Federal Bar Council News

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FBC News

Litigation In An Electronic World

By Nancy L. Savitt

On Wednesday, April 5, 2000, the Federal Bar Council's Program Committee presented "Litigation In An Electronic World: Jurisdiction, Discovery and Computer Forensics," a panel discussion held at the new Southern District Federal Courthouse.

Gerald Walpin, the co-chair of the Program Committee, introduced the program, and thanked Martin Glenn and his committee for organizing it. Walpin then introduced Chief Judge Michael Mukasey. Chief Judge Mukasey noted that the issues to be addressed were on the cutting edge and increasingly valuable as they become more prevalent. He then

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Developments

Council Presents Circuit Judge Cabranes With The Learned Hand Award

The Federal Bar Council's Annual Law Day Dinner, chaired by the Honorable Roanne Mann, was held at the Waldorf-Astoria Hotel on May 2, 2000. Council President Steven M. Edwards presented the Council's Learned Hand Medal for Excellence in Federal Jurisprudence to the Honorable José A. Cabranes, Judge of the Second Circuit Court of Appeals.

Magistrate Judge Mann began the evening by extending a warm welcome to Judge Cabranes and telling the story about getting authority for Judge Cabranes, then sitting in the District Court in Connecticut, to marry her and her husband in New York. Magistrate Judge Mann then introduced Southern District Judge Victor Marrero, who read President Clinton's Law Day Proclamation.

The American Dream

Steve Edwards introduced Judge Cabranes, noting that he was the embodiment of the American dream. Judge Cabranes was born in Mayaguez, Puerto Rico. His parents were both teachers, and his father was one of the first trained social workers in Puerto Rico. When Judge Cabranes was five the family moved to New York City. The family lived in the South Bronx, where his father was director of a settlement house that had long sheltered Jewish immigrants and that had begun to

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Legal History

Galileo's Trial

By Steven M. Edwards

Much has been written about Galileo's trial, which took place in 1633. Few people realize that there is a transcript of the trial that purports to capture Galileo's testimony verbatim. That transcript provides an interesting insight into the nature of the controversy and presents certain parallels to modern events. To understand the transcript, it is necessary to understand the historical context.

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introduced the moderator, Judge Sidney Stein of the Southern District.

Judge Stein pointed out that there is and will continue to be an exponential expansion in the number of cases dealing with computer and electronic issues. The program was designed to give a better grasp of what those issues will look like, from both a legal and a practical perspective. Judge Stein then introduced the panelists: Judge David Trager from the Eastern District; Pamela Chepiga, Director of Fordham Law School's Securities Arbitration Clinic; Steve Miller, Director and Counsel of the Technology and Online Forensics Group at DSFX; Debra Freeman, a partner at Morrison & Foerster; and Joseph DeMarco, an Assistant U.S. Attorney and Computer & Telecommunications Crimes Coordinator in the Southern District.

Jurisdictional Issues

Judge Stein started the substantive part of the program with a discussion of the jurisdictional issues posed by the increasing use of Web sites. There is a still evolving spectrum of such cases, he explained. At one end are those where the Web site is strictly passive, as in the Blue Note case decided by the Second Circuit. In those cases, personal jurisdiction is generally not found, because the use of a passive Web site does not demonstrate any purposeful activity by the Web site operator to inject itself into a particular forum state.

In the middle of the spectrum are cases involving Web sites that permit the exchange of information or goods. In those cases, the courts usually determine whether personal jurisdiction exists by looking at the level of interactivity offered by the Web site. One issue that comes up frequently is where to place a Web site that is passive except for providing a link to an e-mail address for inquiries. Although there is still no unanimity, Judge Stein noted that most cases involving a passive Web site with an e-mail link categorize those sites as passive. Even where there has been an exchange of e-mail between the plaintiff and the defendant, most cases find such contacts inadequate to establish personal jurisdiction. Such e-mail exchanges can, however, aid a finding of jurisdiction if they are part of a larger array of contacts.

E-mail exchanges can aid a finding of jurisdiction if they are part of a larger array of contacts.

Judge Stein pointed out that a goal of these cases should be to permit companies to be able to structure their activities with some assurance as to where they may be subject to jurisdiction.

With interactive Web sites that offer a sales component, many courts require a showing that sales were actually made within the forum state, and not merely that such a service was theoretically available (since the Internet is available everywhere). However, if a Web site operator targets a specific state with online or offline advertising, then jurisdiction is more likely to be found.

At the far end of the jurisdictional spectrum are cases involving the commission of an intentional tort (such as e-mailing a bomb threat), or those where the defendant is actively doing business through its Web site. In those, personal jurisdiction is almost always found.

Electronic Discovery

The program then moved on to issues surrounding electronic discovery and forensics. Those issues were discussed in the context of several hypotheticals surrounding a basic fact pattern, introduced by Pam Chepiga. The hypothetical involved Stan Smith, an attorney who engaged in e-trading through his online broker, E-broker.com. Stan had placed an order to buy 700 shares of XYZ stock, but attempted to cancel the order when the price fell. Believing the order was canceled, he waited until the price dropped, and placed a new order at a lower price. He then left his office for several hours, and when he returned, discovered that the first "buy" order had not been canceled but had in fact been executed — and that it had been executed through an electronic communications network (ECN), rather than an exchange. Stan brought a class action law suit against E-broker.com (since, as Chepiga pointed out, he'd probably be precluded from bringing an individual action, as most customer-broker disputes are subject to mandatory pre-dispute arbitration).

Debra Freeman discussed the first hypothetical, which involved plaintiffs' document request to E-broker. Plaintiffs demanded all of E-broker's computer records of electronic trades since January 1998, and in addition, all e-mail communications between E-broker and all ECNs. E-broker raised two objections to the first request: (1) it does not keep the information the way it was asked for, and it would take a lot of work to pull it together; and (2) it had just switched to a new computer system, and it would be expensive to pull the information and even would require that it write new computer programs to do so. With respect to the request for all e-mail communications with ECNs, E-broker claimed that it was overbroad, burdensome and expensive.

This hypothetical, Freeman pointed

out, highlighted the four key questions that come up in electronic discovery:

- what is the volume of what the request is seeking?
- how does the party that received the request go about retrieving the information?
- how difficult is it to review the information, both for privilege and/or responsiveness?
- what are the costs and the potential for cost-shifting to the requesting party?

As an initial matter, courts generally instruct the parties to confer to attempt to work out some of these issues among themselves. With respect to the retrieval procedure, some attorneys say that because their clients do not have to create documents that do not already exist, they should not have to create computer programs that would be necessary to retrieve the requested electronic documents. Freeman advised that courts are rejecting this argument, looking to the language of Rule 34, which requires the producing party to translate material into reasonably usable form. On costs, depending on the circumstances, some courts are fashioning protective orders that shift some of the costs to the party making the request.

