Federal Bar Council News

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From Our Readers

Major André: A Response

By Honorable Charles L. Brieant

I write in response to the generally fine article by my friend and fellow historian President P. Kevin Castel concerning the spy André. While I agree with his analysis concerning the military tribunal, reliance on secondary sources appears to have caused a misunderstanding as to the three brave farm lads of the Westchester militia (generally commemorated in the frieze medallions of the federal courthouse at White Plains) who, he says, "appeared to ve been preying on Tory travelers." hey were not. The Captors, as they came to be known, were no highwaymen,

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Developments

Council Presents The Learned Hand Award To Circuit Chief Judge John M. Walker, Jr.

By Steven M. Edwards

The Federal Bar Council presented its Learned Hand Award for excellence in federal jurisprudence to the Honorable John M. Walker, Jr., Chief Judge of the Second Circuit, at its annual Law Day Dinner at the Waldorf Astoria on May 1, 2002.

United States Attorney James Comey, who clerked for Judge Walker, presided over the event, and Judge Barrington D. Parker, who recently moved from the district court bench to the Second Circuit, read the President's Law Day proclamation. Federal Bar Council president Kevin Castel also recognized Peggy Brown, who retired as Executive Director of the Federal Bar Council on May 31, 2002.

Largest Gathering

Introducing Judge Walker, Council president Castel noted that it was the largest gathering of federal judges in the history of the Federal Bar Council, with over 80 judges present. He recounted Judge Walker's background, from Yale University to the Marines, then to Michigan Law School, after which he served as a prosecutor in the newly independent Republic of Botswana. From

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FBC News

Peggy Brown Retires

By Nancy L. Savitt

After nearly seven years on the job, Peggy Brown stepped down as the Executive Director of the Federal Bar Council on May 30, 2002. Beloved for her personal warmth and extraordinary skills, she will be sorely missed.

Her path to the FBC was not a straight one. Indeed, Peggy's professional background is extremely diverse. Starting as an art major, she got her undergraduate degree in merchandising from Syracuse. After a stint as an assistant buyer for Bloomingdales, she began her first career,

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FBC News

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as an art teacher for fourth through seventh graders in upstate New York.

Peggy then changed gears, working for Vassar College for 14 years, as Director of College Activities. Thereafter, she took a similar position at Barnard College, during which she also received her Masters in Higher Education Administration from Columbia Teachers' College.

Moving from academia to law, Peggy worked for a law firm for several years as a recruiter, with additional responsibilities for the firm's summer associate program. Afterwards, she took a job in her home town in Connecticut with a meeting and planning company.

"To Talk"

While at that job, Peggy was approached about the FBC's Executive Director position. Actively pursued by the search committee, she agreed to come to Manhattan "to talk." From that very first interview, Peggy felt at home with the organization. She sincerely says that that meeting — a group interview with a half-dozen people — was "fun," and she found the people "great." Shortly thereafter, the committee unanimously offered the vacant position to Peggy, and she accepted. And so began Peggy's remarkable and enthusiastic tenure at the FBC. Steve Edwards marvels, "Peggy's dedication to the organization was amazing; her attitude was to work as hard as it takes to get the job done. No detail was left to chance."

Working for the first couple of years out of a small office on East 49th Street, Peggy found ways to perform her job with limited resources. Her previous experience in planning events and working with people proved invaluable. Peggy's major responsibility was planning the annual Winter Bench/Bar conference, a job that takes 8 months of every year. Simultaneously, planning proceeded for the Thanksgiving luncheon, the Law Day dinner, numerous receptions and programs, publications such as the Redbook, board meetings, and the bi-annual trip to Washington, D.C., for the FBC's admission ceremony at the Supreme Court. In more recent years, her mandate has grown to include the Fall Retreat, and the FBC's continually expanding CLE programs (including applying for and receiving the requisite provider status). At the same time, Peggy was in charge of keeping the office functioning, a Herculean task given the equipment on hand and the lack of any technical support personnel on site.

Dedicated Staff

Peggy has nothing but praise for her small but hard-working staff. The terms "dedicated," "loyal," and "terrific" punctuated all her comments about her colleagues. "It takes more than me. It takes everyone in the office. I simply couldn't have done it without them," she emphasized.

Their assistance, and that of the FBC Presidents, program chairs, and their significant others, proved invaluable throughout her tenure. When she first started, there were no real records, no comprehensive files to guide the planning of the events, particularly the Winter Bench/Bar Conference. Indeed, there weren't even any computers, until Wachtell, Lipton, Rosen & Katz donated several used machines. (Over the years, they have been gradually replaced with upgraded equipment). That first Winter Conference sticks in Peggy's mind as the most difficult task she encountered. She was thrust into the middle of the planning from her first day. Having pulled the event together, she flew down a few days early to discover that the hotel in the Dominican Republic had overbooked, and the FBC's room allotment was unceremoniously being cut by 25 per cent. Scrambling to rearrange the accommodations ensued. The hotel staff was not bilingual, making communications difficult, to say the least. Then there was the tech program that required 10 monitors. The hotel staff neglected to obtain appropriate equipment. Calls were made to the capital, and a supplier was located, promising to deliver them by 3 p.m. the day before. Peggy stayed and waited for the delivery, leaving others to oversee the ongoing activities. Seven hours later, at 10 p.m., the monitors finally arrived Numerous other mishaps took place, a of which she laughs at today — and virtually all of which passed unnoticed by the attendees.

Peggy's proudest accomplishment was "getting the office to the point where it could function without me." Under her direction, the FBC now has organized and comprehensive procedure and planning manuals, detailed histories of past conferences, and resources to inform and guide planning into the future. The job of Executive Director was "a terrific position" which she found "fulfilling and challenging." But "it's the people who made this job for me" and she will miss them.

The feeling was mutual. "Peggy followed with sincere interest the family births, marriages and career changes of our members. For many, she was the hub through which they felt connected to the Council," says Kevin Castel. Steve Edwards concurs: "Peggy's enthusiasm and warmth were contagious. I always knew that if Peggy was involved,

everyone would have a good time."

"Peggy's world class interpersonal skills have been the key to her success," Kevin states. Peggy herself says flat out she never met anyone she disliked, and never made an enemy. "Know your client base, and know what's important to them" has been one of her guiding principles. It helps, as Kevin points out, that "Peggy has a real knack for being able to defuse an awkward situation with a smile and a kind word."

Peggy is confident the office is being left in good hands with Jeanette Redmond. Among Jeanette's strengths, Peggy points to her legal background, her computer literacy, and the injection of energy her arrival and fresh perspective will bring. Peggy's parting words of wisdom to her successor: "Look beyond the groups to treat everyone as an dividual — everyone has individual needs which need to be addressed, with the FBC's interests always kept in mind. Keep a good sense of humor. And keep those computers going!"

And her future plans? Peggy says she's "retiring" for at least six months to a year to spend time with family, travel with her husband, renew friendships, and otherwise regroup. Given how much she's devoted to the Federal Bar Council over the past seven years, this sabbatical is richly deserved.

FBC News

Southern District's Grievance Procedure

By Suzanne Kerrigan

On May 21, Southern District Court Judge Jed S. Rakoff was the guest of the Federal Bar Council Committee on Second Circuit Courts chaired by Peter Eikenberry. Judge Rakoff started his legal career clerking for the late Judge Abraham Freedman of the Third Circuit, then moved to private practice, joined the U.S. Attorney's Office in the Southern District in 1973, and returned to private practice in 1980 before joining the bench in 1996. He is the current Chair of the Committee on Grievances for the Southern District of New York and described some of the work of that committee.

The Committee on Grievances consists of seven judges appointed by the Chief Judge. Its work is in two principal areas — review of state disciplinary decisions for reciprocal action and review of grievances filed in the Southern District. The state disciplinary actions generally arise out of commingling of funds and similar fiduciary breaches or when a lawyer has been convicted of a crime. Judge Rakoff explained that the Southern District cases are referred to the committee by a mix of other judges, the U.S. Attorney's Office, adversaries and clients and raise a greater variety of issues than the state cases. The committee handles about 120 cases a year — with 80 per cent of those being referred by the state and thus requiring little more than a reciprocity analysis.

The committee's decisions are most often by order; it only writes opinions when the underlying grievance raises novel issues (for example, interpretation of the CJA fee rules) or the panel anticipates an appeal (for example, on grounds that censure for statements made to or about a judge violates an attorney's First Amendment rights). *See, e.g., In the Matter of Gino Josh Singer*, 185 F. Supp. 2d 313 (S.D.N.Y. 2002) (opinion addresses fee-related questions under Criminal Justice Act); *In the Matter of Teddy I. Moore*, 177 F. Supp. 2d 197, 200-01 (S.D.N.Y. 2001) (opinion makes clear that attorney is being disbarred not for "indulging in vituperative invective" but for incompetently representing his clients).

