Federal Bar Council News

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From The President

Telling A Client What It Doesn't Want To Hear

By P. Kevin Castel

Think back to the waning days of the last century. The morning mail brought news of seminars on how best to ride the expected wave of Y2K litigation. Cynicism knew no holidays. Nothing was known of chads or orange alert days. Bulls roamed free in Lower Manhattan.

It was in that quaint era that well-groomed, well-spoken individuals publicly praised the virtues of amalgamating law firms with accounting firms. Clients, we ere told, could be better served by the ynergies and efficiencies of MDP — multi-disciplinary practices. Those who

(continued on p. 17)

Developments

Federal Bar Council American Inn of Court Holds Formal Banquet. . .And Then It Rocks!

By Bennette Kramer

The Federal Bar Council American Inn of Court recently held a banquet at Bargemusic on the East River under the Brooklyn Bridge in Brooklyn. While the dinner was convivial, the subsequent entertainment was the main event and an overwhelming success.

At the dinner, well attended by 75 Inn members, the officers for the coming year were introduced and everyone congratulated outgoing President John Siffert for an outstanding year of programs. The incoming officers are the Hon. Denise Cote, president; Henry Putzel, III, president-elect; Lisa Zornberg, secretary and membership chair; Arthur Greenspan, treasurer; Anne Vladeck, program chair; and Hon. David G. Trager and Donald Kempf, Jr., counselors. Lee Richards and John Siffert are past presidents of the Inn.

Something's Afoot

Following dinner, the Inn members and additional guests attended the premiere performance of former Federal Bar Council President Steve Edwards' rock opera, called "There's Something Afoot." Steve's rock opera starred Frank Velie (the Prosecutor), Carrie Kai Heim

(continued on p. 2)

In This Issue:

Focus On: Michael Cardozo 2

Practice Tips 2

Calendar of Events 4

Judge McLaughlin Honored 5

Judge Dooling 7

From Our Readers 7

The Gomes Case 8

The Council's History 9

Videoconferencing 12

Viewpoints: Monitoring Conversations 14

Council's Winter Meeting In Hawaii 20

FBC News

Council Appoints New Executive Director

By Steven Flanders

The Federal Bar Council has reached for the stars in appointing Jeanette Redmond as the new Executive Director, succeeding Peggy Brown. Not only is the new head of the FBC's office the first lawyer, and a distinguished one, to hold this important post, she also has considerable experience running a law office, including much larger ones. And she takes over in a fashion that assures a smooth transition: she arrived in mid-April, but Peggy Brown stayed through

(continued on p. 16)

Developments

(continued from p. 1)

(the Defense Lawyer), Dennis Cariella and Harold Gordan (the Judge), Fran Obeid (the Rapper) and Jennifer Edlind (Defendant's Wife). The Chorus consisted of Elisabeth Edwards (Steve's daughter), Fern Faubiain, Sarah Hipkens and Irene Vavulitsky. The Rock Band included Carey Dunne (drums), Steve Edwards (guitar), John Redman (piano), Yasu Saito (guitar), Spencer Schneider (bass) and Jim Zucker (guitar) — all lawyers.

The crowd was wildly enthusiastic about the rock opera, which has a legal theme. The setting is a trial and the first song introduces the theme: "We've had a murder, someone's been attacked, a man is dead and his body hacked." Each leading character had a solo, ranging from "I Am the Law" by Frank Velie as Prosecutor to "Cause I am A Judge" by the Judge as an ensemble. The surprise ending is revealed through an all-cast finale, and was a real crowd pleaser. Audience members called the rock opera "imaginative" and a "delightful spoof," said that the music was "fun and full of spirit," and declared that the characters were "caricatures who resemble people we have all met."

Thus, the Inn of Court year came to a roaring finish, following many well-planned and executed programs. All participants look forward to a productive and interesting 2002-03.

Focus On:

Michael Cardozo

By Amy Sandgrund, Peter Eikenberrry and Peter Sherwin

Michael Cardozo, the new Corporation Counsel of the City of New York, is having a great time. Cardozo, a former partner at the law firm Proskauer Rose, LLP and a former President of the

From Circuit Clerk Roseann B. MacKechnie

Second Circuit Practice Tips: Offsite Video Arguments

Attorneys and pro se litigants may present oral argument to the Second Circuit from any video-argument center. Attorneys and pro se parties wishing to present their oral argument from a remote site must notify the Calendar Clerk in the Clerk's Office at Foley Square no more than 10 business days after the date of the firm notice, which is the notice informing the parties of the day and time that oral argument has been scheduled. In addition, a party must later confirm the request for a video argument by calling any member of the Calendar Team at 212-857-8595 at least three business days before the argument.

Using the video centers is easy. (For a list of video centers, go to the Second Circuit's Web site at www.ca2.uscourts.gov; click Clerk's Office; and then click Calendars.) On the day of argument, the party at the remote site must telephone the courtroom deputy at 212-857-8595, watch argument on the offsite monitor until the party's case is called, step to the podium and begin oral argument. An assistant at the video-argument center will provide guidance. There is no equipment to operate and there are no special procedures to follow during oral argument.

Just one party, or all parties, can argue by video conference. Counsel will be able to see and hear each of the judges on a split-screen monitor. The screen also will include a timer so that a party will know how much argument time has elapsed. In the courtroom at 40 Foley Square, each judge can observe counsel arguing at the offsite location on an individual screen on the bench and on a larger monitor, near the podium, facing the bench. Counsel arguing from offsite locations also will be seen on two large monitors that face the audience in the courtroom and that have been positioned on either side of the courtroom at 40 Foley Square. Counsel presenting argument from the courtroom are seen at the offsite centers in a "picture-in-picture" insert. In short, judges, counsel, and spectators in the courtroom will be able to see and hear each other as they would if all were in the courtroom. All voices will be heard over a courtroom sound system. All images will be in color and will show full motion. Should equipment malfunction on the day of or during oral argument, the presiding judge will decide how to proceed.

For further information about offsite video arguments, please contact the Calendar Team at 212-857-8595.

Association of the Bar of the City of New York, told us that he has found the best law job ever. The variety of issues that he faces as the new head of New York City's law department is "mind-boggling" and most of the matters concern areas of the law that Cardozo never ran up against in his private practice, everything from tax certiorari matters to municipal bond opinions. "The good news," Cardozo explained, "is that I have great lawyers to assist me in all of these matters." Some of the lawyers handling individual cases report being pleasantly surprised to be exchanging e-mail directly with Cardozo, who has taken a keen personal interest in the issues in their cases and is giving them direct feedback outside of the formal reporting structure.

ederal Court

Because of the nature of the matters before it, the New York City Law Department spends significant time litigating in federal court. Cardozo noted a large number of cases currently pending in federal court against the city that involve Section 1983 claims against the police department and the corrections department for alleged misconduct. There are also, however, several cases pending that could affect the city on a more macro level. One of them, currently pending before Judge Harold Baer, involves the constitutionality of the conditions at New York City prisons. In fact, with Mayor Michael Bloomberg's encouragement, Cardozo himself will argue a motion to stay Judge Baer's most recent order pending its appeal. Cardozo and Mayor Bloomberg believe that the order, which would require prison eds to be spaced six feet apart, rather han approximately three feet as is now the case, would have such enormously



Michael Cardozo

detrimental ramifications for the city's budget that it is appropriate for Cardozo to argue the matter personally.

In the past, in an effort to quell the rising tide of class action law suits, the city agreed to enter into a series of consent decrees that often subjected it to the court system's supervision for extended periods of time. He believes that experience has shown that this is plainly not good policy. Cardozo aims to follow in the footsteps of his predecessors Michael Hess and Paul Crotty who, while encouraging settlements of large policy cases where the city may have been at fault, sought to move away from judicial supervision and toward a system of outside, objective monitors for finite and, preferably, short time periods. This system worked well in a recent series of cases against the Department of Children's Services, and Cardozo hopes to continue and expand efforts along these lines.

Strategic Settlement

More than 30 years of litigation experience has convinced Michael Cardozo that litigation should be the last resort. Cardozo believes that an effective way to curb major policy suits against the city is to make himself and his office available for negotiations with advocacy groups before they file suit. Cardozo explained that he has established a policy of open communications with advocacy groups and has indeed already been successful in avoiding litigation. Cardozo emphasized that regulation and settlement are appropriate if the claim is meritorious. In those instances, early and strategic settlement of cases is in the city's best interest, and thus Cardozo has been encouraging settlements at the early stages of some cases that reach his office.