Nuts and Bolts

Steve Miller launched into a presentation of computer hardware and software to explain electronic discovery from a forensic standpoint, as well as what attorneys need to consider when engaged in electronic discovery. Many companies have their own networks, or Local Area Networks (LANs), with PC workstations connected to the company's own server. The forensic potential of servers is that they serve as a central repository for e-mail, and backups (both recent and archived) likely exist, as do server access logs. Moreover, Miller noted, experts can conduct their inspection without leaving a trace, so that objections that an inspection will disrupt or corrupt the party's system are unfounded.

Workstations have additional forensic potential, particularly with respect to deleted documents. Most of the time, documents and e-mails that are "deleted" on a PC can be recovered. Personal e-mail address books may reveal useful information. In addition, people use their PCs for documents and secrets they want to keep from others, so there are additional documents that would not be found on a server. Documents found on a PC can be more easily linked to a particular user for evidentiary purposes than can those found on a server. PCs with Internet access also have Internet caches, which are a collection of files that reflect what the user has been recently doing on the Web. Miller noted the enormous forensic potential of this information, but because it only reflects relatively recent use, the sooner the data is preserved the better.

There are three major categories of evidence lawyers need to think of with electronic data. First is electronic e-mail. One of the first things the attorney needs to discover is how the e-mail is maintained. Is it centralized or distributed? Is it maintained by an outside Internet Service Provider or other third party (in which case a subpoena may be necessary)? There also may be issues about privacy expectations that need to be addressed prior to any inspection.

The second main category of evidence Miller discussed is deleted files and e-mail. He noted that even defragmenting or reformatting the drive does not defeat forensic recovery of the data, although there are some software programs that may be effective. Some of the best evidence is recovered when a party has been put on notice of an impending inspection, and individual users in a panic hit the delete button in the days before the inspection. The information recovered serves as both evidence in chief as well as of discovery abuses.

The final category of useful electronic evidence is access and usage logs. Miller explained that such logs may be useful in themselves, or in conjunction with other evidence. He gave the example of a log that showed that a key witness, as yet unknown, had been in two different locations on two different dates. By correlating that log information with travel records, they were able to identify the witness.

Miller ended his presentation by discussing the steps that need to be taken in order to preserve electronic evidence: Secure the workstation of the subject, and do not touch it — if it is on, leave it on. Secure all existing back-ups. Make a complete backup of the server immediately. Copy all Internet connection log files. Send an immediate friendly request to ISPs to preserve all relevant e-mail, and then follow that up as soon as possible with a subpoena. And put the adversary on notice of the requirement to similarly safeguard evidence, and to stop any routine destruction pursuant to a document retention policy.

Second Hypothetical

Pam Chepiga set out the facts for the second hypothetical, which dealt with E-broker's document requests to Stan Smith. E-broker wanted to examine Smith's computer for evidence that he may have clicked on the wrong buttons, entered the wrong information, or received an online message that would

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have alerted him that the cancellation had not been executed. While noting that this information could be found on the Internet cache of Stan Smith's computer, Steve Miller cautioned that much of that evidence could be retrieved from E-broker's own system, and that it should look there first because the information retrieved from the computer could contradict a client's recollection or theory of the case.

Joe DeMarco then discussed how to gather the evidence. Before any site inspection, lawyers want to know as much as possible about the system and the set-up. Is the PC networked or a standalone? How many computers are involved? What operating system is used? What is the computer's brand and model number? What are the passwords, and who has them and where are they kept and maintained? Formal or informal discovery can be used to gather this information. Steve Miller emphasized that this information was crucial from a forensics standpoint, and agreed with DeMarco that preparing to inspect a standalone PC is quite different from preparing to inspect an entire network.

DeMarco moved on to the inspection itself, and recommended that it be videotaped. This can be particularly valuable if the inspection is conducted on site. With a site inspection, additional evidence can be obtained, such as noting where in the office the computer is, who has access to it, and other information in plain view such as stickers on the computer or books that may be used to paint the party's level of sophistication (for example, a collection of books about electronic trading).

Debra Freeman addressed the objections raised by plaintiffs in the hypothetical, specifically that defendants should not be allowed to inspect Stan Smith's PC because (1) he was an attorney, his computer contained much privileged information, and (2) there was much irrelevant personal information on his computer as well that they should not be allowed to inspect. It is best for the party requesting inspection to have a tailored plan that addresses the privilege and relevance issues ready to present to court in response to such objections, in addition to making some showing that the information it is looking for would be on that computer. Freeman said that a party improves its chances of getting the inspection if its plan is adequate to address legitimate issues such as those raised in the hypothetical.

Pagers, cell phones, fax machines with growing memory storage capabilities, and electronic organizers will be a source of valuable information.

Joe DeMarco pointed out other electronic appliances, in addition to computers, that can provide valuable information. Pagers, cell phones, fax machines with growing memory storage capabilities, and electronic organizers (such as Palm Pilots) will increasingly be a source of valuable information. Pagers can send and receive e-mails, cell phones store frequently called numbers, organizers contain a wealth of information, and their capabilities and memory just keep expanding. These items should also be considered when conducting electronic discovery, he emphasized. Steve Miller added later in the program that the records of the company that provides service for these appliances should also be checked. For example, a pager may hold only the last thirty pages, but the pager service has much more extensive information.

Tampering And Spoliation

The third hypothetical, introduced by Debra Freeman, raised the issue of what happens when a lawyer comes across something that looks like evidence tampering. In the hypothetical, an electronic version of an e-mail E-broker produced only in hard copy had additional, potentially damaging admissions, as well as unreadable, garbled text. What is the electronic version: an old draft? A smoking gun? An unreliable and inadmissible corrupted document?

Judge Trager stated that the document should be admissible. All the arguments and evidence about the provenance of the document should be heard by the jury, and it was a jury question of what weight to give th document.

In the discovery phase, Steve Miller noted that the electronic version had additional information that the hard copy did not, including a "bcc" indicating that another person had been copied on the e-mail — leading to another witness who could testify about the e-mail. Judge Stein added that it also led to other places to search for additional evidence, such as the bcc's computer and related e-mail files, to see if he or she received a copy and if a clean, uncorrupted copy existed.

The discussion then moved to expansive discovery requests. Steve Miller advised that in response to such a request that truly would be burdensome, expensive, and result in the production of massive amounts of information, a legitimate question could be raised as to whether the recipient would even be able to process the information. The party faced with such a document productio request should demand a reasonable explanation of how the recipient can actually use all of the information that is being requested. Often, Miller noted, the

estimates of how much it would cost to comply with a particular request are overblown.

Judge Trager agreed, noting that litigants may be taking advantage of the ignorance of some judges in making high estimates of the costs of compliance with electronic discovery. As judges get more experienced in these areas, they are able to see for themselves where cost estimates may be exaggerated. But even where the costs are high, the normal rules of discovery and cost-bearing apply. In the hypothetical, a court presented with the questionable electronic version of the e-mail would be well within its discretion to order defendants to turn over anything the plaintiffs wanted to investigate that issue, and to bear the related costs, said Judge Trager.