Generally, if a complaint is made by a judge the committee issues an order to show cause why an attorney should not be disciplined. Judge Rakoff noted that judges may use this procedure if they believe that Rule 11 sanctions are either too strong or too weak and alternatively if they believe that further investigation into a suspected pattern of conduct may be appropriate. Such referrals occur, perhaps, once a month.

Those matters brought by adversaries generally arise out of allegations that an attorney lied and that the presiding judge did nothing about it. However, Judge Rakoff has found that judges generally have addressed such allegations on the record and that there is little more for the committee to do. Client complaints center most often on fee disputes. If the complaint is brought to the committee by the U.S. Attorney's Office, an adversary, or a client, the committee sometimes refers the matter to one of a panel of attorneys (who serve the committee voluntarily) to do a basic investigation and draft charges where appropriate. The panel's investigatory work has no evidentiary weight and is not a matter of public record but may become the basis for an order to show cause.

Judge Rakoff said that once presented with an order to show cause (to which attorneys are asked to respond in writing) the overwhelming majority of attorneys admit the underlying facts but explain their conduct — for example, that they had no intent or that there are mitigating circumstances. If an attorney disputes the facts at issue, a hearing before a magistrate judge or three-lawyer

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panel may be ordered. In fact, however, Judge Rakoff could recall only one evidentiary hearing in the last six years and noted that the committee simply does not issue orders to show cause lightly. By the end of this process, according to Judge Rakoff, about 99 per cent of the attorneys have admitted the underlying facts.

Penalty Determinations

Litigation does, however, occur when it comes to penalty determination — all of which is done on papers, without argument. The judge analogized the discretion of the committee to that of the federal courts in criminal cases before the advent of the U.S. sentencing guidelines. Even with this much "sentencing" discretion, the committee always seeks, and usually obtains, unanimity of its members. Frequently the committee is of the view, according to Judge Rakoff, that with proven violations a little punishment is not a bad thing but a lot of punishment is not a good thing. Except in reciprocal cases, the committee rarely disbars attorneys but also rarely simply issues a reprimand. Usually suspension is ordered for some term or, at the very least, public censure.

Judge Rakoff observed that state disciplinary committees frequently impose harsher sanctions on lawyers for misconduct. This raised an interesting hypothetical — what if an attorney is suspended for three years in the only state in which he or she is admitted but suspended only for three months in the Southern District? Judge Rakoff said in such a case he or she may resume practice in the Southern District after the Southern District suspension ends even while the state suspension is in effect. He observed that this had in fact happened once — and that it created a bit of a procedural nightmare because this attorney's adversaries frequently reported his continuing practice in the district.

When asked if there were related matters of concern which the committee on Second Circuit Courts might consider, Judge Rakoff noted that he, and many judges, remain concerned about sharp deposition practices and abuses.

Editor's note: Suzanne Kerrigan is an associate with Davis Polk & Wardwell.

Calendar of Events

Fall Bench & Bar Retreat
Hudson Valley Resort & Spa
Kerhonkson, New York
October 25-27, 2002

The Federal Bar Council is pleased to announce that the 3rd Annual Fall Bench & Bar Retreat will take place on Friday, October 25 - Sunday, October 27, 2002. This year's retreat will be held at the newly renovated Hudson Valley Resort & Spa in Kerhonkson, New York (Catskills). Details of the program and reservation forms will be mailed in early July. Please be advised that space is limited for this conference.

For further information, please contact this year's Chair of the Fall Bench and Bar Retreat, Robin Zablow, Esq., at (212) 299-2212.

FBC News

Inn Of Court Seeks Applicants

By Lisa Zornberg

The Federal Bar Council Inn of Court is inviting applicants to fill several vacancies in next year's Inn. The Inn has been a resounding success during its first two years and expects to build on that success during the coming year. The objective of the Inn, which is modeled after the British Inns of Court, is to foster collegiality among the federal judges and practicing lawyers who are its members. Members are designated as "masters," "barristers," and "associates," based on their varying levels of experience, and are drawn from all walks of federal practice — the bench, private practice, government, academia, public interest, and in-house. A primary goal of the Inn is to provide mentors to its younger members from among the federal judges and "masters" who are members.

Inn meetings are held once a month from September through June. During these meetings, members socialize and participate in unique educational programs designed and presented each month by different Inn members. This past year's programs have ranged from discussion of lawyers' ethical obligations to training in techniques for evaluating witness credibility and re-enactment of the historic Sacco and Vanzetti trial. CLE credit is offered for each monthly program. Inn members must commit to attending every meeting. 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 Lisa Zornberg, at 1 Saint Andrew's Plaza, New York, NY 10007.

FBC News

Reception Honors Senior Judges

By Bennette Kramer

The Federal Bar Council's annual spring reception at the Union League Club recently honored all senior judges of the courts in the Second Circuit. The reception was well attended with judges and FBC members filling the room. Kathleen O'Connor, who clerked for Second Circuit Judge Thomas Meskill, and Shawn Regan, who clerked for Southern District Judge Kevin Duffy, co-chaired the reception. Second Circuit Chief Judge John Walker spoke about the important contributions that senior judges made in both the Second Circuit and the district courts. Kathleen O'Connor welcomed the judges and other attendees and then introduced FBC President Kevin Castel.

Castel thanked the senior judges for their continuing service to the bench. He remarked that, even though these judges could be enjoying retirement, they were lending their many years of experience to the courts. He noted that there were three nonagenarians—Judges Whitman Knapp, Southern District of New York, 93 (nearly 30 years on the bench), Jacob Mishler, Eastern District of New York, 91 (nearly 42 years on the bench) and Milton Pollack, Southern District of New York, 95 (nearly 35 years on the bench) — and 10 octogenarians sitting on the Second Circuit, the district courts and the bankruptcy court. Castel pointed out that, according to the Federal Judicial Center, one in five trials is conducted by a senior judge, thereby substantially relieving the case loads of the district judges.

Next, Shawn Regan introduced the judges present in ascending order of their service on the bench. In making the introductions, Shawn noted the number of years each had served on the bench: Judge Dorothy Eisenberg, Bankruptcy Court, Eastern District of New York, 13 years; Judge Miriam Goldman Cedarbaum, Southern District of New York, 16 years; Judge Louis L. Stanton, Southern District of New York, 17 years; Judge Peter K. Leisure, Southern District of New York, 18 years; Judge Peter C. Dorsey, District of Connecticut, 18 years; Judge John F. Keenan, Southern District of New York, 19 years; Judge Shirley Wohl Kram, Southern District of New York, 20 years; Judge Ralph K. Winter, Second Circuit, 21 years; Judge I. Leo Glasser, Eastern District of New York, 21 years; Chief Judge Conrad Duberstein, Bankruptcy Court, Eastern District of New York, 21 years; Judge John Sprizzo, Southern District of New York, 21 years; Judge Robert W. Sweet, Southern District of New York, 25 years; Judge Charles S. Haight, Southern District of New York, 26 years; Judge Richard Owen, Southern District of New York, 28 years; Judge William Conner, Southern District of New York, 28 years; Judge James L. Oakes, Second Circuit, 31 years; Judge Constance Baker Motley, Southern District of New York, 36 years; and Judge Wilfred Feinberg, Second Circuit, 36 years.

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All of the Senior Judges within the Second Circuit were presented with a crystal memento from the FBC, acknowledging each judge's dedicated service as a Senior United States Judge.

FBC News

Federal Rules Program

By Stephen Kennedy

The Federal Bar Council recently sponsored a program entitled "Developments Under the 2000 Amendments to the Federal Rules of Civil Procedure and Evidence." The program featured six panelists: the Honorable Laura Taylor Swain, the Honorable Ronald L. Ellis, the Honorable Roanne L. Mann, Professor Daniel J. Capra, Gregory P. Joseph, and Michael C. Silberberg.

The panel members discussed a variety of issues concerning the changes to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. For example, the panelists expressed their views as to whether the change to Rule 26(b)(1) has broadened or narrowed the scope of discovery. Panel members also discussed their experiences with certain amendments to the rules. The judges on the panel stated, for instance, that they have found that mandatory disclosure now required under Rule 26(a)(1) has not created many disputes among parties. The judges also said that the amendment to Rule 30 imposing a temporal limit of "one day of seven hours" for depositions had not, generally speaking, increased the number of discovery applications by parties.

In addition to hearing a very interesting and informative discussion, program attendees received helpful written material prepared by Professor Capra and Messrs. Gregory and Silberberg concerning the amendments to the Federal Rules of Civil Procedure and Evidence.

Second Circuit News

Staffs Take Daughters —And Sons—To Work

By Stephen Young

When Circuit Judge Sonia Sotomayor looked out at the sea of young faces filling Foley Square's ceremonial courtroom the morning of April 25, she saw only girls. For the tenth and probably last year, it was Take Our Daughters to Work Day. But in a portent of likely things to come, it was Take Our Children to Work Day at the White Plains courthouse, as boys joined their distaff classmates. Yet no one there seemed to notice the difference. Everyone was too busy getting with the program.