As President of the Association of the Bar and in his work with the Fund for Modern Courts, Cardozo tirelessly advocated for merit selection of judges. Mayor Bloomberg has expressed to Cardozo and others his commitment to finding the best and brightest candidates for the judiciary. He has used the background and skills of Cardozo and Carol Robles-Roman, the Deputy Mayor for Legal Affairs, to find "good people" and the "best candidates" for open slots. With the help of Cardozo and Robles-Roman, Mayor Bloomberg issued an executive order setting out a merit selection system for judges. The mayor has established a Mayoral Committee on the Judiciary with Zachary Carter, former U.S. Attorney of the Eastern District, and Robert Keating, a former state court judge, as chair and vice-chair, respectively. The committee has a mandate to conduct major outreach in its search for potential judicial candidates. Moreover, in an effort to ensure the high quality and independence of judicial candidates, Mayor Bloomberg has publicly stated that he will appoint only those candidates approved both by his Committee on the Judiciary and by the Association of the Bar of the City of New York.

(continued on p. 4)

(continued from p. 3)

Budget

Like all of New York City's government offices, the Law Department faces budgetary restraints that affect both its staff and its ability to increase its ranks. The department's incoming class this year was cut in half, with only 25 new attorneys reporting for work this Fall. There have been no salary increases beyond those pre-established for each class, and two special bonus programs have been suspended. However, in an effort to gain support from the private sector, Cardozo has re-instituted a partnership with private law firms that was first introduced during New York City's last budget crisis under Mayor Edward Koch.

Cardozo has met with the heads of the litigation departments at most of New York City's major firms and has asked them to commit to taking part in the program in one of two ways. The first is to "donate" a litigation associate to the Corporation Counsel's office. That lawyer would be assigned for six months to the tort or family law division of the Corporation Counsel's office to try cases. The associate and law firm benefit through the unprecedented trial experience that the associate would receive. The Law Department benefits by getting some relief from the cases on trial calendars throughout the city. The second option for firms in lieu of donating a particular associate is to become the city's co-counsel on some of its larger and more complex cases, most likely policy cases, labor litigations or affirmative litigations taken on by the city. Ideally, according to Cardozo, firms would agree to both options.

The response from the city's private sector has been enormous. Over 30 firms have already committed to the program, and Cardozo expects to sign up several more soon.

Managing The Department

Cardozo believes that the lawyers in his office are terrific and he strives to give them the best training possible. Many divisions have frequent training sessions. The department also hosts a city-wide continuing legal education program that is available to all lawyers employed by the city. Due to the events of September 11, the Corporation Counsel office's staff was dispersed into 40 different offices. This has made any department-wide training difficult to manage. Cardozo is grateful for having his entire team under one roof again at 100 Church Street. Meanwhile, Cardozo is emphasizing an increased use of technology. He is encouraging some of the junior lawyers to partner with their more senior colleagues for tutorials in the use of the new technology that Cardozo hopes will become part of the every day routine.

Cardozo encourages young lawyers to consider work at the Corporation Counsel's office. The work is dynamic, the cases are interesting and varied and it is an excellent opportunity to perform a much needed public service.

Recent Issues

There are a number of interesting issues that have faced the Corporation Counsel's office recently. For example, the head of city archives under former Mayor Rudolph Giuliani signed a contract with a non-government, not-for-profit corporation associated with Giuliani to take possession of all of his mayoral records. The contract contained a provision that was read by some to mean that the not-for-profit corporation would have final say regarding access to those papers and what would be divulged to the public. Cardozo and the Giuliani not-for-profit worked out a plan making it clear that the documents would be made available to the public through the same Freedom of Information Law applicable to all other city documents and that the

Calendar of Events

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

Anti-Terrorism Measures and Civil Liberties
U.S. Courthouse, 500 Pearl Street, New York
Wednesday, October 30, 2002

Enron and Andersen: Ethical and Legal Issues in Litigation
U.S. Courthouse, 500 Pearl Street, New York
Wednesday, November 20, 2002

Annual Thanksgiving Luncheon
Waldorf-Astoria Hotel, New York City
Wednesday, November 27, 2002

Corporation Counsel's office would determine what documents would be released under the Freedom of Information Law.

The impact of September 11 on the Law Department has been enormous. The issues have ranged from the physical housing of the Law Department staff (many of whom worked just one block from the Trade Center) to the many legal matters that have sprung from the tragedy. Cardozo himself met with Ken Feinberg, the federal government's special master administering the program, to discuss and give input into the distribution of the funds for the victims of the disaster. The rebuilding efforts are fraught with legal issues regarding the real property rights of the government, the private sector and the utilities involved. Then, of course, there are the potentially ge number of suits brought by individuals that could be filed at any time. Cardozo and his office have been working with the Federal Emergency Management Agency to negotiate how New York City will be indemnified for some of the claims. Thus far, over 13,000 claims have been filed for injuries allegedly stemming from the clean up of the World Trade Center site.

"The challenges, opportunities and diversity this job offers are extraordinary," said Cardozo. The contracts, real estate, economic development and tort issues arising from 9/11 alone are sufficient to keep a large law firm busy. And the important day-to-day work of the office —such as drafting legislation, prosecuting juvenile delinquents, handling all the city's worker's compensation claims, and bringing and defending against thousands of law suits of every type — is unique. "At a time when New York City is facing the huge economic and other problems in the aftermath of 9/11, I am very fortunate to head this great Law Department," Cardozo concluded. "I am also fortunate to work with such a proactive, supportive mayor who empowers the Law Department to be the best it can be."

Editor's Note: Amy Sandgrund, a former Proskauer Rose associate, is now a Staff Director of Citizens Union; Peter Sherwin is a partner at Proskauer Rose. Peter Eikenberry is a member of the Board of Editors of the Federal Bar Council News.

The Judiciary

Judge McLaughlin Honored

By Patrick McHugh

With characteristic, if not notorious, wit and wisdom, the Honorable Joseph M. McLaughlin returned to the federal courthouse in Brooklyn recently for what the judge referred to as his "hanging." The occasion was the presentation of the portrait of Judge McLaughlin in the ceremonial courtroom commemorating the judge's distinguished service as a district court judge in the Eastern District of New York from 1981 to 1990, prior to his elevation to the Second Circuit.

The Honorable Edward R. Korman, Chief Judge of the Eastern District, welcomed the crowd and introduced the audience to the judge's background and

(continued on p. 6)

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(continued from p. 5)

enviable credentials. Following Chief Judge Korman's warm welcome, Judge I. Leo Glasser, Senior United States District Judge for the Eastern District, spoke of the days when he and Judge McLaughlin, both former deans of New York law schools, served together as district judges in the Brooklyn courthouse. Consistent with a theme of good Irish humor, and reminiscent of Judge McLaughlin's induction speech at his swearing-in at Foley Square in October 1990, Judge Glasser recounted the story of the Irishman who fell into a vat of Guinness, expressing the wish that his mouth be worthy of the occasion.

Federal Bar Council President Kevin Castel then offered congratulations to the judge on this great honor. Speaking on behalf of the members of the Federal Bar Council and the entire litigating bar, Castel noted the extremely high regard in which the judge is held and compared his judicial opinions to finely-cut crystal, "transparent in their reasoning and clear in their style." Castel was careful to point out, however, that no tribute to the judge, as educator, dean, practicing lawyer or jurist, could ever be complete without due acknowledgment of "Del Vermo" — a recidivist character of exploits who seemed to appear in every one of the judge's teaching hypotheticals, whether in the law school classrooms at Fordham or St. John's or the halls of the Practicing Law Institute, providing legendary insight and treasured humor to young students in pursuit of the law.

Edward Tighe, in-house counsel for the National Football League and former law clerk to Judge McLaughlin, spoke on behalf of the family of McLaughlin law clerks, both past and present. Ed Tighe compared his task of speaking immediately before Himself as being a bit like Frank Sinatra, Jr., "just warming up the crowd for the Old Man," noting that no good could possibly come of it. He pointed out to the audience that the collection of McLaughlin law clerks had grown in size over the years, approaching the size of the College of Cardinals in Rome, "but better instructed in matters of Canon Law."