Documents that have been deleted or destroyed may also demonstrate evidence tampering. Joe DeMarco pointed out that people who would never run documents through a shredder often do not hesitate to hit the delete key, even after a subpoena has been served. There is rarely more persuasive evidence of awareness of guilt/liability or obstruction of justice than deleted documents. DeMarco advised that lawyers need to instruct their corporate clients that this is the last thing they want to do, particularly given the ease of recovery of deleted documents.

Judge Trager noted that similar concerns could apply even to a corporate document destruction policy. Attorneys should question their clients about their policies, and see if the policy is reasonable in light of the client's business. If there are legitimate business reasons to keep documents for at least a year, it may raise questions if the company destroys documents in a shorter period of time. Also, Judge Trager stated, an attorney could point to a party's use of deletion software to raise questions about its document destruction practices.

Admissibility

The final hypothetical of the evening raised the issue of the admissibility of third-party e-mail. The question is hearsay, Debra Freeman explained, and particularly whether e-mail qualifies as a business record. This topic is percolating through the courts, with most courts to date holding that third-party e-mail is not a business record. One item courts look at are the companies' policies with respect to e-mail—if e-mail is supposed to be printed out and sent to file, for example, it is more likely to be found to be a business record. Some courts are admitting e-mail under other exceptions to the hearsay rule, Freeman advised, including as present sense impressions.

Judges Stein and Trager then engaged in an animated discussion of the trustworthiness of e-mail. Both agreed that people send e-mail in a lackadaisical fashion, with typos and other mistakes that would not ordinarily be found in a business record. But does this immediacy make e-mail more or less trustworthy under the Federal Rules of Evidence? Judge Trager emphatically stated that this makes e-mail more trustworthy. Judge Stein reiterated that people may

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not have given e-mail the thought required for the business record exception. Tell that to the jury, Judge Trager advised, and he stated that in a few years, this whole debate will be a non-issue, with e-mail readily being deemed admissible in federal court.

Steve Miller chimed in with the Internet community's view, which is that e-mail is akin to passing a note in school. Debra Freeman noted that that spontaneity makes it more likely to find a smoking gun. Judge Trager agreed, particularly in employment cases. Corporations are living in a dream world, he said, if they think the business record exception will stop e-mail from coming into evidence. As impeachment, present sense impression, or in other ways, e-mail will be seen by a jury.

The final part of the program was a demonstration by Joe DeMarco of how to present the computer evidence to a jury. The bad news, DeMarco explained, is that the material can be complex and take time to explain to a jury — not only the mechanics of the alleged wrong-doing (in this case, e-trading), but also the mechanics of how the evidence was found and created (LANS, caches, etc.). The good news is that with the increasingly reduced costs of presentation technology, attorneys have the means to present the computer evidence to the jury in a clear and understandable way. Juries can understand pictures on a screen, and through PowerPoint and other presentation software, lawyers can communicate the issues effectively. DeMarco proceeded to demonstrate his thesis, presenting a five minute summation of the hypothetical fact pattern accompanied by a PowerPoint presentation. This entertaining and effective demonstration earned a round of applause from the audience.

Developments

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serve the wave of Puerto Rican immigrants. Judge Cabranes attended public schools in New York and graduated from Columbia University in 1961. After a year of teaching history in Puerto Rico, he attended Yale Law School, from which he graduated in 1965. Judge Cabranes then received a Masters Degree in International Law from Cambridge University in England in 1967.

Next, Judge Cabranes worked for Casey Lane & Mittendorf for four years, after which he joined the faculty of Rutgers Law School, where he taught International Law. In 1973, Judge Cabranes became Special Counsel to the Governor of Puerto Rico and head of the office of the Commonwealth of Puerto Rico in Washington, D.C. He then returned to Yale as General Counsel and Director of Government Relations.

First Book

In 1979, Judge Cabranes became a United States District Judge for the District of Connecticut — the first person of Puerto Rican descent to be appointed a federal judge outside Puerto Rico. Also in 1979, Judge Cabranes published a book entitled "Citizenship and the American Empire," which traces the history of the relationship between Puerto Rico and the United States from the annexation by the United States following the Spanish American War to the passage of the Jones Act in 1917, which conferred limited citizenship on the people of Puerto Rico. Edwards noted that the clarity of thought, meticulous research, and tone of the book were impressive.

While on the bench, Judge Cabranes has co-authored a book with his wife Kate Stith, a professor at Yale Law School, entitled "Fear of Judging," which describes the history and shortcomings of the sentencing guidelines and explains how they have shifted the exercise of discretion away from the judicial branch to the executive branch through the prosecutorial charging power and the appointment of the Sentencing Commission. As Edwards stated, the book makes a number of proposals for improvement, including more extensive use of departures, adoption of comprehensive rules to govern the sentencing process, and appointment of the members of the Sentencing Commission by the Judicial Conference.

Edwards remarked that, once appointed to the federal bench, Judge Cabranes quickly distinguished himself "developing a reputation as a careful thoughtful judge whose rulings resisted ideological categorization and rarely were reversed." Judge Cabranes took great pleasure in performing naturalization ceremonies, identifying with the new citizens.

With the Connecticut vacancy on the Second Circuit already taken by Judge Calabresi, Judge Cabranes was deemed a citizen of New York when he was appointed, because he had grown up there. Since his appointment to the Second Circuit in 1994, Judge Cabranes has written significant opinions on labor relations, employment discrimination, international law, the First Amendment, and the Americans With Disabilities Act. Edwards noted that Judge Cabranes' decisions could not be pigeon-holed ideologically.

In addition to serving on the federal bench, Judge Cabranes has devoted a great deal of time to non-judicial, public interest pursuits, serving as a trustee of Yale, Colgate, the American Museum of Natural History, and the Twentieth Century Fund. He also has been a

director of the Federal Judicial Center, International League for Human Rights, Aspira, and the Puerto Rican Legal Defense and Education Fund, and a member of the American Academy of Arts and Sciences, the President's Commission on White House Fellowships, the Council on Foreign Relations, and the American Law Institute. Continuing a lifelong concern for the Hispanic community, Judge Cabranes has played a leadership role among Hispanic lawyers, co-founding the Puerto Rican Legal Defense and Education Fund.

Hand's Legacy

In accepting the award, Judge Cabranes reflected on the legacy of udge Learned Hand, whom he called "possibly the greatest judge of the so-called inferior federal courts in our history." Judge Cabranes accepted the award on behalf of the Second Circuit as the court of which Judge Hand was Chief Judge. Judge Cabranes noted that Judge Hand, who served as a district judge for 15 years and a circuit judge for 37 years, was a meticulous craftsman of judicial opinions who rejected dogmatism and grand theories and was suspicious of political ideologies.

Judge Cabranes observed that it was appropriate that one of the themes of this year's Law Day was judicial independence because judicial independence was an essential principle that Judge Hand understood well, defended strenuously and cared for deeply. Judge Hand believed that the integrity of the judicial process as well as constitutional and democratic government depended on judicial independence.

