# Federal Bar Council News

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## From the President

### Council To Participate As Amicus in En Banc Review of *Apprendi*

**By P. Kevin Castel**

The Second Circuit has granted rehearing en banc in a criminal case of circuit-wide significance. The court's order invites the Federal Bar Council and two other bar groups to participate as amici curiae. The circuit's sparing use of en banc procedures dates back to the Hand Court and, thus, its action is noteworthy.

Last term, the Supreme Court held, five to four, in *Apprendi v. New Jersey* that "[o]ther than the fact of a prior

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## Developments

### Council Honors Supreme Court Justice Kennedy At Law Day Dinner With Learned Hand Award

**By Steven M. Edwards**

The Federal Bar Council presented its Learned Hand Award to Supreme Court Justice Anthony M. Kennedy at its annual Law Day Dinner on May 1, 2001. Dinner Chair Loretta Lynch, the United States Attorney for the Eastern District, led off the program with a brief history of the Federal Bar Council. District Judge Laura Taylor Swain, the most recently appointed judge in the circuit, read the President's Law Day proclamation.

In her remarks, Lynch noted that the Federal Bar Council was founded in 1932, when it broke away from the Federal Bar Association, a national organization that had refused to admit Francis P. Giles, an African American Assistant United States Attorney in the Eastern District of New York, as a member. "The Federal Bar Council of New York, New Jersey and Connecticut removed itself from the national organization and chartered itself under the laws of New York State, with membership open without regard to race," Lynch stated. When Governor Franklin Delano Roosevelt signed the charter, said Lynch, he remarked that even though there were too many bar associations already, "there

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## FBC News

### Council Forms "First Decade Committee"

**By Michael Cohn**

In furtherance of its mission to promote overall excellence in federal practice and positive relations between the federal bench and bar, the Federal Bar Council recently formed the First Decade Committee. The First Decade Committee is dedicated to organizing social and educational programs of interest to attorneys in their first decade of practice. Recently, invitations to join the committee were sent to all such Federal Bar Council members

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## FBC News

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and the positive responses were overwhelming.

As its first endeavor, the First Decade Committee is planning an event for this Fall in which attorneys admitted to the bar for less than ten years will have the opportunity to meet and speak with members of the federal bench. The event will also include panel presentations by federal judges on topics such as effective oral argument techniques, pitfalls in written submissions, and dealing effectively with chambers, just to name a few.

Audrey Strauss serves as the liaison between the committee and the Federal Bar Council Board of Directors. The Fall event is being organized by Gregg Weiner, Michael Cohn and Jayson Glassman.

If you need additional information about the committee or the upcoming meet-the-judges event, please check the Federal Bar Council Web site, www.federalbarcouncil.org, or contact Michael Cohn at 212.859.8383 or at cohnmi@ffhsj.com. Alternatively, Gregg Weiner can be reached at 212.859.8579 or at weinegr@ffhsj.com and Jayson Glassman can be reached at 212.859.8899 or at glassja@ffhsj.com.

With the amount of interest Federal Bar Council members have already expressed in the committee and the event it is planning, there is little doubt that the Fall "meet-the-judges" event will be a great success.

### From Circuit Clerk Roseann B. MacKechnie

## Second Circuit Practice Tips

Applying for admission to practice before the Second Circuit is relatively straightforward. The rules that govern admission are Federal Rule of Appellate Procedure ( FRAP) 46 , as well as our Local Rule 46 (Attorneys). You may call the Second Circuit (Kevin Brofsky is our Admissions Clerk; his number is 212-857-8603) or stop by the Clerk's Office at 40 Foley Square, Room 1802, and we will provide you with an admission packet.

Admission requires:

1. that you are an attorney of good moral and professional character and are a member in good standing of the bar of the United States Supreme Court, the highest court of a state, another United States Court of Appeals or a United States District Court.

2. that you have argued three substantive appeals in either state or federal appellate courts. (The argument of an appeal in a moot court program conducted by a law school recognized by the American Bar Association counts as one appellate argument. In addition, two substantive motions argued in state or federal courts or before an administrative tribunal count as one appeal.)

3. that you observe two appeals in the Second Circuit.

4. that you have read and are familiar with FRAP and the Second Circuit's local rules.

5. that you ask someone who is already admitted to the Second Circuit and who can attest to your character, reputation and honesty, to complete the sponsor's affidavit. (We will provide that form to you.)

6. that you submit a check, in the amount of $40.00, payable to "Clerk, U.S. Court of Appeals, 2nd Circuit," along with your application. (Federal government attorneys, whether they are Department of Justice or assistant United States attorneys, or employed by any other federal government agency, are not subject to an admissions fee.)

The application process generally takes a few weeks. If you have any questions, please do not hesitate to call.

### FBC News

## Inn Of Court Seeks Applicants

Following the successful completion of its inaugural year, the Federal Bar Council Inn of Court is inviting applicants to fill several vacancies in next year's Inn. The objective of the Inn is to foster collegiality among the eight federal judges and practicing lawyers who are its members. The Inn holds monthly meetings during the Autumn, Winter and Spring for the purpose of conducting organized educational programs focusing on legal skills, ethics and professionalism. A major objective of the Inn is to provide for its younger members the same sort of opportunity to find senior mentors as is often found among the British Inns of Court, which are its model.

Those who are interested in joining the Inn are invited to submit a brief statement of interest, together with a curriculum vitae, to Membership Chair Henry Putzel, III, at 565 Fifth Avenue, New York, NY 10017.

FBC News

# A Lawyer's Conduct

**By Marc L. Abrams**

Earlier this Spring, attendees of a Federal Bar Council seminar witnessed an unusual sight: Judge Barbara S. Jones under investigation for obstruction of justice. Judge Jones assumed this unlikely acting role to illustrate some difficult issues that lawyers face, in the seminar entitled "A Strong Defense or a Criminal Offense: Exploring the Limits of a Lawyer's Representation of a Client and a Prosecutor's Investigation of the Lawyer's Conduct." Other panelists included Andrew C. McCarthy, the Assistant United States Attorney in charge of the Southern District's White Plains office; Daniel C. Richman, a professor of law at Fordham Law School; David B. Fein, a white collar defense lawyer for Wiggin & Dana; and Robert G. Morvillo, a partner at Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C.

To start the seminar, Judge Jones presented a hypothetical set of facts to the panelists and audience: A U.S. Attorney suspects that a corporation and its officers have made improper payments to city politicians, who, in return, have awarded the corporation lucrative city contracts. The U.S. Attorney begins an investigation of the corporation and its directors, issuing a subpoena for all documents relating to the company. Unknown to the U.S. Attorney's Office, but known to counsel for the defendant, one of the officers of the corporation had concocted various invoices to give the appearance that the corporation had actually performed "consulting services" for the city.

Judge Jones cast the other panelists in more likely roles: Fein and Morvillo acted as counsel for the defendant; McCarthy played the role as the U.S. Attorney assigned to the investigation; and Professor Richman took on the all-purpose role of law professor and truth teller. A spirited exchange followed.

First, Fein and Morvillo as defendant's counsel discussed (1) whether to turn over the concocted documents, and (2) if they were to be turned over, whether they should be accompanied with an explanation from defendant's counsel explaining that some documents had been improperly manufactured. In short, defendant's counsel faced a Hobson's choice. By turning over the documents without an explanation, the lawyers might face an investigation for obstruction of justice. On the other hand, by turning over the documents with an explanation, counsel might waive the attorney client privilege, giving rise to an attorney malpractice action.

Unable to decide on a course of action, defendant's counsel agreed that they needed a legal opinion from another attorney. Professor Richman concurred: "Every attorney should have an attorney who should have an attorney, who should have an attorney." To the surprise of some in the audience, McCarthy, the U.S. Attorney, explained that in such a situation he would probably prefer that the defendant not produce the documents at all, rather than produce documents that might foster an obstruction of justice.

Attempting to bridge the impasse, Morvillo proposed that counsel for the defendant should request an ex parte, in camera hearing; the court could then advise defendant's counsel in private as to how the documents should be produced. Temporarily stepping out of her role as the criminal defendant, Judge Jones disagreed, stressing that she "would not touch" such an issue "with a ten-foot pole."

By the end of the seminar — which also raised issues such as prosecutorial misconduct, the application of ABA regulations and the vitality of the executive and judicial branches of government — many in the audience had gained a greater understanding of the ethical and intellectual challenges that these issues raise. And by watching some of the area's leading legal minds struggle with these issues, the onlookers came to appreciate that oftentimes, there are no simple answers.