Life In Chambers

Turning his attention to a brief look at life in chambers, Ed Tighe recalled an event at the IRA gunrunning trial presided over by the judge. At one point during the trial, the government's lawyer sprang to his feet, objecting to a defendant's detailed and colorful recitation of the history of Ireland's troubles. The judge overruled the objection. When asked why, the judge responded, "It's interesting."

No one, according to Ed Tighe, could complain of unequal treatment during the trial. The defense called an auxiliary bishop from Brooklyn as a character witness, but it became readily apparent that the witness barely knew the defendant. Surprised that the government cross-examined only briefly, the defense was ill-prepared to proceed and requested an adjournment for the afternoon. At sidebar, the judge inquired pleasantly, "What's the matter, Murphy, Rent-A-Bishop closed?"

"What Can I Do For You?"

Good-natured humor aside, Ed Tighe recounted how the judge always greeted attorneys with courtesy and respect, noting that invariably, "What can I do for you?" was the first line of any Judge McLaughlin transcript. Ed Tighe spoke for all of Judge McLaughlin's law clerks when he said that his two-year clerkship was easily the best two years of his professional career (a statement that took courage and deserves respect, given Ed's current boss).

Judge McLaughlin thanked his former law clerk but noted that compliments always embarrassed him. "I always feel that, with the exception of Ed Tighe, they don't go on long enough." Commenting that the phantom from his career as a district judge flits regularly before him, the judge indulged the crowd with some of his more memorable experiences at the Brooklyn district court. On asking one prospective juror on voir dire, "What are your adult children doing now?" he was advised "Two to six in Otisville." Another prospective juror revealed that her husband was an attorney. When asked whether her husband practiced criminal law, she responded, "Yes. He does real estate development."

The conduct of a trial, the judge recalled, also had its light moments. One such moment arose during the cross-examination of a criminal defendant about his past criminal record. The defendant responded that he had twice before been convicted of a crime. When asked whether he was sure those were the only two prior convictions, the defendant responded, "Yes, two. This will be my third."

After regaling the gathering with similar insights from within a judge's chambers — letters of recommendation in the clerkship application process that confirm proofreading to be among the lost arts; tales of Irish turf farmers before the central courts in Dublin; and histories of the more colorful past members of the Eastern District bench — the judge offered a proposal based on the writings and self-inflicted fate of Jeremy Bentham, generally considered to be the principal spokesperson of Utilitarianism: "Now, by way of conclusion, I propose to the Eastern District Board of Judges that

when the time comes for me to cross the Great Divide, they retain a taxidermist to exercise all of his skills and artistry to perform the necessary services, so that not only my spirit but my very body may be ensconced in this Ceremonial Courtroom, if not, indeed, in the lobby. In this manner, like Bentham, I will always inspire the court's deliberations and I will rest eternally secure in the knowledge that though I may be forgotten, I will never be gone."

As Castel expressed with eloquence and sincerity, the Federal Bar Council congratulates Judge McLaughlin on this well-deserved honor.

The Judiciary

Judge Dooling

by Michael Cooper

Editor's Note: Following are excerpts from remarks by Michael Cooper on the presentation of a portrait of Judge John F. Dooling, Jr., to the United States District Court for the Eastern District of New York.

John Dooling had an unquenchable thirst for knowledge — in and out of the law. Indeed, it was his ability and determination to master whatever field of knowledge or experience his cases took him to that accounted, as much as any other quality, for his success at the bar. He handled a number of complex tax cases involving such matters as foreign tax creditors and the World War II excess profits tax. His intellectual curiosity led to his becoming skilled in patent litigation, and he spanned both fields in a major tax case on the valuation of a patent for the purpose of tax amortization. Whether it was tax or patent law, or corporate governance, or antitrust or commercial transactions gone sour, John Dooling brought his razor-sharp analytic abilities to bear in the service of his client. In our time of increasing specialization, the rich variety of John Dooling's practice stands in striking contrast and demonstrates the truth of the proposition that a great advocate's skills transcend the boundaries of practice specialities.

It is impossible to capture in words the essence of what made John Dooling special. His mind was so rigorous and disciplined that it could be said that he had no mental fat. His intellectual curiosity was — or seemed — boundless, and his reservoir of knowledge was astonishing. His dedication was total.

He was also a marvelous teacher of, and exemplar for, young lawyers, who were drawn irresistibly to him. During the brief time I knew John Dooling, he worked most evenings at the office and would dine at a restaurant named Masoletti's at 70 Pine Street before returning to the office. Younger lawyers had an open invitation to join him, and if the number outgrew the table, another table and sometimes two were joined. We sat like acolytes, soaking in whatever he chose to talk about. John did most of the talking, not because he wanted to dominate the conversation but because we were smart enough to realize how much we could learn by listening to this extraordinary scholar and raconteur.

I will close with an anecdote and an image. The anecdote concerns Christmas day in 1960. I had been with the firm [Sullivan & Cromwell] for two months. I was not married or romantically attached at the time, and my planned celebration for the day was to have dinner with my widowed mother in Tenafly, New Jersey. Lacking anything else to do Christmas morning, I went to the office. I was working in a library carrel when I sensed a physical presence behind me. When I turned, there was John Dooling standing behind my chair. I do not remember his words, but I do vividly recall the message he conveyed: that if I was at the office on Christmas morning, it meant either that the firm was overburdening me with work or that my work ethic was overmastering other qualities he thought essential to leading a full and rounded life; either explanation for my presence saddened him. He left, and I continued my work, chastened, for a few minutes until it struck me that having himself come to the office on Christmas day, he was in no position to chide me for doing so.

The image that I mentioned is associated with a Second Circuit Judicial Conference, held in Lake Placid, to which Judge Dooling had graciously invited me and my wife. Having seen very little of him since he ascended to the bench, I hungered for his company and offered him a lift for the 300-mile drive to Lake Placid. He accepted and suggested I pick him up on a corner near the courthouse. When I approached the corner, I saw a solitary figure standing reading a book. The figure was, of course, John Dooling; the book was *The Iliad*.

From Our Readers

Tenure

By Hon. Wilfred Feinberg

I received yesterday the latest issue of the *Federal Bar Council News*. As always, it was interesting and well written.

However, I do want to correct an incorrect impression that your readers

(continued on p. 8)

(continued from p. 7)

may get from the article (p.5) on the Federal Bar Council's spring reception for senior judges. The article states that I have been a circuit judge for 36 years. That is correct, but before that I was a judge of the United States District Court for the Southern District of New York for the period from October 1961 to March 1966, when I went to the circuit court. In other words, I have been on the federal bench since October 1961, a few months short, at this time, of 41 years. While I would be happy to be five years younger, I must confess to the longer period of service.

The Gomes Case

Balancing Rights

By Gerald Walpin and David Wales

Editor's Note: In the Gomes case, the Court of Appeals for the Second Circuit invited the Federal Bar Council to submit an amicus curiae brief addressing whether a non-dangerous criminal defendant can be involuntarily medicated to be made competent for trial. The issue presented two conflicting constitutional rights: an individual's right to be free from compelled bodily intrusion through medication and society's right to bring an indicted defendant to trial.

The Council appointed three members to prepare the brief. They analyzed the facts and issues and reported that they were split 2 to 1. The board considered both views and, by a similarly split vote, adopted the majority report. But, given the substantial split, the Federal Bar Council's brief presented both the majority and the minority positions. The minority Federal Bar Council position — which was authored by Gerald Walpin and David Wales — was that the state has a substantial and fundamental interest in trying a defendant charged with a crime, with that interest trumping any objection as long as the treatment is supported by findings, based on expert medical opinion and the court's analysis of the nature of the offense. The position of the Federal Bar Council majority view was that the state's interest in trying a defendant may not, under any circumstances, override the defendant's interest in being free from compelled bodily intrusion through forced medication.

The Court of Appeals sided with the minority report. Herewith is a summary of the position that ultimately became the court's decision.

Relevant Facts

Gomes, whose record included at least three prior convictions for crimes of violence or drug dealing, was indicted for possession of a firearm by a convicted felon. If convicted, he faced a mandatory minimum sentence of 15 years' imprisonment. Gomes refused to participate in a psychiatric examination both when his own attorney suggested doubts as to his competency and when the district judge ordered a competency hearing.