Judge Cabranes pointed out attacks on the independence of the federal judiciary during Judge Hand's 52 years as a federal judge including Theodore Roosevelt's proposal during the Progressive-Bull Moose campaign of 1912 for the popular recall of federal judges and the recall of decisions interpreting the Constitution; Franklin Roosevelt's court-packing plan; and efforts by members of Congress during the Cold War to strip the Supreme Court of jurisdiction over cases involving internal security questions. In each case, Judge Hand defended the need for an independent judiciary as central to a constitutional democracy with separation between the judiciary and its coequal branches of government. In contrast, Judge Cabranes noted that Judge Hand did not always live up to the ideal of judicial independence. He explained that Judge Hand was actively involved in Progressive Party affairs when Theodore Roosevelt challenged President William Howard Taft in 1912 and ran on the Progressive Party ticket for Chief Judge of the New York Court of Appeals in 1913, after he had assumed the federal bench.

Judge Cabranes said that Judge Hand placed the responsibility for judicial independence on the judiciary, not politicians, believing that judges were accountable not to politicians or popular will, but to the ideal of the rule of law. Judge Cabranes noted that at the end of his career Judge Hand may have taken the separation of law and politics too far when he publicly questioned the constitutional legitimacy of *Brown v. Board of Education*, which Judge Cabranes described as a case that demonstrates the essential role that judges play in the sound development of the law.

Judicial Ideal

Judge Cabranes conceded that judicial independence was an ideal and that complete independence was difficult, if not impossible, to achieve in any particular judge or any particular case, but must in any event serve as the abiding ideal of all judges. Federal judges must justify their privilege of life tenure by pledging judicial independence and using it as their compass. Judge Cabranes acknowledged the paradox of the political appointment of judges followed by complete independence from politics.

Judge Cabranes concluded by recognizing the friends and sponsors responsible for supporting his career and thanking them for friendship, guidance, and support. He stated that he felt privileged to play a role in the grand experiment of American democracy by serving as a district judge and a judge of the Second Circuit. Judge Cabranes stated how grateful he was to receive the Learned Hand Medal.

New Appointments

Life In The Fast Lane: Chief Judge Korman Takes Over In E.D.N.Y.

By Steven Flanders

Brooklyn Law School Dean Joan Wexler put on a splashy reception May 17 to celebrate local-boy-makes-good Judge Edward R. Korman, who has just assumed the office of Chief Judge of the Eastern District of New York. In a graceful and complimentary introduction that was all the more attractive because it was completely believable, Dean Wexler singled out from among the new Chief's judicial virtues his notable quality as a good listener. Lawyers sometimes find it unnerving, she said: he never takes notes, just sits there, looks you in the eye, and listens.

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The new chief judge had best be a good listener. He operates in the 21st century judicial equivalent of a railroad flat. Since the Manny Cellar portion of the Cadman Plaza complex was torn down several years ago to make way for the new building now (finally) under construction, judges and staff have been doubled and tripled up. Like his colleagues — no exemption for the chief judge — Judge Korman is grouped with two other judges; the three of them share two courtrooms. Somehow this has the effect that Judge Trager and Judge Block must use the chief's private office as a passageway from nearly everywhere they work to nearly everywhere else. For this correspondent, the practice was an unexpected bonus: a brief visit yielded numerous pleasing and unexpected conversations on the run, opportunities to catch up and gain independent perspectives on the district. But one can imagine that the chief judge of one of the busiest courts anywhere might cherish a little more privacy and quiet. Perhaps this is simply life in the fast lane; New York doesn't actually have a lot of railroad flats any more.

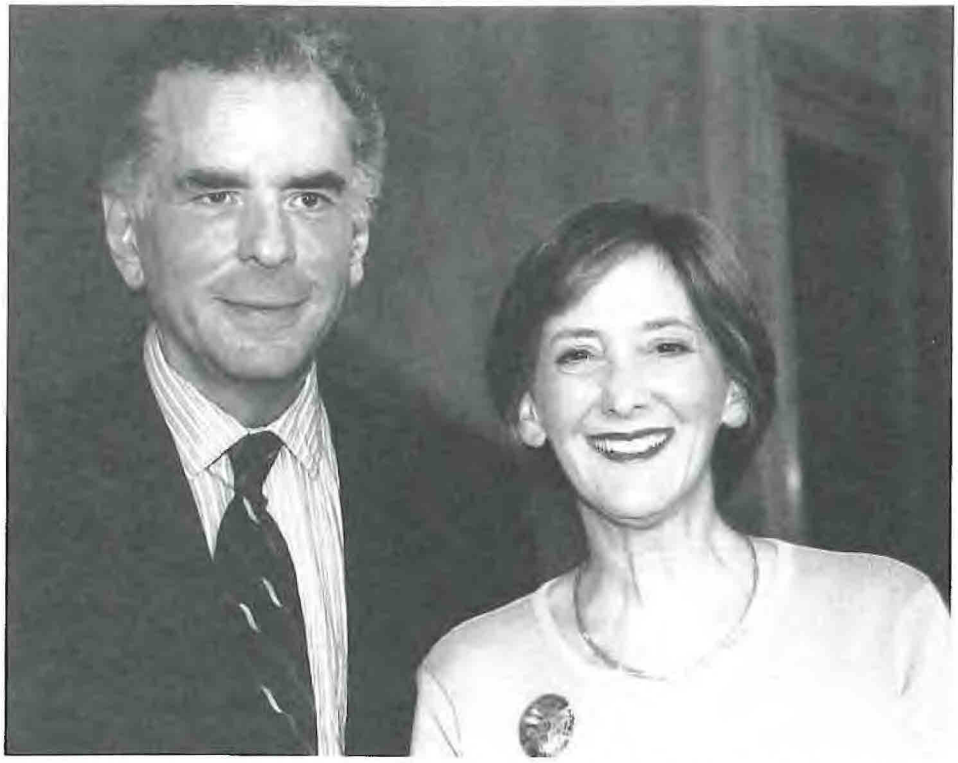
From East New York

Chief Judge Edward R. Korman is a Brooklyn boy through and through whose career demonstrates that it is possible to make it in the widest of worlds without ever —well, hardly ever — leaving Brooklyn. A graduate of Brooklyn College and Brooklyn Law School, he grew up in East New York and now lives in the Heights. Admittedly, there were three brief intervals when he was employed outside Kings County. Only one of these required him actually to live outside the Borough, however: his stint with the Office of the Solicitor-General of the United States from 1972 to 1974 under Erwin Griswold and Robert Bork.

After graduating from law school, Judge Korman clerked for Judge Kenneth Keating of the New York Court of Appeals, was briefly an associate at Paul, Weiss, Rifkind, Wharton & Garrison, and then served twice in the office of the United States Attorney for the Eastern District of New York before his appointment in 1978 as the U.S. Attorney. When the White House changed hands, but only after being permitted to complete his four-year term, he became a partner at Stroock & Stroock & Lavan before his judicial appointment in 1985. At age 57, he assumes the office of chief judge at a more tender age than any of his recent predecessors.