FBC News

# Judge Sotomayor Appears at Second Circuit Courts Committee

Judge Sonia Sotomayor recently was a guest at the 2d Circuit Committee meeting chaired by Peter Eikenberry. She was introduced by Ernest J. Collazo, who has known Judge Sotomayor for nearly 20 years. Collazo noted that he first met Judge Sotomayor when she was a fellow member of the board of the Puerto Rican Legal Defense Educational Fund. At that time, she was serving as an assistant district attorney in New York

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County, having previously graduated from Princeton University in 1976, summa cum laude, and from Yale Law School in 1979, where she was a member of the law journal. Judge Sotomayor spent five years as an assistant district attorney in Manhattan and thereafter joined the firm of Pavia & Harcourt, where she was an associate from 1984 to 1987 and then a partner from 1987 to 1992. At Pavia & Harcourt, she practiced in the area of international commercial litigation. Judge Sotomayor is an adjunct professor at NYU Law School and a lecturer-in-law at Columbia Law School, as well as a member of various bar associations, including the ABA and the Puerto Rican Bar Association.

In 1992, Judge Sotomayor was confirmed as a United States District Judge for the Southern District of New York and, in 1998, she was confirmed to the Second Circuit Court of Appeals. Collazo noted that Judge Sotomayor has the distinction of having been nominated to the federal bench by two consecutive presidents: Republican George Bush and Democrat Bill Clinton. If the recent talk in Washington about bi-partisan cooperation means anything, then. . . .

**Unanimous Opinions**

Judge Sotomayor was asked initially why the Second Circuit seems to achieve more unanimous opinions than some other courts. She stated that there was a good collegial atmosphere on the circuit court and that the judges feel that achieving consensus is very important in instilling confidence in the circuit's development of law. She gave the example of the possibly lower credibility of other circuits where there are often dissents and less respect for panel precedents.

She said that in moving from the district court to the appeals court she found more time for collegiality and that an appellate judge has a less lonely position. For one thing, the fax exchanges among judges hardly ever stop and there is much more talking among judges on the appellate level. She said that with the volume of work in the trial court, there were occasionally decisions — that for whatever reason — it took her personally a lot of time to decide. She stated that if an attorney had written to her in that isolated case to question the delay, she would not have resented it in the least, but that it would not have led to a faster decision, because she really could not decide the case until she was ready.

Judge Sotomayor said that very many of the briefs that she reads are very good, but that there are still a significant number of them which are poor. She suggested that a well written brief — focusing on the critical facts and law — is essential to a well presented appeal. She stated that she very much has enjoyed being a judge on both the district and circuit courts.

Judge Sotomayor explained how the court of appeals staff weighs the different appeals to appear on a calendar for a particular day as to the difficulty of the issues. As a result of rating the cases by numbers from one through four, the staff attempts to have a relatively balanced calendar for each day. She stated that the judges rotated continuously so that the panels vary from sitting to sitting, to achieve almost a uniform amount of service with almost every judge in a given period.

## *Calendar of Events*

***Fall 2001***
***"Meet the Judges" program planned by First Decade Committee***

***November 20, 2001***
***Thanksgiving Luncheon***

***February 16-23, 2002***
***Winter Bench & Bar Conference at Westin Rio Mar in Puerto Rico***

***March 4, 2002***
***U.S. Supreme Court Admissions Ceremony***

***For further information about any of these events, please call the Federal Bar Council office at 212-883-1777.***

## FBC News

# New Judges Feted

**By Stacey Creem**

The Federal Bar Council hosted a reception at the Union League Club on April 4, 2001 in honor of recently appointed judges within the Second Circuit.

"This is a wonderful event," said Chief Judge Walker. "It speaks well for lawyers who practice before the federal courts that they take the time and make the effort to have an occasion to honor

the judges who carry out the task with high enthusiasm and limited pay."

Federal Bar Council President P. Kevin Castel welcomed attendees. In his opening remarks, Castel compared the New Judge's Reception to the Roman Catholic Church's Consistory, the ceremony elevating new cardinals, and the National Basketball Association's draft, the ceremony introducing new players. Castel stated that there are similarities between Article III judges, cardinals and NBA players. For example, Article III judges, like cardinals, are given life tenure. Article I judges, like NBA players, serve for a fixed term of years. Both Article I and Article III judges are required to take an oath which can be analogized to the "ecclesiastical vow of poverty."

Castel stated that the manner of selection of chief judge of the circuit and district courts has few precedents in other institutions of our society. Unlike the Chief Justice of the United States Supreme Court, the chief judge of the circuit or district court is not appointed. Rather, the position is given to the judge with the most seniority. Thus, the willingness to entrust such important institutions to those who have assumed the position through seniority is a statement of confidence in the quality of all federal judicial appointments.

Next, Castel introduced Charles Platt, a partner at LeBoeuf, Lamb, Greene & MacRae and editor-in-chief of the *Federal Bar Council News*, and Margie Peerce, a partner at Stillman Friedman and a frequent Federal Bar Council panelist, to present the new appointees.

**New Chief Judges**

Platt began by introducing the new chief judges. Platt noted that although the chief judges had diverse backgrounds and experiences, they all shared the experience of working in the United States Attorney's office at some point in their legal careers. First, Platt introduced Chief Judge John Walker, who was appointed chief judge on October 1, 2000, after sitting on the Second Circuit since 1989. Before his tenure on the Second Circuit, Chief Judge Walker served as a district court judge from 1985 to 1989. He also served as the Assistant Secretary to the Treasury and a partner at the law firm of Carter, Ledyard & Milburn.

Platt next welcomed Chief Judge Michael Mukasey of the Southern District of New York. Chief Judge Mukasey assumed his responsibilities as Chief of the Southern District on March 31, 2000, and has been sitting as a district judge since 1987. Chief Judge Mukasey came to the bench after many years as a partner at Patterson, Belknap, Webb & Tyler and an Assistant United States Attorney in the Southern District.

Platt then introduced Chief Judge Edward Korman of the Eastern District of New York. Chief Judge Korman became a chief judge on March 18, 2000, after having served as a district judge in the Eastern District of New York since 1985. Before becoming a judge, Chief Judge Korman was a United States Attorney in the Eastern District of New York, a partner at the law firm of Stroock, Stroock & Lavan and a professor at Brooklyn Law School.

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Finally, Platt introduced Chief Judge Frederick Scullin from the Northern District of New York, who was appointed chief judge on April 6, 2000, after serving on the district court since 1992. Before assuming the bench, Chief Judge Scullin held a long and distinguished career in public service, where he served as a United States Attorney and in other prosecutorial positions.

**New Judges**

Peerce presented the remaining appointees. First was Judge Carla E. Craig, who was appointed to the Eastern District of New York bankruptcy court on February 28, 2000. Prior to assuming the bench, Judge Craig was an associate at the law firm of Milbank, Tweed, Hadley & McCloy, an associate and then partner at the firm of Herzog & Calamari and a partner at Brown Raysman Millstein Felder & Steiner, specializing in business bankruptcy and commercial litigation. Next, Peerce introduced Judge George B. Daniels, who was appointed as district judge for the Southern District of New York on February 24, 2000. Other than a brief stint at Skadden, Arps, Slate, Meagher & Flom, Judge Daniels has always worked in the public sector. For example, he worked for the Legal Aid Society, as a clerk for Judge Rose Bird of the California Supreme Court, as an Eastern District of New York prosecutor, as a Criminal Court and Supreme Court Judge and as counsel to Mayor David Dinkins.

Peerce then introduced Judge Nicholas G. Garaufis, who took office as district judge for the Eastern District of New York on August 28, 2000. Immediately prior to his appointment, Judge Garaufis was Chief Counsel to the Federal Aviation Administration. Prior to that, he served as Chief Counsel to the Queens Borough President, as an associate at the firm of Chadbourne & Parke, as an Assistant Attorney General and in private practice in Queens.

Then came Judge Robert E. Gerber, who was appointed to the Southern District of New York Bankruptcy Court on September 5, 2000. Prior to his appointment, Judge Gerber was a partner at the law firm of Fried, Frank, Harris, Shriver & Jacobson, where he specialized in securities, commercial and bankruptcy litigation.

At that point, Peerce introduced Judge Allan L. Gropper, who was appointed as a Southern District of New York Bankruptcy Court judge on October 4, 2000. Prior to joining the bench, Judge Gropper was a partner at White & Case, where he specialized in bankruptcy and restructuring, and served as the head of the firm's bankruptcy and reorganization practice.

Judge Gerald E. Lynch was next. His appointment to the Southern District of New York bench was confirmed by the Senate on May 24, 2000. Judge Lynch, who was unable to make the reception, clerked for United States Supreme Court Justice William Brennan. Judge Lynch was a professor and vice-dean at Columbia Law School. He also served as an Assistant United States Attorney in the Southern District of New York, where he was Chief Appellate Attorney and, later, Chief of the Criminal Division. From 1992 to 2000, Judge Lynch was of counsel to the law firm now known as Covington & Burling.