Psychiatric experts testified that Gomes was incompetent, suffering from persecutory delusions, believing that the federal criminal prosecution was "part of a vast conspiracy against him orchestrated by the judge in a prior state court proceeding." Subsequent hearings elicited expert testimony that antipsychotic medication was appropriate as "the indicated treatment for Gomes's illness." Although Gomes, prior to his indictment, had voluntarily taken such medication, he stopped doing so, asserting instead that he simply should be declared incompetent to stand trial, which, because his psychiatric condition — as distinguished from his criminal conduct — did not make him a danger to himself or society, would mean that he would be released to live free in society.

The district court ordered involuntary medication, finding, based on medical testimony and evidence, that (i) "[p]sychotropic medicine is . . . medically appropriate and necessary in this case . . . to relieve the defendant's suffering from persecutory delusional beliefs and improve and restore his mental functioning"; (ii) there were no "less intrusive means by which to achieve these results"; (iii) there was "a high likelihood of successfully treating the defendant with psychotropic medication and restoring him to competency"; (iv) although recognizing "there are possible side-effects," they "can be corrected by treating the defendant with secondary forms of medication"; (v) defendant "will not regain competency without the medication"; and (vi) the "potential of the psychotropic medications to interfere with the defendant's ability to participate and assist his counsel at trial is insufficient" because "these side-effects are substantially preventable or treatable."

Discussion

The "[c]onstitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace." *Illinois v. Allen*, 379 U.S. 337, 347 (1970)(Brennan, J., concurring), statement adopted by the Court in *Riggins v. Nevada*, 504 U.S. 127, 136 (1992).

This right has been also labeled as "greatly important," *Winston v. Lee*, 470 U.S. 753, 762 (1985), "legitimate," *Singer v. United States*, 380 U.S. 24, 36 (1965), and "essential," *United States v. Weston*, 2001 U.S. App. Lexis 16851, *1, *14 (D.C. Cir. July 27, 2001).

The Due Process Clause of the Fourteenth Amendment is the source of defendant's right to be free from compelled bodily intrusion, including involuntary medication. *Washington v. Harper*, 494 U.S. 210 (1990).

These rights, however, are not absolute. The Supreme Court has in various contexts held that courts must balance the "liberty of the individual" against "the demands of an organized society." *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982). It has thus been held that "due process allows a mentally ill inmate to be treated involuntarily with anti-psychotic drugs where there is a determination that 'the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest.'" *Riggins*, 504 U.S. at 134-35 (quoting *Harper*, 494 U.S. at 227). *Accord, Jurasck v. Utah State Hospital*, 158 F.3d 506, 513 (10th Cir. 1998)("forced medication of involuntarily-committed individuals designated as 'gravely disabled'"); *Khiem v. United States*, 612 A.2d 160, 166 (D.C. Ct. App. 1992)("It would surely be incongruous ... to hold that the Court, after committing an accused for treatment to render him competent so that he can stand trial for the offenses with which he has been charged is obliged to withhold treatment at the accused's sole option"); *Woodland v. Angus*, 820 F. Supp. 1497, 1509 (D. Utah 1993)(forced medication approved if "for the needs of the institution"). Other examples of the non-absolute nature of the freedom from bodily intrusion are force feeding a prisoner on a hunger strike, *Cruzan v. Director*, 497 U.S. 261 (1990); *State ex Rel White v. Narick*, 170 W. Va. 195 (1982); *In re Sanchez*, 577 F. Supp. 7 (S.D.N.Y. 1983); compelled medical treatment, *Commissioner v. Myers*, 399 N.E.2d 452 (Mass. 1979); *Polk County Sheriff v. Iowa District Court*, 594 N.W.2d 421 (Iowa 1999); and compelled inoculations, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

Even more restrictive controls over a defendant have been approved as constitutional in order to permit a criminal trial to proceed to verdict. Thus, an unruly defendant may be shackled and gagged, if the court determines that no other lesser restriction would permit the trial to continue without disruption. *Illinois v. Allen*, 397 U.S. 337, 342 (1970). Or, even more extreme, the court is, in appropriate circumstances, authorized simply to remove an unruly and uncooperative defendant from the courtroom and continue the trial without him. *Id.* at 342.

To meet the argument that the jury's observance of a "sane" and "calm" defendant would torpedo the defendant's insanity defense, the district court carefully insured that it fully and continually be aware of and consider "any issues concerning the defendant's treatment during the course of trial at the time of trial." The district court could thus inform the jury, in connection with any insanity defense, that, in considering the defendant's behavior in court, the defendant is being administered mind-altering medication, which the court has found is required in order to make him competent to stand trial. This would leave to the jury the determination of the insanity defense based on the evidence, including experts' testimony, as to the defendant's unmedicated condition at the time of the offense, with the court providing information which must be of substantial help to the defendant on the insanity defense.

Court Of Appeals' Decision

The Court of Appeals stated that "[t]he need for medication to render Gomes competent continues to yield an argument of some force that but for the medication, his illness would amount to insanity and that he suffered from the same illness when the crime was committed." While it remanded for an up-to-date hearing, and specified additional details, the Second Circuit, in a well-reasoned, clear opinion, essentially affirmed the district court's decision that, with appropriate findings, forced medication is constitutionally proper to render a defendant competent to stand trial.

FBC News

The Council's History

By Bennette Kramer

Editor's Note: This is the final part of a history of the Federal Bar Council. The first part appeared in the June 2002 issue.

In 1952, the era of Henry Ward Beer, at that date the first and only President of the Federal Bar Association of New York, New Jersey and Connecticut, came to an end and the modern era began. The Hon. Theodore Kupferman and Ted Jackson, two friends from the copyright field, headed the new leadership. This new group, including directors Cornelius Wickershim and Harvey Greenfield, recruited many new members and continued the practice of

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sharing information about federal law. The new leadership provided fresh ideas, appointed new chairs to head committees and held diverse social events. The Thanksgiving Luncheons became an annual event beginning in 1952; regular trips to Washington, D.C., for member admissions to the Supreme Court began in 1955; and Law Day Dinners began in 1962. In 1956, the constitution of the organization was amended to allow the vice president to automatically succeed the president and made all past presidents permanent members of the Board of Trustees. In 1957, a Women's Division was organized, which flourished until it was integrated into the general membership in the mid-1960s. Presidents in the 1950s were Bernard Grossman, Ted Kupferman, Ted Jackson, Cornelius W. Wickershim, Jr. and Harvey Greenfield.

Active committees beginning in the 1950s were copyright, taxation, space law, atomic law, civil defense and applied psychology in the law. The psychology and the law committee held a major conference in 1954, breaking new ground. The space law committee urged the President of the United States to call for an international conference to discuss the peaceful use of outer space.

Beginning in 1953, the FBA also continued the practice of Judge Murray Hulbert of the Southern District to commemorate Constitution Day. The Constitution Day Proceedings were published in a special edition of the Journal of the Federal Bar Association in 1953 and 1956. The 1956 program took place in the Eastern District courthouse. The focus was on individual rights and civil liberties, which were being challenged at that time by the House Committee on Unamerican Activities.

Peter Brown became president of the FBA in 1961, and ushered in another growth phase. He had been an Assistant United States Attorney under J. Edward Lumbard, and then went to Sullivan & Cromwell. He recruited his colleagues from the major law firms to join the solo practitioners who had revived the FBA in the 1950s. Peter Brown inaugurated the presentation of the Emory Buckner and Judge Learned Hand Awards at the Thanksgiving Day Luncheons and the Law Day Dinners. The Board of Trustees established a practice of having lawyers and judges sit together at social functions so that they could get to know one another.

