Federal Bar Council News

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From The President

Judicial Nominees

By Gerald Walpin

Our Founding Fathers provided that nomination of federal judges is the sole responsibility of the President, "with the advice and consent of the Senate." Until recently, the confirmation process focused on qualifications, integrity and experience. But lately the nominees' views — or predicted views — on such issues as abortion, the death penalty and affirmative action, and their political leanings in general, have displaced a determination based on qualifications. It has even "progressed" to the point of a minority of the senators engaging in a

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Trial Lawyers

A Look At The Wonderful Career Of Bob Fiske

By Suzanne Kerrigan and Peter Eikenberry

The first things you notice walking into Bob Fiske's office are three courtroom sketches. These, in his almost 50-year long career, were his most interesting and important trials. One is of the trial of Leroy "Nicky" Barnes — one of the most notorious drug dealers in New York City history. Fiske hadn't planned to try Barnes himself — until a *New York Times* article got the attention of President Carter. The *Times* described Barnes's flashy lifestyle, his penthouse apartments in New Jersey, his many cars and his 300 suits. After repeated evasions of the cops and of conviction, he became known as Mr. Untouchable. He habitually thumbed his nose at law enforcement. One car chase ended with Barnes in a New Jersey washroom using $100 bills to dry his hands . . . in front of the cops. He also frequently handed out food and toys to neighborhood kids and was considered a role model by some.

Judge Griffin Bell, then Attorney General, called Bob Fiske and reported that the President had read the *Times* article and had said that this was the most important case in the country because if we couldn't put someone like this away,

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Court Decisions

Forced Medication Of Pretrial Detainees

By Sara Beth Savage

The U.S. Supreme Court ruled this past June, in *Sell v. United States*, that the Constitution permits a court, in rare, limited circumstances, to order that non-violent pretrial detainees be medicated against their will to render them competent to stand trial.

In ruling that Sell could be forcibly medicated, the Court, in an opinion written by Justice Breyer, held that forcible medication of a defendant does not violate a defendant's Fifth Amendment liberty interest to reject medical treatment if (1) significant government interests are at

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Trial Lawyers

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there was something wrong with our system of justice. He said he hoped the prosecutors had a good case. In turn, Judge Bell said to Fiske, "I hope you have a good case." Fiske, returning understatement with understatement, responded that there were some problems with some of the witnesses but also said, "we'll be OK." The trial was the first before an anonymous jury (a decision the trial judge made on his own initiative for the jurors' protection). In the end, Barnes spent 21 years of a life sentence in prison — during which his cooperation with federal prosecutors helped convict many more big New York drug dealers.

Anthony Scotto

The second sketch is from the trial of Anthony Scotto, President of Local 1814, International Longshoremen's Union, who was convicted in 1979 of racketeering with Anthony Anastasio, the vice president of the same union. A June 2002 press release from the DOJ, announcing indictments of Gambino family members for their control of the waterfront through control of the ILA, invoked Fiske's Scotto prosecution as the first in a series of assaults on organized crime's control of the waterfronts. Fiske had been involved in the investigation — which explains his decision to try the case personally. The case was very high profile and received prominent media attention (Former Mayors Wagner and Lindsay and then New York State Governor Hugh Carey were character witnesses for Scotto). Fiske established that Scotto and Anastasio had received payoffs and kickbacks from various companies doing business on the waterfront and convinced the jury not to believe that the money was intended for political contributions (despite the testimony of campaign officials).

Three Mile Island

The third sketch is from a civil case that Fiske handled at Davis Polk & Wardwell. On March 21, 1980, marking the end of three weeks off after returning to the firm from the U.S. Attorney's office, GPU, the owner of Three Mile Island, sued Babcock & Wilcox for $4 billion. B&W had manufactured the reactor that almost melted down the previous year. Fiske explained that, in the course of congressional hearings into the accident, documents surfaced showing that the year before the accident, the same sequence had been observed in Toledo — a valve got stuck open and water supply to the reactor's cooling system was ultimately cut off. Operators misread the symptoms and turned off the cooling water, leading, in the instance of Three Mile Island, to severe damage to the reactor core.

Not only did internal safety documents identify the potential problem and state that B&W had not provided adequate training but they also recommended in urgent terms that a memo be sent to operators of all other B&W plants immediately advising that this particular combination of symptoms required a particular course of action. B&W did not send the memo. Fiske explains the sequence of events today as he did for those he cross-examined before Judge Owen — very simply — so as to necessitate the conclusion that it was the operators (whose basic training was not B&W's responsibility) who missed very obvious signs and should have been able to figure the problem out. After three months of trial the case settled on terms very favorable to B&W.

The Facts

Fiske observed that he learned early that cases are won on the facts. He and his team spent a year learning how a nuclear reactor works — background essential both to the ability to cross examine the operators and to reduce a series of symptoms to a simple accident sequence with a predictable outcome. He insists that if you develop the facts in your favor, the applicable legal principles will supply themselves.

Mastery of the facts is one of the lawyer skills that Fiske learned from two of the more influential lawyers in his life — Judge Lawrence Walsh and Hazard Gillespie. Fiske worked with Judge Walsh when Judge Walsh returned to Davis Polk at the end of his tenure as Deputy Attorney General under William Rogers. For 15 years at Davis Polk, Fiske worked extensively with Judge Walsh and Hazard Gillespie (for whom he also had worked when Gillespie was U.S. Attorney for the Southern District). Judge Edward Lumbard, the U.S. Attorney when Fiske joined the office as a student assistant in 1954, was another influence — he made Fiske realize the importance of public service.

Fiske's initial goal, on becoming U.S. Attorney in 1976, was to run the office the same way that Judge Lumbard had. He says that teaching bright young lawyers trial and appellate advocacy skills and imbuing them with the importance of public service has been one of the most gratifying experiences of his career. He is also proud of increasing the number of women AUSAs in the office. Hiring solely on merit, by the end of Mr. Fiske's tenure the representation of women had risen from 6 to 44. He rattles off a long list, including Judges Barbara Jones, Denise Cote, Naomi Buchwald, Debora Batts and Pat Williams and former U.S. Attorney Mary Jo White.

Whitewater Counsel

Fiske describes his time in Little Rock, as Independent Counsel in the Whitewater Investigation from January to October 1994, as an exciting and rewarding experience. He was upset when he was replaced because he was preparing to file a number of indictments, which subsequently were filed by Ken Starr. Another disappointment was the conservative opposition that prevented his selection by Richard Thornburgh as Deputy Attorney General (for what was, in his view, wrongfully perceived as an ideologically driven equivocation over Judge Bork and other candidates by the ABA Standing Committee on Federal Judiciary of which Fiske had been chair). Of the Bush Administration's reduction of the role of the ABA in the judicial selection process, Fiske observed that he thinks the administration is missing out. The concept, from the days of the Eisenhower Administration, was that purely objective analysis by the ABA gave the administration a heads-up on problems that might be awkward if they were to arise after nomination. Currently the ABA provides pre-nomination advice only to the Senate Judiciary Committee.

Full Caseload

Fiske carries a full caseload at Davis Polk and reports that he has no plans for retirement. He is trying to change the mix a bit, to permit more time off. His most recent high-profile case was the defense of Alfred Taubman, who just completed nine months of a yearlong sentence for fixing auction commission rates while at Sotheby's.

As for advice to young lawyers, Fiske says that he has found a career based on a mix of private and public responsibilities to be extremely rewarding and recommends government and other public service to all.

New Appointments

Judge Wesley Moves To The Second Circuit

By Nathaniel Z. Marmur

On June 11, 2003, the Senate confirmed Richard C. Wesley, an Associate Judge of the New York Court of Appeals, for a seat on the Second Circuit by a vote of 96-0. As a result, Judge Wesley became the first judge of the highest court in New York State to sit on the Second Circuit.

Judge Wesley's transition from the state to the federal judiciary has been a whirlwind ride. In June he was still working on opinions concluding the Court of Appeals' 2002-03 term; by early September he already had sat on three different Second Circuit panels. Judge Wesley spoke with the Federal Bar Council to discuss this unprecedented transition and his experiences thus far on the Second Circuit.

Background

Judge Wesley grew up in the small Western New York town of Hemlock, near Rochester. The son of a truck driver and the grandson of a dairy farmer, Judge Wesley was in the first generation of his family to attend college. After graduating from the State University at Albany (in 1971, summa cum laude) and Cornell Law School (in 1974), he returned to Livingston County, where he enjoyed the practice of a small-town litigator. He cut his teeth appearing in night court and trying cases involving local disputes over farming and other rural issues.

From 1979 to 1982, he also served as assistant counsel and chief legislative aide to New York Assembly Minority Leader James L. Emery. Judge Wesley himself was elected to the Assembly in 1982 and served until 1986, when he was elected to the Supreme Court. He was appointed to the Appellate Division, Fourth Department in 1994, and to the Court of Appeals in 1997.

Judge Wesley continues to make his home in Western New York. He lives in Livonia, where his wife is a teacher in the local primary school. Judge Wesley is immensely proud of his son (who attends Cornell) and his daughter (who attends SUNY Buffalo Law School), and reports that he never missed any of their sporting events when they were growing up. FBC sources (who wish to remain anonymous) insist that Judge Wesley was also the loudest voice in the stands at those events. Judge Wesley is also an avid runner who has already finished two marathons and looks forward to competing in more.

The Transition

Perhaps the first question that comes to mind when examining Judge Wesley's historic move from the Court of Appeals to the Second Circuit is why? "Most of my life has been spent trying to grow and increase my understanding," he explains after a thoughtful pause. "The new challenge intrigued me. I had the opportunity to learn and to grow, to tackle new law and to face new lawyers."

It is clear, though, that the most difficult part of the change was leaving a job and colleagues that he enjoyed immensely. "I liked everything about the Court of Appeals," he says, expressing a true affinity for the people and the institution. He discusses with enthusiasm

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and insight the work of the Court during his tenure there, including the opinions he authored. One notable opinion was his decision in *People v. Harris*, in which Judge Wesley, perhaps contrary to his "pro-prosecution" reputation among some observers, wrote for the Court in reversing the first death sentence imposed under New York's 1995 death penalty statute. Judge Wesley also expresses great admiration for Chief Judge Judith Kaye, whom he believes has done more to develop the New York court system than any chief judge in the history of the state.