Peerce next introduced Judge Cecilia G. Morris, who was sworn in as a Southern District of New York Bankruptcy Court judge on July 1, 2000. Prior to her appointment, Judge Morris was an Assistant District Attorney in the Child Support Recovery Unit of the District Attorney's Office in Griffin, Georgia. She also worked in private practice, and ultimately served as the Clerk of the Court of the Southern District of New York Bankruptcy Court, which was the first court to implement electronic filing via the Internet.

Then Judge Laura Taylor Swain was introduced. Judge Swain was sworn in as district judge for the Southern District of New York on August 31, 2000. Judge Swain was an associate and then counsel at Debevoise & Plimpton, concentrating on employee benefits, ERISA, employment law and related litigation. She also served on the New York State Board of Law Examiners and was the first woman and person of color to serve as a member of the board.

Finally, Ms. Peerce introduced Magistrate Judge William D. Wall, who was appointed as a magistrate judge in the Eastern District of New York on June 1, 2000. Prior to assuming the bench, Judge Wall was a former Special Assistant Attorney General for the Office of Special State Prosecutor, and a partner at Farrell Fritz, where his practice included the defense of corporations and individuals charged with criminal violations of the environmental and other regulatory laws.

**Unique Relationship**

After the introductions, Chief Judge Walker said a few words. He thanked the Federal Bar Council for hosting the reception. He noted the unique relationship between the Federal Bar Council, practitioners and the bench. He also praised the programs offered by the Federal Bar Council, including the new

educational programs, and the fellowship and quality among practitioners.

Chief Judge Walker congratulated the new judges. He said that the courts of the Second Circuit are in the best place they have been for many years because all of the vacancies have been filled. And he noted that the caliber of judges was high despite the vows of poverty they are required to take.

"This is a marvelous gathering of judges and practitioners," said Judge Swain, one of the honorees. "I am very honored to be here and to be a judge among such an esteemed group."

## FBC News

# Judicial Conference Upcoming

**By Bennette D. Kramer**

The Second Circuit Judicial Conference is scheduled to take place June 14 through 17 at The Sagamore, on Lake George, Bolton's Landing, New York. Because the conference will take place after this issue has been sent to the printer and long before the next issue is written, we provide a preview of this year's program, which focuses on international law.

The Honorable J. Garvin Murtha and Bettina Plevan are the chairs of this year's conference. Lawrence W. Newman of Baker & McKenzie is the program chair. He and Steve Edwards have worked together on the Friday program, which will explore international legal issues relating to the Internet. The Saturday program, organized by Newman and Judge Jon O. Newman, will examine international judicial systems and how they relate to domestic judicial systems. Other activities will include a hike and a chamber music concert, along with dinners on Friday and Saturday nights.

The Friday program is entitled "Cyberwars: International Legal Consequences Of Shenanigans On The Internet" and concerns transnational legal issues arising out of misconduct on the Internet in the United States and the judicial treatment of Internet misconduct in the United States, England, France and other countries. In a "Fred Friendly" format, panel members will assume roles based on an extensive hypothetical concerning a fictional corporation with an Internet site. Judge Gerald E. Lynch from the Southern District of New York will moderate the panel and play an assigned role. Other panelists include Roberta Katz, Scott Charney, Christopher Wolf, Max Gitter, V.V. Veeder and Emmanuel Gaillard. One of the purposes of the presentation will be to provide a basic understanding as to the scope and capabilities of the Internet as it relates to the issues raised. As issues are raised, the panel will discuss them in the context of the hypothetical.

The Friday program will first address issues concerning hackers into corporate Web sites; internal investigations in multinational corporations; and personnel relations and privacy requirements in multinational corporations. Then, the panel will turn to civil remedies in the international context, including causes of action, jurisdiction, choice of forum, procedures, discovery, provisional remedies, and enforcement of judgments. The panel will also consider issues relating to enforcement of and/or challenges to a judgment obtained in another country by means that would be considered illegal in the United States. Defamation arising from Internet postings will also be considered, along with the effect of an Internet privacy policy and international differences in regulatory approaches to the Internet. Finally, the panel will discuss prosecution and the variations in criminal statutes in various countries relating to Internet crime.

Judge Carole Bagley Amon of the Eastern District of New York will MC the Friday dinner, when new judges will be introduced.

On Saturday morning, Justice Ruth Bader Ginsburg will report on the Supreme Court and participate in a Q & A session, followed by a program in which Justice Ginsburg and Justice Sandra Day O'Connor will participate. The Saturday program will be divided into three parts. In addition to Justices Ginsburg and O'Connor the panel members will be Judge Jon O. Newman as moderator; Judge Melchior Walthelet, European Court of Justice; Peter Trooboff, Covington & Burling; Professor George Berman, Columbia Law School; and Professor Ruth Wedgewood, Yale Law School.

The first part will explore the relationship between national courts and international forums and the extent to which they should defer to one another. The panel will consider the possibility of international courts overruling the United States Supreme Court.

Second, the panel will discuss the types of international forums that are available, including the International Court of Justice, the European Court of Justice, the International Court of Human Rights, the International Criminal Court, the United States-Iran Central Claims Court, the NAFTA arbitration tribunal and others; the types of claims that may be brought to these forums; and how these forums fit into the litigation process.

Third, the panel will address how United States courts should use decisions

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of international tribunals; whether such decisions have precedential effect on United Sates law; the consideration international tribunals should give to domestic courts; how attorneys should use decisions of foreign and international tribunals in domestic courts; and the accessibility of foreign and international tribunals decisions.

## A Day In The Life

# High Court Justice Visits Columbia Law

**By Susan Berger Sabreen**

Supreme Court Justice Stephen Breyer revealed some of the Court's inner workings to a Columbia Law School audience recently, giving a detailed overview of the daily life of a Justice and the interaction between the members of the Court.

Speaking before a large lecture hall filled with students, faculty and invited guests, Justice Breyer described the process used by the Justices to trim the thousands of certiorari petitions down to the 80 or 90 that are actually heard by the Court during each session. Justice Breyer stressed the importance of the sheer number of cases before the Court, explaining how the volume factor influences the Justices to focus on cases highlighting issues of federal law on which lower courts disagree, rather than on the resolution of perceived errors in individual cases.

His wide-ranging discussion addressed topics from the division of responsibility between Justices and their clerks to the decision-making and decision-writing procedures used in the cases that the Justices do ultimately decide.

Justice Breyer even took his audience on a verbal tour of the weekly conferences the Justices hold behind closed doors. He described the basic format for deliberation on each issue: discussion begins with a succinct statement of position by the Chief Justice, followed by input from each Justice in order of seniority, with no one speaking twice until everyone has spoken once. Pointing out that he is still the "junior" member on the Court — after seven years in his position, he is still the most recent appointee — Justice Breyer hinted that being the last to speak often has its advantages as well as disadvantages.

Justice Breyer also engaged in a freewheeling question and answer session with his audience. The Justice expressed more optimism than some of his listeners with regard to the Court's ability to achieve consensus on many of the major issues that will be coming before it. In addressing whether the Court was damaged by its *Bush v. Gore* Florida vote-count ruling, Justice Breyer referred the audience to the discussion of that issue in his dissent, concluding that time would determine the extent of damage the decision may have caused in the public eye. He added that the Justices themselves are able to move past the potential divisiveness of such a dispute by adhering to the Court's internal tradition of collegiality. The Justices express their disagreements frankly and fully, he asserted, but no disagreement is ever expressed in a raised voice; and once a decision is made, it is relegated to the past, and the Justices simply move on.

Justice Breyer punctuated his presentation with frequent humor, at one point jokingly boasting that only he and renowned Justice Joseph Story (member of the Court 1812-1845; junior Justice 1812-1823) had spent so much time in the junior slot on the Court, and therefore had become so well-versed in the coveted skill of opening the conference room door to accommodate interruptions. The members of the audience clearly found the Justice's frankness and humor refreshing, demonstrating their appreciation by enthusiastic and extended applause at the conclusion of his remarks. Justice Breyer then attended a reception following his presentation, chatting extensively with numerous students who took advantage of the extraordinary opportunity to speak one-on-one with a Supreme Court Justice.

Justice Breyer was the fourth Supreme Court Justice to speak at Columbia's Maurice Rosenberg Memorial Lecture Series in recent years; he follows Justice Anthony M. Kennedy in 1996, Justice Antonin Scalia in 1997, and Columbia graduate Justice Ruth Bader Ginsburg in 1998.