A committee on committees appointed by the Board of Trustees in 1967 recommended that the number of committees be limited to 20, and that 11 committees be abolished. The remaining committees were: Admiralty, Aeronautical and Space Law, Antitrust Laws and Trade Regulations, Bankruptcy and Corporate Reorganization, Condemnation, Corporations & Securities, Criminal Law, Customs and Trade, Federal Lawyers' Referral Service, Federal Courthouse, Federal Law and Practice, Immigration and Naturalization, Judiciary, Labor Law, Law Day, Law of the Theatre, Membership, Professional Ethics and Grievances, Public Defender and Taxation. The Committee on Professional Ethics and Grievances was responsible for all disciplinary proceedings in the Southern District, indicating that the FBA worked closely with the U.S. Attorney's Office during this period. The Labor Law Committee was extremely active, writing a number of reports on issues such as migratory farm labor, sweetheart contracts, the legal status of defamation in labor relations disputes and federal public employee relations. Members of the Committee on Federal Law and Practice testified in Congress in support of a bill that would permit consumers to bring class actions in the federal courts regardless of the amount in controversy or the citizenship of the parties and submitted a report calling for long range commitments in federal housing programs. In 1970 the Legislation Committee, led by Richard A. Givens and Peter K. Leisure, submitted a report to Congress opposing legislation concerning the use of television in political campaigns.

Statement Of Purpose

In the 1960s the present day structure of the FBA began to take shape. The trustees decided to focus on major issues affecting the relationship between bench and bar. A statement of purpose defined the FBA purposes as: (1) to advance th science of federal jurisprudence; (2) to protect the administration of justice; (3) to uphold the high professional standards of the federal judiciary, government attorneys and attorneys of the federal courts; and (4) to encourage cordial and friendly relations among members of the legal profession. The trustees established several committees to foster these goals. A Committee to Increase Salaries for Federal Judges lobbied for a state bill providing for supplemental payments for judges sitting in New York to bring salaries to the level of Supreme Court Justices sitting in the same counties. Another worked with the federal judiciary to develop a plan to provide counsel for indigent defendants where legal aid was not available by setting up a Federal Defender's Fund to provide for court fees, appointed attorneys' expenses and fees for protracted cases. Beginning in 1962, the Judicial Committee cooperate with the ABA by reviewing qualifications of candidates for federal judgeships.

Peter M. Brown, Daniel Gutman, Paul Windels, Jr., Arnold Bauman and Laurence Vogel were the presidents of the 1960s.

In 1968, the trustees agreed to change the name of the organization to the Federal Bar Council, intending it to be an advisory council to the courts of the Second Circuit like the Law Council of Inns of Court in England. The FBC was open to all members of the legal profession in good standing, admitted to practice before the federal courts. In 1967, the Federal Law Newsletter, an information newsletter, was first published. It included a report on the Thanksgiving Luncheon at the Waldorf-Astoria Hotel where FBC President Arnold Bauman introduced Supreme Court Justice John M. Harlan, who presented the Emory Buckner Award to District Judge Sylvester J. Ryan. The first Annual Winter Meeting, attended by more than 140 members, was held February 19-23, 1969 in Nassau, the Bahamas. At the first meeting, panel discussion topics included the Texas Gulf Sulfur decision, aircraft skyjacking and "Nassau, Bahamas — what it offers your clients." A black tie dinner concluded the meeting.

In 1969, the FBC established its first permanent office, manned by Evelyn Gelman, who had become executive secretary in 1964. The Federal Bar Foundation was also established at this time when David Finkelstein turned over the proceeds of the disbanded Martin Foundation to the FBC. The first new members' reception was held on October 27, 1970.

A new group of leaders in the 1970s, led by presidents Fred Nathan, George Leisure, Jr., and Whitney N. Seymour, continued the efforts of the FBC. The Board of Trustees decided to streamline the organizational structure by concentrating on the courts. The Second Circuit Courts Committee, intended to improve and facilitate the workings of the Second Circuit Courts, was formed; Leonard Sand became the first chair. The committees that had been active during 1950-1970 were eliminated as FBC activities.

Along with the federal courts committees of the city, county and state bar associations, the new committee decided to study sentencing, judicial salaries, housekeeping problems in the courts, and use of new technologies to improve efficiency and reduce costs and to monitor Congressional action on the speedy trial act. The committee opposed proposed rules of admission to federal district courts and represented the FBC at a hearing on the subject on November 20, 1974. The committee recommended a post graduate/post admission learning seminar program instead of requirements for admission. The committee also opposed the proposed recommendation of the Hruska Commission for a creation of a National Court of Appeals, because such a court would not relieve the congestion of the Supreme Court. The committee also considered methods for selection of chief judges; prepared guidelines for the appointment of magistrates; developed methods to increase the efficiency of the clerk's office; and encouraged the more effective utilization of jurors. The committee continued throughout the 1970s to consider such issues as the evaluation of sitting judges; utilization of the magistrate judge system; creation of a separate federal district composed of Nassau and Suffolk counties; and creation of special appellate courts for patent and civil tax appeals.

The creation of the Second Circuit Courts Committee, with the responsibility for formulating policies and advancing proposals, was viewed as a turning point in the history of the FBC. Throughout the 1970s the board debated how many other committees the FBC should support. In 1975, at the recommendation of President Fred Nathan, the board adopted a plan whereby six committees were mandated and the formation of additional committees was left to the discretion of the president with the advice and consent of the board. The mandated committees were: (1) Emory Buckner Award and Learned Hand Medal; (2) Judiciary; (3) Membership; (4) Professional Ethics and Grievances; (5) Publications; and (6) Second Circuit Courts. In order to satisfy those who wanted substantive committees that had been at the FBC from the beginning, workshops were developed to share common concerns in specialized legal fields.

The Judiciary Committee continued to work for better salaries for federal judges in the 1970s. It also reviewed the proper procedures to follow in recommending judges, while following its usual procedure of commenting on the name submitted and reporting its findings to the ABA. The Audit and Budget Committee worked with Evelyn Gelman to develop the budget and oversaw its execution. The Membership Committee conducted annual membership drives in the major law firms and the Southern District. In addition, Judge Lumbard signed a letter directed to all attorneys who practiced in the federal courts. By 1981, the FBC had 1,800 members.

Winter Meetings

The Winter Meetings continued with interesting panels drawing on the most prominent experts in the legal field. The Second Circuit Redbook was first published in 1975, and was recognized immediately as a major reference for

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practitioners in the federal courts. The Second Circuit Digest, summarizing cases in the federal courts, was published beginning in 1974.

The Second Circuit History Committee, created in 1980, was composed of lawyers and judges. The objectives of the committee included: (1) collecting and cataloging historical materials found in the Foley Square Courthouse; (2) hanging and preserving the portraits of judges that were stored in the Foley Square Courthouse; (3) developing exhibits to be installed in the Foley Square Courthouse to educate the public and the bar about the history of the Second Circuit Courts; (4) presenting an annual lecture by a Second Circuit Judge on a topic relating to the history of one of the district courts or the court of appeals; and (5) establishing a commission to write a popular history of the courts of the Second Circuit.

The period from 1970 to 1985 saw the establishment of the FBC in its present form. Administratively, its functions were streamlined and it began to operate on a sound financial basis. The reduction of the number of committees and focus on the Second Circuit Courts Committee provided a more effective use of FBC resources and heightened its influence in the legal community. The leaders of the FBC during this period were Harold R. Tyler, Jr., Robert Fiske, Jr., Louis Pulvermacher and David Trager. Women were included as officers and board members, including Ruth Bader Ginsburg, who served as Vice President in 1980 and 1982. Evelyn Gelman continued to provide administrative support, celebrating her silver anniversary with the FBC in 1989. She retired in the early 1990s, and Sheila Cohen assumed the duties of Interim Executive Director, until Peggy Brown was appointed Executive Director. The Second Circuit Digest evolved into the *Federal Bar Council News*.

Today, we enjoy the Thanksgiving Luncheon, the Law Day Dinner and the Winter Bench and Bar Conference. A Fall conference has been added to enable younger members to participate in a conference with Second Circuit Judges during a long weekend. Peggy Brown retired earlier this year, and Jeanette Redmond has assumed the duties of Executive Director.

Trial Practice

Videoconferencing

By Norris D. Wolff

The use of videoconferencing for trials is permitted by Federal Rule of Civil Procedure 43, which provides that the "court may for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location." At this time, there are no local rules respecting videoconferencing, nor is there a section in the Federal Bar Council's Redbook providing details respecting this technology's availability. Videoconferencing, however, is available in the Second Circuit and there are some steps that lawyers can take to implement its usage.