"But loving what you're doing is not a reason not to do something else," he admits.

A New Challenge

For one who has spent his whole professional life immersed in New York State law, the transition to the federal judiciary has indeed been challenging. Whereas New York cases often involve interpretation and development of the common law, federal appellate review involves much more statutory interpretation. Moreover, the statutory schemes that Judge Wesley is called upon to interpret — such as immigration law, sentencing guidelines, and habeas corpus procedure — do not often arise in the state courts. Nevertheless, he is excited about learning these and other new areas of substantive and procedural law. He has already found, for example, that he enjoys intellectual property cases — another area of law that is largely specific to federal practice.

The transition has been made easier, he notes, by his new colleagues. He describes them as "wonderful, kind, generous people who have been nothing but helpful and available to me." "The level of collegiality on the Second Circuit," he observes, "is equal to the level of collegiality I experienced in Albany."

Of course, Judge Wesley brings to the Second Circuit a wealth of experience and a professional life spent developing and refining his approach to judging. "Good judges spend a lot of time examining and re-examining their own positions," he explains. "If you think you are always right, you are going to be wrong. I've had cases where my initial perception was wrong, or where I have been persuaded to change my position by the argument of a colleague or an attorney."

As a result, Judge Wesley believes strongly in the importance of oral argument. He estimates that his view of a case "changes 20 percent of the time as a result of oral argument." Sometimes this is because counsel is persuasive; other times it is because of insightful and probing questions of the other judges on the bench, who may see an issue in a manner that Judge Wesley had not fully considered.

Judge Wesley acknowledges his reputation as a tough and direct questioner from the bench. However, he cautions attorneys who argue before him "not to take it personally" and "don't presume I am trying to shoot down an argument by asking difficult questions." Rather, he is simply trying to forge his own understanding of the case. With that in mind, he advises counsel to avoid evasive answers and to acknowledge the weaknesses of their cases rather than lose credibility by trying to win every point. "Be yourself," he suggests, "and be comfortable in your own skin."

New York State Law

Judge Wesley also brings to the circuit an unparalleled understanding of state law. He describes a recent conference following a morning of argument in which one of his colleagues, in a diversity case involving New York law, remarked (perhaps only half jokingly) that he would vote "however Judge Wesley votes."

Noting that the Second Circuit is often called upon to decide important questions of state law, Judge Wesley observes that as a New York Court Of Appeals judge he appreciated the certification process. Certification, which has become more common in recent years, occurs when the federal court, faced with an unresolved question of state law, asks the Court of Appeals to answer the question rather than predict how the state would resolve the issue. Judge Wesley fully supported certification when he was a state judge because it showed that "the Second Circuit was a willing partner in the development of New York State law and that it recognized that the New York Court of Appeals is the final arbiter of that law." As a Second Circuit judge, he will encourage certification in appropriate cases and predicts that it will "be fun to be on the other side of the certification process."

Deciding Cases

When asked whether it is difficult to move from a court that almost always has the last word on an issue to an intermediate appellate court, Judge Wesley reminds that he has already served in the state Supreme Court and the Appellate Division, so he is used to having his opinions reviewed by a higher court. In any event, he notes, a judge cannot constantly worry about being reversed, and cannot decide cases simply to please litigants, the city bar or commentators. "As a lower court judge, I always tried to do the right thing, but it

is always dangerous to become too proprietary about one's opinions. When my decisions were reversed, often I thought that the higher court was right. Of course, it is difficult to know how a top court will come out on an issue, so all you can do as a judge is carefully apply precedent and reasoning to decide cases, and to remember that an opinion is only as good as it is persuasive."

Judge Wesley recognizes, of course, that decisions of both the Court of Appeals and the Second Circuit not only resolve discrete disputes, but create important precedent as well. A Court of Appeals' decision creates a broad "wake" throughout New York law that required Judge Wesley to consider how even the smallest nuances of his opinions would be interpreted. The Second Circuit, he observes, not only influences the law for the six districts whose decisions it reviews, but is called upon to rule on issues of national importance. As a result, its opinions are given serious consideration by courts around the country. Judge Wesley is excited to participate in that national discourse and be a part of the development of the federal law.

Conclusion

Judge Wesley clearly loves being a judge. "Where else can one grapple with significant social issues and resolve them through articulate and creative writings?" he asks rhetorically. "This is the best possible world for me." Losing Judge Wesley's intelligence, experience, and enthusiasm may be difficult for the Court of Appeals, but it is the Second Circuit's gain.

Focus On:

Connecticut's U.S. Attorney

By Ralph W. Johnson, III

On November 22, 2002, Kevin J. O'Connor was sworn in as the 48th United States Attorney for the District of Connecticut. Prior to his appointment by President Bush, Mr. O'Connor was a partner in the law firm of Day, Berry & Howard. While there, he also served from 1999 to 2001 as Corporation Counsel for the Town of West Hartford, Connecticut. From 1995 to 1997, Mr. O'Connor served as a Staff Attorney and Senior Counsel in the Division of Enforcement of the United States Securities & Exchange Commission in Washington, D.C. From 1993 to 1995, he was a litigation associate at Cahill Gordon & Reindel in New York City. Before that, Mr. O'Connor served as a law clerk to the Honorable William H. Timbers of the United States Court of Appeals for the Second Circuit.

Mr. O'Connor graduated with high honors from the University of Connecticut School of Law in 1992 and with honors from the University of Notre Dame in 1989. Mr. O'Connor has served as a Trustee of the Federal Bar Council and remains, along with his wife Kathleen, an active member of the organization. He has served as an Instructor and Adjunct Professor at the University of

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Connecticut School of Law and the National Law Center at George Washington University.

Appreciating His Position

Anyone who has the opportunity to spend some time with Kevin O'Connor will quickly learn that he has many fond memories of the previous positions he has held and the people with whom he has worked. He is also very grateful to his mentors. When commenting on the last year, he has, however, no hesitation in saying that his position as the U.S. Attorney for Connecticut is the best job he has ever had. Mr. O'Connor has found himself surrounded by a group of exceptional lawyers who are committed to maintaining the strong reputation of the Office of the U.S. Attorney in Connecticut.

Mr. O'Connor has found it extremely satisfying to know that each day his main concern at work is to try to do what is right. He takes great comfort in the value that our legal system places on civil liberties. As a reminder of his role in that system, Mr. O'Connor prominently displays near his desk a framed excerpt from Justice Sutherland's opinion in *Berger v. United States*, 295 U.S. 78 (1935). In relevant part, the opinion states:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

To better appreciate his position and to help him in improving his office, Mr. O'Connor met individually with every Assistant United States Attorney in the district. Mr. O'Connor asked them about the strengths and weaknesses of the office. He was interested in learning what they liked and disliked about the office. Mr. O'Connor was also interested in learning about their suggestions for improving the office.

Mr. O'Connor's survey did not end with the members of his staff. He also met with his predecessors in order to get their insights. Mr. O'Connor also has met with each of the State's Attorney's in Connecticut, the heads of federal agencies, the Chief Public Defender, members of the criminal defense bar, all of the district judges in Connecticut and several members of the Second Circuit. He found such meetings to be very productive and was pleased to find out that the general impression of his office was very positive.

Successful And Productive Year

After his meetings, Mr. O'Connor was quick to implement the suggestions that could be easily accomplished. For example, he had a web page created for his office (www.usdoj.gov/usao/ct). It contains basic information that assists the public in interacting with his office. The launching of the web site did not increase his office's budget and has reduced the number of telephone calls Mr. O'Connor's staff has had to field regarding some of the more frequently asked questions.

In the last year, Mr. O'Connor's office has successfully prosecuted several high profile, public corruption cases. The results in these cases have been a great source of pride for his office. Although he inherited an office in very good shape, Mr. O'Connor does want to insure that his prosecutors keep up their good work and even improve on it. To this end, he has made efforts to recognize the office's accomplishments. His efforts have included the compilation of a list of the attorneys who have received awards from the Department of Justice over the years. A plaque was created from the list and it is now publicly displayed in the main conference room of the U.S. Attorney's office. Mr. O'Connor has also supported efforts to compile a history of the United States Attorney's Office in Connecticut. Office alumni include current bankruptcy, magistrate, district and circuit court judges.

Mr. O'Connor has also enjoyed the challenges that he has had to face in his new position. He has had to effectively manage an organization with offices in three cities, over 100 employees, a multi-million dollar budget and a caseload in the hundreds. He is the primary contact with Washington, D.C., interacts with the press and makes employment decisions. Moreover, he is responsible for the general direction of his office. Thus, in many respects, Mr. O'Connor finds himself functioning as a general counsel. In this regard, he relies on his experiences as West Hartford's Corporation Counsel. One of the most difficult tasks he has is determining where to focus his office resources. As part of this process, he finds himself coordinating with the state

prosecutors and the heads of the federal agencies in Connecticut.

Charging Decisions

In addition to his many administrative responsibilities, Mr. O'Connor is responsible for making charging decisions. He has continued the office's tradition of having the U.S. Attorney sign every indictment. Mr. O'Connor is fully informed about each case at the time he signs the indictment. He also receives regular updates and consults with his AUSAs regarding these cases on a regular basis. Before signing an indictment, Mr. O'Connor also reflects on the impact that a prosecution will have on a defendant's life.

Over the past year, Mr. O'Connor has come to appreciate the effect that his ffice's work has on the quality of life in Connecticut. He believes that, as important as the high-profile prosecutions are, the narcotics, guns and identity theft prosecutions are equally important. For example, some of these prosecutions have cleaned up city neighborhoods.

Mr. O'Connor has also had the opportunity to consider new areas in which his office could develop more expertise. In particular, he is interested in expanding his office's involvement in corporate and securities fraud cases. His interest is based in part on his background with the SEC. It is also based on Connecticut's unique relationship with the corporate world. The state is the home to many large corporations as well as the home for many corporate officers who travel to New York for work. Mr. O'Connor has been coordinating with the SEC and is hopeful that his office will be participating n a greater number of corporate fraud cases. Going forward, he also believes that his office will see more and more cases arising out of internet-related crimes. Overall, Mr. O'Connor is very hopeful that his office will continue to improve on an impressive first year.