*Editor's note: Susan Berger Sabreen, a former television journalist, has clerked for the Honorable Lisa Margaret Smith, United States Magistrate Judge, Southern District of New York.*

## Focus On:

# Chief Judge Alfred V. Covello

**By Toni M. Smith-Rosario and Peter G. Eikenberry**

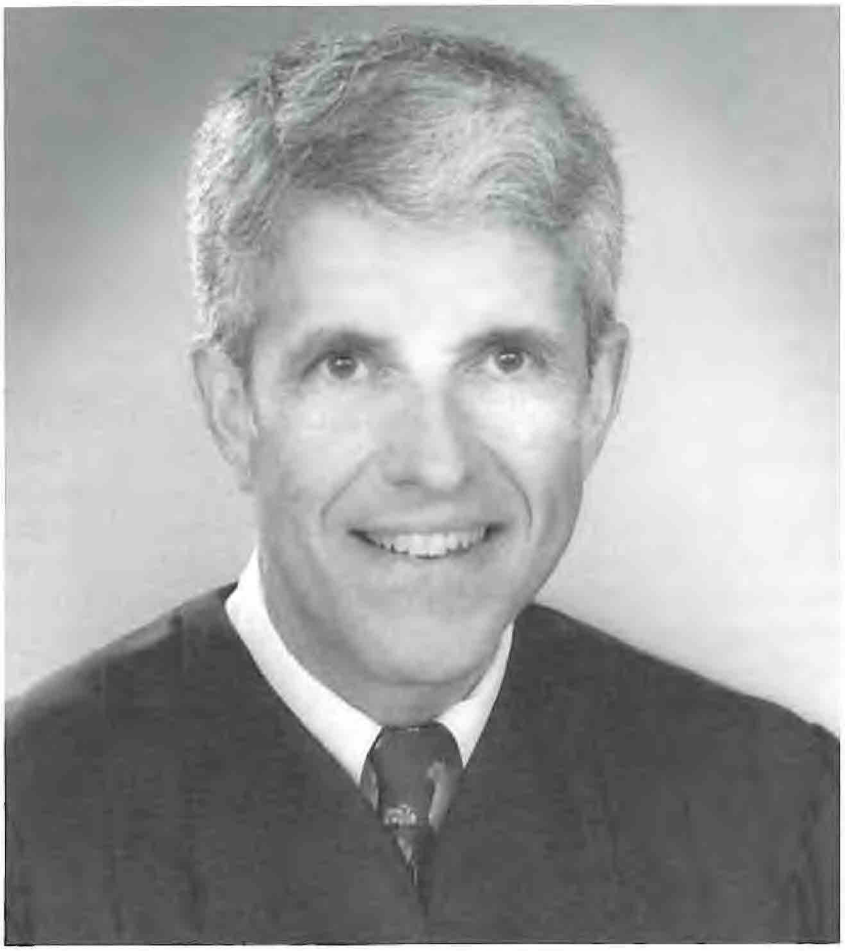
Chief Judge Alfred V. ("Tim") Covello joined the federal bench in Connecticut in 1992 after 22 years as a state court judge, including five years on the Supreme Court of the State of

Connecticut. He became chief judge of the district in 1998. In a recent interview, he reflected on the changes that have occurred since he became a federal judge and discussed his new initiatives as chief judge.

**Role As Chief Judge**

Contrasting the conditions in the district when we interviewed him seven years ago, Chief Judge Covello noted that the environment has "mercifully changed" as new appointments have significantly reduced each judge's caseload. As chief judge, he now seeks to "simplify and accelerate the process" of litigating in the district court, by making its courts more accessible and responsive o the public.

His folksy, self-deprecating humor still in evidence, he "decodes" the title of chief judge as "simply the oldest." A flight instructor for many years, he emphasized the importance of physical fitness, noting that it takes stamina to stay focused on the bench. He joked that, even if a judge is in good shape, he or she still has "to be careful what you say after 4:15 in the afternoon."



*Chief Judge Covello*

**Simplify, Simplify**

Chief Judge Covello meets with the judges in the district every four to six weeks to discuss attorney admissions, rule changes and the creation of uniform protocols. In between meetings, he and other judges communicate regularly via e-mail.

One of his primary goals has been developing uniform procedures and forms throughout the district. He emphasizes that the federal rules are complicated enough without forcing litigants to walk through a "thicket of chambers' practices" and that it is "outrageous" for otherwise adequate pleadings to be rejected due to idiosyncratic chambers' rules.

He contrasts his drive for uniformity in Connecticut with the situation in Massachusetts, where federal chambers' rules have been encapsulated in a thick tome. He adds that his colleagues have been very cooperative in this endeavor, noting that many of their practices were simply inherited from prior judges.

**World Wide Web And Beyond**

Chief Judge Covello also has initiated changes in the district's method of disseminating information. The district's Web site (www.ctd.uscourts.gov) has been updated and made more user-friendly. Greatly increasing the volume of information available through the Web site, he has transformed it into a repository for all decisions from the judges in the district. Users also can access these decisions at no cost, as well as rules, forms, directions, and juror information. The Web site's dramatic rise in popularity is evidenced by its accumulation of nearly 18,000 hits.

Known for his technological savvy, Chief Judge Covello also has sought to bring ground breaking technology, such as optical scanners, into the district. He envisions the day when the district, like others in the country, will offer electronic

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storage of entire case files, which are then readily accessible via computers both to chambers and to the public. He would like to bring in high speed scanning equipment to effectuate these changes, but notes that this is still very expensive. He emphasizes that electronic filing will be a tremendous boon to litigants by reducing mailing and courier costs.

**Second Circuit Council**

In addition to his duties in Connecticut, Chief Judge Covello also sits on the Second Circuit Council that reviews complaints against judges in the circuit. This council, which meets twice a year, is comprised of the six chief judges and six appellate judges from the circuit.

Although the great bulk of cases are readily dismissed as mere complaints regarding the outcome of cases, he notes that the council occasionally does get a matter requiring investigation by a subcommittee. His exposure to these cases has led him to question the practice of affording lifetime tenure to federal judges. He compares this to the state Supreme Court where the Chief Justice personally certifies every person over the age of 70 who wants to continue sitting on the bench. He notes the absence of such a federal safeguard and questions whether every elderly person is up to the challenge of judicial service.

**Then And Now**

Chief Judge Covello noted that dramatic changes have occurred in the district over the past seven years. With eight federal judges, five senior judges and five magistrate judges, the workload of each judge has been reduced significantly. At the same time, filings in the federal court are down by about 10 percent while case terminations are up by five percent. In contrast to a caseload of nearly 700 cases in 1994, Chief Judge Covello now has about 255 cases.

The district also faces fewer multidistrict cases. Once the site of a number of multidistrict cases, including the Colonial Realty case with its 7,000 plaintiffs, the district now has only one such case, litigation surrounding the Croatian Air airplane crash involving the late Commerce Secretary Ron Brown.

In cases that are disposed of without a trial, the average stay in the district is now 12 months. He has seen the average length of time for a case to reach trial diminish from 30 to 24 months. He hopes to cut that even further to 15 months. Indeed, the district has become so efficient that Chief Judge Covello says the real problem is finding attorneys who are able to try the cases ready for trial.

To deal with the caseload he faced as a new judge, Chief Judge Covello began what he called a "three-legged practice." He still uses this innovative case management strategy.

First, under a docket of about 700 motions pending in 1994, he created a "motion practice" under which 10 to 12 interns assisted in the processing of motions. Under his supervision and that of his law clerks, the interns would be informed of the structure and content to be included in the decision, as well as the reasons for this analytical structure. This system resulted in Chief Judge Covello's having almost no motions on the six month pending list required to be reported to the U.S. Senate's Judiciary Committee by the district.

His motion practice now exists on a much smaller scale. He uses a handful of interns to help him respond to his 150 or so pending motions. His underlying philosophy in responding to these motions remains constant. Chief Judge Covello's three goals for his opinions are that they be clear, appeal-proof and, interestingly, that they not be read.

Chief Judge Covello's final point was a response to what he feels is the unnecessary proliferation of published opinions. To make this point, he brought his interns into his law library to see how the reporters for the past few years equal in number those over the prior 40 years. He feels this situation burdens a bar that now must read a tremendous volume of material in order to remain current.

Although he used to refer FDIC matters to Magistrate Judge Owen Egan, Chief Judge Covello generally discourages the practice of referring motions to magistrate judges for recommendations. He notes that this approach is not an efficient use of the magistrate judge's time and adds yet another layer to the decision that ultimately must be made by the district court judge.

As the second part of his three-legged practice, he created a system of encouraging parties to mediate before their cases go to trial. In 1994, he employed a cadre of approximately a dozen retired attorneys to serve as mediators.

He uses far fewer mediators today, joking that some of his mediators have been "snatched" by other judges. The current head of his mediation practice is Read Murphy. Magistrate judges also play a key role in mediation. Each magistrate judge in the district is paired with two federal judges. His own magistrate judge, Thomas Smith, is a "whiz at settling cases." Currently, 95 percent of litigation before him is disposed of through mediation.