Southern District

The District Court for the Southern District has had videoconferencing technology for approximately five years. All of the courtrooms in Manhattan, and some of the courtrooms in White Plains, are wired with three ISDN lines, which provide videoconferencing capability since the equipment can be transported from courtroom to courtroom. The videoconferencing equipment is used frequently in the Southern District. The technology is put to a variety of uses, including taking testimony at trial and proceedings in which prisoners are litigants, thus minimizing the need to transport prisoners to court. The court also uses videoconferencing to facilitate internal administrative communications.

The Southern District Bankruptcy Court also has videoconferencing capability in two of its courtrooms in Manhattan and one in White Plains. While the equipment became fully operational this year, to date, only a few of the judges have used it, including a visiting judge who uses videoconferencing to communicate with his "home" court. The Southern District Bankruptcy Court hopes to expand its videoconferencing capabilities by wiring more courtrooms for the equipment.

Eastern District

The Eastern District Bankruptcy Court in Brooklyn does not currently use videoconferencing for any proceedings, and its use is restricted to administrative functions, such as communication with the court in Central Islip and the administrative office of the United States courts in Washington, D.C. The Bankruptcy Court in the Eastern District of New York in Brooklyn currently leases space, and its videoconferencing capability is constrained by the size of its surroundings. The hope is that once the Bankruptcy Court moves into a permanent home in the post office building on Cadman Plaza it will be able to have greater videoconferencing capability.

The District Courts of the Eastern District in Brooklyn and Central Islip both have videoconferencing technology in every courtroom since all have ISDN lines to which the videoconferencing equipment can be linked. Courtrooms in the Eastern District have had the videoconferencing capability for about four and one-half years now. The court now uses the videoconferencing technology frequently for a variety of matters, including trials in which witness testimony is received from remote foreign locations as diverse as Israel and Kuala Lumpur. Videoconferencing is also used for status conferences, administrative functions, and videoconferencing within the courthouse to accommodate the public or the press who want to watch proceedings when there is not enough room in the primary courtroom.

Once the new Brooklyn courthouse is complete sometime next year, the expectation is for the court's videoconferencing capability to be greatly enhanced. Instead of being limited to using videoconferencing where ISDN lines are present, videoconferencing will be possible wherever a network connection is available. With this enhanced capability, the court will more than double its capacity to conduct videoconferences from external sites as well as greatly expand its internal videoconferencing capacity.

Connecticut

In the District Court for the District of Connecticut in New Haven, videoconferencing equipment is available in two rooms, neither of which is a courtroom. The videoconferencing equipment has not been used for trials yet and is utilized primarily for arguments before the Second Circuit or to accept a criminal plea. The District Court in Connecticut hopes to have videoconferencing capability in its courtrooms by, approximately, the early part of 2003.

The Bankruptcy Courts for the District of Connecticut have access to the Second Circuit's videoconferencing equipment housed in the district court. The Bankruptcy Court in Connecticut has not used the videoconferencing equipment to date, in part because there are a number of branches of the bankruptcy court throughout Connecticut, and it does not take a long time to travel within Connecticut, thus reducing the demand for videoconferencing.

Vermont

The District Court for the District of Vermont, in Burlington, has had videoconferencing for three and one-half to four years in two of its courtrooms. Though the technology is rarely used for trials, it is used for arraignments in criminal cases and for arguments before the Second Circuit. In cases involving arraignments, the judges' practice requires defendants to sign a waiver recognizing that they have, but are foregoing, the right to appear in person for the proceeding. When it is necessary to administer an oath to a witness, it is administered by court personnel from the courtroom —just as it would be with a live witness.

The Bankruptcy Court for the District of Vermont in Rutland has had videoconferencing capability in its sole courtroom for about three and one-half years. There is currently no Bankruptcy Court in Burlington although the bankruptcy judge does sit there on a regular basis and utilizes one of the district court's courtrooms. In the past, the videoconferencing system was used four to five times a month for hearings (but not trials or other evidentiary proceedings), which often permitted litigants to go to one of several Vermont Interactive Television System locations throughout the state rather than to the court in Rutland. The videoconferencing equipment is also used for arguments before the Second Circuit. In addition, the bankruptcy court uses the technology for management purposes, including meetings and training. The use of videoconferencing by the bankruptcy court for hearings has diminished since the current judge prefers to travel to Burlington so that litigants can appear in person.

Northern District

The courts in the Northern District of New York all have videoconferencing capabilities, although not necessarily in all courtrooms. Videoconferencing is used primarily for video pleas, pre-trial conferences in both civil and criminal matters, and continuing legal education for law clerks and personnel. The courts hope to expand their videoconferencing capabilities in the near future.

Western District

The District Court for the Western District in Buffalo has had videoconferencing technology for a couple of years, and approximately four of the six courtrooms are equipped with this capacity. At this time, the videoconferencing technology has been used at least once for a trial, and it is also used for conferences involving prisoners. The primary use to which the Western District of New York puts the videoconferencing technology is for communication with the court's branch in Rochester. At times, the

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videoconferencing equipment has been used for training programs. Overall, the videoconferencing equipment is used about twice a week. At some point in the future, the District Court in the Western District of New York should be able to connect with the Second Circuit in Manhattan for oral arguments.

The Bankruptcy Court for the Western District of New York in Buffalo has access to the district court's videoconferencing equipment, but it has apparently not yet used the equipment. The court is currently examining ways to update its courtrooms, and adding videoconferencing capability may be one of the updates.

Although videoconferencing costs substantially more than a phone call, in the long run it is significantly less than the cost of transporting a witness to court. Moreover, in the event a trial is subject to lengthy delays, the witness is not required to be near the courthouse while waiting to testify. In addition, videoconferencing may enable testimony that might otherwise be too difficult or impractical to secure. For instance, if a witness' testimony is brief, but nonetheless important, it may be easier to justify the cost of receiving that witness' testimony through videoconferencing than it would be to have the witness travel to the trial location. If a witness has a scheduling conflict and is outside of the court's subpoena power, the witness may be more agreeable to testifying at trial via videoconferencing, as opposed to traveling to the court. Witnesses with serious health issues or of an advanced age may also prefer testifying via videoconferencing.

Practical Tips

When considering the use of videoconferencing, it is important to "plan ahead."

For example, lawyers should ascertain the precise videoconferencing capabilities of the court in which their case is pending. It is important to insure that the technical characteristics of the remote system are compatible with the characteristics of the court's videoconferencing system.

Additionally, lawyers should investigate videoconferencing facilities where their witness is located. In many instances, hotels, court reporters and certain copy centers may have this capability.

Once lawyers have identified an out of court videoconferencing facility, they should conduct a test connection with the court. It is better to find out in advance there may be a problem, rather than at the moment a connection fails at trial. Lawyers will need to use a conference call to help the court personnel communicate with the remote videoconferencing provider.

Don't forget, too, that there may be significant time differences between the court and where the witnesses are. Lawyers cannot subject witnesses to testifying in the "middle of the night" for them, nor can they expect, in many locations, the technical personnel at the foreign end to be available at all hours.

There also may be language barriers between the court personnel and the remote videoconferencing facility. Thus, lawyers may want to have the translator present for the tests to bridge a language gap and resolve what may be a simple technical matter.

Part of the cost will be paying for the long distance telephone connection because the court cannot make long distance calls from its equipment. Thus, lawyers should have their long distance calling cards at the courthouse and be prepared to make long distance calls to the remote videoconferencing facility. Remember, cellular phones are not permitted in court.

The increasing availability of videoconferencing throughout the Second Circuit offers litigants the opportunity to save time and money as well as to minimize the burden on witnesses appearing at trial. With proper planning and a little luck, the video links generally work smoothly and provide the court and counsel with a significant new mechanism for trying cases in a cost efficient manner.

Editor's Note: The author recently tried a case in the Southern District Bankruptcy Court in which four of the six trial witnesses testified in Italian via videoconferencing from two different locations in Italy. A translator was present in court in New York and each video witness was sworn in by the court reporter in New York

Viewpoints

Monitoring Conversations

By Frederick H. Cohn

Editor's Note: This article takes place in the future, 50 years from now. Responses are welcomed.

The recent declassification and release to the public of documents from the period often referred to by historians as "America's War on America" has brought scholars and reporters of all stripes to the Library of Congress. Of particular interest are tape recordings and documents relating to the earliest monitoring of privileged conversations between attorneys and their clients.