Focus On:

New E.D.N.Y. Marshal Corcoran

By Stephen Young

For Eugene J. Corcoran, the new United States Marshal for the Eastern District of New York, fascination with law enforcement began at home. As a child he listened to the stories of his retired paternal grandfather, John F. Corcoran, who had served 39 years with the New York Police Department. For much of that time — during Prohibition and the Depression — the elder Corcoran had been attached to the Harbor Division. He told his grandson many a tale of police boats with machine guns at their bows, ready to deal with miscreants of all kinds, and of rescues from the swirling waters, including one in which he saved several people off the Rockaway coast and was honored with a major citation. The only thing stronger than John F. Corcoran was the mandatory retirement law, which removed him involuntarily from the Force.

With a larger-than-life role model focusing his attention, young Eugene Corcoran, growing up on Long Island, progressed through St. Joseph Grammar School in Ronkonkoma, St. John the Baptist High in West Islip, Suffolk County Community College, and SUNY Empire State College, where he received his Bachelor's degree. He eventually earned a Master's in Public Administration at Marist College, where the program centered on police studies. Well after his career was underway he also graduated from the FBI National Academy at Quantico, Virginia.

Police Career

In 1978 Marshal Corcoran begin a 21-year career in the New York State Police. His rise there was swift, making sergeant in 1983, investigator in 1985, lieutenant in 1989, and captain in 1993. It was as a result of his finishing in the top 8 on the lieutenant's exam that he was sent to Quantico. There, he experienced his first sustained contact with federal agencies, as he studied under an academic regimen that emphasized interagency cooperation — what the Marshal calls a "synergistic" approach to law enforcement.

The State Police provided him a smorgasbord of law enforcement experience. Assigned to Long Island early in his career, he was later detailed to the Violent Felony Warrant Squad headquartered at the 50th precinct in Riverdale — but which worked all five boroughs in close cooperation with the NYPD. Then in 1989 he went from the mean streets to a maze of trees, as he was transferred to Troop B in Lake Placid, with jurisdiction over the five Adirondack counties of St. Lawrence, Clinton, Franklin, Essex and Hamilton, near the Canadian border. The North Country was beautiful, Corcoran recalls, and it also gave him diplomatic experience in working with a culture he had not previously encountered. The Akwasasne Mohawk Reservation is located on the border near Massena. The validity of federal or New York jurisdiction is an issue among many Native Americans there, making for what the Marshal calls an "interesting dynamic" — especially in

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an area where cigarette smuggling is a major problem. Intense use of the Marshal's negotiating skills was required in 1990, when a Vermont National Guard helicopter was downed by gunfire from within a Native American encampment called Ganienkeh, injuring a medical doctor with shrapnel. Corcoran negotiated with Native Americans to be allowed to conduct an investigation on the reservation and to retrieve the chopper. Working with the FBI, his team was able to identify and issue arrest warrants for several suspects (some of whom fled to Canada) on the condition that no force would be used by New York or U.S. agents.

After a year in the North Country, the future Marshal transferred to the World Trade Center in 1991. Those buildings every day hosted as many people as the entire population of Lake Placid. Working out of a 57th floor office, Corcoran provided State Police support help to a variety of agencies, including the New York Attorney General's office, the New York County District Attorney, and even the Governor of New York (then Mario Cuomo), for whom he conducted background investigations.

Corcoran's wife and three children had always remained on Long Island — he had planned his North Country sojourn to be brief — but after two years in Manhattan a suburban opening occurred, allowing him to be even closer to home. He left the World Trade Center — just a few months before its first bombing.

But far from a more placid existence, his new venue led to his involvement in two infamous cases.

Joel Rifkind

One began on June 28, 1993, when two young State Troopers under the command of Lt. Corcoran tried to stop a vehicle for a traffic violation. The car sped away and a high speed chase ensued. When the troopers finally apprehended the car and its driver, they found the decomposing remains of a female. So began the Joel Rifkind investigation, the biggest serial murder case in the history of New York. Corcoran assembled and ran a task force from Troop L headquarters in Farmingdale, working with several police departments in the region with open homicide cases. Many were brought to closure as 17 female victims were located and eventually identified. Rifkind was convicted of murder in 1994. Additional convictions followed.

TWA Flight 800

The second infamous case was the crash of TWA flight 800 on July 17, 1996. By this time Captain Corcoran was the State Police Suffolk County Zone commander. The aircraft plunged into the water off the coast of Southampton, and quickly became a recovery operation because there were no survivors. The State Police provided scuba divers who scoured the seabed in more than 500 dives, under the supervision of the Navy, to recover human remains and aircraft wreckage. Corcoran's operation also included transportation and security for delivery of parts to the Calverton site, where the plane was being reconstructed. Most painfully, he supervised transportation for family members from their hotels to medical examining offices and to the memorials that followed.

Between these two human-caused traumas was an enormous fire, apparently not the result of human intervention, which decimated more than 5,000 acres on both sides of Sunrise Highway. It began on the morning of August 24, 1995, and soon exploded into such fierceness that Captain Corcoran activated the State Emergency Disaster Plan. Setting up his Command Post at Sunrise Highway, his operation was so successful that no one perished despite the enormity of the blaze.

Professional life on Long Island did have its more pleasant details for Corcoran, however. Chief among them was supervising security for the annual U.S. Open Golf Tournament at Shinnecock Hills Golf Club. Corcoran does concede to be somewhat of a golfer himself but laments, "It's a humbling game. It keeps your ego in check."

MTA Police Department

After a generation of service with the New York State Police, the stars aligned to lure him to another arm of law enforcement. The Metropolitan Transportation Authority had recently merged its Long Island Railroad and Metro North Railroad police departments, and it chose James D. O'Donnell — formerly of the State Police — as its chief. O'Donnell reached back into his old agency to appoint Corcoran as deputy chief of the new MTA Police Department, overseeing security for the busiest commuter railroads in the country. In his new position, Deputy Chief Corcoran's most central concern was the security of Grand Central and Penn Stations. He was in his Madison Avenue office when the 9/11 attacks occurred, and again he put an emergency plan into effect. This time the deputy chief brought all available personnel into the city for 12-hour tours of duty to protect the two major depots and also to assist at Ground Zero and One Police Plaza, which was the communications hub. But turning to first things first, Corcoran enabled the

trains to funnel thousands of people out of town by assuring the safety of the stations, tracks and tunnels.

The new Marshal is proud of his accomplishments. Reflecting upon the opportunities that have come his way, he says, "In law enforcement, you get to see everything up close and personal." But his style is to be a team player, who credits all his successes to the street cops, scuba divers, and other hands-on personnel who, he believes, really deserve the recognition.

Shortly after 9/11, when Corcoran learned the Marshal's position would be available, he decided to go for it. It is a 4-year Presidential appointment requiring Senate confirmation. He applied, gained the support of Governor Pataki, among others, and was easily confirmed. His old colleagues at the MTA Police Department were sorry to lose him, as they demonstrated by staging a farewell dinner in his honor on May 14, 2003.

For the new Marshal there is something old and something new. He returns to his old vocation of tracking down fugitives — largely career criminals. His office is part of the Regional Fugitive Task Force, which also operates from Manhattan and several New Jersey locations. There is a terrorism nexus as well. Corcoran's office is part of the Joint Terrorism Task Force, to which several of his deputies are assigned. Consequently, he is vigilant for fugitives having any association with terrorism, or with any country fostering it.

What is new is his work for the judiciary, the major focus of his office. Providing courtroom security, assuring that incarcerated individuals are in their proper courtroom for appearances, and protecting the Brooklyn and Central Islip courthouses, are always at the top of his daily agenda. Every morning he reviews the court calendars to assure nothing untoward is developing.

Corcoran is impressed with the professionalism of the judges. Dealing with lawyers and judges, is, he says, "A little different from the street atmosphere. Certainly different from the [Bronx] 42nd Precinct."

Clearly there will be no Fort Apaches in the Eastern District for the next four years.

Focus On:

Dr. Gregory Williams

By Peter G. Eikenberry

After eight years as Dean of The Ohio State University College of Law, Greg Williams came to New York City in August 2001 — one month to the day before 9/11 — to take the reins as President of the City College of New York, with his goal of making CCNY the national leader in public urban education.

Dr. Williams is no stranger to daunting challenges. When he was 10, his father informed him that he was black and not white and that the family was breaking up. Greg and one brother moved with his father from Virginia, where they had lived as a white family of six, to Muncie, Indiana, where Greg and his brother moved with their father to live with Greg's grandmother in a black housing project. Greg's mother, sister and a second brother went a separate way. Both Greg's grandmother and father had serious alcohol abuse problems, and Greg and his Indiana brother were raised by a neighbor. Later, to help work his way through college, Greg became a deputy sheriff.

Greg Williams' autobiography, "Life on the Color Line: The Story of a White Boy Who Discovered He Was Black," was a national best seller, earning him an appearance on Oprah and the 1995 Los Angeles Times Book Award. The book is used at colleges across the country in discussing racism, poverty, alcoholism and other social and coming of age issues.

Dr. Williams has earned two masters degrees, a doctorate in political science and a law degree. Before becoming Dean at Ohio State University Law School, he was an administrator and law professor at the University of Iowa College of Law. While Dean at Ohio State, Dr. Williams raised $57 million, which now supports 50 endowed scholarships, 10 endowed chairs and three professorships, and he was elected President of the Association of American Law Schools.

College Campus

Upon arriving to interview Greg at CCNY, one is struck by the fairy tale like campus with its historic George B. Post architecture on a hill high above New York City. Greg's office is decorated with a signed copy of a basketball — a gift from his associates at Ohio State — and a picture of him in his deputy sheriff outfit with gun.

Greg talked at lunch about his students. The CCNY 2003 valedictorian, from Guatemala, started her studies at CCNY amidst her 4 1/2 year career as a live-in maid. Her boyfriend was killed on a New York City street while she was at CCNY, yet she earned a 4.00 grade point average in chemical engineering. The year 2003 salutatorian knew not one word of English when she arrived in the U.S. from China - - one year before she entered CCNY, yet she earned a 4.00 in electrical engineering. Greg intends that CCNY will be a pipeline for highly qualified students of diversity into the

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nation's law schools and other professional colleges. Both the valedictorian and salutatorian have full scholarships at major universities to secure their respective graduate degrees.