The treasured tradition of judicial collegiality in the Eastern District are what makes it possible for the district to function under the conditions the new chief judge faces as he assumes office. Fortunately, the new courthouse in Central Islip will open late this summer, and the Cesar Pelli building on Cadman Plaza should follow within three years. It will be none too soon; the district has long had the highest caseload in the circuit by all per-judge measures, and one of the highest anywhere, yet it also has remained reasonably current in the face of this. Most notably, the extremely high number of drug trials results in more use of the courtrooms than in almost any other federal jurisdiction, so the Eastern District of New York is almost the last place enforced courtroom sharing should be expected to work.

But work it does. My interview with Judge Korman was interrupted twice for a single event, a plea-taking that could



Chief Judge Edward R. Korman, with Brooklyn Law School Dean Joan G. Wexler. Photo courtesy Faye Ellman.

not occur at the scheduled time because the courtrooms were both in use. Similar minor glitches are completely routine, yet a burden successfully assumed by judges, staff, the bar, and the affected agencies. A recent assessment of the judiciary's space and facilities program on behalf of Congress and the Administrative Office in Washington concluded that

"courtroom sharing is placing an additional burden on [the Court]. While these challenges are largely overcome through the cooperation of the judges and the dedicated efforts of case managers, effective judicial administration is nonetheless hampered."

lore Recognition

Chief Judge Korman takes enormous pride in the special qualities of the Eastern District, noting that it is not always recognized properly. With the Eastern District having nearly half the population of New York State and a case load to match, Chief Judge Korman would like to see larger recognition of the district in activities of the Federal Bar Council and other organizations. "Our wonderful juries" reflect the extraordinary diversity of a district that includes almost every segment of American demographics.

The relatively young (and exceptionally young-looking) new chief judge is in some ways a representative of an earlier time, however. There can be few high-powered professionals today in any field with local roots so deep. And how many high achievers do we know of today who are defined by a talent for ;tening? Judge Korman does his drafting on yellow pads; the only discernible concession to changing times that I noticed was that they are of the reduced, non-legal size the judiciary implemented some years ago. Rather ruefully, he responded to Judge Trager's surprised discovery of a computer in the private office by saying that he's working on learning how to turn it on. And as befits the complete city boy — even in Washington, he lived within walking distance of Main Justice — he doesn't drive.

The bar is not likely to see dramatic changes resulting from the new administration. Chief Judge Korman intends to broaden the participation of judges in governance of the Court, relying on an executive committee of the judges who are in line for his office to assist in budgeting and similar matters. He intends to extend his own knowledge of the district by placing his name in the Long Island case assignment wheel, so he will have trials there and be personally familiar with conditions and problems. It will be a particular focus for him to build upon and extend the tradition of collegiality that all so value.

New Appointments

District Judge George B. Daniels Takes Office

By Stephen L. Ratner and David M. Powers

George B. Daniels was sworn in as a United States District Court Judge for the Southern District of New York on April 17, 2000. Prior to his federal judicial appointment, Judge Daniels was a New York State Supreme Court Justice, serving in that role since 1995.

For Judge Daniels, becoming a district court judge has entailed more than just moving to a new courtroom a few blocks down the street from his previous chambers. "From my perspective, [as a district court judge], I have to organize differently than I did in state court simply because of the diversity of cases," Judge Daniels said. In addition, many of these new cases have a broader impact than those he tried in state court, "particularly with regard to the federal constitutional issues that arise; issues which are rarely dealt with as a state court judge," he added.

Counsel To The Mayor

Before being elected to the New York State Supreme Court, Judge Daniels was a Judge of the Criminal Court of the City of New York from 1989-1990, by appointment of Mayor Edward I. Koch, and again from 1993-1995, by appointment of Mayor David N. Dinkins. From 1990-1993, Judge Daniels left the bench to serve as Counsel to Mayor Dinkins, advising the mayor on legal, legislative, and political issues, and representing the mayor on various boards and committees.

Prior to assuming the bench in 1989, Judge Daniels had an impressive and diverse legal career. He was an Assistant United States Attorney for the Eastern District of New York from 1983-1989 and a litigation associate at Skadden Arps, Slate, Meagher & Flom from 1981 to 1983. From 1980-1981, Judge Daniels clerked for Chief Justice Rose E. Bird of the California Supreme Court. In addition, from 1978-1980, Judge Daniels was a trial attorney for the Legal Aid Society of New York in their Criminal Defense Division.

Judge Daniels' extensive experience as a trial lawyer inspired him to seek a judicial appointment. "I had primarily been a litigator and trial lawyer, and most enjoyed being in court. I thought that those experiences best prepared me to be a judge . . . and I thought I would feel most comfortable playing that role," he said.

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One of his most notable experiences as a Supreme Court Judge occurred when Judge Daniels was asked to open his courtroom up to a national television audience during a criminal trial. The case, *People v. Senko*, was nationally televised on Court-TV, and Judge Daniels found the experience to be a positive one. "In some ways I think it enhanced the process. I found that the witnesses were much more careful about how they testified and about the accuracy of their testimony because they were on camera," Judge Daniels said. In addition, although people might expect lawyers on television to "show off" for the camera, Judge Daniels found that they were very well behaved in this case. "I found that lawyers don't like to be embarrassed on national television," he said.

Judge Daniels earned his J.D. in 1978 from the University of California, Berkley, Boalt Hall School of Law. While at Boalt Hall, Judge Daniels was President of the Black Law Students Association and helped draft an amicus brief filed by that organization in the seminal civil rights case of *Regents of the University of California v. Bakke*. Judge Daniels earned a B.A. in American Studies from Yale University in 1975.

Born in Allendale, South Carolina on May 13, 1953, Judge Daniels was raised in Brooklyn, where his family moved when he was 6 years old.

To some, becoming a federal judge might seem like a world away from being a newly graduated lawyer working for Legal Aid. "In fact," Judge Daniels remarked, "my new office is right down the street from the very first office I had when I got out of law school." For Judge Daniels, then, this latest accomplishment brings him back to very familiar territory.



U.S. District Court Judge George B. Daniels

Legal History

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Seventeenth century Florence was a little bit like the United States of today. Having enjoyed hundreds of years of unparalleled prosperity, Florence was the artistic and intellectual capital of the world—home at various times to artists such as Michelangelo, da Vinci, Raphael, and Botticelli; writers such as Boccaccio and Dante; and scientists such as Galileo.

Galileo Galilei was born in Pisa on February 15, 1564. His father, Vincenzio, was a musician and is considered to be one of the founders of modern opera. Galileo grew up in Florence but returned to Pisa for college, where he studied medicine and mathematics. Although he was considered a brilliant student, Galile never graduated because he failed to complete the course requirements for a degree.

Galileo nevertheless obtained various teaching positions, first at the University of Pisa and then at the University of Padua in the Republic of Venice. Known for rebelliousness (he refused to wear academic robes), Galileo fathered three illegitimate children, whom he raised. Between terms at the University of Padua, Galileo returned to Florence and tutored the young Medici prince, Cosimo, son of the Grand Duke Ferdinando I and his French wife, Grand Duchess Cristina, a devoutly religious woman.