Up until September 11, 2001, attorneys and their clients were assured

absolute privacy in their professional conversations, subject to exceptions such as the crime-fraud exception. That near-blanket privilege seems strange to current practitioners and legal scholars. The much more limited privilege that exists today stems from the 9/11 attacks. Targeting some 20 terrorists then in custody who up to that time had enjoyed the protection of the Constitution, U.S. Attorney General John Ashcroft declared by regulation that if a head of a governmental agency gave him information that raised a reasonable suspicion that an attorney was engaged in conduct that would aid his or her client in activities that were a threat to the nation or to the security of the institutions in which they were housed, notice would be given to the offending parties and a team of justice department listeners would monitor their conversations.

Hoping to avoid a huge outcry not only by the organized bar and civil liberties organizations, but by the judiciary itself, the Attorney General included in the regulations assurances that the monitors would not disclose the content of the conversations unless there was what they perceived to be a "threat" in the communications. This protection proved to be inadequate when attorneys were heard to discuss with their clients what they knew that could help the government and therefore help themselves to less stringent jail conditions. The listening teams quickly made a determination either that lives of U.S. soldiers or allies could be saved or that fugitives whose attendance at some ill-defined proceeding the government avidly sought could be gleaned from the information that the client was legitimately supplying to his attorney. The "Chinese Wall" quickly crumpled.

Several attorneys sued on behalf of their clients. One attorney was indicted for violation of the government-imposed secrecy agreements, and several attorneys who had received notice that they were being monitored sought to withdraw from their cases. Those who were not allowed to withdraw were fired by their clients, who refused new counsel on the ground that their attorneys, paid for by the government, were at best unwitting or unwilling agents of the government. At the very least, said the detainees, they were ineffective as a matter of law because they could not discuss matters of importance.

Years of litigation ensued. After they were convicted, Muslims challenged the process without benefit of counsel. The courts, caught up in the war fever, rejected each attack on a system of justice that was increasingly weighted against defendants who posed a danger to the public. As that danger waned, enterprising prosecutors became sensitized to the argument that defendants who arguably were a threat to many people were, in fact a greater danger to the public and to the economy than terrorists. They extended the regulations to many real dangers, such as the Mafia and the drug trade, where thousands died each year and billions of dollars were extracted from the economy. In 10 years, the right to independent counsel in whom a defendant could confide was eviscerated. Counsel was tasked with the duty to report any activity about which they learned where physical and economic harm might be prevented by disclosure.

Attorneys began to caution their clients that telling them the truth was a high risk and low profit strategy. Finally, in a landmark case, the Supreme Court, to avoid a blanket and retroactive reversal of a decade of jurisprudence that had evolved from the erosion of the privilege, declared that the laws against perjury and obstruction of justice were thereafter unconstitutional because due process demanded that criminal defendants have a right to defend themselves and, because the right to confidentiality had effectively ceased to exist, the only defense otherwise guilty defendants had was the right to lie to everyone, including their attorneys.

The Tapes

Scholars and political scientists have long awaited the opening of the documents just made available in hopes that there might be a seminal signal of what was to come. Of great interest is a tape recording of a conversation between Attorney General Ashcroft and the Director of the Bureau of Prisons:

Dir. BOP: Sir. You know that we allow telephone conferences between those terrorists and their lawyers. We don't monitor them but we do have our case worker in the room because of the high security risk that those prisoners pose.

AG: Yep. What about it?

Dir BOP: Well, there is one attorney who calls from New York every few weeks. Every time he calls his client asks him some time during the conversation. "How's the weather in New York?"

AG: So?

Dir BOP: Well sir, our case worker can't help but overhear this and it occurred to him that the weather in New York couldn't be of any legitimate interest to these prisoners. I mean they are in isolation. They don't even have a window. They never get outside. Why should they care about the weather?

AG: Hmm.

Dir BOP: That's right sir. And when the case worker went to the warden with it, the warden agreed that probably the lawyer was passing on flight information

(continued on p. 16)

(continued from p. 15)

for another terrorist attack.

AG: That's ridiculous!

Dir BOP: Maybe, sir. But you know what a hit the President took because there was information that, if anyone had paid any attention, might have prevented 9/11. We ought to be paying close attention to these creeps. You got these Arabs on one side and these New York lawyers on the other. Can we take a chance?

AG: Well, I need a reasonable suspicion in order to give monitoring notice.

Dir BOP: Sir. Any suspicion is reasonable if we can say that we were afraid lives could be lost. Anyway, what's the harm? With this as an excuse you never know what intelligence we can pick up.

AG: You're right. I'll give the bastards notice right away. It'll take 'em at least a year in court to get out from under, if they ever do. Judges are loyal Americans too, at least some of 'em. Everyone may talk about the weather but we're damn sure goin' to do something about it.

One Conversation

Called for comment on this transcript, a prominent constitutional historian who spoke only on the condition of anonymity said, "If you can ever trace anything to one conversation this seems like this could be it."

Also called for comment, the son of an attorney whose father went through years of litigation and became a pariah to the public but something of a closet hero to his profession, would only quote a joke that was current at the time, "....One Nation, under surveillance, with liberty and justice for all."

FBC News

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the end of May. They worked together on the Law Day dinner and other Council projects.

Jeanette Redmond came to the law by an unusual route that gave her far more confidence that she knew what she was getting into than is possible for most lawyers when they enter the profession. She worked for the Metropolitan Transportation Authority from 1984 until 1997 (the year of her graduation from law school), as Executive Legal Assistant and ultimately Manager of Legal Support Services and Assistant Secretary to the Board. She describes the successive General Counsels of the MTA as superb and encouraging mentors, providing a practical understanding of the life and work of the law and encouraging her remarkable academic career in the face of full-time and demanding work. Going to school at night she graduated summa cum laude from New York University in 1993, and from Fordham School of Law in 1997, where she served in several law review posts for three years and published a significant Note.

Judge Platt's Clerk

Graduation from law school led to a new full-time post even more relevant to her new duties at the Federal Bar Council: a clerkship for Judge Thomas C. Platt, Jr., of the Eastern District of New York. The Uniondale chambers, and those of neighboring judges and staff, were "a cozy community" that she enormously enjoyed, and where she learned a great deal. Notwithstanding a reputation as a judge who may be a bit hard on lawyers on occasion, Judge Platt provided a terrific learning experience to this clerk, "charming, gentle, gallant, a great



Jeanette Redmond

teacher." He trained the clerks to keep track of the relevant deadlines, was an excellent writer who sharpened her own work considerably, and she found "the fun part" to be learning the lawyers' tricks.

Jeanette Redmond describes the decision to come to the FBC as closely related to 9/11 events. She went from Judge Platt to the firm of Davis Polk & Wardwell, serving as a corporate associate in the offices in Hong Kong and ultimately in Tokyo. As it happened, when the attacks occurred she was at a printer's office (it was 11:00 p.m. in Tokyo), and it was some time before the full enormity of the events, or even their basic contours, became clear to this New Yorker. A television was on but there was no cable; the transmission naturally was in Japanese, and it looked like a movie. And it was more than two weeks before she was able to book return flights to New York. (The firm sent her home promptly, at her request, and she rejoined the head office here.) But this searing experience led to a decision that she preferred a more cozy, smaller environment. She describes the FBC as "just fun," and jokes that she should be paying her employer, not the other way around.

A New Yorker

Jeanette Redmond was born and raised in Manhattan, mostly in Harlem, and later lived in Queens and Long Island. While she has never been a litigator, she feels her experiences as a law clerk and managing a large office introduced her to the relevant sensitivities. She looks forward to helping Kevin Castel and Gerald Walpin extend the work of the Council —"we'll do what we currently do, maybe a little better." As efforts continue to build the membership, she expects to be especially helpful in reaching out to young lawyers. Will she miss practice? Perhaps after a year or so she might hope to take on some pro bono work, she believes.

With this remarkable appointment, the Federal Bar Council can look forward to continuing strong leadership at the staff level as well as from its officers.

From The President

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raised objections were either fuddy-duddies or, more likely, turf protectors who invoked high-minded principles of professional responsibility to guard narrow economic interests. Opponents were reminded that if state codes remained inflexible, a single piece of commerce clause legislation could sweep these obstacles away. Our clients, we were told, were against us on this one.