And an exciting program it was, not only in Manhattan and White Plains, but also in Rochester, Albany, Islip and New Haven — the first time so many Second Circuit venues have been involved with this event. Run in close coordination with the Women's Bar Association of the State of New York and its local affiliates, the day gives local students, including children of court employees, the opportunity to see what goes on inside those imposing federal courthouses.

There were variations in the agenda from place to place. But at all the courthouses the youngsters interacted with a wide variety of employees, so that the aspirations of as many of the children as possible could be stimulated.

In Manhattan, there was a full-scale security briefing from the United States Marshals. And speaking of scales, the kids also got a good look at the Southern District Courthouse fitness center and some pointers from its expert, Nancy Chiocchi. (A workout guru at the courthouse — who knew?)

In White Plains, where the day's program was run by Assistant Deputy-in-Charge Lorraine Lombardo, Court Reporter Angela O'Donnell showed what it takes to get all the words right. Supervising Officer Maggie Smusz Cendagorta of Pre-Trial Services demonstrated electronic bracelets. (Doubtless all the children did their homework and went to bed on time that night).

In Rochester, U.S. Marshal Roxann Sentiff went to the next level, locking up the eager students with shackles. The Rochester kids also heard from the Secret Service, the FBI, the ATF and Federal Public Defender Kim Schecter. Training Specialist Judith L. Graus put Rochester's agenda together.

Meanwhile, in New Haven, Probation Officer Jacki Carroll told the girls how she keeps offenders on the straight and narrow. And Drug Enforcement Agent Eileen Dinan showed why there's no hope in dope. Courtroom Deputy Betty Torday produced the New Haven program.

In Albany, Chief Deputy Clerk John Domurad put together a similarly expansive agenda, while in Central Islip Deputy-in-Charge Joseph Ditalia was the impresario who brought the program to the suburbs for the first time.

Truly impressive as well was the number of judges who gave of their time and effort to host their visitors. Six women jurists from the Southern District

(Naomi Reice Buchwald, Loretta Preska, Denise Cote, Miriam Goldman Cedarbaum, Laura Taylor Swain and Debra Freeman) joined Judge Sotomayor in Manhattan. Judge Colleen McMahon and Magistrate Judge Lisa Smith led the White Plains welcomes, along with Magistrate Judge Arlene Lindsay in Central Islip, and Judges Janet Arterton and Ellen Burns in New Haven.

Alas, the Rochester and Albany courthouses have only male jurists, but Magistrate Judge Jonathan Feldman in the former, and Judge Lawrence Kahn along with Magistrate Judges Randall Treece and David Homer in Albany, did not allow gender identification to mitigate their enthusiastic participation. And in a way that was fitting, because it is likely that next year all the courthouses will have only one requirement of their student guests: that they be children, ready to be taught, inspired and entertained by the federal workers who help protect and defend them.

Second Circuit News

Paul Chosen For Inns Award

By Stephen Young

Marcia B. Paul of Kay & Boose LLP in Manhattan, an intellectual property practitioner, is the first winner of the Professionalism Award bestowed jointly by the Second Circuit Courts and the American Inns of Court Foundation. The presentation to Paul was made on June 8 by Justice Ruth Bader Ginsburg and Chief Judge John M. Walker, Jr., during the Circuit's annual judicial conference at the Mohonk Mountain House in New Paltz. The diploma accompanying the award cites Paul, "In recognition of ongoing dedication to the highest standards of the legal profession as expressed in the Professional Creed of the American Inns of Court, and in recognition of the mentorship you have given to a generation of lawyers."

Paul was chosen over 19 other nominees — the largest field ever to compete for such an award, according to the foundation.

Paul was chosen over 19 other nominees — the largest field ever to compete for such an award, according to the foundation.

The Second Circuit has now joined nine other circuits in giving the American Inns of Court accolade. The award, like the Inns themselves, celebrates lawyers who help their younger colleagues develop professional skills. In soliciting nominations, Circuit Judge Dennis Jacobs, who chaired the Second Circuit selection committee, stated, "It doesn't matter whether a nominee has received an award before. The kind of distinction we're seeking has been insufficiently recognized by the profession."

Paul's nomination was supported by 21 letters of recommendation from lawyers, clients, and judges. Many of the missives stretched to three pages single spaced. Over and over, the writers cited her skill as an advocate, her exhaustive knowledge of her subject matter, her extraordinarily high ethical standards, and her devotion to teaching younger colleagues.

Marcia B. Paul, a graduate of Barnard College and Columbia Law School, began her legal career in 1972 at Sullivan & Cromwell. She practiced there for five years, and at three other firms for eight years, until she joined Kay & Boose in 1985. She is now a senior partner in its litigation department. Paul is a member of the Bars of New York, the District of Columbia, and numerous federal courts. A highly experienced intellectual property litigator, she represented New York Magazine in its successful effort to prevent Mayor Giuliani from suppressing her client's bus ads, *New York Magazine v. Metropolitan Transit Authority*, 987 F. Supp. 284, aff'd, 136 F.3rd 123 (2d Cir.), cert. denied, 119 S. Ct. 68.

In addition to her appearance at the conference, Paul has been invited to attend the Foundation's Leadership Dinner, to be presided over by Chief Justice Rehnquist at the Supreme Court in October.

Besides Judge Jacobs, the Second Circuit selection committee consisted of Circuit Judge Robert Katzmann and Southern District Judge Denise Cote. The choice was made in conjunction with a national foundation committee chaired by Fifth Circuit Judge Patrick E. Higginbotham, and also including Judge William C. Koch, Jr., of the Tennessee Court of Appeals, and attorneys Karen S. Crawford of San Diego, William G. Paul of Oklahoma City, and Joseph F. Rice of Charleston. Justice Randy J. Holland of the Delaware Supreme Court, who chairs the American Inns of Court Board of Trustees, was also instrumental in bringing the Second Circuit Award to fruition.

The Second Circuit selection committee considers the nominations received in 2002 to have continuing eligibility for next year's award, although it says that supplementary letters of recommendation will be encouraged.

Second Circuit News

Courts Team Up To Press Case With Media

By Stephen Young

It was billed as "A Morning of Court-Press Communications," and it was quite different from previous meetings between the Third Branch and the Fourth Estate. On May 22, some 55 journalists from 20 different news organizations, joined by 24 judges, assembled in the 15th floor courtroom at Foley Square, warmed and wakened by early morning coffee. The gathering was a project of the New York Federal-State Judicial Council, a joint entity of the Second Circuit and New York courts that has been energized by its ex officio members, Chief Judges John M. Walker, Jr., and Judith S. Kaye, and led into action by its chair, New York Court of Appeals Judge Howard A. Levine.

The Council conceived the May 22 program with a dual purpose. First, to offer journalists an opportunity to learn more about the courts in a setting insulated from deadline pressure. And second, to begin a dialogue on matters of concern reporters have about covering the courts — and to do so in a forum that could result in neither bad press reviews for judges nor contempt of court for reporters.

Three Steps

To accomplish these objectives, the Council offered a three-pronged approach.

First, all journalists in attendance were given a large looseleaf reference book telling them "everything in the world" they might want to know about the two court systems. The scribes also received a handy notebook-sized paperback featuring a legal glossary, key federal and New York court telephone numbers, and other information that could be helpful in covering judicial proceedings. The books were printed by the New York Office of Court Administration.

The gathering was a project of the New York Federal-State Judicial Council, a joint entity of the Second Circuit and New York courts.

Second, following welcoming remarks by Judge Levine, there was a learning session covering the basic operations of specific courts in both jurisdictions. This part, introduced by New York Chief Administrative Judge Jonathan Lippmann, was conducted by a panel of six judges, each of whom outlined essential information about his or her respective tribunal. The six jurists were Chief Circuit Judge John M. Walker, Jr., and Southern District Judge Denise Cote for the federal courts, and for New York, Chief Judge Kaye, Queens Supreme Court Administrative Judge Steven W. Fisher, New York City Criminal Court Administrative Judge Judy Harris Kluger, and New York County Family Court Supervising Judge Susan Knipps. These presentations were not without some self-examination, particularly as Chief Judge Kaye and other New York judges repeatedly criticized the complicated nature of the state's judicial administrative structure. And just as the federal judges sought to guide their listeners through the jurisdictional differences between state and federal courts, the New York jurists tried to make sense for the reporters out of the tangled web of their courts' respective functions.

In the third part of the program, it was the press that set the agenda. The procedure was different as well: instead of judges' prepared statements, a Donohue-style dialogue was conducted by moderator Jack Ford of ABC News, for whom it was a pro bono gig. The four-member panel consisted of Circuit Judge Robert D. Sack and Southern District Judge George B. Daniels for the federal courts, and Acting Kings County Supreme Court Justice Alan D. Marrus and Deputy Chief Administrative Judge for Justice Initiatives Juanita Bing Newton for New York.