The third part of Chief Judge Covello's case management strategy, which he once jokingly referred to as

"the short leg of the stool," is his participation in the management of cases. When each case is assigned to him, his chambers sends a notice to the parties that they must confer within 30 days after the appearance of a defendant to discuss the case and develop a discovery plan. He is concerned that parties be informed that the district has opted to incorporate Rule 26 (f) of the Federal Rules of Civil Procedure.

When interviewed in 1994, Chief Judge Covello nodded in approval when his attitude of "never having met a lawyer he did not like" was compared to that of Will Rogers. His high regard for the bar has not decreased over the years. Consistent with that view, Chief Judge Covello continues in his commitment to making the district more "user-friendly," by improving communications, increasing efficiency, and developing uniform practices.

*Editor's Note: Toni M. Smith-Rosario is a prosecutor in the Appellate Bureau of the Office of the Chief State's Attorney in Connecticut.*

## Focus On:

# Judge Carol Bagley Amon

**By Kevin J. O'Brien**

Trial judges are not often known for their grace or sensitivity, nor would most want to be. United States District Judge Carol Bagley Amon of the Eastern District is an exception, as anyone can attest who heard her speech this past March to the New York Council of Defense Lawyers. Honoring this year's recipient of the Ostrow Award for Excellence in Criminal Defense, Tom Concannon, who has headed the Eastern District's Federal Defenders unit for 20 years, Judge Amon spoke foremost of "the spirit and tone" of Tom Concannon's leadership. While not skimping on the mandatory courtroom war stories, she praised him above all for his benevolent sense of humor and his appreciation of "the frailty of human nature, whether it be reflected in his client, the witness under cross-examination, his own staff attorneys or indeed the judge before whom he appears."



***Judge Amon***

Although Judge Amon, characteristically, honored the whole person and not just the trial lawyer, she has spent virtually her entire professional career in the courtroom. After receiving her degree from University of Virginia Law School in 1971, she tarried only two years in private practice before entering the Justice Department, where she remained until 1986. Twelve of those years were logged as an Assistant United States Attorney in the Eastern District, where Judge Amon served as Chief of General Crimes, Chief of Frauds and Senior Litigation Counsel. Among her noteworthy successes was *United States v. Duggan*, a difficult case involving gun-running for the Irish Republican Army by defendants who portrayed themselves as freedom-fighters. Judge Amon became a magistrate judge in 1986 and then a district judge in 1990.

Not surprisingly, Judge Amon believes that an essential ingredient of her job is knowing "how to run a trial," which requires not just an understanding of procedure but an appreciation of how personalities interact and an appetite for "the back and forth" of any hotly contested litigation. Practical intelligence, in her view, is no less important than facility with legal issues. Consistent with her

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common-sense approach, Judge Amon attempts to "let the lawyers try their cases as they see fit," without superimposing unnecessary rules (such as time limits on openings and closings). At the same time, however, she is solicitous of jurors and will occasionally tell lawyers before her that "it's one thing to waste my time — I'm not going anywhere — but it's another thing to waste the jury's time."

Given the demands of her docket, Judge Amon is a firm believer in attempting to settle civil cases as expeditiously as possible, although she finds fewer opportunities to do so than she did as a magistrate judge. She has found that, contrary to what she initially expected, most parties welcome her early intervention for this purpose, since very often they find themselves frozen by mutual antagonism into positions that are contrary to their actual interests. In criminal cases, Judge Amon controls her docket by attempting to adhere strictly to scheduled dates. She finds that, as a former prosecutor, she tends to hold the government "to a higher standard" than might otherwise be the case.

Judge Amon looks for judgment and discretion from the litigators who appear before her. Courtroom theatrics and rhetorical overstatement "do not impress" her, notwithstanding the old saw about pounding the table when all else fails. Although Judge Amon herself reads all of the major cases cited in briefs, a "reasoned explication of the law," presented without distortion or hyperbole, makes an impact to the extent that it assists her analysis of legal issues. Judge Amon grants that she is not a "specialist" in any legal field — learning new areas of the law is, she says, one of the biggest challenges of her job — and she appreciates genuine assistance from briefs and oral argument. She takes every opportunity to question oral advocates vigorously and even to rule from the bench where appropriate.

Since 1998 Judge Amon has served as Chair of the Judicial Conference Committee on Codes of Conduct, which provides ethical advice to federal judges across the country on issues that arise under the Code of Conduct and the Ethics Reform Act. Judge Amon's committee, which she fondly refers to as the "Dear Abby Committee," consists of 15 judges, including one circuit or district judge from every federal circuit as well as representatives of the magistrate judges and the bankruptcy judges. The members of the committee give confidential responses, both oral and written, to judges' requests for guidance; they also issue public advisory opinions.

Much of the committee's advice bears on recusal questions raised by financial interests of various kinds. Judge Amon notes that, in most instances where judges have been criticized for presiding over cases in which they own stock in a party, the error was inadvertent and could have been avoided with better screening procedures. The committee accordingly is in the process of improving the computer software used to flag possible conflicts. Judge Amon's service as chair of the committee, she believes, has made her more sensitive to the kinds of ethical issues that confront trial judges.

## Focus On:

# Judge Denise Cote

**By Alexandra A.E. Shapiro and Peter G. Eikenberry**

When Denise Cote first became a judge nearly seven years ago, on August 12, 1994, one of her primary goals was to ensure prompt decisions for litigants. She determined to attempt to decide all motions within two months after they were submitted. Judge Cote accomplished that goal, and she still maintains, and usually meets, the same standard.

Judge Cote received her law degree from Columbia Law School in 1975, where she served as Notes & Comments Editor of the Columbia Law Review. After graduating from Columbia, Judge Cote served as law clerk to the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York, whom she describes as her role model as a judge, from 1975 to 1976. Shortly thereafter, she became an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office for the Southern District of New York. She served as Deputy Chief of the Criminal Division from 1983 to 1985, when she left the office to join Kaye, Scholer, Fierman, Hays & Handler, where she became a partner in 1988. In 1991, Judge Cote left the firm to rejoin the United States Attorney's Office, as Chief of the Criminal Division. Judge Cote was the first (and only) woman to have served in that position, which she held until taking the bench in 1994.

### Civil Cases

Judge Cote explained that while in private practice, she worked on a number of significant civil cases in areas including antitrust, trademark and contract disputes, but that she had never tried any civil cases as a practicing lawyer. Rather, all her trials were criminal trials. Not surprisingly, the procedures she follows during jury trials clearly reflect her experiences as a federal prosecutor trying

cases in the Southern District. For example, she believes that it is very important to ensure that jury members feel their time is used as efficiently as possible. Consequently, she permits very few sidebars. Instead, she expects the trial attorneys to be as prepared as possible, and to bring likely evidentiary disputes to her attention before the jury's day begins. Thus, the attorneys are expected to appear at 9:00 a.m., 30 minutes before the jury.

Judge Cote uses written voir dire questionnaires to ensure that attorneys get complete information about each juror. She distributes a copy of the jury charge to the jury so that jurors can read along as the charge is read to them. Judge Cote explained that "we're kidding urselves if we think that jurors could remember the law" simply from listening to the judge's instructions. Her practice is to prepare the jury instructions prior to looking at the requests to charge submitted by the parties, guided by Second Circuit law. She consults Judge Sand's treatise as a check on her draft instructions, and only reviews the requests to charge after compiling her own draft instructions.

**Quick Verdict**

In civil non-jury trials, Judge Cote works to be in a position to render a quick verdict. She puts a premium on pre-trial briefing and is a "huge fan of direct by affidavit." She finds that requiring that direct examination be conducted via affidavit helps to focus her on the case prior to the trial and determine what questions she herself would like to ask. Having the direct examination and xhibits before trial begins allows Judge Cote to write a draft of her opinion prior to trial, which she modifies after hearing cross-examination. Judge Cote typically rules from the bench after the trial is over and does not allow post-trial briefing. This allows her to decide cases when the trial testimony is fresh in her mind.

Judge Cote usually does not refer discovery disputes to magistrate judges. She keeps discovery disputes in her civil cases to a minimum by limiting the parties' written submissions to a two-page letter. After receiving the respective letters, she holds a telephone conference to resolve the dispute. Judge Cote will typically delegate no more than three to four discovery disputes to magistrate judges per year, in cases in which "the attorneys have worn me down."

Judge Cote believes that the parties are entitled to have a trial judge who is untainted by involvement in settlement talks. This may reflect Judge Cote's background as a prosecutor, because (by contrast to civil practice) judges are prohibited by Rule 11 of the Federal Rules of Criminal Procedure from being involved in plea negotiations in criminal cases.

**Trial Dates**

When asked if she has changed the way she manages her docket since taking the bench, Judge Cote stated that when she first became a judge, she set firm trial dates in every case. However, she quickly learned that such a system was unworkable, principally because of the heavy docket and the backlog that develops if each case gets a different trial date. Now she sets firm trial dates in civil cases only when there are foreign witnesses who need advance notice to appear. Her current practice is to have a monthly "trial-ready list" in civil cases. She send the parties a letter two months before the month in which their cases is listed as "trial-ready," along with a list of all other cases on that month's list. The cases are listed, and tried, in order of docket number. Most cases, of course, settle before the month set for the trial, and therefore, the cases that actually go to trial usually receive about two weeks' notice of a firm trial date.