Always looking for ways to supplement his income, Galileo employed his knowledge of astronomy to prepare horoscopes for doctors to use in diagnosis and treatment. In the course of his astrological endeavors, he learned that the Dutch had invented an instrumen called the spyglass, which made far away objects appear close. Galileo refined the design of this instrument, constructing powerful telescopes that enabled him to

discover four of the moons of Jupiter. He wrote a book about his discovery, entitled "The Starry Messenger," which he dedicated to his former pupil, Cosimo deMedici, who had become the Grand Duke of Florence after his father's death in 1609. This landed Galileo a lucrative appointment as Philosopher and Mathematician to the Grand Duke.

After-Dinner Debates

One of Galileo's responsibilities in that role was to provide after dinner entertainment, debating other guests on matters of philosophy and science. One such guest was Cardinal Maffeo Barberini, who later became Pope Urban VIII. Galileo and Cardinal Barberini ɔok the same side in a debate over why ice floats in water and, to use modern terminology, "bonded" as a result.

Life was not without complication, however. A number of other philosophers and scientists were competing with Galileo for the Medici largesse, and one of them persuaded the Grand Duke's mother, Cristina, that some of Galileo's beliefs — particularly his acceptance of the Copernican theory that the Earth revolved around the Sun — were contrary to the Holy Scriptures (see, e.g., the 103rd Psalm: "O Lord my God, Thou art great indeed . . . . Thou fixed the Earth upon its foundation, not to be moved forever.") Concerned that he might lose his benefactor, Galileo wrote Cristina a 50-page, carefully footnoted letter arguing that the Copernican theory was consistent with the Bible. He then journeyed to Rome to seek an official ruling on the subject.

The Pope put his theological advisor, Cardinal Roberto Bellarmino, in charge of the matter. Cardinal Bellarmino could fairly be characterized as a leader of the 16th century version of the religious right, and had served as the prosecutor in the trial of Giordano Bruno, who was burned at the stake in 1600 for, among other things, advocating the Copernican theory. Cardinal Bellarmino met with Galileo on February 26, 1616, and, not surprisingly, ordered him to abandon the Copernican theory that the Earth moves around the Sun. Galileo was also directed not to "in any way hold, teach, or defend it by word or in writing." This directive had the effect of an injunction, which Galileo was obligated to obey unless and until it was formally vacated.

While the session with Cardinal Bellarmino was private, on March 5, 1616, the Congregation of the Index — which published the list of prohibited books — issued an edict stating that the Copernican theory was "false and contrary to Holy Scripture," and it suspended Copernicus' book, "De revolutionibus," until the offending passages were corrected. Galileo's rivals used this development to undermine his standing in academia and the court of the Medicis, spreading a rumor that he had been tried and convicted of heresy. This prompted Galileo to return to Cardinal Bellarmino in an effort to obtain an exculpatory letter, which the Cardinal provided on May 26, 1616. That letter stated:

"We, Roberto Cardinal Bellarmino, having heard that it is calumniously reported that Signor Galileo Galilei has in our hand abjured and has also been punished with salutary penance, and being requested to state the truth as to this, declare that the said Signor Galilei has not abjured, either in our hand, or the hand of any other person here in Rome, or anywhere else, so far as we know, any opinion or doctrine held by him; neither has any salutary penance been imposed on him; but that only the declaration made by the Holy Fathers and published by the Sacred Congregation of the Index has been notified to him, wherein it is set forth that the doctrine attributed to Copernicus, that the Earth moves around the Sun and that Sun is stationary in the center of the world and does not move from east to west, is contrary to the Holy Scriptures and therefore cannot be defended or held."

The distinction between "in any way hold, teach, or defend," which Galileo had been prohibited from doing in the February 26 injunction, and "defended or held," as stated in the letter of May 26, became an issue in Galileo's later trial.

Galileo's Book

In 1623, Cardinal Barberini, Galileo's debating partner at the Medici palace years before, became Pope Urban VIII. Galileo was anxious to write a book detailing the scientific support for the Copernican theory, so he traveled to Rome to try out his ideas on the new Pope. The details of their conversations are not known, but Galileo later claimed (at least prior to his trial) that the Pope had given him permission to write his book so long as the Copernican theory was discussed hypothetically.

Galileo published his book, "Dialogue on the Two Chief World Systems," in 1632. There are three characters in the book: Salviati, who argued the Copernican point of view; Simplicio, who argued the Ptolemaic point of view that the Sun revolved around the Earth; and Sagredo, who spurred the debaters on with questions and comments, frequently taking Salviati's side. Although the book was careful to point out that neither point of view could be proven conclusively, the debate was clearly won by Salviati, who

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backed up his arguments with logic and empirical evidence, while Simplicio was portrayed as a fool.

The book speaks volumes about Galileo's intent. Knowing that he was prohibited from holding or defending the Copernican theory, Galileo sought refuge in the artifice of a debate. He could not restrain himself, however, from seeing to it that the Copernican theory came out on top, and he wrote the book in Italian — as opposed to Latin, which was favored by academics — making it clear that his goal was nothing less than to persuade the general populace of the correctness of his views.

Galileo sought a measure of protection by submitting the book to various censors. The historical record is unclear as to whether they actually read the book in detail, although they ultimately approved it provided Galileo made certain changes. In any event, the censors did not know about Cardinal Bellarmino's injunction of February 26, 1616, and Galileo did not tell them about it. Nor did Galileo implement all of the changes suggested by the censors.

When the book was published, it was an immediate popular success. Galileo's rivals, however, complained to the Pope that Galileo was attempting to get away with heresy. At the time, the Pope was the subject of strong criticism for the way he was handling the Thirty Years War, which had evolved from a battle between Catholics and Protestants in Germany into a struggle for control of the Holy Roman Empire (remember, it was neither holy, nor Roman, nor an empire). Pope Urban VIII was being criticized abroad for lending too little support to the war effort, while at home he was being criticized for running up the papal debt. To make matters worse, much of Italy was suffering from an onslaught of the bubonic plague, which was naturally attributed to a decline in religiosity.

Defender Of The Faith

To remain in office, the Pope had to demonstrate that he was a strong defender of the faith. Accordingly, in September 1632 he directed the Office of the Inquisition to summon Galileo to Rome. In some respects, the Office of the Inquisition was similar to the Office of the Independent Prosecutor. Ostensibly operating free of political influence, the Inquisition was supposed to investigate certain crimes and bring the results to the attention of secular officials for appropriate action.

Contrary to popular myth, Galileo was not required to testify before a raucous crowd of accusers and onlookers.

Galileo initially attempted to avoid the trial by claiming ill health, but the Pope ordered him to appear anyway. Letters from doctors were also to no avail, and Galileo was given the choice of coming to Rome of his own free will or being dragged there in chains. Galileo finally journeyed to Rome in 1633, and the trial began on April 12, with Galileo as the only live witness.