The spirited one hour discussion that emerged revolved around three major points of contention: reporters' access to jurors after conclusion of a trial, reporters' access to trial exhibits and records, and cameras in the courtroom. Although the sometimes conflicting missions and goals of the courts and the press were clearly on display, the session did feature more light than heat. There was no breakthrough on any of these thorny issues, nor did anyone seriously expect one. But there was a notable absence of vituperation on both sides, despite the recognition — alluded to several times in the dialogue — that in particular instances, it may not be possible to accommodate the respective interests of the press and courts to the satisfaction of both. Yet by no means did this diminish the success of the morning's program, which was about communication and the resulting influence it might have on the cultures of the two sides.

Although held in a magnificently restored courtroom, it was by design that the judges on the panels did not sit in their customary high back chairs on the most elevated part of the bench. Rather they

sat just behind the bar, where clerks usually sit, closer and more accessible to their listeners. And the many judges who spoke from the audience were shoulder to shoulder with the journalists — there were no special seats set aside for the jurists.

Perhaps most significantly, after the session was completed and Jack Ford thanked those assembled, there was no mass rush for the exits — many reporters and judges stayed in the courtroom and in the hallway, where neither the food nor the conversation had become stale. The dialogue continued. And that might have been the program's greatest success.

New Appointments

Randolph F. Treece Sworn In As Magistrate Judge

By Stacey Creem and Laura Walls

Randolph F. Treece has been sworn in as Magistrate Judge for the U.S. District Court for the Northern District of New York. As the first black ever to serve in the Northern District federal judiciary, Judge Treece brings with him a distinguished and diverse career.

Prior to his appointment as Magistrate Judge, Judge Treece served as General Counsel for the Office of the Comptroller of the State of New York. He was formerly the First Deputy with the Capital Defenders Office, and an Assistant Attorney General with the New York State Department of Law and an Assistant Public Defender for Rennselear County. Judge Treece also has worked in the private sector, where he was a partner at the law firm of Fritts, Whiting & Treece.

Judge Treece is also very active in community and legal organizations. He is on the Board of Trustees of Albany Law School and Siena College. He is also a member of the House of Delegates of the New York Bar Association; the Treasurer and a member of the board of directors of the New York Bar Foundation and a member of the National Bar Association. Judge Treece has been a member of the board of directors for the Albany County Bar Association since 1994, and is co-founder and president of the Capital District Black Bar Association. In addition, he is a member of the Rennselear County Bar Association, Albany Law School Government Law Center, Albany Law School-NAACP Legal Assistance Program, and an Honorary Board Member of the Capital District Women's Law Project and the Committee for Modern Courts.

Judge Treece has received many awards. In 1999, he received the President's Award from the Albany County Bar Association and Albany Law School's 1999 Alumni Distinguished Service Award. In 2000, he received the Man of the Year Award from the Capital District Chapter of the Links. He was awarded the Omega Phi Psi Citizen of the Year in 2001 and the Center for Law and Justice Person of the year in 2002. In addition, Judge Treece has received the New York Civil Liberties Roland Smith Award, NAACP Thurgood Marshall Award, New York State Root/ Stinson Award and the Urban League of Northeastern New York McNamee Award.

Judge Treece received his J.D. from Albany Law School in 1976, and an accounting degree from Siena College in 1970. He is admitted to practice law in the United States Supreme Court and the United States District Court for the Northern District of New York.

New Appointments

Larry A. Kudrle Becomes Magistrate Judge

By Stacey Creem and Laura Walls

Larry A. Kudrle has been sworn in as Magistrate Judge for the U.S. District Court for the Northern District of New York. Judge Kudrle comes to the bench with a distinguished career in the United State Air Force as well as private practice.

Prior to his appointment, Judge Kudrle was a shareholder and vice-president at Lewis, Rogers, Kudrle & Meconi, P.C., in Plattsburgh, New York. He had been associated with that firm since 1994. Judge Kudrle had a general law practice, with an emphasis in elder and children's law. His practice areas included probate, trusts and estates, children, guardianship and conservatorship, and real estate. He was a law guardian in Clinton County Family Court since 1996.

Before entering private practice, Judge Kudrle worked in the United States Air Force Judge Advocate's Department from 1981 to 1994. From 1992 to 1994, he served as the Deputy Staff Judge Advocate, HQ Eighth Air Force, where he supervised four active duty and four reserve judge advocates. From 1989 to 1992, Judge Kudrle served as Staff Judge Advocate at Plattsburgh Air Force Base, where he supervised an office of military attorneys and paralegals. He also served as a judge advocate on assignment in

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Hawaii, Colorado and New York, where he was a legal advisor to commanders and the administration of military justice, focusing primarily on criminal prosecutions.

Judge Kudrle was in the Air Force from 1974 to 1994, when he retired as lieutenant colonel. He graduated, with distinction, from Officer Training School in 1974, and also completed Squadron Officers School, Air Command and Staff School and Air War College. In 1978-81, Judge Kudrle was selected for the Air Force Funded Legal Education Program. In addition, Judge Kudrle received the Air Force's highest military decoration — the Air Force Meritorious Medal. From 1975 to 1978, he was a weather forecaster and staff weather officer at Shaw Air Force Base in South Carolina.

Prior to entering the military, Judge Kudrle taught junior high school in Minnesota from 1973 to 1974.

Judge Kudrle is active in many community organizations. He is president of the Plattsburgh AM Rotary Club, the North Country Tennis Association and the Clinton County Historical Association. He is also a trustee of the Hill and Hollow Music Association and the Battle of Plattsburgh Association.

Judge Kudrle received a B.S. in mathematics, magna cum laude, in 1970 from Mankato State College; an M.S. in mathematics in 1972 from the University of Arizona, and a J.D. with highest distinction in 1981 from the University of Arizona School of Law. While at law school, Judge Kudrle was a member of the Order of the Coif.

As a magistrate judge, Judge Kudrle's primary cases are criminal misdemeanor border cases involving smuggling and immigration violations. He recognizes that he is the first person that defendants meet in the federal criminal court, so he says that he tries to give them "as fair a shake" as he can to get started. He also believes that justice needs to be speedy in the type of cases over which he presides.

Second Circuit Decisions

Fees On Fees

By Charles C. Platt

Last August, the Second Circuit certified a state law question of some significance to corporate practitioners: Can officers and directors recover the legal fees they incur in establishing their rights to indemnification for underlying litigation fees and expenses? The New York Court of Appeals accepted that certification, and held recently in *Siegel v. Health Management Systems* that such "fees on fees" are not permitted under the New York Business Corporation Law.

The Underlying Litigation

The "fees on fees" issue arose out of an underlying securities fraud case commenced in 1997 against Health Management Systems, Inc. Philip Siegel was an officer of that company who was named (along with other officers and directors) as an individual defendant. In response to this securities fraud lawsuit, the company hired outside counsel to act on behalf of all the defendants. Siegel nevertheless chose to hire his own lawyer, who eventually obtained a stipulation of dismissal of all claims against him.

Siegel incurred approximately $67,000 in legal fees in the defense of this underlying litigation. When he sought indemnification from the company for these legal fees under the BCL, the company refused to reimburse him, claiming the legal fees that Siegel had incurred were unreasonably excessive and unnecessary.

Siegel's Indemnification Action

Siegel then brought an action in the Southern District of New York seeking indemnification for the fees he incurred in the underlying securities fraud case. After some dispute, the company eventually conceded that Siegel was "probably" entitled to indemnification for his legal fees in the underlying litigation. Magistrate Judge James C. Francis then awarded indemnification, but denied Siegel's request for "fees on fees" — that is, the legal fees he incurred in obtaining the indemnification. Magistrate Judge Francis reasoned that there was no specific statutory or contractual authorization for such "fees on fees."

Judge Berman adopted Magistrate Judge Francis' decision and noted that awarding fees to Siegel as the prevailing party in this case would be contrary to the "American rule," absent some evidence that the company had acted in "bad faith" in denying the indemnification request. Although a "close call," Judge Berman concluded that "bad faith" was not present here.

The Second Circuit affirmed the judgment that the company had not acted in bad faith by initially declining indemnification. However, the question whether the New York BCL permitted Siegel to recover the fees he had incurred in securing indemnification was certified to the New York Court of Appeals.

New York's Decision

The New York Court of Appeals concluded that the BCL statute does not provide for the recovery of fees incurred

by a corporate officer in obtaining indemnification. The Court reasoned that the BCL's plain language limited recovery to only those expenses that are "actually and necessarily incurred as a result of the [underlying] action or proceeding."

The BCL requires a "reasonably substantial nexus" between the costs incurred and the underlying lawsuit defended against.

The Court rejected Siegel's argument that this plain language entitled him to reimbursement of all fees that he would not have spent had he not been made a party to the underlying suit (which included fees spent seeking indemnification). In the New York Court of Appeals' view, the BCL requires a "reasonably substantial nexus" between the costs incurred and the underlying lawsuit defended against. Since the fees that Siegel had incurred in seeking indemnification were caused by the company's refusal to indemnify, and not the underlying litigation, there was no reasonably substantial nexus for those "fees on fees."

The Court found further support for its decision in the legislative history of the BCL, which contained nothing indicating that the legislature intended to provide coverage for fees on fees, and in the law in other states (especially Delaware), which does not provide for such fees.