**Death Penalty**

Judge Cote has presided over two criminal cases in which the government sought the death penalty. Both cases were ultimately resolved by the defendant pleading guilty to charges carrying terms of imprisonment, but only after extensive litigation including pre-trial motions and, in one of the cases, the beginning of jury selection as well. We asked Judge Cote if there was anything about her experience in these cases that surprised her, or that was particularly significant. She stated that in these cases, she had learned a lot about the role of death-qualified counsel. (Each defendant in a capital case is entitled to an attorney who is supposed to be learned in the law of capital punishment, in addition to his or her other attorney.)

Although she had assumed that such counsel were needed because they had expertise in death penalty law, she was left with a different impression after her first death penalty case. Judge Cote now believes that death-qualified counsel play three key roles: (1) they can help persuade a prosecutor not to seek the death penalty; (2) they develop and present mitigating evidence at the sentencing phase of a trial; and (3) because of their extensive experience with these types of cases, such lawyers are often skilled at developing a unique attorney-client bond, and thus, in helping the defendants make the difficult choice between pleading guilty with an agreement to a long prison term or proceeding to trial with the risk of being sentenced to death.

## Criminal Law

# New Arraignment Procedures In S.D.N.Y.

**By Hon. Theodore H. Katz**
**Chief Magistrate Judge**
**Southern District of New York**

The Board of Judges of the Southern District of New York has adopted new procedures, which went into effect on February 5, 2001, for arraignments in felony cases in the Manhattan courthouse. These procedures, which are embodied in Local Rule 8 for the Division of Business Among District Judges, have resulted in the elimination of the Thursday morning arraignment proceedings previously scheduled before the magistrate judge on criminal duty in Manhattan.

Under the revised procedures, after an indictment has been returned by a grand jury, or a notice has been filed by the United States Attorney's Office of an intention to file an information upon the defendant's waiver of indictment, the presiding magistrate judge who accepts the return of the indictment (or notice of intention to proceed by information) will randomly select from the relevant assignment wheel the district judge who will preside in the case. It will then be the responsibility of the United States Attorney's Office to contact the district judge's chambers to seek the scheduling of the initial pretrial conference in the case. The United States Attorney's office will also be responsible for notifying defense counsel of the date set by the court for the conference. At the initial pretrial conference the district judge will address those matters routinely addressed at such a conference, including arraignment of any defendant who is present. In those cases where the government is seeking to proceed by information, each defendant will have the opportunity to execute a waiver of indictment.

It is anticipated that the revision of the arraignment procedures will result in greater efficiencies, with respect to both time and costs, on behalf of the defense bar, prosecutors, the United States Marshals Service, and the court. Attorneys will no longer have to spend several hours on Thursday mornings waiting for the fairly pro forma arraignments of their clients, while dozens of other defendants are arraigned. Similarly, the Marshals Service will not be required to transport large numbers of defendants to court simply for the entry of a not guilty plea, only to have them brought back to court within a matter of days for the initial pretrial conference.

The new arraignment process will not apply to the United States Courthouse in White Plains, which will continue to follow existing procedures.

## Intellectual Property

# ICANN Domain Name Disputes

**By Nancy L. Savitt**

Your client, with rights in the trademark "client," has a popular Web site at www.client.com. But www.cleint.com is a porn site. And www.client.net has been purchased by someone who has offered to sell it to your client for $10,000.00. What do you do? This article will focus on one of the more efficient methods for eliminating the immediate problem of a bad faith domain name registration, a proceeding under the Internet Corporation for Assigned Names and Numbers (ICANN) Uniform Domain Name Dispute Resolution Policy.

But before your client even has to consider an adversarial proceeding, it could be that the entity that hosts the infringing site will take care of the problem for you. Frequently, Web hosting agreements will provide that the site not violate intellectual property rights, or not contain illegal material or material that is harmful to minors. Depending on the circumstances (for example, a porn site that uses a typographical misspelling of a real children's Web site), the Web hos may well take the site down. This may be just a temporary solution, as the site owner can attempt to find someone else to host the site, or put the site on a server of its own.

How do you find out who owns the domain name? You can find out who registered the site by checking one of the WHOIS services, such as the one at Network Solutions (www.network-solutions.com). The registration agreement typically requires the registrant to provide accurate information. Even if the information turns out to be false, because of that representation, you can at least take action to get your domain name back. A prudent first contact with the domain name holder is a cease and desist letter. Although they often have no effect in these situations, they should be used, because they could save your clients time and money, as well as showing your clients are proceeding in good faith.

If the dispute needs to be resolved by a third party, your client can file suit, or, in the proper circumstances, file a

complaint under ICANN's Uniform Domain Name Dispute Resolution Policy with an approved service. All the services (there are currently four approved services) operate under the ICANN Policy, with their own supplemental rules implementing it. One of the most widely used services is that offered by the World Intellectual Property Organization (WIPO).

Lawsuits can proceed under a variety of theories, including standard trademark infringement and dilution (where bad faith is not a required element), and/or violation of the Cyberpiracy Prevention Act, commonly referred to as the AntiCybersquatting law. The Cyberpiracy Prevention Act provides a cause of action against bad faith domain ame registration, including damages of up to $100,000 per domain name. In addition, in appropriate circumstances, an in rem action can be brought against the domain name itself, but only if the domain name registrant cannot be located or is not subject to in personam jurisdiction. In such cases, monetary damages are not available.

With a lawsuit, you can seek damages (except for in rem actions) and immediate injunctive relief in the appropriate circumstances. With an ICANN arbitration, the sole remedy is an order canceling the registration or transferring the domain name to the complainant. However, in a case where immediate injunctive relief is not obtainable, an ICANN proceeding may be preferable, since it typically results in a decision in two-three months. Moreover, in cases where the domain name registrant has provided false information or is located overseas (thus making a damages remedy difficult to pursue), the availability and speed of the ICANN proceeding is attractive.

One of the ways an ICANN proceeding manages to be so efficient is that there is no discovery, and the proceedings generally permit only one submission per party. The proceedings commence with the filing of a complaint. The complaint is more of a summary judgment brief and affidavit combined in one document. The factual basis for the claim is set forth, with supporting documents attached evidencing the complainant's right to the mark at issue. The legal arguments are also part of the complaint. In a WIPO proceeding, for example, prior WIPO decisions supporting the arguments (available at WIPO's Web site, www.wipo.org), are also attached as exhibits.

The complainant must show three key issues:

(1) the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;

(2) the respondent has no rights or legitimate interests in the domain name; and

(3) the respondent has registered and used the domain name in bad faith.

Bad faith can be demonstrated by a number of factors. The ICANN policy sets forth a non-exclusive list, which includes an intent to sell the domain name for more than the out-of pocket costs of registration; a pattern of cybersquatting; an intent to disrupt the business of a competitor; or an intent to attract users for commercial gain by creating a likelihood of confusion with the complainant's mark. Decisions by WIPO panels have also found bad faith where the domain name comprises a name which can only sensibly refer to the complainant, where there is no obvious possible justification for the selection of the domain name, where the respondent has not sought to put before the panel any credible justification for selection of the domain name and where it is difficult to conceive of any use of the domain name which will not be likely to cause confusion of some kind.

The complainant pays the fee, which for a proceeding before WIPO can be as little as $1,500 for up to three domain names registered by the same registrant, as long as a single arbitrator rather than a panel of three has been chosen.

The respondent then has 20 days to put in its response, again with supporting documentation and whatever factual and legal arguments it can muster. The respondent can counter the complaint by demonstrating that, before the dispute, it used the domain name in connection with a bona fide offering of goods or services, or it has been commonly known by the domain name, or it has been making legitimate noncommercial or fair use of the domain name without intent for commercial gain to misleadingly divert consumers or tarnish the complainant's mark. There is no fee, unless the respondent chooses a three member panel where the complainant opted for the one member panel.

To keep the proceedings streamlined, WIPO puts a 5,000 word limit on each of the submissions. And that's it. Except in extraordinary circumstances, there are no in person hearings, and there are no additional submissions. The panel decides the case on the information presented, and looks at whether the complainant has shown the three key issues. If the rules are adhered to, the decision is issued two weeks after the panel is appointed (which is supposed to happen five days after the response has been submitted).

An ICANN proceeding does not preclude a later (or simultaneous) court proceeding. After the panel renders a decision in favor of a complainant, the decision is held in abeyance for 10

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business days. If during that time the panel is sent official documentation of the pendency of any court proceeding, then the decision is implemented, and the domain name transferred or canceled.