And then the public was smacked across the face with reports of accounting restatements and undisclosed liabilities. The merry-go-round stopped and questions were asked about corporate checks and balances. Suddenly, the public wanted to know where the auditors, directors and outside counsel were while the corporate books were in the oven. Conflating the roles of lawyer and vendor of collateral services no longer seemed so attractive.

And so it now looks like the private bar will remain free of accounting firm overlords. Our ability to render independent advice should be savored. Some clients will push, at times, to get us to bless or pursue strategies which, while not indisputably violative of any written code, are unsound and unwise. Free of the economic dominance of any one client, we should relish our ability to follow our instincts and give the client our best thoughts, even if that is not what it wants to hear. We retain the ability to engage in glorious pushback — loyal, but strong, resistance to a bad idea. The most able among us will do this and still maintain the client's continued loyalty and respect.

Of course, our profession is not free from sin or sinners. When our colleagues at the bar go astray, it is rarely because they misunderstood the text of the Code of Professional Responsibility. You don't need a rule book to know that you can't cheat or steal from a client. But you do need backbone and character to stand your ground with a client even when that may mean losing its business.

The swing of the Enron pendulum has presented a new set of issues for our profession. Section 307 of the Sarbanes-Oxley Act of 2002 requires the SEC to issue rules requiring attorneys who represent public companies before the SEC to report material violations of the securities laws, breaches of fiduciary duty, "or similar violation" by a company or its agents to its chief legal officer or chief executive officer. If the legal officer or CEO does not "appropriately respond" (your guess is as good as mine), then the attorney is required to report to the audit committee, a committee of independent directors, or the full board. Consistent with the attorney-client privilege, no public or agency reporting obligation is expressly imposed.

Certain of these obligations previously existed in lawyer disciplinary codes, see, e.g., DR 5-109(B). But their inclusion in SEC rules puts them in play in future litigation. Even in the non-party witness context, it is not clear how the attorney-client privilege will apply to the following yes or no question directed to a lawyer: Did you engage in any internal reporting required by Sarbanes-Oxley? (I would hope that even a yes or no answer would be precluded by the privilege.) It does not take a great imagination to paint a picture of where issuer's counsel may stand in relation to future securities litigation. I choose not to speculate further on the new vistas which may have been opened. But it is fair to raise the policy question: Will corporate officers and in-house lawyers be less likely to ask for outside legal advice on tough judgment calls because of the fear that their "own lawyers" will go over their heads and, if this is the case, will the world be a better place for it? Some hints at answers are found in a book-length empirical study published by Professor Vincent C. Alexander (who happens to be the editor of the Federal Bar Council's Redbook) entitled *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 St. John's L. Rev. 191 (1989). Though not dispositive of the questions posed, Professor Alexander observed that 75 percent of the surveyed executives expressed the belief that attorney-client confidentiality promoted candor.

I finish with a plea that, in drafting the regulations, the SEC keep in mind that it is the lawyers who, most often, are the firmest voices in favor of "doing the right thing." Typically, outside lawyers are not present on the day-to-day scene,

(continued on p. 18)

(continued from p. 17)

have no roving mandate from the corporation to freely contact any and all of its personnel, and know only that which the participants elect to share with them. Care should be exercised so that the role of lawyer is not converted into the role of quasi-government agent such that the lawyer is excluded from the very discussions in which he or she can do the most good through careful counselling. A good drafting model for the SEC may be New York's DR 5-109, which takes into account "the scope and nature of the lawyer's representation" and requires that the actions taken by the lawyer, including reporting to the corporation's board, be "designed to minimize the disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization...."

The Back Page

(continued from p. 20)

Campaign Finance Reform will be covered by a panel led by the Honorable Nicholas G. Garaufis, U.S. District Judge for the Eastern District of New York. This panel also will include Brooklyn Law School Associate Dean Joel Gora, Kenneth A. Gross, a partner in the Washington office of Skadden, Arps, Slate, Meagher & Flom LLP and a noted authority on campaign law compliance, and Roger M. Witten, a partner at Wilmer, Cutler & Pickering in Washington, D.C.

A panel discussing Document Retention Policies and Ethical Issues for Corporate Counsel After Enron will be moderated by the Honorable Janet C. Hall, U.S. District Judge for Connecticut.



The pool deck reception area at the Kapalua Bay Hotel.

Joining Judge Hall will be Federal Bar Council members Robert J. Giuffra, Jr., a partner at Sullivan & Cromwell, and Richard F. Ziegler, a member of Cleary, Gottlieb, Steen & Hamilton.

The Honorable Gerard E. Lynch, U.S. District Judge, Southern District of New York, will moderate a panel on "Terrorism — Internal Security and Civil Liberties." Other panelists for this program will include Louis J. Freeh, former Director of the Federal Bureau of Investigation, Steven R. Shapiro, National Legal Director of the American Civil Liberties Union, and Mary Jo White.

Participants who attend all six programs will earn a total of 12 CLE credits, a portion of which will be ethics CLE credits.

Presentation Of Outstanding Public Service Award

At the conference's banquet on the final evening, Gerald Walpin, who then will be president of the Federal Bar Council, will present the Council's award for Outstanding Public Service by a private practitioner. The award, established by the Council in 1986, is named in honor of the late Whitney North Seymour, a leading member of the bar who served as president of the American Bar Association, the Association of the Bar of the City of New York, the Legal Aid Society and in countless other major positions of leadership at the bar and in the community. The award is in the form of a barrister's wig case, similar to the type used by barristers in Great Britain and to a case acquired by Whitney North Seymour at the time he was made an honorary bencher of Lincoln's Inn on the occasion of the first meeting of the American Bar Association held in London.

The Council has not yet selected the 2003 awardee, but past recipients have included Arthur Liman, Joseph H. Flom, Fritz Schwarz, Ambassador Morris A. Abram, John D. Feerick, Robert B. Fiske, Marvin E. Frankel, Bernard W. Nussbaum, and, most recently, Evan A. Davis, former president of the Association of the Bar of the City of New York.

We hope you will join us next February for what is sure to be a successful and interesting program. Registration applications and further information may be obtained by contacting the Federal Bar Council at (212) 883-1777 or federalbar@federalbarcouncil.com.

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Jeanette Redmond
Executive Director
September 7, 2002.

The Back Page

Council's Winter Meeting To Be Held In Hawaii In February 2003

By Jeanette Redmond

The Federal Bar Council will hold its 35th Annual Winter Bench and Bar Conference at the Kapalua Bay Hotel on the beautiful island of Maui in Hawaii, from Saturday, February 15, 2003, through Saturday, February 22, 2003. The conference will offer participants the opportunity to attend six continuing legal education programs organized by the Planning Committee, chaired by the Honorable Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit.

From White Collar Crime To Campaign Finance Reform

Although formation of the panels is still in progress, a number of panelists already have accepted invitations to participate in the scheduled programs. For example, the Honorable Carol Bagley Amon, U.S. District Judge for the Eastern District of New York, will moderate a panel covering current issues in White Collar Criminal Practice. The panelists for this program will be Mary Jo White, former United States Attorney for the Southern District of New York, Peter C. Wolff, Jr., of the Office of the Federal Defender in Honolulu, Hawaii, Susan R. Necheles, a member of Hafetz & Necheles, and Valerie Caproni, counsel to Simpson Thacher & Bartlett.

In addition to serving as chair of the Planning Committee, Judge Leval will moderate panels covering recent Supreme Court cases and the New Federalism. Joining Judge Leval on these panels will be Professor Samuel Estreicher, special counsel in the Labor and Employment Law Practice Group at Morgan, Lewis & Bockius LLP and a professor of law at New York University School of Law, Charles J. Cooper, a Federal Bar Council member and a member of Cooper & Kirk, PLLC, in Washington, D.C., and Michael E. Rosman, General Counsel of the Center for Individual Rights in Washington, D.C. Mr. Cooper and Mr. Moss each served as Assistant Attorney General for the Office of Legal Counsel in different administrations.

A panel on issues concerning Church and State and child abuse will be led by the Honorable Richard C. Casey, U.S. District Judge for the Southern District of New York. Also participating in the panel will be Kings County District Attorney Charles J. Hynes and Federal Bar Council members Thomas W. Hyland, a partner with Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, Paul K. Rooney, of Paul K. Rooney, P.C., and Michael G. Dowd.

(continued on p. 18)

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