Greg's cheerful good humor, and boyish looks and enthusiasm, belie the intensity that has driven him to achievement. His eagerness to attain the university's goals and his identification with the aspirations of students with life stories as remarkable as his make him the perfect person to lead CCNY back to its former status as an educator of Nobel Laureates. As reported in the *New York Times*, CCNY "is re-emerging at or near the top on indexes like freshman SAT scores and high school averages as a result of a pool of high-achieving immigrants, new recruiting programs that stress its strength in engineering, architecture and science; an enticing honors program; and sharp reductions in the number of less-prepared students."

With Dr. Williams at the helm, we shall hear much more about The City College of New York. Greg still has a connection with the law; his daughter Natalia, a recent graduate of NYU Law, is a lawyer with South Brooklyn Legal Services.

FBC News

Conversations With Judges

By Bennette Kramer

The Federal Bar Council in association with the Second Circuit has begun a new project: videotaping judges of the Second Circuit. The Federal Bar Council is underwriting and providing interviewers for the project, which was conceived by Stephen Young, Assistant Circuit Executive for Public Affairs for the Second Circuit, an attorney with a television background. Chief Judge John M. Walker, Jr. approved the project, which will preserve for posterity the individual and historical knowledge of Second Circuit judges.

The aim of the project is to collect individual judges' personal insights not included in opinions and to capture for future generations the persona of the judges interviewed. Young stated that the interviews would focus on the personal background of each judge interviewed, including the judge's life unrelated to his or her time on the bench. Young noted that the flexibility of videotape was an advantage, because each interview can be tailored to the particular judge's interests, and the video medium will bring out the individual judge's personality. These videotapes, using digital technology, will provide an opportunity for judges and practitioners to know the judges through the years.

Project Funding

Federal Bar Council President Gerald Walpin says that he enthusiastically recommended funding the project after Chief Judge Walker called and asked him if the Federal Bar Council would underwrite it. Walpin convinced the board to fund it, and to have Federal Bar Council members actively assist in the project. Walpin says the Federal Bar Council considers underwriting the project to be within the main aim and purpose of the Federal Bar Council to work with the judges of the Second Circuit. Given the high quality of our senior judges, it is worthwhile for history, posterity and the record of the Second Circuit to videotape and keep for history the benefit of these judges' experience, he believes.

Federal Bar Council involvement in this project arose from its participation in an earlier audiotaped oral history project in the mid-1990s. Norman Kleinberg of the Federal Bar Council was in charge of the oral history project then, and is assisting Young now by providing lawyer volunteers to help conduct the interviews.

The oral history project differed from the videotaped conversations in several ways. First, they were oral only. Second, they were produced to conform to scholarly parameters, resulting in edited tapes and transcripts, which are now deposited in the Second Circuit library. Third, Federal Bar Council members conducted the interviews after a formal training program, run by a consultant. The substance of the oral history interviews focused on the judges as judges. Kleinberg said that the oral history project resulted in six taped interviews of Second Circuit and district court judges. The videotaped conversations will be less formal and focus primarily on capturing the persona of the individual judges. The interviews will be conducted by Young and volunteer lawyers who each will participate in one interview. The volunteers recruited by Kleinberg to participate in the interviews are individuals who are interested in participating in a historical project.

Preparing To Interview

In preparation for a conversation with Judge Oakes, Fred Nathan and Young prepared a list of topics to cover and generalized questions. They submitted the outline to Judge Oakes, who made some revisions. The videotaping lasted over four hours and covered all the stages of Judge Oakes' life from childhood to the present. The

conversation focused on Judge Oakes' philosophy and outlook as a judge and touched on only the most historically significant of Judge Oakes' opinions. The final edited tape will provide a unique historical insight into Judge Oakes' development and career, which will be available at the Second Circuit library. The tape will be divided into sections so that one section at a time can be viewed. Technical support for the actual filming was provided by Brattleboro (Vermont) Community Television, which works only with public or not for profit agencies. The project paid for the crew, but Brattleboro Community Television provided the equipment free of charge.

Prior to a conversation with Judge Miner, FBC member Ralph Johnson, III, a senior associate with Halloran & Sage LLP in Hartford, reviewed and expanded on the outline and questions prepared by Steve Young. Johnson is interested in biography, and particularly how personal relationships affect the stages of a subject's life. Therefore, he added questions about Judge Miner's relationships in law school, each stage of practice, as a prosecutor, on the state bench, as a district judge, as an appellate judge and a senior appellate judge. Johnson is interested in who Judge Miner's friends and colleagues were at all these stages, including role models. He had not met Judge Miner prior to the interview, but wanted to know about his career, life, reflections on his career, and his sense of his place in the traditions of the court. Johnson said that the Federal Bar Council is providing a way of preserving the insights of the judges for future judges and practitioners, so that they could serve as role models for future generations. Technical support for the interview with Judge Miner was provided by a cable television station in Hudson, New York.

Young will supervise the post production process and oversee the editing. He plans to create at least two video conversations per year and possibly more, depending on how long post production takes.

FBC News

Winter Meeting Set For Mexico

By Jeanette Redmond

The Federal Bar Council will hold its 36th Annual Winter Bench and Bar Conference at the Grand Bay Hotel in the beautiful Pacific coast city of Manzanillo in Mexico from Saturday, February 14, 2004, through Saturday, February 21, 2004. The conference will offer participants the opportunity to attend six continuing legal education programs organized by the Planning Committee, chaired by the Honorable Robert D. Sack of the U.S. Court of Appeals for the Second Circuit.

Death Penalty To Punitives

The Honorable Deborah A. Batts, U.S. District Judge for the Southern District of New York, will moderate a program examining the death penalty, which will include a stage reading of the play "The Exonerated" as well as a panel

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The Grand Bay Hotel in Manzanillo, Mexico

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discussion. Assisting Judge Batts in developing this program are Franklin B. Velie of Salans, Stephen A. Marshall of Sonnenschein Nath & Rosenthal, Lee S. Richards, III, of Richards Spears Kibbe & Orbe, and Robert J. Anello of Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C.

The 36th Annual Winter Bench and Bar Conference will be held in Manzanillo, Mexico, from February 14 through February 21

In addition to serving as chair of the Planning Committee, Judge Sack will moderate a program focusing on recent significant Supreme Court cases. The subcommittee assisting Judge Sack includes David R. Schaefer of Brenner, Saltzman & Wallman LLP and Sheldon H. Elsen of Orans, Elsen & Lupert LLP.

A program examining the changing role of federal judges will be moderated by the Honorable Robert N. Chatigny, U.S. District Judge for Connecticut. Michael G. Considine of Day, Berry & Howard LLP is assisting Judge Chatigny in developing this program.

A subcommittee consisting of Sheldon Elsen and Michael Donald Patrick, of Fragomen, Del Rey, Bernsen & Loewy, P.C., is working with the Honorable Gerard E. Lynch, U.S. District Judge for the Southern District of New York, on a program examining the law's treatment of terrorism since 9/11. Judge Lynch will be the moderator for this program.

The Honorable Richard M. Berman, U.S. District Judge for the Southern District of New York, will moderate a program exploring various phases of expert witness preparation through role playing. Assisting Judge Berman are Steven M. Edwards of Hogan & Hartson LLP and Anton J. Borovina of Borovina & Marullo PLLC.

A program examining current issues in electronic discovery will be moderated by the Honorable Jed S. Rakoff, U.S. District Judge for the Southern District of New York. The subcommittee for this program includes George F. Hritz of Hogan & Hartson LLP and Robert J. Giuffra, Jr., of Sullivan & Cromwell LLP.

Finally, the Honorable Joanna Seybert, U.S. District Judge for the Eastern District of New York, will moderate a program exploring punitive damages issues. Jerome J. Lawton of Skadden, Arps, Slate, Meagher & Flom LLP and Richard Allen Rothman of Weil, Gotshal & Manges LLP are assisting Judge Seybert in organizing this program. Panelists will include Sheila L. Birnbaum and Barbara Wrubel, both of Skadden.

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

Public Service Award

At the conference's final banquet, Federal Bar Council President Gerald Walpin 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 leadership positions. 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 when 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.

Although the Council has not yet selected the 2004 awardee, 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, Evan A. Davis and, most recently, Frederic S. Nathan of Kelley Drye & Warren LLP and a past president of the Council.

We hope you will join us for what is certain to be a successful and interesting program. Registration applications and further information may be obtained by visting the Council's web site at www.federalbarcouncil.org or contacting the Federal Bar Council staff at (212) 883-1777.

Inns Of Court

Walpin Receives Award

By Henry Putzel III

Gerald Walpin, President of the Federal Bar Council, was honored at the Second Circuit Judicial Conference recently as the recipient of the prestigious American Inns of Court Professionalism Award.

The award, presented annually on behalf of the American Inns of Court, honors a lawyer in each of the federal circuits "whose life and practice display sterling character and unquestioned integrity, coupled with ongoing dedication to the highest standards of the legal profession and the rule of law." On

behalf of the Second Circuit, Chief Judge John M. Walker, Jr. and Circuit Justice Ruth Bader Ginsburg conferred the award upon Walpin during festivities marking the culmination of the conference.

For many years Jerry Walpin has been a prominent litigator with the law firm now known as KMZ Rosenman. A graduate of the City College of New York and the Yale Law School, he served during the 1960s as an Assistant United States Attorney and, for five years, as chief of the Special Prosecutions Unit under the fabled tenure of Robert Morgenthau.

In reciting Walpin's many and varied professional accomplishments, Chief Judge Walker noted in particular the honoree's exemplary record as a mentor to generations of young lawyers trained by him both in the United States Attorney's office and at the Rosenman firm.

In a brief response, Walpin paid tribute to the imporant mentors in his own life, and in particular his wife Sheila and the Hon. Edward Dimock, the federal district court judge for whom he served as law clerk after his graduation from law school.