The ICANN policy has been in effect for about a year and a half, and more and more entities are availing themselves of it as time goes by. The availability of an ICANN administrative proceeding is an important alternative to bear in mind when a client is faced with a bad faith domain name registration.

## Developments

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is room for a militant one that will work for the public interest first and foremost."

### Tough Stands

The Federal Bar Council has continued to take tough stands, observed Lynch, throughout its history. One of its founders wrote a brief in support of anti-lynching legislation in Congress. In 1939, the Council spoke out against Rumanian injustice to Jewish lawyers and praised the Rumanian Bar Association for refusing to bow to demands that it oust its Jewish members. When the Federal Bar Council published its first newsletter, called *The Bulletin*, in the mid-1940s, one of its first articles was on the need for a constitutional amendment to guarantee women equal rights. Interestingly enough, according to Lynch, the Federal Bar Council had a "Women's Division" from the late 1950s to the mid-1960s, which was eventually absorbed into the general membership.

Federal Bar Council President P. Kevin Castel introduced Justice Kennedy by noting that he attended Stanford University, where he was Phi Beta Kappa, and went on to Harvard Law School, where he graduated cum laude in 1961. He then went to a 22-lawyer firm in San Francisco, which was the predecessor to Thelin Reid Priest, but two years later took over his father's solo practice. As a solo practitioner, he handled a wide array of matters, from probate to divorces and commercial transactions to civil litigation, and he taught a three-hour constitutional law class every Monday night at the University of the Pacific, lecturing without notes.

Justice Kennedy was nominated by President Ford to the Ninth Circuit in 1974 at the age of 38, and in 1987 President Reagan nominated him to the Supreme Court. On the Court, Justice Kennedy has distinguished himself as a stalwart supporter of First Amendment rights. Castel quoted Justice Kennedy's words from a recent decision:

"When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true.

"The Constitution exists precisely so that opinions and judgments . . . can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."

Castel observed that Justice Kennedy has often been the swing vote in five-to-four decisions, and according to one author, the Court should be called the "Kennedy Court" in light of his influence.

### Cardozo's Chair

Accepting the award, Justice Kennedy touched on a broad range of subjects in his remarks. He told a story of standing before Justice Cardozo's chair when he toured his Supreme Court chambers for the first time with his wife. He commented on how extraordinary it is that Justice Cardozo left the Supreme Court 50 years ago, yet the chair is still known as Justice Cardozo's chair. According to Justice Kennedy his wife responded: "Yes, if you use it for the next 50 years, it will still be known as Justice Cardozo's chair."

Justice Kennedy also discussed the unique role of the U.S. legal system in the world. He noted the wide and growing gap between underdeveloped countries and American society. Many underdeveloped countries are now in the position of the United States two hundred years ago. The U.S. stands almost alone in the breadth and depth of the precedent that supports the judicial process.

Quoting Solzhenitsyn, he pointed out that many people outside of the United States are hostile to the rule of law because they only have seen it applied by institutions that are corrupt. Affection for the rule of law is not universal. He said it brought to mind the words of Learned Hand that are inscribed on a plaque outside the moot courtroom at Harvard Law School, which Justice Kennedy passed so often as a student: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it."

### Precedent

He recounted how he was invited by Canadian constitutional scholars to

express his views on the meaning of language in their constitution. Some making the inquiry had actually drafted the provisions under discussion and, initially, Justice Kennedy thought it odd that they would ask him what, in effect, they had intended. He had often thought that the task of his own Court would be so much easier if he could only turn to Justice John Marshall and ask what the draftsmen and ratifiers had actually intended. It struck Justice Kennedy that perhaps he and his modern day colleagues have something of an advantage over the Marshall Court in that they have the benefit of two hundred years of precedent interpreting the constitution.

Justice Kennedy, who spoke without notes, thanked the Federal Bar Council for the honor of the Learned Hand Award. His wife, Mary, and the couples' three children were present at the dinner. On the morning of the event, Justice Kennedy attended an off-the-record breakfast with trustees and directors of the Federal Bar Council and Foundation and responded to questions.

## From The President

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conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Labeling the factor as a "sentence enhancer" does not excuse the requirement of a jury trial. For constitutional purposes, it is an element of the offense. Thus, if a state wishes to punish possession of an unlicensed firearm with a five year sentence and possession of a sawed-off shotgun with a ten year sentence, then the fact that the firearm was of a particular type must be proven to a jury.

The questions on which the circuit has granted rehearing include whether the quantity of an illicit drug which increases the penalty above the statutory maximum constitutes an element of an offense under the rationale of *Apprendi* and what is the effect of a failure to allege the quantity in the indictment. Also, if the failure to allege drug quantity is error, is it subject to the plain error doctrine? Can it be harmless error? Recognizing that the "responses to these questions may affect other cases that raise questions not directly before the Court," the court went on to encourage "consideration in the briefs of any such significant and foreseeable effects of this case."

I have asked Jack Cooney, Tom Engel and Mark Pomerantz to serve as a committee to study the issue and make a recommendation to our Board. Jack is a partner in Davis Polk and a former Chief of the Narcotics Unit in the S.D.N.Y., Tom is a partner in Engel & McCarthy and a former Assistant Chief of the Criminal Division in the S.D.N.Y., and Mark is a partner in Paul, Weiss and a former Chief of the Criminal Division in the S.D.N.Y. Their present law practices are sufficiently diverse in scope to give them the opportunity to look at the questions fairly objectively. I have asked them to make a recommendation as to what position, if any, to take and how to express that position, i.e. in a separate brief or joinder in the brief of others. After hearing their views, if the Board concludes that a separate brief is appropriate, they will draft it.

The rehearing en banc takes place in the context of *United States v. Thomas*, a case remanded in light of *Apprendi*. While *Thomas* was twice before the circuit pre-*Apprendi*, it appears that the post-*Apprendi* "rehearing" will first be considered by the en banc court, rather than a panel. This added twist makes the case even more unusual. Undoubtedly, there will be significant judicial economies from the course the circuit has chosen. A single panel might have taken a narrow case-specific view of the issue. Subsequent panels might have tried to distinguish the first case and, perhaps, tug in a different direction. In some cases, en banc is not appropriate because the issue cries out for Supreme Court review. Here, we have a circumstance where the Supreme Court has spoken and the remaining questions are squarely on the shoulders of the circuit.

The court has also taken the rather unusual step of asking the Unites States Attorneys in the six judicial districts within the circuit to file a single, joint government brief. One can imagine how chaos could have ensued if district courts in six districts were faced with differing arguments by different prosecuting offices, with the resulting decisions eventually winding up on the circuit's docket.

Judge Hand's reluctance to support en banc proceedings was formed at a juncture when the circuit had no more than six active judges. Today, there are twice that number. "His" court did not have to grapple with the sentencing guidelines and the plenitude of drug cases. The court's approach in *Thomas* frankly sounds very sensible.

If you have not perused the rules lately, I note that the 1998 Amendments to Rule 35, Fed. R. App. P., abolished the long used terminology "suggestion for rehearing en banc." The concept of "suggestion" captured the notion that the court was not required to vote on the request. It is now called a "petition for an en banc hearing or rehearing" and it suspends the time for filing a petition for a writ of certiorari. It remains the case that no vote need be taken unless requested by a member of the court.

And now a few words for fans of Legal Trivial Pursuit. Which is correct: en banc or in banc or both? Section 46 of title 28 uses the term "in banc" but, as a result of the 1998 Amendments, Rule 35, Fed. R. App. P., has abandoned "in banc" and now uses "en banc." For this reason alone, no one could be faulted fairly for using either. Legal purists will note that a statute trumps a rule. Linguists will respond that "banc" is from the French for bench and, therefore, "en" rather than "in" is the correct preposition. (It appears that the phrase "in banco" exists in Italian but there is no close Latin equivalent.) For those who must know more on this subject, I recommend footnote 1 to Judge Newman's article "In Banc Practices in the Second Circuit: The Virtues of Restraint," 50 Brooklyn L. Rev. 365 (1984) republished in Distinctive Practices of the Second Circuit (Federal Bar Foundation 1989).

En banc procedures are not limited to rehearings and a case can be heard in the first instance by the full court. A notable instance of an initial hearing of an appeal by the full court is the Pentagon Papers case, *United States v. New York Times*. Thirty years ago, all eight active judges of the court heard oral arguments in that historic matter. Five of the judges voted to continue the stay to permit the government to specify with particularity those portions of the report for which disclosure would present a grave and imminent danger. Three judges dissented and voted to vacate the stay immediately, the stance ultimately adopted by the Supreme Court.

Judge James L. Oakes, one of the dissenters, will participate in a panel presented by the Federal Bar Council to commemorate the 30th anniversary of the litigation. Other panelists include: Professor Arthur Miller (moderator), Floyd Abrams, Mel Barkan, Michael Hess and Professor David Rudenstein.