Contrary to popular myth, Galileo was not required to testify before a raucous crowd of accusers and onlookers in a circus-like atmosphere. Galileo's testimony was actually taken by deposition before three people. While he did not have counsel, and there was no distinction between direct and cross-examination, the questions, by and large, were not hostile or leading, and Galileo was permitted to frame his answers in his own words.

After a few introductory questions, Galileo was asked whether he acknowledged writing the book, which he did. He then was asked whether he had been in Rome in 1616 and, if so, for what purpose, to which he responded:

"I was in Rome in 1616, and afterward I was here in the second year of the pontificate of His Holiness Urban VIII, and lastly I was here three years ago, on the occasion of my wish to have my book printed. The occasion for my being in Rome in the year 1616 was that, hearing questions raised about the opinion of Nicolaus Copernicus concerning the motion of the Earth and stability of the Sun and the order of the celestial spheres, in order to assure myself against holding any but holy and Catholic opinions, I came to hear what was proper to hold concerning this matter."

In this answer, which went beyond the question, Galileo began to lay the groundwork for his defense — i.e., notwithstanding anything Cardinal Bellarmino had told him, the Pope and the censors had approved the book.

Cardinal Bellarmino was deceased by this time, and Galileo did not know whether there were any records of their meeting on February 26, 1616, so when he was asked about the discussion that took place at the meeting, he dissembled:

"The occasion for discussing with these cardinals was that they wished to be informed of the doctrine of Copernicus, his book being very difficult to understand for those outside the mathematical and astronomical profession. In particular they wanted to know the arrangement of the celestial orbs under the Copernican hypothesis, how he places the Sun at the center of the planets' orbits, how around the Sun he places next the orbit of Mercury, around the

latter that of Venus, then the Moon around the Earth, and around this Mars, Jupiter, and Saturn; and in regard to motion, he makes the Sun stationary at the center and the Earth turn on itself and around the Sun, that is, on itself with the diurnal motion and around the Sun with the annual motion."

The prosecutor then asked Galileo to describe the outcome of the meeting, and Galileo testified: "Lord Cardinal Bellarmino informed me that the said opinion of Copernicus could be held hypothetically, as Copernicus himself had held it." To support his position, Galileo produced a letter that Cardinal Bellarmino had written to Father Antonio Foscarini on April 12, 1615, in which he expressed ıe view that Foscarini and Galileo were "proceeding prudently by limiting yourselves to speaking suppositionally and not absolutely, as I have always believed that Copernicus spoke." When the prosecutor reminded Galileo that the meeting with Cardinal Bellarmino took place in February 1616, not April 1615, Galileo acknowledged that he was told he could not hold or defend the Copernican theory, but he continued to insist that he was permitted to express it hypothetically.

The prosecutor then confronted Galileo with the record of what he was actually told, which appeared in the minutes of the Holy Office for the year 1616:

"In the Palace and residence of Cardinal Bellarmino, Galileo being called and being in the presence of the Cardinal and of the Reverend Father Michelangelo Seghizzi of Lodi, f the Order of Preachers, Commissary General of the Holy Office, the Cardinal admonished the said Galileo of the error of the above-mentioned opinion and warned him to abandon it; and immediately and without delay, the said Cardinal being still present, the said Commissary gave Galileo a precept and ordered him in the name of His Holiness the Pope and the whole body of the Holy Office to the effect that the said opinion that the Sun is the center of the universe and the Earth moves must be entirely abandoned, nor might he from then on in any way hold, teach, or defend it by word or in writing; otherwise the Holy Office would proceed against him."

Galileo was clearly surprised, and he testified that he did not recall the words "nor teach" or "in any way," noting that the letter he had received from Cardinal Bellarmino in May 1616 did not contain those words.

The prosecution then addressed one of Galileo's defenses — that Pope Urban VIII had given him permission to write the book — and asked whether after Cardinal Bellarmino's injunction was issued, Galileo had obtained "any permission" to write the book. Apparently sensing that he was playing at a disadvantage, and any attempt to overstate what the Pope had told him could make matters worse, Galileo backed off and testified: "I did not seek permission to write the book, because I did not consider that in writing it I was acting contrary to, far less disobeying, the command not to hold, defend, or teach that opinion, but rather that I was refuting the opinion."

The prosecution then went to work on Galileo's other defense, asking him to recount the process by which the book was presented to the censors. The following exchange took place (note that the questions below are in the third person but answers are in the first person):

"Q: Whether, when he sought permission from the Master of the Sacred Palace [the censor] to print the said book, he revealed to the same Most Reverend Father Master the injunction previously given to him concerning the above-mentioned directive of the Holy Congregation.

"A: I did not happen to discuss that command with the Master of the Sacred Palace when I asked for the imprimatur, for I did not think it necessary to say anything, because I had no doubts about it; for I have neither maintained nor defended in that book the opinion that the Earth moves and that the Sun is stationary but have rather demonstrated the opposite of the Copernican opinion and shown that the arguments of Copernicus are weak and inconclusive."

This, of course, was nonsense; the book clearly supported the Copernican theory, as three experts retained by the Inquisition to review the book confirmed.

Galileo's "Confession"

On the second day of his testimony, Galileo decided to make a form of "confession." He testified that, during the two weeks that elapsed between the first and second days of his testimony, he had reread his book, which he had not looked at for three years, and he testified: "[O]wing to my not having seen it for so long, it presented itself to me like a new writing. I freely confess that in several places it seemed to me set forth in such a form that a reader ignorant of my real purpose might have had reason to suppose that the arguments brought on the false side, and which it was my intention to confute, were so expressed as to be calculated rather to compel conviction by their cogency than to be easy of solution." He added: "My error, then,

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has been — and I confess it — one of vainglorious ambition and of pure ignorance and inadvertence."

After being dismissed, Galileo left the room briefly and then returned to offer the following compromise: "[T]o resume the arguments already brought in favor of the said opinion, which is false and has been condemned, and to refute them in such an effectual way as by the blessing of God may be supplied to me." In other words, Galileo was willing to add a chapter to the book in which he would "refute" the Copernican theory more effectively than he had in the past (which is to say, not at all).

Galileo then returned for a third day of testimony to present his defense. Not surprisingly, he focused on the issue of why he did not tell the censors about the order he had received from Cardinal Bellarmino. His explanation was inadvertence: he assumed that the censors knew about the edict of the Congregation of the Index of March 5, 1616, declaring the Copernican theory "false and contrary to Holy Scripture," and to the extent that the injunction went beyond the edict — by prohibiting him from "teaching" the theory, which presumably would include speaking about it hypothetically — he had forgotten it.

On the fourth and final day of Galileo's testimony, the prosecutors focused on intent:

"Q: Whether he holds or has held, and for how long, that the Sun is the center of the world and the Earth is not the center of the world but moves also with diurnal motion.