Walpin and each of the honorees from the other judicial circuits will be further recognized by the American Inns of Court at its annual dinner, to be held at the Supreme Court.

Courthouses

Sen. D'Amato Honored

By Anton J. Borovina

On June 16, 2003, the atrium of the Central Islip United States Courthouse was standing room only with the many friends and colleagues of former Sen. Alphonse M. D'Amato gathered to commemorate the naming of the courthouse as the Alphonse M. D'Amato United States Courthouse.

In a testament to his distinguished years of service in the Senate, the dais included Sens. Charles Schumer, Hillary Clinton, and Joseph Biden as well as Chief Judge Edward Korman. Each of them spoke about Senator D'Amato's accomplishments as a senator and his service to New York.

Sen. Charles Schumer said "no one fought harder to bring money back to New York than Al D'Amato."

Sen. Hillary Clinton, who was investigated by Sen. D'Amato during the Whitewater probe, said "I have to confess that if a few years ago someone had in the same sentence said Al D'Amato, Hillary Clinton and a courthouse, I don't think this is what we would have had in mind." She concluded by saying "life is full of surprises."

Senator Joseph Biden, who counted himself a personal friend of Al D'Amato, recounted how they met as well as their shared experience in having their two children attend Georgetown University as roommates.

Senator D'Amato was the last to speak. He described how fortunate he was that his parents were alive during the naming ceremony for the courthouse. He concluded by saying "when I was told a building would be named after me, and that I might even have my name carved in stone in the front, I thought 'that's wonderful, that's exciting, because the next time my name is carved in stone, I won't be there to enjoy it — although others might.'"

There were about 500 people in attendance. Following the ribbon-cutting ceremony, a reception was held for the honored guest, members of the dais and the invited attendees.

Senator D'Amato was genuinely humbled and honored by the day's events. His portrait hangs in the atrium of the courthouse now named in his honor.

Courthouses

Attorney Lounge

By Jeanette Redmond

The Federal Bar Council and the Southern District Executive Office have recently refurbished the Attorney Lounge at the Daniel Patrick Moynihan U.S. Courthouse at 500 Pearl Street. The lounge, first opened in the fall of 1998, is located on the first floor in room 110.

Thanks in large part to the efforts of the Honorable William H. Pauley, III and his colleagues in the Southern District, and to diligent follow through by Jim Griffenkranz in the District Executive's Office, the lounge has been freshly cleaned and painted and is equipped with a refrigerator, photocopier and fax machine for incoming faxes (fax number: 212-805-0444). There is also a telephone to allow attorneys to call the Southern District Executive Office in the courthouse (212-805-0500) or the Federal Bar Council (212-883-1777) if there are any problems with the equipment.

In addition, there are two work stations available with electrical outlets and telephone connections for laptop computers (lawyers must have the software provided by their internet service provider installed on their laptop and use a dial-up number in the 212 or 718 area code or an "800" number).

The attorney lounge and the kitchen located inside the lounge are open from at 8:00 a.m. until 8:00 p.m. Monday through Friday.

Legal Practice

MJP For Litigators

By Bruce A. Green

"Unauthorized practice of law" ("UPL") provisions of state law apply not only to non-lawyers but also to out-of-state lawyers. Nevertheless, lawyers commonly perform work outside the states in which they are licensed (i.e., their "home states"). Lawyers know that they may not open an office or practice regularly in states where they were not licensed. They also know that they may not appear in the courts of other states without obtaining *pro hac vice* admission. But at least until a few years ago, many lawyers gave little thought to the possibility that state UPL laws restricted them from performing out-of-court work on discrete matters outside their home states.

In 1998, however, the California Supreme Court reminded lawyers of the possible reach of state UPL laws. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*, 949 P.2d 1 (Cal. 1998), involved a New York law firm that represented a New York company and its California affiliate in connection with a potential arbitration. The law firm advised the two companies, filed an arbitration claim in California, and negotiated a settlement of the dispute before proceedings commenced. The law firm's services were rendered partly in California, but primarily in New York. Nevertheless, the firm's conduct was held to be in violation of California's UPL law, which was a misdemeanor.

Shortly after the *Birbrower* decision, California changed its law to allow out-of-state lawyers to be admitted *pro hac vice* in arbitration proceedings. But the bar was on notice that, even as law practice was becoming increasingly national and international, early 20th-century UPL laws provided a potential roadblock.

Model Rules Amended

In response, the American Bar Association appointed a Commission on Multijurisdictional Practice (to which I was Reporter) to suggest how to modernize the rules and procedures governing lawyer regulation. A little over a year ago, based on the commission's proposals, the ABA amended several of its model rules and adopted several new policies concerning lawyers' practice outside the states where they are licensed. Among other things, the ABA adopted a Model Rule on Pro Hac Vice Admission to promote greater uniformity in how state courts deal with out-of-state lawyers as well as to encourage the adoption of necessary safeguards and the elimination of unnecessary restrictions.

Probably the most important innovations were additions to Rule 5.5 of the Model Rules of Professional Conduct concerning multijurisdictional practice of law ("MJP"). These included new provisions identifying situations in which a U.S. lawyer could provide temporary services in a state in which the lawyer is not licensed. The ABA commission's aim in drafting these provisions was "to facilitate multijurisdictional law practice in identifiable situations that serve the interests of clients and the public and do not create an unreasonable regulatory risk."

The ABA's newly amended Model Rule 5.5 would not give a New York litigator carte blanche to practice outside New York. But in states that adopt it, litigators will have substantial leeway to work on particular matters outside their home states in situations where pro hac vice admission is unavailable.

Various Situations

Consider a hypothetical New York litigator who wishes to provide various discrete services in Delaware. Rule 5.5 specifies various situations in which the New York lawyer, working in Delaware temporarily, would not run afoul of UPL restrictions.

As law practice has become increasingly national and international, UPL laws provide a roadblock.

First, the rule would allow the New York lawyer to serve as co-counsel with a Delaware lawyer who is actively participating in the matter. Thus, a Delaware corporate client who was conducting an internal investigation could retain a New York lawyer to conduct the investigation in tandem with a Delaware lawyer. Or, in connection with a litigation conducted by a Delaware lawyer, a New York lawyer could provide behind-the-scenes advice or assistance on particular aspects of the representation.

Second, a New York lawyer who reasonably expected to be admitted *pro hac vice* in Delaware could conduct work in Delaware prior to filing a lawsuit there. Under the Model Rule, this lawyer would not be engaging in the unauthorized practice of law in Delaware by advising the client about the prospective lawsuit or by conducting an investigation or negotiation in Delaware.

Third, a New York lawyer could conduct an arbitration, mediation or other

alternative dispute resolution proceeding in Delaware, without associating a Delaware lawyer as co-counsel, if the lawyer's services "arise out of or are reasonably related to the lawyer's practice" in New York. This provision addresses situations like the one in *Birbrower*. Model Rule 5.5 is not precise about when work in an ADR proceeding will be thought to "arise out of" or be "reasonably related to" a New York lawyer's practice. But obvious examples include where the ADR proceeding relates to a New York client, to a dispute in New York, or to work previously rendered for the client in New York. Another example is where the proceeding is governed by a body of federal law (e.g., securities law) on which the lawyer has developed a recognized expertise through regular practice.

A New York litigator cannot safely rely on the ABA amendments except in states that adopt them. As of July 2003, they had been adopted (with some variations) in Delaware, Nevada and North Carolina, and were under consideration in many other states, including several in which they had been approved by the state bar and forwarded to the state courts for consideration (e.g., Arizona, Arkansas, Georgia, Louisiana, Minnesota, South Carolina and South Dakota).

New York Proposals

In New York, the New York State Bar Association House of Delegates has proposed amendments to Disciplinary Rule 3-101 of the New York Code of Professional Responsibility, substantially based on the ABA model. Of course, lawyers licensed in New York will not benefit from the proposed changes to the New York Code — these changes are directed at lawyers licensed elsewhere. But if and when the New York courts liberalize the rules governing law practice by out-of-state lawyers, other states may be encouraged to follow suit. New York litigators have as much to gain as other New York lawyers from the universal adoption of ethics rules that recognize specific exceptions to the otherwise applicable restrictions on practice by out-of-state lawyers.

USA Patriot Act

Financial Institutions As Targets

By Diana D. Parker

The USA Patriot Act of 2001, although formally titled the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act," contains many provisions not limited in any way to terrorism — or to crimes of violence of any sort. Among these are provisions creating new criminal and civil actions, penalties and forfeitures, including changes to both substantive and procedural law, with the legislative overruling of Supreme Court decisions in the bargain. Virtually all of these provisions affect financial institutions, including foreign financial institutions, and some provisions broaden the government's power to bring actions directly against such institutions. These new powers should be examined as Attorney General Ashcroft urges Congress to extend them in Patriot Act II.

New Crimes

Section 315 of the Act adds significant new money laundering predicate offenses to 18 U.S.C. §§ 1956 and 1957, the money laundering statutes. Sections 371 and 373 of the Act create new criminal laws related to monetary instruments, which are found, respectively, at 31 U.S.C. § 5332 ("Bulk cash smuggling into or out of the United States") and 18 U.S.C. § 1960 ("Prohibition of unlicensed money transmitting businesses").

18 U.S.C. § 1956 makes it a crime to engage in financial transactions with the intent to promote or to conceal proceeds of "specified unlawful activity." The term "specified unlawful activity" now includes offenses against foreign countries of "bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official" and any offense that could, by treaty, be the basis for extradition from the United States. The Act also adds customs fraud (18 U.S.C. § 541) and computer fraud (18 U.S.C. § 1030) as "specified unlawful activity." Because 18 U.S.C. § 1957 incorporates the defined "specified unlawful activity" from Section 1956, Section 1957 has been expanded to the same extent, and Section 1957 does not require an intent to promote or conceal specified unlawful activity, requiring only "knowingly" engaging or attempting to engage in a transaction involving more than $10,000 derived from a specified unlawful activity. Section 318 of the Act further expands both Sections 1956 and 1957 by explicitly including foreign banks as "financial institutions" through which a money laundering transaction may take place.

