney Robert T. Johnson to seek the death penalty in a particular case.

The next year, he issued his 1997 report that reflected that in 1996 he also had written to the government of the United States to express his concern that there may have been executive intimidation of the independence of the judiciary in statements made by President Clinton and Senator Robert Dole concerning a ruling of Judge Harold Baer, Jr.

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