Chief Judge Kaye's Dissent

Chief Judge Kaye dissented. She reasoned that the company would "gain considerable leverage" in keeping individual officers "in the fold of a common defense" if those officers were required to pay to secure indemnification. This would discourage officers from retaining their own counsel, even though they might have a "legitimate independent legal position at odds" with the company. In Chief Judge Kaye's view, this leverage was inconsistent with the language and purpose of the BCL.

Conclusion

Before *Siegel*, the "fees on fees" case law in New York had been unsettled. The rule is now clear. If individual officers or directors wish to retain their own counsel in company-related litigation, they should obtain the company's consent that those legal fees will be indemnified. Otherwise, they may incur significant costs in obtaining that indemnification.

Legal History

The Court Martial Of Captain Charles McVay

By C. Evan Stewart

Doug Stanton's book, "In Harm's Way," tells a harrowing tale of the sinking of the USS Indianapolis in the last days of World War II. Already assigned a bit part in history because of its role in delivering to the island of Tinian the necessary parts of the atomic weapon later dropped on Hiroshima, the battle cruiser was torpedoed by a Japanese submarine in the dead of night, as it headed for its next assignment at Leyte in the Philippines.

The Sinking

The ship sank in twelve minutes. Some 300 men died in the immediate explosions and sinking; approximately 900 survivors jumped or fell into the oil drenched Pacific Ocean, hundreds of miles from land in any direction. Bereft of any meaningful supplies, the men drifted in packs for four plus days, with increasing numbers dying, drowning, giving into temptation to drink salt water, being subject to escalating physical and mental breakdowns, and (perhaps most frightening) being attacked regularly by roving bands of sharks.

The Navy, because of a series of errors and miscues, failed to notice that the Indianapolis had not reached Leyte in a timely fashion. It was only after an American plane, a PV-1 Ventura hunting for Japanese submarines, spotted men floating in the ocean that frantic rescue efforts began. Three hundred twenty-one (living) men were pulled from the water, with 317 ultimately surviving (four died in military hospitals). The ordeal was not over for one man, however — the Captain of the Indianapolis, Charles McVay.

Court Of Inquiry

Ten days after Captain McVay was plucked from the Pacific Ocean (and one day before Japan surrendered on August 14), a court of inquiry was conducted on Guam. The court considered various aspects of the disaster. For example, there was testimony and evidence regarding the intelligence report (enemy submarines were known to be on the route McVay was ordered to undertake, but that was not disclosed in the report because it had been uncovered by the top-secret ULTRA program);

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McVay thus believed the route was free from ominous danger(s). The intelligence officer who briefed McVay prior to the Indianapolis's departure testified that he believed a Japanese submarine attack had been "practically negligible."

After 43 witnesses had given testimony, the court recommended that McVay be court martialed. That finding was based upon two articulated grounds. The first was the failure to transmit a distress signal. On this point, there was disputed testimony. McVay averred that he did not think a message had been sent out in the twelve minute period. The ship's radioman, however, testified that an S.O.S. had been transmitted; and, in fact, it was received by various personnel at Leyte, but not effectively acted upon for a series of reasons, some unfathomable.

The second basis for the court's recommendation was the Captain's order to cease "zigzagging" on the night the ship was torpedoed. McVay's orders had been to zigzag during the day; at night, he was to do so, at his discretion, during periods of good visibility. On the fateful night, McVay had ordered the zigzagging to cease. The sea was quite rough and the sky had only occasional glimpses of a thin strip of moon in and amongst a heavy cloud cover. In the words of Stanton: "At times, it was so dark that men on the bridge had to announce themselves by name." Nonetheless, the court cited to "good [conditions] with intermittent moonlight" in support of its recommendation.

Court Martial

Although Admirals Chester Nimitz and Raymond Spruance counseled against a court martial, Admiral Ernest King (the head of Naval operations) and the Secretary of the Navy, James Forrestal, believed one was warranted. At that point, however, the Navy's judge advocate general had not finalized what charges to bring against McVay!

The Navy brass believed that the case was "of vital interest not only to the families of those who lost their lives, but also to the public at large."

Charge I was set — the failure to zigzag. As to other charges, it was decided to drop the matter of whether a distress signal had been sent. But if they stopped there, a trial was deemed to be unnecessary, because it was indisputable that the ship had not been zigzagging when hit by the torpedoes. The Navy brass believed that the case was "of vital interest not only to the families of those who lost their lives, but also to the public at large," so a second charge was coopered up. Charge II became "failure to abandon ship in a timely manner." Proving such a charge would be problematic, at best; but that was of little or no importance.

The court martial trial was set for Washington, D.C., on December 3, 1945. McVay learned of the proceeding five days beforehand. His request for a short delay to accommodate the schedule of his chosen attorney was refused; as such, he was left with inexperienced counsel with just days to prepare a defense — a defense for the first captain ever in American history to be court martialed for losing his ship to enemy action in war time.

Testimony by Indianapolis survivors cut against the government's case. To a man, they all averred that visibility on the night of the attack was poor. The government's rebuttal to the court was that it was at least clear enough for the Japanese submarine to see and torpedo the ship. And, in furtherance of that point, the Navy flew the submarine commander in from Japan to testify about "what he saw, what he did, and how he did it."

Unusual Strategy

That unusual strategy, just four months after the war's conclusion, brought howls of protest in Congress and in the media. More interesting perhaps for trial lawyers was the poor job of horse-shedding that was done with the Japanese commander. In his direct testimony he explained to the court that zigzagging would have had absolutely n(effect upon what he did on the fateful night — that the Indianapolis would have been sunk regardless of her orders. And, if that were not enough, another key witness — this time one of America's leading submarine commanders — testified that zigzagging was not an effective defensive mechanism against submarine attack.

Notwithstanding that devastating testimony, as well as the fact that Admiral King had recently been given a report detailing the intelligence failures that put the Indianapolis on a course which ensured its meeting with the Japanese submarine (a report which McVay's lawyer was, of course, unaware, just as he was unaware of the intelligence failure itself and the reasons therefore — the ULTRA secret being years away from being declassified), McVay was ultimately convicted under Charge I. Charge II was, not surprisingly, dismissed And while his sentence was remitted on the recommendations of Admirals King

and Nimitz, McVay's active naval career was over; he officially retired a few years later and became an insurance salesman.

Aftermath

Almost right after he returned to the States, Captain McVay started receiving ugly hate mail, purportedly coming from family members of lost crewmen and blaming him for their deaths. But the survivors of the Indianapolis did not blame him. Rather, they revered him, honoring their Captain at a survivors' reunion in 1960. They also began an effort to clear his Naval record.

Before their efforts bore any fruit, however, McVay's inner torment (and the weight of the hate mail) got the better of him. He committed suicide.

Years later, spurred in part by the declassification of intelligence reports that demonstrated that the Indianapolis had been sent (unbeknownst to McVay and his crew) into harm's way, as well as by the efforts of a Florida teenager whose history project caught the attention of the media (and thereafter some politicians), Congress enacted a resolution in 2000: (i) citing McVay's "lack of culpability for the tragic loss of the USS Indianapolis" and (ii) stating that because "certain exculpatory information was not available to the court-martial board... Captain McVay's military record should now reflect that he is exonerated." Notwithstanding that action, the Navy has not expunged the 1945 conviction because "internal and external reviews have supported the fairness and legality of the court-martial proceedings...." In the words of a Navy officer who has examined the proceedings: "The lesson here is that a decision can be legally correct and still be unjust."

FBC News

The Council's Early Years

By Bennette Kramer

The 70th Anniversary of the passage of the private act of the New York State Legislature establishing the Federal Bar Association of New York, New Jersey and Connecticut inspires this article.

The Federal Bar Council was organized in 1928 as the New York chapter of a national group called the Federal Bar Association. The Federal Bar Association was the first bar association for federal court practitioners in the country. The association with the FBA ended in 1932, when the New York Chapter seceded from the national group because it rejected the applications of its African-American members (20 African-American Assistant U.S. Attorneys from the Southern and Eastern Districts of New York). A private act signed by Governor Franklin D. Roosevelt on April 1, 1932, gave legal recognition to the group called the Federal Bar Association of New York, New Jersey and Connecticut (the "Association"). The name was changed to the Federal Bar Council in 1968.

First Meeting

The first record of a meeting of the New York Chapter of the Association was a formal dinner held December 6, 1928 at the Hotel Roosevelt in New York to honor the judges of the U.S. Circuit Court of Appeals, U.S. District Courts for New York and New Jersey and the U.S. Customs Court. The concerns raised by Charles H. Tuttle, then U.S. Attorney for the Southern District, who was Chair of the Executive Committee, would sound familiar to federal court practitioners today. He spoke of the need for a new courthouse and the appointment of more federal judges, with increased salaries. Charles Evans Hughes of the permanent Court of International Justice paid tribute to the group for honoring judges. Finally, the group endorsed a resolution calling for speedy passage of a bill to provide circuit court judges with law clerks.