31 U.S.C. § 5332 creates a new criminal statute changing the result in *United States v. Bajakajian*, 524 U.S. 321 (1998), in which the Supreme Court held that a forfeiture under a similar currency reporting offense was "grossly

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disproportional" to the gravity of that offense, and therefore unconstitutional under the Eighth Amendment. The new statute makes it a crime to carry — in addition to the previous crime of failing to report — more than $10,000 into or out of the United States, with intent to violate currency transaction reporting requirements. The long-winded preamble states that prior statutes have forced criminals to eschew traditional financial institutions in favor of carrying bulk cash and "only the confiscation of [this cash] can effectively break the cycle of criminal activity" of which it is a part, requiring a new crime so that the cash can be "confiscated as the corpus delicti" of the offense. The statute also provides for a personal money judgment if forfeitable proceeds or substitute assets cannot be found.

The Patriot Act affects financial institutions, including foreign financial institutions.

Section 373 of the Act amends 18 U.S.C. § 1960, which makes it a crime to conduct, supervise or own all or part of an unlicensed money transmitting business. An "unlicensed money transmitting business" is now defined as one without a license or that fails to comply with registration requirements or one that has engaged in the transmission of funds the defendant knows to have been derived from or intended to promote unlawful activity. Thus, even a business with a license that complies with registration requirements may be deemed an "unlicensed" money transmitting business, if the defendant knows the unlawful source or use of the funds.

Moreover, Section 373 of the Act converts Section 1960 into a "general intent" crime, making it illegal to conduct any unlicensed money transmitting business regardless of whether or not the defendant knows the licensing requirement or that the absence of a license is a criminal offense. Because the new 18 U.S.C. § 1960 does not have the specific intent requirement of 18 U.S.C. § 1956 or the $10,000 threshold requirement of Section 1957, the government believes that Section 1960 may be more useful than those traditional money laundering statutes.

New Civil Actions

Section 317 of the Act grants the government the power to bring civil actions pursuant to 18 U.S.C. § 1956(b) against persons (including corporations) based on alleged violations of 18 U.S.C. § 1957 — which, as noted above, has no intent element — in addition to its previous power to bring such actions for violations of Section 1956. This section of the Act also authorizes jurisdiction over foreign persons (including corporations) that have no presence in the United States, if the financial transaction occurs in part in the United States or the foreign person converted property as to which the United States has obtained a forfeiture order.

Most significantly, the statute also grants jurisdiction over all foreign financial institutions based solely on having bank accounts "at a financial institution in the United States." In a recent criminal case, *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003), the Second Circuit discussed at length the power of Congress to enact laws providing for extraterritorial jurisdiction over non-citizens for conduct occurring outside the United States, finding no limits to such power in that case — even if such an American law violates international law, including both customary and treaty-based international law. There remain, however, U.S. Constitutional limits on the power of Congress to enact such laws, including the Due Process Clause, and courts have repeatedly held that the mere existence of a correspondent bank relationship is an insufficient basis for asserting personal jurisdiction in civil cases.

New Restraining Orders

Section 317 of the Act amends 18 U.S.C. § 1956(b) to authorize restraining orders to preserve assets and appoint receivers to manage property that is subject to civil penalties, civil or criminal forfeitures or restitution in criminal cases. Whether this statute will implement or overrule the Second Circuit decision in *United States v. Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992), which mandated less drastic means than outright seizures in forfeiture actions, is an open question.

Section 319 of the Act explicitly empowers a court to order, pursuant to 21 U.S.C. § 853, the repatriation of assets, including substitute assets, that might be subject to criminal forfeiture under that chapter. The violation of this provision may subject the defendant to civil or criminal contempt and/or a sentencing enhancement for obstruction of justice. Such repatriated funds are deposited in the registry of the court, with the United States Marshals Service or with the Secretary of the Treasury pending trial.

Section 323 of the Act authorizes restraining orders under 28 U.S.C. § 2467 to preserve assets in the United States that may be subject to foreign forfeitures, while prohibiting any person from contesting such a restraining order

in the United States on any ground that is the subject of the foreign litigation involving the same property. This statute was purportedly enacted to set an example of the reforms the United States believes other countries should follow in their own laws. This section also grants broader jurisdiction to enforce foreign forfeiture orders based on any violation of foreign law that would give rise to forfeiture in the U. S. had the offense been committed here.

New Forfeitures

Section 319 of the Act creates a new civil forfeiture codified at 18 U.S.C. § 981(k) with wide-ranging effects on foreign banks. This statute deems any funds deposited into a foreign bank that has a correspondent bank account "in the United States" to have been deposited into the correspondent account in the United States. Thus, this section provides that the government is not required to establish that funds seized in the United States are directly traceable to the forfeitable funds deposited into the foreign bank. Rather, contrary to the specific exemptions of 18 U.S.C. § 984(c), under this statute if a depositor has forfeitable funds in a foreign bank, the United States can seize the foreign bank's funds deposited in the United States, deeming those funds to be the forfeitable funds.

Importantly, the bank whose funds have been seized is deprived of an "innocent owner" defense. The statute specifically provides that only the initial depositor, and not the intermediary bank, has standing to contest the seizure of the bank's funds, unless the bank is also accused of wrongdoing or the bank proves that the foreign depositor has withdrawn his money from the foreign bank before the seizure, which would require production of the foreign depositor's bank records.

Because "specified unlawful activities" of 18 U.S.C. §§ 1956 and 1957 have been expanded, as described above, 18 U.S.C. § 981(a)(1)(A) is thereby broadened to include forfeiture of assets that are proceeds of those new offenses. Similarly, Section 373 of the Act authorizes the civil forfeiture, pursuant to Section 981(a)(1)(A), of all property involved in a violation of the new 18 U.S.C. § 1960, described above.

However, Congress did not stop there. Section 320 of the Act also

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Statement of Ownership, Management, and Circulation

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amended 18 U.S.C. § 981(a)(1)(B). This statute previously authorized the forfeiture only of proceeds of drug offenses against foreign nations. It now also authorizes the forfeiture of "any property used to facilitate" any felony against a foreign country if that offense is also a U.S. felony.

As discussed above, Section 371 of the Act provides for the forfeiture of unreported monetary instruments carried into or outside of the U.S. This Section also provides for the forfeiture, pursuant to 31 U.S.C. § 5332(c), of any "article, container or conveyance" used or intended to be used to conceal, transport or facilitate the transportation of such monetary instruments.

Section 372 of the Act expands civil and criminal forfeitures, pursuant to 31 U.S.C. § 5317(c), related to cash transaction reports and structuring, to provide for the forfeiture of all property involved in any conspiracy to commit an offense prohibited by 31 U.S.C. §§ 5313, 5316, and 5324.

Finally, Section 322 of the Act amends 28 U.S.C. § 2466 to provide that if any majority shareholder or individual filing a claim on behalf of a corporation is prohibited from making a claim in a forfeiture proceeding by virtue of being a fugitive, the corporation itself is also prohibited from making the claim.

Correspondent Banks

Section 319 of the Act creates a new 31 U.S.C. § 5318(k)(3) providing for service of a summons or subpoena on any foreign bank with a correspondent bank account "in the United States." Such foreign banks are required to appoint someone here to accept service of process, thereby permitting the U.S. government to avoid treaty requirements and other procedures that require the cooperation of foreign governments. If a foreign bank fails to comply with a summons or subpoena for its records, its correspondent accounts in the United States must be closed upon pain of a penalty up to $10,000 per day to be paid by the correspondent bank. This provision, along with the other provisions concerning correspondent accounts described above, would seem to encourage foreign banks simply to take their U.S. dollar transactions offshore and to encourage foreign depositors to use foreign banks without correspondent accounts in the U.S.

Expanded Venue

Section 1004 of the Act was incorporated to overrule *United States v. Cabrales*, 524 U.S. 1 (1998), in which the Supreme Court limited the venue for some money laundering prosecutions to the district where the monetary transaction took place. Ratifying decisions in the Sixth and Ninth Circuits, 18 U.S.C. § 1956(i) now provides that prosecutions under Sections 1956 or 1957 may also be brought in any district where a prosecution for the unspecified unlawful activity could be brought, if the defendant participated in the transfer of proceeds from that district to the district where the monetary transaction took place. In addition, a prosecution for an attempt or a conspiracy may be brought in the district where venue would lie for the completed offense or in any other district where an act in furtherance of the attempt or conspiracy took place. Specifically attempting to overrule a Fourth Circuit case, the statute further provides that any person who conducts any portion of the transaction (as broadly defined) may be charged in any district in which the transaction took place.

Whatever the intent of Congress, it is of course limited by the United States Constitution which provides both that "the Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed," U.S. Const., Art. III, § 2, cl. 3, and that a defendant must be tried in the "district wherein the crime shall have been committed, which district shall have been previously ascertained by law." Id. amend. VI.

Courts will now be required to address whether the Constitution can be stretched to encompass the expanded venue of the Patriot Act.

From The President

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filibuster to prevent a vote on several judicial nominations. To paraphrase the famous cliché about Nero: these senator filibuster while the courts burn in the need of a full complement of judges.

Some senators are proud of their filibustering of several Bush nominees, publicly labeling them as "conservative extremists," "right-wing ideologues" and generally "unqualified," thereby butting head-on (without mentioning it) the unanimous rating of these nominees by the American Bar Association as "well-qualified."

I strongly believe that this conduct is bad for America and for the judiciary both now and as a precedent for the future. I realize that some who know me might attribute this view to my political leanings and nothing else. How do I refute that conclusion? Many would accept my word for it. To those who are skeptical, I can point to two newspaper articles which Sen. Patrick Leahy inserted into the Congressional Record on June 18, 1998 (of which I was unaware until recently shown to me by an associate who helped me on the research for this

column). Sen. Leahy was then speaking to further the confirmation of Sonia Sotomayor for the Second Circuit Court of Appeals. The two articles Sen. Leahy highlighted quoted me and one of them described me as "a well-known conservative" who had "rushed to Sotomayor's defense."

I thought then (as I do now) that Judge Sotomayor is a wonderful human being and, more relevant to the judicial nomination, possesses the integrity, experience, judicial demeanor, intelligence and other qualifications for her judicial position. I, therefore, without publicity, went to bat for her confirmation through a detailed memorandum which somehow got to Sen. Leahy and (surprising to me) to some media. I knew then that Judge Sotomayor and I did not agree on various social and political issues (not surprising), but I believed that her nomination should be determined on her excellent qualifications, not on any issues litmus test.