"A: A long time ago, that is, before the decision of the Holy Congregation of the Index, and before I was issued that injunction, I was undecided and regarded the two opinions, those of Ptolemy and Copernicus, as disputable, because either the one or the other could be true in Nature. But after the said decision, assured by the prudence of the authorities, all my uncertainty stopped, and I held, as I still hold, as most true and indisputable, Ptolemy's opinion, namely the stability of the Earth and the motion of the Sun."

The prosecutor essentially told Galileo that he did not believe him and urged him "to freely tell the truth," but Galileo continued to maintain that he did not hold and had not held "the condemned opinion." Not satisfied with this answer, the prosecutor again warned Galileo to tell the truth or the Inquisition "would have recourse to the remedies of the law and to appropriate steps against him." Galileo responded:

"I do not hold this opinion of Copernicus, and I have not held it after being ordered by injunction to abandon it. For the rest, I am here in your hands; do with me what you please."

The prosecutor then threatened Galileo with torture, but he stuck to his guns, apparently believing, like others after him, that it is always better to deny intentional wrongdoing than to confess.

On June 22, 1633, the Inquisition issued its decision, with three of the 10 cardinals abstaining. Among other things, it found that the dialogue was a subterfuge because the arguments made in favor of the Copernican theory "were effective enough to be capable of convincing, rather than being easy to refute." At the very least, therefore, Galileo had defended the Copernican theory. The Inquisition also rejected his defense that the censors had approved the book, finding that "you artfully and cunningly extorted [the censor's license] since you did not mention the injunction you were under." Nevertheless, the Inquisition offered to grant Galileo leniency if he agreed to abjure (disavow) his errors.

A kind of plea agreement was worked out in which Galileo had to deliver a public allocution. Galileo refused to agree to two of the clauses that the Inquisition proposed: one which suggested he had behaved in a manner contrary to the Catholic faith and a second that admitted that he had acted deceitfully in obtaining the censor's approval for publishing the Dialogue. The Inquisition agreed to delete these clauses, and the actual abjuration was somewhat equivocal:

"I, Galileo, son of the late Vincenzio Galilei, Florentine, aged 70 years, arraigned personally before this tribunal, and kneeling before You, Most Eminent and Reverend Lord Cardinals, Inquisitors-General against heretical depravity throughout the Christian commonwealth, having before my eyes and touching with my hands the Holy Gospels, swear that I have always believed, I believe now, and with God's help I will in future believe all that is held, preached, and taught by the Holy Catholic and Apostolic Church. But whereas — after having been admonished by this Holy Office entirely to abandon the false opinion that the Sun is the center of the world and immovable, and that the Earth is not the center of the same and that it moves, and that I must not hold, defend, nor teach in any manner whatever, either orally or in writing, the said false doctrine, and after it had been notified to me that the said doctrine was contrary to Holy Writ — I wrote and caused to be printed a book in which I treat of the already condemned doctrine, and adduce arguments of much efficacy in its favor, without arriving at any solution: I have been judged vehemently

suspected of heresy, that is, of having held and believed that the Sun is the center of the world and immovable, and that the Earth is not the center and moves.

"Therefore, wishing to remove from the minds of your Eminences and of all faithful Christians this vehement suspicion justly conceived against me, I abjure with a sincere heart and unfeigned faith, I curse and detest the said errors and heresies, and generally all and every error and sect contrary to the Holy Catholic Church. And I swear that for the future I will never again say nor assert in speaking or writing such things as may bring upon me similar suspicion; and if I know any heretic, or person suspected of resy, I will denounce him to this Holy Office, or to the Inquisitor or Ordinary of the place where I may be. I also swear and promise to adopt and observe entirely all the penances which have been or may be imposed on me by this Holy Office. And if I contravene any of these said promises, protests, or oaths (which God forbid!), I submit myself to all the pains and penalties imposed and promulgated by the Sacred Canons and other Decrees, general and particular, against such offenders. So help me God and these His Holy Gospels, which I touch with my own hands."

The crime of being "vehemently suspected of heresy" was like second degree heresy, intended for those who said heretical things without necessarily believing them.

For his punishment, Galileo was sentenced to spend time in the Tuscan abassy in Rome and then in the custody of the Archbishop of Siena, where he was treated as an honored guest. After five months, he returned to Arcetri, a village outside of Florence, where he lived in relative comfort until he died in 1642 at the age of 77.

Galileo Today

In 1979, Pope John Paul II called for a reexamination of Galileo's case, and in 1982 he established a commission to determine what should be done. Initially, the Church considered an annulment, but that would leave open the possibility of a retrial. When Galileo was convicted, Pope Urban VIII did not invoke papal infallibility, making it possible to reverse his conviction. In 1992, therefore, after years of study, the conviction was reversed on the ground that religion and science should be viewed as two separate fields which do not necessarily have to be consistent with each other.

Much has been written about the trial of Galileo, and it is generally depicted as a low point in the development of Western civilization. As it is, however, Galileo actually got off easy. Leaving aside the correctness of the law, there can be no doubt that he violated it and then he lied about what he had done (not to mention his willingness to denounce his own beliefs). He was not adjudged to have held the Copernican theory, which would be heresy in the first degree, and he was not prosecuted for perjury.

One question is whether the result would be any different if the trial were held today. One major difference would be the right to counsel. Counsel undoubtedly would have assisted Galileo in keeping his story straight, or perhaps would have advised him not to testify at all, but the most compelling proof against him was documentary, and in the end, it is not at all clear that his testimony made any difference.

Moreover, if the trial took place today, the prosecution would have far more potent weapons at its disposal (with the possible exception of torture). It would be able to take advantage of the grand jury procedure and to offer immunity to witnesses. Galileo had told many of his colleagues that he believed the Copernican theory was correct, and a prosecutor would undoubtedly be able to persuade those people to testify against Galileo—making a conviction for heresy in the first degree likely.

Furthermore, our system emphasizes that the law must be obeyed even if it is wrong. Jury nullification is viewed with disfavor, and we are often told that the proper course is to appeal from an erroneous order, not to disobey it. From a procedural standpoint, therefore, it is doubtful that the result would be any different today.

From a substantive standpoint, it is difficult to imagine a case such as this today. Our system not only provides broad protection for speech, but almost unlimited protection for thought. Yet we do punish certain types of speech on the theory that we can distinguish between good speech and bad speech. The Church in Galileo's day thought it could make the same distinction. Are we infallible, or will future generations look back and wonder how we could have thought what we think today? To paraphrase Brecht: The mechanism of the heavens is now clear; the mechanism of the courts is still murky.

Author's note: Reference materials used for this article include "Galileo's Daughter" by Dava Sobel (1999); "The Galileo Affair: A Documentary History," edited by Maurice Finocchiaro (1989); "The Cambridge Companion To Galileo," edited by Peter Machamer (1998); "Galileo" by Bertolt Brecht (1966); www.cco.caltech.edu; The New York Times; and my son's course materials for his 7th grade Galileo project.

The Back Page



Pictured above are members of the Federal Bar Council who attended the United States Supreme Court admission program last month. Photo courtesy Dana Fraser.

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