The second recorded meeting was a banquet held on January 30, 1930, after the group had assumed the name Federal Bar Association of New York, New Jersey and Connecticut. President Henry Ward Beer reported on progress in getting new judges appointed to the federal courts in New York, New Jersey and Connecticut. The honoree for that evening was Representative George S. Graham, Chair of the House Judiciary committee, and a fervent advocate of judicial reform.

Between 1932 and 1952, the Association's activities were dedicated to understanding the issues of the evolving federal law. Most of the members at the time of the break from the national organization were from the U.S. Attorney's Office's in the Southern and Eastern Districts of New York and New Jersey. Those founders who were not in the U.S. Attorney's Offices were attached to other federal offices in New York such as the Veterans Bureau, the Federal Trade Commission, the Prohibition Unit in New York, and the U.S. Customs Service. There also were private practitioners who practiced in federal court, including Charles Tuttle, a member of Breed Abbott & Morgan. Henry Ward Beer, president from 1928 to 1952, was a Special Attorney for the Federal Trade Commission and a Special

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Assistant U.S. Attorney, as well as an expert on trade, trust and copyright law.

Charter Meeting

The charter passed by the New York State Legislature was read aloud at a meeting at the Hotel Commodore on June 15, 1932. New York State granted the Association "all the general rights, powers and duties of the Bar Association under the Membership Corporation Law." The purpose of the organization was "to advance the science of jurisprudence, protect the administrations of justice and uphold the high professional standard for the federal judiciary, ... and to encourage cordial and friendly relations among the members of the profession in said states."

Following the charter meeting, the organization established a number of committees on topics pertinent to federal law. The Committee on Federal Practice presented a petition to Congress and was instrumental in getting the Supreme Court to appoint a distinguished committee of lawyers whose goal was to simplify practice and procedure in the federal courts. The Committee on Immigration and Naturalization held a symposium on pending immigration law, attended by Congressman Dickstein, Chair of the Immigration and Naturalization Committee of the House of Representatives. In Washington, members of the Committee on Immigration and Naturalization attended hearings and made a record that the Association favored legislation that "protect our government against such types as criminal aliens and for humanizing the existing immigration laws."

The Committee on the Rules of Federal Practice demanded of Congress that it eliminate rules that the committee considered obstacles to justice. One of the objectives of the committee, explained by President Beer in a letter to Judge Learned Hand, was "to modernize and simplify obtaining examinations before trial in federal courts in the same manner as now provided in state courts where such practice is permitted. Bills of Discovery in federal courts belong to oxcart days." The Committee on the Rules of Federal Practice published two pamphlets. The first, published in 1938, was entitled "Report on the United States Supreme Court's Advisory Committee's Proposals for Amendments to the Federal Rules of Civil Procedures." The second, published in 1942, was called "Petition to the Congress of the U.S. and the Supreme Court of the U.S. to Amend Federal Laws and Rules Concerning the System of Qualifying, Summoning and Impaneling Juries and Covering Other Trial Practices in Federal Courts." In 1936, the Association successfully lobbied Congress to obtain an appropriation for the appointment of 70 law clerks to the federal courts, at an annual salary of $2,300 each. The Association was in the forefront of the effort that resulted in the passage by Congress in 1934 of an Enabling Act nationalizing federal practice and preparing federal courts to conduct litigation for an increasing number of statutes.

Other active committees of the Association at this time were Social Security Legislation, Admiralty, Bankruptcy, the Federal Communications Commission, Unlawful Practice of the Law, Judiciary, Federal Taxation, Alcoholic Beverage Tax, Criminal Laws and Procedures. The Social Security Committee helped the Social Security Administration promulgate rules for the operation of the Act. The Committee on Unlawful Practice of the Law focused on protecting the public against the so-called members of administrative and trade bar associations who were not lawyers.

Foley Square Courthouse

The Association joined with other bar associations and civic groups to lobby for a separate courthouse building in Foley Square. Ground breaking ceremonies were held on July 20, 1932, and Association President Beer was a featured speaker. The Association celebrated the completion of the courthouse in 1936 with a reception and banquet at the Hotel Commodore (cost: $5 per person), where Attorney General Homer S. Cummings attended as guest of honor.

The Association also participated in the successful effort to reform the bankruptcy laws, and specifically to prohibit circuit or district courts from appointing a standing receiver, or giving a corporate receiver a monopoly to act as legal administrator of bankruptcy proceedings. The Second Circuit's appointment of Irving Trust as principal administrators of bankruptcy proceedings had been in reaction to charges of favoritism by certain judges that concentrated power in the hands of a few favored attorneys. The appointment of Irving Trust as sole bankruptcy receiver spurred the Association in the 1930s to lobby Congress and the New York State Legislature to enact laws against this practice, which resulted in the passage of the Chandler Act in the late 1930s. The new General Orders of Bankruptcy promulgated by the U.S. Supreme Court went into effect on February 13, 1939.

Beginning in 1935, the Association took steps to condemn fascism. In 1935 the Immigration Committee called for tightening of the laws to prevent criminals and subversives (defined as fascists,

Nazis and communists) from entering the United States and becoming citizens. In 1938, the Association passed a resolution condemning Rumanian injustice to Jewish lawyers, who had been ousted from jobs because of their religion. The same resolution condemned the use of Jews as scapegoats by "unscrupulous rulers and dictators" in their efforts to distract "the attention of their peoples from their own shortcomings and other domestic difficulties." The Association held a symposium on Aeronautical Law that resulted in a resolution condemning aerial bombing of civilian populations, which was sent to the President of the United States, the Department of State, the League of Nations and the International Red Cross.

In March 1939, the Association published the first and only issue of a 60 age journal of legal thought intended to allow members to express their opinions. The journal included articles reflecting the interests of standing committees. President Beer commented that he hoped the journal might be a "voice of controversy," which would accomplish in the future what the Association had achieved in the past with the reform of the Rules of Civil Procedure and the location of the Foley Square Courthouse. The Federal Bar Bulletin followed in 1944, which was intended to be a current affairs information sheet. The few issues addressed concerns of the day such as the proposed new rules for Criminal Procedure, the need for more pay for federal judges, summaries of the latest case decisions, and the need for Equal Rights for Women. The Association gave a Thanksgiving Luncheon in 1943.

Reforming Federal Practice

Henry Beer continued as president until 1952, when new leadership took over. The interests of the Association were very similar to those concerning members of the Federal Bar Council today. With its focus on the federal courts and federal rule issues, the Association assisted in reforming the practice of law in the federal courts. Federal court practitioners today owe a debt of gratitude to our forebears who were not afraid to take controversial positions.

Editor's Note: The source of the information for this article is a piece that Peggy Brown found in the Federal Bar Council office. It appears to have been written in the 1980s and the author is unknown. This article covers the early years from 1928 to 1952; later periods will be covered in a subsequent article.

Careers

Law-Related T.V. Shows

By Marjorie J. Peerce

In recent years, law-related television programs have increased in number and popularity. Litigators often question how the stories are researched and written and, more importantly, how the writers decide when to present the case accurately or to fictionalize the law and facts. While the ability to synthesize a complicated legal story into less than 60 minutes of drama requires great skill, it appears that extensive dramatic license is taken at times to make the point. We thought a chat with some of these writers might be worthwhile.

Todd Ellis Kessler, a longtime writer for programs like "The Practice" and "Crossing Jordan," reports that he is one of the few non-lawyers writing for such shows. Kessler culls a network of lawyers across the country for technical advice and guidance to ensure that his stories are as accurate as possible. However, in an effort to dramatize the stories and present what otherwise might be dry scenes such as motion practice, writers have to mix fact with fiction. Kessler notes that writers know "what is real versus what is needed for the drama and try to mix them appropriately."

Law & Order

Marc Guggenheim, a former civil litigator in Boston, currently writes for "Law & Order." He and other writers maintain a Rolodex of lawyers in New York and elsewhere to contact for technical advice and information relevant to the episode. In researching story ideas and drafting the script, Guggenheim often consults newspapers, articles in the *ABA Journal*, caselaw, editorials, and, where appropriate, academicians. When legal argument is depicted on "Law & Order," the caselaw cited is real, and the writers take pain to ensure that the rules of evidence are followed. According to Guggenheim, it's not just practicing lawyers who know when the legal issue or scene being presented is being done improperly — the average viewer often has a "gut feeling" that the show is handling an issue incorrectly. "We try to strike a balance between realism and the dramatic license we take in writing the script. I will research a case, talk to people, learn the fact pattern — I prepare for a script the same way I used to prepare to write a brief in a case."