Thus, I have been consistent, whether the nomination is by a Democratic President (Clinton nominated Judge Sotomayor) or by a Republican President (Bush's current nominations): A nominee who has integrity and qualifications should be confirmed, and certainly should not be filibustered.

Sen. Leahy expressed it well in June 1998: "If we want to vote against somebody, vote against them. I respect that . . . but don't hold up a qualified judicial nominee. . . . I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported." Many other senators voiced agreement. For example, Sen. Charles Schumer in 2000 stated: "We are charged with voting on the nominees. The Constitution does not say, 'if the Congress is controlled by a different party than the President, there shall be no judges chosen.'"

Filibustering

Unfortunately, many of these senators, without rational explanation, have altered their principles 180 degrees. Senators (including Senators Leahy and Schumer) are engaging in filibustering to prevent confirmation of several Bush nominees, including a two-year filibuster to prevent confirmation of Miguel Estrada as the first Hispanic judge on the Court of Appeals for the District of Columbia.

This filibustering of judicial nominations, which clearly have the majority vote for confirmation, is totally new in our country's history.

This filibustering of judicial nominations, which clearly have the majority vote for confirmation, is totally new in our country's history. Even the few past nominations which were rejected by the Senate, arguably on issue disagreement rather than qualifications, were not filibusters. President Nixon's nomination of Clement Haynsworth to the Supreme Court in 1969 was rejected by a bipartisan vote of senators who objected to his poor civil rights record and ethical improprieties. A bipartisan majority of senators then rejected Nixon's nomination of Harrold Carswell on the basis of his segregationist record and his mediocre record as a federal judge. The Senate took a turn away from limiting its scrutiny of judicial nominees to qualifications, integrity and adherence to the Constitution when the nomination of Robert Bork was narrowly rejected because of his criticism of *Roe v. Wade*, even though there was no question as to his ability and integrity. And disagreement with Clarence Thomas' political, social and legal views led to a virulent attack on his nomination which narrowly won confirmation, despite his endorsement only one year before by senators, both liberal and conservative: e.g., then Sen. Al Gore, who had "no question as to Judge Thomas' competence," finding him to be "an impressive man with an outstanding background . . . and inspiration . . . a beacon for all who will follow."

Qualifications And Integrity

Significantly, however, those opposed to each of these nominations did not use a filibuster, and allowed the nomination to come to a vote by the full Senate. Nor did senators opposed to confirmation of Justices Stephen Breyer and Ruth Ginsberg attempt to filibuster the vote; indeed, although these two nominees did not hide their liberal and pro-choice views, they received an overwhelming yes vote, 96-3 and 87-9 respectively, because almost all senators (conservative and liberal) made the determination on the basis of their undisputed qualifications and integrity, not on their political views.

Likewise, the contrast, between the Senate's 1997 treatment of liberal Merrick Garland, nominated to the same Court of Appeals to which Bush nominated conservative Estrada, is telling. Although both have unquestionable credentials and both refused to discuss personal views on various issues, Garland was easily confirmed with 32 Republican votes, while Estrada, thwarted by a filibuster, felt compelled to ask the President to withdraw his nomination.

History has proven our Founding Fathers correct in seeking to limit the

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Senate's dissection of a judicial nominee to qualifications and integrity. There are various known examples of judges, who after assuming the bench, surprised everyone with their voting records which were the opposite of what was expected. Justice Hugo Black, a southerner with an active membership in the Ku Klux Klan, became a champion of civil rights and rights of criminals. Earl Warren, who had been a tough law-and-order California attorney general and Republican candidate for Vice President on a conservative platform, was responsible for a nation-changing series of decisions applauded by liberals, including *Brown v. Board of Education*, *Reynolds v. Sims* and *Miranda v. Arizona*. And David Souter, announced as a conservative "home run," has regularly voted with the Court liberals.

The lesson: there never will be a time when everyone is going to applaud the vote of each justice on every case, but if a judicial nominee is qualified and has integrity, the justice will — as the Constitution intended — vote on the basis of what he or she believes the law warrants and facts and equity demand. That's what we as lawyers, and all citizens, want and should demand of judges, acting without fear or favor, and without regard to whether his or her past indicated liberalism or conservatism. A Senate filibuster deprives our courts of competent honest judges, instead imposing unfilled vacancies on courts that desperately need a full complement. Justice delayed due to a smaller number of sitting judges is not what the public wants and needs.

Editor's note: The author acknowledges the invaluable contribution made by Alexandra Klein, a summer associate at Katten Muchin Zavis Rosenman, who has returned to complete her law studies at NYU Law School.

Court Decisions

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stake; (2) it is necessary to further those important government interests because alternative, less intrusive means are unlikely to be effective; (3) it is substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that may undermine the fairness of the trial; and (4) it is medically appropriate. The Court anticipated that application of this test will be satisfied only in "rare" circumstances.

The Court also noted that the test applies only to determine a defendant's competency for trial, and that there are "strong reasons" for a court first to consider alternative grounds for forced medication—e.g., due to an individual's dangerousness or for his or her own medical interest. Those other grounds, which lead to a defendant's civil commitment, typically are more objective and, if applicable, obviate the need to medicate for trial competency purposes.

Astounding Facts

The facts of the case are indeed astounding. Charles Sell was a practicing dentist with a history of mental illness dating back to 1982. In 1997, he was charged with submitting false insurance claims for payment. After a psychiatric evaluation, a magistrate judge released Sell on bail, finding that he was "currently competent," but noting the possibility that he might develop "a psychotic episode in the future." A superceding indictment charged Sell and his wife with mail fraud, Medicaid fraud and money laundering. Again, Sell was released on bond.

In early 1998, the government sought to have Sell's bond revoked, claiming he tried to intimidate a witness. At a bail revocation hearing, Sell screamed, used racial epithets and spat at the magistrate judge. After considering a psychiatric report concluding that Sell's condition had worsened, as well as other testimony, the magistrate judge revoked Sell's bail. Later in 1998, Sell was charged in yet a new indictment with attempting to murder both the FBI agent who had arrested him and a former employee who had planned to testify against him in the fraud case. The cases were then joined for trial.

The Court noted that the test only applies to determine a defendant's competency for trial.

In early 1999, Sell requested that the magistrate judge reconsider his competency to stand trial. After examination by a government psychologist, Sell was ruled incompetent and ordered detained for up to four months at a medical facility to determine if he would attain the capacity to stand trial. After two months of detention, the medical staff recommended that Sell take antipsychotic medication, which he refused. After a hearing, the magistrate judge found that the medication was likely to render Sell competent to stand trial and that he was a danger to himself and others, and authorized forced medication.

The district court affirmed the order of forced medication, but found the "dangerousness" finding clearly erroneous. Focusing solely on the fraud charges (the court declined to consider the murder conspiracy charges due to

concern that they were the product of his delusional disorder), the Eighth Circuit affirmed and the Supreme Court granted review.

Court's Ruling

The Supreme Court assumed that Sell was not dangerous (although it noted that there was evidence to the contrary). It then articulated the four-part standard to determine whether Sell should be forcibly medicated for trial competency purposes.

In discussing the first factor — whether important government interests are at stake — the Court noted the important government interest in prosecuting a person accused of a serious crime. The Court did not define what constitutes a "serious" crime, but provided two examples of special circumstances that may lessen the government's interest: (1) the potential for future, lengthy institutional confinement and (2) the amount of time the defendant has already served, for which he or she would receive credit toward a sentence that is ultimately imposed.

As for the second factor — whether forced medication is necessary to further those important government interests — a court must make a specific finding that no alternative, less intrusive treatments are likely to achieve substantially the same results. For example, a court must consider ordering a defendant to take medication and subjecting the defendant to contempt for failing to do so.

To satisfy the third factor, a court must find that the forced medication is substantially likely to render a defendant competent to stand trial and substantially unlikely to have side effects that may undermine the fairness of that trial. The Court cited with approval Justice Kennedy's concurring opinion in *Riggins v. Nevada*, in which he detailed the side effects of forced antipsychotic medications that might interfere with a defendant's ability to receive a fair trial. These include sedation, restlessness and anxiety, diminished awareness of and interest in events in the surrounding environment, disrupted memory and motor disturbances, such as tremor of the limbs, diminished range of facial expression, or slowed movements and speech. These potentially impact the fairness of the proceeding by affecting a defendant's ability to participate in presenting a defense and affecting his demeanor during trial.

The Supreme Court assumed that Sell was not dangerous (although it noted that there was evidence to the contrary).

Finally, a court must conclude that the forced administration of the antipsychotic medication is medically appropriate — that it is in the patient's best medical interest in light of his medical condition. This element will likely require substantial fact-finding by the district court.

Standard Applied

Applying this test to Sell, the Supreme Court vacated the Eighth Circuit's decision affirming the forced medication order and remanded the case for further fact-finding. In so doing, it noted that much of the factual record had focused on whether Sell was dangerous so there was no finding that forced medication was justified on competency grounds alone. As a result, trial-related side effects that might affect the fairness of the trial, such as whether a medication would affect Sell's demeanor and ability to communicate with counsel, were not explored. In addition, the lower courts failed to consider Sell's already lengthy confinement and potential for continued confinement — two factors that moderate the importance of the government's interest in prosecution.

In essence, the *Sell* decision can be distilled down to a balancing — the government's interest in prosecution against an individual's liberty interest in refusing medication. The standard announced by the Court suggests that it applied a heightened level of scrutiny — as opposed to strict scrutiny — to the balancing of these interests. (It is curious that the Supreme Court did not expressly address the level of scrutiny since there are several conflicting appellate court decisions about whether the correct standard is strict scrutiny, heightened scrutiny or some other level of scrutiny.)

Justice Scalia, joined by Justices O'Connor and Thomas, dissented on the ground that the Court lacked jurisdiction because the forced medication order was not final. He noted that the framework propounded by the majority creates an incentive for a defendant to engage in "opportunistic behavior," for example, by taking medication halfway through trial and then refusing to continue taking it and demanding an interlocutory appeal from a forced medication order.