The program qualifies for two CLE credits (which credit is provided without charge to all members; there is a $45 charge for non-members seeking credit). The panel also will be of interest for those not in need of CLE credits, including judges, summer associates, academics, spouses of members and the general public. There is no charge for their attendance. It will be held at the Moynihan Courthouse, 500 Pearl Street, from 5:30 to 7:30 p.m. on June 13. Reservations are not required but space is limited.

Finally, if you would like to read more about *Apprendi*, I direct you to the fine article, *Apprendi at One*, by Elizabeth Cronin and Rachel Dimitruk in the April 2001 issue of the *Federal Bar Council News*. Again, I hope to see many of you at the June 13 program on the Pentagon Papers.

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The groups' ties were strengthened by mutual need. The Estelusti brought to the Native Seminoles methods of agriculture suitable to Florida, which was similar in climate to coastal West Africa. They also possessed an understanding of the white man's language, tools and customs. They became the military and political leaders of the Seminole communities, acting as warriors, translators and emissaries. Thus, Major General Thomas S. Jessup noted in 1837 that "The two races, the negro and the Indian, are rapidly approximating; they are identical in interests and feelings. . . ." But, the Estelusti and other free blacks living in Florida presented problems for the United States. By 1810, strongposts like the "Negro Fort," whose agricultural settlements extended for some 50 miles up the Apalachicola River in western Florida, were a beacon to slaves in America whose escape threatened the South's economy. General Jessup put it succinctly: "Should the [Seminole] Indians remain in this territory [Florida,] the negroes among them will form a rallying point for runaway negroes from the adjacent states; and if they remove, the fastness of the country will be immediately occupied by negroes." Slave raiders, seeking to return runaways to Southern plantations, began encountering the Seminoles. In response, the Florida tribes often identified the Estelusti as their slaves. Servitude of the type common in the United States was unknown among the Seminoles, however Rather, the term "slavery" reflects the lies told to slave raiders, and it also reflects the perception of whites to whom the Estelusti and other free blacks put the lie to the supposed moral underpinnings of slavery, i.e., that African people were inferior and incapable of self-restraint or self-government.

Once Spain sold Florida to the United States, the Army was sent to remove the Seminole Indians. The Seminoles resisted fiercely, facing deportation and, for some, slavery. What ensued was the longest and costliest series of wars in America's brief history. Together the Estelusti and blood Seminoles fought the Army to a standstill in the Florida swamps. At first the Army was badly mauled in what it called "the negro war." The Seminoles wiped out entire commands and led others to their deaths deep in the swamps, using hit and run tactics well suited to jungle warfare. Those who survived, unable to live off the land, ate their horses and dogs (used to hunt escaped slaves) and returned to their camps as "living skeletons." Lurid accounts of the war, such as the "Horrid

Massacres of the Whites, by the Indians and Negroes in Florida" (1836) were published and public outcry was extreme. The wars dragged on over three decades. Six Presidents fought the Seminoles (two of them, Andrew Jackson and Zachary Taylor, in the field and in office) and thirteen states, including Alabama, Mississippi and Louisiana, would be added to the Union before the Florida peninsula was secure and could be admitted to the Union in 1845. The Second Seminole War (1835-1842) alone cost the United States more than $20 million, which was four times the purchase price of Florida from Spain. It also cost the lives of 1,500 soldiers and sailors and of untold militia and Indians. These were the longest wars fought by the United States until the Vietnam conflict and like it, were indecisive. Ironically, in Vietnam our armed forces would suffer from many of the same tactics they encountered in Florida.

Eventually, of course, the Army won. Most of the Seminoles surrendered and were relocated to Indian Territory, now the State of Oklahoma. Some Seminoles fled deeper into Florida because "[t]he negroes who rule the Indians [were] adverse to relocating to so cold a climate." Most Estelusti went to Indian Territory, where their freedom was challenged by Creek Indians and the Southern military, both of which supported the slave trade. There was violence and some Estelusti fled to Mexico. During the Civil War, Seminoles fought on both sides; hostilities ended with the Treaty of 1866, quoted above. At the turn of the previous century, the United States terminated common tribal ownership of land, gave individual allotments to the Estelusti and the blood Seminoles alike, and prepared Indian Territory for eventual statehood and the Seminoles for assimilation into American society. Oklahoma became a state in 1907, but the Seminoles remain a people apart.

**The Lawsuits**

In 1972, the United States Court of Indian Claims determined that the United States had violated its treaties with the Seminoles in 1823 and 1832, and awarded reparations that, with interest, came to approximately $56 million. For another twenty years, competing Seminole groups in Florida and Oklahoma fought over ownership of those funds. By 1990, however, Congress was able to appropriate the necessary funds and awarded a Judgment Fund to "the Seminole Nation of Oklahoma." Pub. L. 101-277, 104 Stat. 143 (the "Distribution Act"). At least 80% of distributions from the Judgment Fund must be used for "common tribal needs . . . ." The Seminole Nation has established programs for education, housing, burial assistance, and numerous other worthy causes.

Unfortunately, the Seminole Nation, aided by the Bureau of Indian Affairs ("BIA"), has contrived to exclude the Estelusti from these programs and from any benefit of the Judgment Fund. The language of the Distribution Act, coupled with the fact that the Estelusti are by law and custom full members of the Seminole Nation and were forcibly dispossessed of Florida along with the blood Seminoles, should have been enough to ensure their participation. But, the Tribe and the BIA require the Estelusti to prove a degree of Indian blood to obtain the benefits of the Judgment Fund, which many cannot do.

Jon Velie, a young lawyer in Norman, Oklahoma, aided by his brother, Will, then a student at the University of Oklahoma College of Law, undertook to represent the Estelusti. Faced with an onslaught of procedural defenses raised by the BIA, Jon called on his uncle, Frank Velie, and the Salans firm for help. The Eselusti's claims are now proceeding on two fronts. In the Western District of Oklahoma, the court is considering whether the case may proceed in the absence of the Tribe, which the BIA claims is a "necessary party." This procedural defense is, of course, a Catch-22: the Tribe enjoys sovereign immunity and cannot be joined against its will. More recently, in Washington, D.C., the district court is considering whether the Seminole Nation may lawfully oust the Estelusti from tribal citizenship, given, inter alia, the terms of the Seminole Constitution and the strictures of the Treaty of 1866. The Tribe purports to have done so, reasoning that the Estelusti's claim to a share of the Judgment Fund, which is common tribal property, becomes moot if the Estelusti are no longer members of the Tribe.

Although these lawsuits are addressed to the status and financial needs of the Estelusti, they raise questions of cultural identity and demand historical proof of a badly-documented aspect of American history. They have opened to scrutiny the beliefs and prejudices of people who, while maintaining their identity against great adversity, no longer remember — or have chosen not to respect — their own history. The United States, too, has not taken well to allegations of racist complicity. That has provoked strong feelings on all sides, but at least the Estelusti are now being heard.

For further reading, please consider Kenneth W. Porter, The Black Seminoles: History of a Freedom Loving People, Univ. Florida (1996); William Loren Katz, Black Indians: A Hidden Heritage, Atheneum Books (1986); and Kevin Mulroy, Freedom on the Border: The Seminole Maroons in Florida, the Indian Territory, Coahuila, and Texas (1993).

# The Black Seminoles

**By Franklin B. Velie and Mark H. Goldey**

*Davis v. United States*, No. 96 CV 1988-M (W.D. Okla.)
*The Seminole Nation v. United States*, No. 00 CV 02384 (CKK) (D.D.C.)

"ARTICLE II. The Seminole nation covenant that henceforth in said nation slavery shall not exist . . . . And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants . . . shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color . . . ." Treaty of March 21, 1866, 14 Stat. 755.

Most people are surprised to discover that "black Indians" exist. Yet, for a full century before the Civil War, African and Native American communities lived together on the fringes of American society. Many formed close bonds as a consequence of slavery, racism and government policy towards Indians. Many modern Indian tribes have members of clear African ancestry, just as, by some estimates, 10 percent of African Americans have some Indian blood in their families. Some Indian tribes, however, such as the Seminole Nation of Oklahoma, have African-American members. And that is where this story begins.

## First Settlers

The "Black Seminoles," or "Estelusti" in the Seminole language, were among the first settlers of Florida in the 1700s, after smallpox and war had decimated the native population. They were escapees from plantation slavery in the New World and they were joined by many Indian peoples escaping troubles of their own. These groups came to live where the land was fertile and, but for the scattered Spanish, empty. The historical and archaeological records reveal that the Florida Seminoles were probably the first racially-integrated community in the present-day United States. Like other Seminoles, the Estelusti paid tribute to local tribal leaders and respected the tribal laws. But, they lived freely in their own towns or among the Native Seminoles, and intermarriage was common.

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