Bill Fordes practiced as an ADA in the New York County District Attorney's

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Office and as a defense lawyer before joining "Law & Order" at its inception. Fordes explains that the show literally takes stories from the "headlines," that is newspapers and the *New York Law Journal*, and then decides whether there are interesting legal issues unrelated to the actual case that can be melded into the story. In determining whether to take dramatic license with a storyline, Fordes explains that his rule of thumb is to present the story as written so long as it is not offensive and does not make him "gag." So, for instance, while it is rare in real life for a client to blurt out inculpatory statements before asking about a plea offer, such scenes are routine on the show in order to present the story as dramatically as possible. According to Fordes, "the best thing about writing for 'Law & Order' is that if you don't like the outcome of the story you've written, you just change the facts," for example, by making an eyewitness a drunk. However, the scenes involving the introduction of evidence, though truncated, are created by "arguing" the issues "among ourselves, writing down our argument, excising out extraneous material and then we have the lawyer's argument for the show."

So the next time you roll your eyes at the dramatic license being taken in a law-related program, remember that you are watching drama, and imagine how boring it would be to watch a full program, for instance, on the authentication of business records, which is what would have to be done to make the trial seem real.

From Our Readers

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neither were they Cowboys or Skinners. John Paulding, the leader of the group, had obtained a pass from his commanding officer (Col. Hammond) for a detail of militiamen to go to Tarrytown from North Salem where they were stationed, to prevent cattle from being driven down towards New York for the British. The detail divided itself into two groups, stationed about 200 yards apart. Paulding, Isaac Van Wart and David Williams captured André, who first threatened them with General Arnold's wrath and then tried to bribe them. For a contemporaneous account, see Bolton, "History of the County of Westchester," Vol. 1 p. 213 *et seq.* (New York 1848).

The Captors testified at André's military trial and were cross-examined. A grateful state of New York rewarded them handsomely. Each received a farm from New York, and on November 3, 1780, a Congressional vote of thanks which carried with it a life pension. Were their conduct the least irregular, their contemporaries in the small community in which they lived would have known of it, and they would not have been so rewarded. Because of the class divisions in early America, the trial tribunal chaired by General Greene had a greater empathy for a British officer than for these militiamen. If they could have been disregarded as unworthy of belief, they would have been.

Paulding served many years as elected Town Clerk of the Town of Cortlandt in Westchester County. He died in 1818 at age 60. The City of New York purchased and installed a large monument for his grave, which still stands in Van Cortlandtville Cemetery, commemorating his service to the nation. This would not have been done for a mere highwayman; the Captors were soldiers who were not diverted from their duty by Benedict Arnold's pass issued to "Anderson," or André's threats or blandishments. Their loyal service saved West Point, and perhaps the nation.

On the subject of military courts, it might be noted that the same court which tried André also tried Justice Melancton Smith of the Supreme Court for his part in the affair. Smith was acquitted. With no respect for double jeopardy, Governor Clinton arrested Smith and imprisoned him at Newburgh for a trial in civilian court. Smith escaped and dressing himself as a woman, rode on a horse behind a farmer to New Jersey, where he was taken to Manhattan, then in the hands of the British, by boat. He escaped to New Brunswick, along with many other Tories, and re-established himself there, where he also became a judge.

Tories who had lost their property in the Colonies due to their loyalty to the Crown petitioned the Chancellor in London for compensation. Smith's petition was turned down, because he had been acquitted of treason by the military court.

Author's Reply

By P. Kevin Castel

The comments of that learned student of American history and all things pertaining to Westchester County, the Honorable Charles L. Brieant, are most appreciated. His affection for the general subject area is such that his own letterhead is embossed with a pictorial figure of a revolutionary era soldier accompanied with the legend "Westchester Militiaman, Battle of White Plains, October 28, 1776."

It is, indeed, true that I relied upon secondary sources for my article but, in partial mitigation, I note that the principal such source was Chief Justice John Marshall's biography of George Washington published in 1805. Chief Justice Marshall, who served at Valley

Forge, was granted access to Washington's papers by Marshall's colleague on the High Court and Washington's nephew, Justice Bushrod Washington. The events described were still fresh in the memory of the living. Overworked and underpaid federal judges should note that Marshall published this five volume work while continuing to serve as one of the nation's most prodigious federal judges. He is identified on the title page simply as "John Marshall." Jean Edward Smith, author of the 1996 biography of Marshall, reports that Marshall and Bushrod Washington netted $19,500 each from the project.

The point of my article related to the trial of John André, as to which Marshall's work was of great assistance, including the participation of Generals Greene, Steuben and Lafayette on the tribunal, he advice to André that "he was at perfect liberty not to answer any interrogatory" and that André's own testimony "render[ed] the examination of any witnesses unnecessary. . . ." However, in truth, my fleeting suggestion that the patriots who captured André may have been lying in wait to prey on Tory travelers cannot be attributed to Marshall. This suggestion comes from Willard Sterne Randall's "George Washington: A Life" (Henry Holt 1997) and Robert Leckie's "George Washington's War: The Saga of the American Revolution" (HarperCollins 1992).

As Judge Brieant correctly notes, there was considerable gushing on the part of the American officer corps at the bravery, nobility and honor of the British spy and Marshall joins in this to some extent (but not in anyway suggesting that there was an inequity in André's xecution). As to the three who captured André, I am more than content to abide by Marshall's judgment that they rendered an "invaluable service" to their country and that the humble pension awarded to them by Congress of $200 a year for life was "much more accurately apportioned to the poverty of the public treasury than to the service which had been received." Had they not captured André and uncovered Benedict Arnold's treason, some of our colleagues, today, might be sporting barrister's wigs and addressing the jurist presiding in Provincial Court as "M' Lord."

Developments

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there, he went to Davis Polk & Wardwell and then to the United States Attorney's Office in the Southern District. Judge Walker subsequently practiced law as an associate and later a partner at Carter, Ledyard & Milburn before joining the government as Assistant Secretary of the Treasury for Enforcement and Operations.

Judge Walker became a district court judge in 1985 and then was elevated to the Second Circuit in 1989. He has served as president of the Federal Judges Association and has taught at Yale Law School and New York University Law School. In addition, Judge Walker co-chaired the Second Circuit's Task Force on Gender, Racial and Ethnic Fairness in the Courts.

In concluding his remarks, Castel noted Judge Walker's intellect, grace and uncommon ability, and he observed that, in addition to counting United States Attorney James Comey among his former law clerks, Judge Walker was proud that the former head writer for *The Simpsons* is also a former clerk — although Castel hastened to add that any similarity between the dialogue of Homer and anything Judge Walker may have said in chambers was purely coincidental.

Good Humor

Judge Walker began his remarks with characteristic good humor, commenting that earlier in the evening someone had asked him whether he was nervous. He told her he was not. Judge Walker joked that she responded by asking him, "then why are you in the ladies room?"

Turning more serious, Judge Walker discussed three types of restraint: the restraint on liberty; the restraint on governmental power spelled out in the Constitution; and judicial restraint. He described the circumstances surrounding Judge Hand's "Spirit of Liberty" speech, which he gave at a naturalization ceremony in Central Park in 1944 for over 150,000 immigrants. The theme was one of restraint: "A society in which men recognize no check upon their freedom soon becomes a society in which freedom is the possession of a savage few." For Judge Hand, the spirit of liberty was, at its core, "a spirit that is not too sure that it is right."

With respect to governmental restraint, the question — according to Judge Walker — was "how to have majoritarian rule, on the one-hand, but not majoritarian intemperance and oppression, on the other." The Framers attempted to achieve this balance, said Judge Walker, by diffusing power among the various branches of government and adopting the Bill of Rights to protect individuals against governmental oppression.

The concept of judicial restraint was a by-product of an independent judiciary, which was "a new development in the science of politics," according to Judge Walker. "Over the past two centuries, the judiciary, unelected and life-tenured, has proven itself to be uniquely capable

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of resisting the pressures of public opinion," he said. Judge Walker added: "The judiciary has turned out to be the ultimate guardian of individual liberty."

Judge Walker observed that the ultimate question is "who will guard the guardians?" He expressed the view that if the judiciary is to remain independent, it has to restrain itself, and if the law is to be obeyed, it must be seen and felt as operating with the consent of the people. When judges make law, in his view, it does not have the moral authority that comes with the consent of the governed. In addition to creating uncertainty and unpredictability in the law, Judge Walker noted, failure to exercise judicial restraint weakens the law's moral authority, politicizes the judiciary and "threatens to undermine the legitimacy of the judicial function itself."

Judge Walker stressed that the concept of judicial restraint "poses the greatest challenge — because it relies not on external rules but on the integrity of the judge." Invoking the memories of Judge Hand as well as Judge Henry Friendly, Judge Edward Weinfeld and others, Judge Walker concluded by stating that it has been "an honor and privilege to serve on the bench and bar of the Second Circuit" and to transmit the legacy of those judges "to our successors. In this way, as lawyers and judges, we may do our part to make it possible for the spirit of liberty, thus constrained, to thrive and do its noble work. "

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Professor Bell, professor of constitutional law and legal scholarship at New York University Law School, also worked with Judge Motley at the Fund. He spoke of his experience observing Judge Motley argue a case in a courtroom in Mississippi in the early 1960s, with a mural on the courtroom wall that depicted slaves picking cotton and loading a ship. In the gallery of the courtroom the spectators were segregated, with whites sitting on one side and African-Americans sitting on the other. Professor Bell remarked that "Constance Baker Motley came into that courtroom and it soon became obvious that she was the wave of the future. Constance Baker Motley was straightforward, she was fearless, and she was a very formidable opponent. Ms. Motley was superior to . . . her opponents in every way. She knew more than they did, she was better prepared than they were, she was quicker on her feet. They would win the case in the district court, but they would know that they would lose it on appeal." Professor Bell expressed his aspiration to follow in Judge Motley's footsteps and to "be formidable."