Application of Sell

In *United States v. Gomes*, decided prior to *Sell*, the Second Circuit weighed in on this issue when it vacated an order to forcibly medicate for purposes of trial competency a defendant charged with possession of a firearm by a felon. Prior

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to issuing its opinion, the Second Circuit requested that the Federal Bar Council (and two organizations with medical expertise) submit amicus briefs addressing key issues.

The decision has important implications for the issue of whether a mentally ill death row inmate may be forcibly medicated to render him or her competent to be executed.

After much discussion and debate, the Federal Bar Council submitted a brief that contained a majority position and a minority position. The majority position argued that forcible medication for trial competency purposes should be impermissible until advancements in treatment promise better results using less intrusive means. In eschewing a balancing of the state's interest in prosecution against the potential harm to the defendant, it emphasized the negative effect on a defendant's demeanor and the defendant's ability to participate in his or her defense, as well as the uncertainty of achieving positive results with today's medicine. The minority position contended that a court should balance the state's interest in trying a defendant against the likelihood of successful treatment, through the least intrusive means available and without side effects that affect the fairness of the trial.

In *Gomes*, the Second Circuit espoused a four-part balancing test that essentially is the same as the test announced by the Supreme Court in *Sell*. That test looks to whether (1) the prosecution will serve an essential government interest; (2) it is necessary to render a defendant competent because less intrusive means are unlikely to be effective; (3) the defendant can be fairly tried while forcibly medicated; and (4) the treatment is medically appropriate. (It appears as if the Supreme Court in *Sell* and the Second Circuit in *Gomes* agree with the minority position of the Federal Bar Council.) The Second Circuit remanded Gomes and directed the district court to consider more fully the government's interest in prosecuting Gomes, as well as the potential impact of the medication on the fairness of the trial.

One week after its decision in *Sell*, the Supreme Court granted certiorari in *Gomes* and remanded the case to the Second Circuit for further consideration in light of *Sell*. The Second Circuit, in turn, remanded *Gomes* to the district court for further consideration in light of *Sell*, where it is still pending.

Application To Death Penalty Cases

The *Sell* decision also has important implications for the still unresolved issue of whether a mentally ill death row inmate may be forcibly medicated to render him or her competent to be executed. If the *Sell* test applies to death penalty cases, the government must argue, paradoxically, that rendering the inmate sane is in the defendant's medical interest, an argument that ignores the ultimate purpose of the exercise — to put the inmate to death. Indeed, as the American Psychiatric Association has noted, "it matters little if the drugs benefit the prisoner in the short term when the overall effect of the drug treatment is his ultimate death." David M. Siegel of New England School of Law has noted that the *Sell* factors — particularly whether the medication is medically appropriate — do not comfortably apply when the purpose of medicating is to execute. However, in light of the language in *Sell* indicating that it applies only to determine trial competency, the Supreme Court may well decide that the *Sell* framework is not appropriate for the death penalty context.

This issue may be resolved if the Supreme Court decides to grant certiorari in *Singleton v. Norris*, in which the defendant, who is on death row, is challenging Arkansas's decision to forcibly medicate him. Initially, Singleton was ordered forcibly medicated due to his dangerousness, not to render him competent for trial. When Singleton's execution date was set, he contended that Arkansas's claim that forced medication was in his best medical interest disappeared. The Supreme Court could use *Singleton* to decide whether and when it is appropriate to forcibly medicate an inmate to render him competent to be executed.

Weston's Case

Another interesting death penalty case is percolating in the lower courts. Russell Weston, Jr., who has been diagnosed with paranoid schizophrenia, is charged with the capital murder of two Capitol police officers, and could face the death penalty if convicted. Weston was found incompetent to stand trial and was ordered forcibly medicated to render him competent. The D.C. Circuit upheld the involuntary medication order and the Supreme Court refused to hear the case in late 2001. Singleton has been forcibly medicated since early 2000.

The day after the *Sell* decision was issued, the trial court heard evidence that Weston's condition was improving after taking antipsychotic medication, and noted that he could be tried as early as

this fall. However, Weston's attorney indicated he planned to file a motion asking the court to reconsider its forced medication order in light of *Sell*.

Conclusion

According to David M. Siegel, roughly 16 percent of inmates are mentally ill: 282,000 in state and local jails; 7,900 in federal prisons; and 500,000 on probation. About five percent of them are pre-trial detainees receiving psychotropic treatment. The Justice Department released figures showing that 59 federal pre-trial detainees were forcibly medicated in a recent one-year period, and approximately three-fourths of them were rendered competent. Given the number of pre-trial detainees who are mentally ill, the *Sell* decision has significant practical implications for the administration of justice.

Editor's Note: Sara Beth Savage is an associate at Stillman & Friedman, P.C.

The Back Page

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paint a different picture, the testimony as depicted on the screen raises serious questions about Arnold's guilt. The accuser comes across as someone who is making it up as he goes along, struggling to get the annoying details straight, while the witnesses who say that nothing happened appear credible, unbiased and totally comfortable with their stories. As far as the police are concerned — let's just say they do not inspire confidence. And the defense lawyers do what defense lawyers often do: They are competent but busy, and one suspects that they will not get a big fee if they try the case.

The problem is that, while Arnold may not be guilty of the crimes of which he has been accused, he is guilty of something. He admits to his lawyer that there are incidents of child molestation in his past. His son Jesse admits to nothing, but he is also accused. In some of the most extraordinary footage this writer has ever seen, the family is captured on videotape as they confront the prospect of a trial. Arnold professes his innocence; his wife Elaine bitterly complains that she has been betrayed; Jesse, a child, has no appreciation of what is happening; and the other children — David and Seth — seem utterly helpless as they watch their family unravel.

Guilty Pleas

The trial closes in on them like a gathering storm. The pressure builds and all signs point in the direction of Arnold giving up. Everyone thinks he should give up — the prosecutor wants him to give up; the lawyers think he should give up; and Elaine is convinced that Arnold should give up to save Jesse. A perverse logic takes over and consumes the family like a divining rod pointing to water in a drought: If we feed the angry beast by persuading Arnold to plead guilty, maybe Jesse will be left alone. Of course it doesn't work that way. Arnold pleads guilty and then everyone assumes that Jesse is guilty as well. At that point, Jesse realizes that he has no choice but to plead guilty. They both go to jail, and Arnold commits suicide after making Jesse the beneficiary of a $200,000 insurance policy.

The agonizing, and unbelievably compelling, thing about "Capturing The Friedmans" is that the guilt or innocence of Arnold and Jessie is not clear. Maybe they did it; maybe they didn't. This documentary has real drama. The viewer is left wondering what really happened. Isn't there a way of finding out the truth?

Trials

Of course, we have a societal mechanism for finding out the truth. It is called a trial. It may not be perfect, but it is the best method we have been able to devise, after centuries of experimentation and refinement, for determining what really happened. It is amazingly simple, and one might say, elegant — choose a group of unbiased, fair minded citizens to hear the case and let both sides tell their stories; let the jury hear and see the accusers; let the accused confront his or her accusers and present his or her own witnesses; and give the jurors some common sense principles to guide them in making a decision. Why didn't that happen here? Why doesn't it happen in most cases?

It doesn't happen because nobody wants it to happen. As our system of justice has evolved over the last 50 years, everything is geared to avoiding a trial. In civil cases, the conventional wisdom is that the system has failed if the parties do not settle. In criminal cases, the defendant is punished more severely if he or she goes to trial and loses. The pressure to enter into a plea bargain is overwhelming.

There are reasons for this. We only have a limited number of judges and courtrooms, so we can only have a limited number of trials. By giving people an incentive to plea bargain or settle, we save money. This is a laudable objective, but have we gone too far?

As lawyers, we need to convince society that the justice system is worth the money. It is not only important to afford every defendant due process, it is important for society to find out what really happened. We need to be able to determine whether the system is really working. We want to know that the guilty are really guilty, and we want to know what they are guilty of.

Some of us can't stand the suspense.

Capturing The Legal System

By Steven M. Edwards

"Capturing The Friedmans" is a fascinating film, a must see for lawyers. It uses home movies, photographs and videos to capture the lives of a middle class family in Great Neck, Long Island doing the kinds of things middle class families do — having dinner, celebrating birthdays, playing games and joking around. The scenes of family life are almost idyllic in their ordinariness. Nothing goes wrong in the Friedman household in Great Neck, until the unthinkable happens. The Friedmans are captured by the law.

A postal inspector notices that Arnold, the likeable if somewhat nebbishy father, is the addressee of a package from the Netherlands. Suspecting foul play (why would any decent citizen receive mail from the Netherlands?) the postal inspector opens the package and discovers child pornography. This gives rise to an elaborate sting, where the postal inspector appears at the Friedmans' front door, asks Arnold to sign for the package and then returns a short time later with a search warrant, the probable cause for which is the fact that Arnold did not shoo the postal inspector away.

At this point the house is invaded by the police, looking for evidence of an activity that is so secret even Arnold's family is unaware of it. At first they come up with nothing, but then they move the piano and find — hidden inside a panel in the back of the piano — Arnold's stash. Magazines. At least a dozen of them. This award winning school teacher, pillar of the community, has been unmasked.

Arnold's detention and subsequent arrest is captured in the news, which leads to further inquiry. The local police receive a tip that something may have happened in computer classes that were conducted by Arnold — with the assistance of his 18 year old son Jesse — in the basement of their home. Even though the classes have been offered for more than a dozen years without any complaints (and, indeed, with many students re-enrolling), and even though parents have routinely dropped their children off at the Friedman house and picked them up without suspecting a thing, it is now revealed that Arnold has engaged in numerous sexual acts with the students, with Jesse's assistance, in front of the other students. At first the evidence is hard to come by, but aided by investigative techniques such as psychotherapy and hypnosis, repressed memories are revived and at least one former student, now a teenager, recalls a litany of horrible acts.

The maker of this documentary film (Andrew Jarecki, founder of Moviefone, which was sold to AOL/Time Warner for $300 million) interviews one of the accusers, as well as other students who attended the computer classes, and the police. While it is reasonable to suspect that Jarecki is trying to make a point, and it is therefore conceivable that another interviewer might

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