The last speaker in honor of Judge Motley was Judge Swain, who once served as Judge Motley's law clerk and now is a member of the same district court bench. She spoke of the immense importance that Judge Motley played as a role model and mentor to her: "I am still in the process of understanding the depth and richness of the experience of clerking for the Judge. . . . It was clear from the first that her priorities were justice and fairness, and the quality and delivery of both, no matter who the parties were and no matter what the substantive area. Her grace, patience, and single-mindedness in getting there inspired me to do my best for Judge Motley and to begin to hope that I might have the privilege of doing similar work some day." As Chief Judge Mukasey noted, Judge Swain's presence on the bench, where she has the privilege of which she spoke, must serve as a source of satisfaction for Judge Motley.

Judge Motley responded to these remarks in the dignified manner for which she is renowned. She noted that when she was appointed to the bench by President Lyndon Johnson in 1966, there were only four other women in the country on the federal bench. Of those four, she is the only survivor, but she noted that by living long enough, she has been able to see change, as was obvious by the large number of women judges gracing the bench at this ceremony.

Judge Brieant

To honor Judge Brieant, the court called upon Thomas Tormey, the Honorable Thomas P. Griesa, Senior United States District Judge, Vilia B. Hayes, and the Honorable Shira A. Sheindlin, United States District Judge. Tormey, who clerked for Judge Brieant and is now associated with Davis Polk & Wardwell, spoke of his great affection for the Judge, remarking on the "special spark that gives him a unique ability to connect with all people." Tormey recounted that when he clerked for Judge Brieant the Judge was the earliest to arrive in chambers each day, and that he set a schedule that led his staff to nickname him "the tornado." Tormey noted Judge Brieant's continuing interest in the administration of the court, and in encouraging settlements, both of which require conferences. He noted, therefore, the appropriateness of naming the court's Conference Center in honor of Judge Brieant.

Judge Griesa, who succeeded Judge Brieant as the Chief Judge of the Southern District, remarked, "We owe the creation of this courthouse more to Charles L. Brieant than to any other person." He

spoke of the indispensable and pivotal role that Judge Brieant played, not only in the building of the Daniel Patrick Moynihan Courthouse, but also in the building of the courthouse in White Plains, which took place at the same time. Three attributes of Judge Brieant were crucial to the successful completion of the two Southern District courthouses. First, Judge Brieant worked well with the governmental institutions upon which the project depended. Second, Judge Brieant brought the judges of the court into the process, enlisting their assistance and input through a committee, of which he was an active part. Third, Judge Brieant was amazingly resourceful in dealing with the problems and surprises that arose during the process. According to Judge Griesa, these attributes were a major reason for Judge Brieant's success shaping the buildings that now house the court.

Vilia Hayes, a partner at Hughes, Hubbard and Reed, clerked for Judge Brieant in 1980-81. Hayes spoke of Judge Brieant as her mentor and friend, who taught her of the importance of insuring that legal arguments could withstand the scrutiny of common sense and live up to the fundamental notion of fair dealing. She recited some of the sayings with which he instructed his law clerks: "Why continue talking when you have won? You can't settle a case by talking about the merits. Better to keep your mouth shut and let people think you are stupid than to open your mouth and prove them right." Hayes revealed the extraordinary efforts that Judge Brieant took to encourage litigants to treat one another with respect and civility.

Judge Scheindlin, also a former law clerk for Judge Brieant, noted that along with other parts of her training, she was "blessed to be trained by a truly magnificent writer." She spoke of the extraordinary breadth of Judge Brieant's knowledge, evidenced by his opinions in which are found quotations from scripture, historical figures, and literature. Judge Scheindlin remarked upon Judge Brieant's wonderful sense of humor, and the priceless insights he shared with his clerks about the lawyers and cases that were before him. She observed that Judge Brieant may be the only district judge in the nation who boasts a magistrate judge, a bankruptcy judge, a district judge, and a state court judge among his former law clerks, and opined that this was far from coincidental. She credited much of the success that she and her fellow law clerks have achieved to Judge Brieant's instruction to be involved in public, political, and bar association activities, and also to his willingness to help and support his judicial family. Finally, Judge Scheindlin offered an insight from the unique perspective of one who is a member of the court: "Judge Brieant is the most admired Judge in the court today, and . . . he is every judge's teacher and spiritual leader. . . . Judge Brieant acts as the conscience of the court, urging its members to do what is right for the court, whether or not it is convenient for an individual member. He has a deep love and respect for the court as an institution. . . . As a role model for newer judges, Judge Brieant stands for the best we can be. His message is clear and simple: if you are principled and honest in your dealings, you cannot help but be fair and maybe even right[.]"

Judge Brieant's words in response to these offerings were characteristically gracious. Judge Brieant extended his congratulations to Judge Motley, with whom he has served for over 30 years on the Southern District bench, and noted that it had been Judge Motley's "great vision for this building" when she was Chief Judge, which Judge Brieant shared and took on when he became Chief Judge, that led to the building of the Moynihan Courthouse. He offered regret that "our court's best friend," Senator Moynihan, after whom the Manhattan courthouse is named, had been unable to attend the ceremony. He continued, "I am greatly blessed to be honored and remembered in this glorious courthouse which bears his name, and that Judge Motley and I will each have a place in the building in which we are recognized."

Chief Judge Mukasey concluded the ceremony with the assurance to Judge Motley and Judge Brieant that "you will be appreciated not only in the rooms that bear your names, but throughout this building and indeed, throughout the court system of this country."

Marked With Plaques

The Honorable Constance Baker Motley Jury Assembly Room is on the first floor of the Moynihan Courthouse and is the space where most prospective jurors begin their first contact with the court system. Up to 450 citizens appear each day to complete their jury service in the federal court. The Honorable Charles L. Brieant Conference Center is on the eighth floor of the Moynihan Courthouse, and is made up of 3,800 square feet of space that can be used as a large conference room for up to 150 persons, or can be partitioned to create several separate meeting spaces. The well-equipped center includes the latest technical systems, and is used by judges as well as other units of the court for meetings, training, videoconferences, public receptions, and courthouse events. Both of the newly named spaces are marked with plaques in honor of the extremely distinguished judges for whom they are named.

Dedication Of Rooms Honoring Judges Motley And Brieant

By Magistrate Judge Lisa Margaret Smith

The Judges of the Southern District of New York recently dedicated two rooms at the Daniel Patrick Moynihan Courthouse at 500 Pearl Street in lower Manhattan to two of their own. Chief Judge Michael B. Mukasey presided at the ceremony, welcoming the near-capacity crowd to the occasion, at which the Jury Assembly Room was named in honor of Senior District Judge Constance Baker Motley, and the Conference Center was named in honor of District Judge Charles L. Brieant. During their careers, Judge Motley and Judge Brieant each held the post of Chief Judge of the Southern District, and they each played a significant part in the planning for and the building of the Daniel Patrick Moynihan Courthouse.

To honor Judge Motley, the court called upon the Honorable Kimba M. Wood, United States District Judge, Elaine Jones, Professor Derrick A. Bell, Jr., and the Honorable Laura Taylor Swain, United States District Judge. Judge Wood noted that before Judge Motley ascended to the bench, she had fought for racial integration in the jury system, among other things. In *Swain v. Alabama*, 380 U.S. 202 (1965), the only one of 10 cases that Judge Motley argued before the U.S. Supreme Court that she lost, Judge Motley argued that the small number of African-Americans in the jury venire, and the racially motivated use of peremptory challenges, violated the defendant's right to equal protection. Her argument was rejected. Twenty-one years later, in *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court overruled its decision in *Swain* and adopted the reasoning that Judge Motley had unsuccessfully urged decades before. Judge Wood concluded her remarks by noting the appropriateness of naming the Jury Assembly Room for "the woman who understood, well before it was apparent to most of the legal community, that equal access to jury service is an essential aspect of democracy in America."

Elaine Jones, President and Director-Counsel of the NAACP Legal Defense and Educational Fund, noted that Judge Motley began her career with the NAACP Legal Defense and Educational Fund as a law student, and that after her graduation she returned to the Fund, where she worked with the late Thurgood Marshall, later a Justice of the Supreme Court. As a staff attorney with the Fund, Judge Motley waged a legal battle for desegregation in the schools, from elementary schools to universities, winning cases on behalf of African-American students in 10 different states across the country. She won public housing cases on behalf of minorities in five more states, and public transportation cases as well. Jones suggested that Judge Motley, who had been the first woman on the staff of the Fund, had set the standard that she and other women at the Fund have followed.

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