Federal Bar Council News

February 1999 Vol. VI, No. 1

From the President

Our Editorial Policy

By Steven M. Edwards

I only have been in office for two months and already I am mired in controversy. The issue stems from an "editorial" concerning the Clinton impeachment that I wrote for the October edition of the Federal Bar Council newsletter. The question is whether, from an editorial standpoint, the newsletter should publish opinion editorials that deal with political issues.

Leaving aside the issue of whether I, as president of the Federal Bar Council, should be publishing opinion editorials in the newsletter (notwithstanding any disclaimer), this matter raises a number of interesting questions: (1) Should the newsletter publish opinion editorials on

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Developments

Federal Bar Council's Thanksgiving Luncheon Honors Jack Greenberg For His Public Service

By Steven Flanders

The Federal Bar Council inaugurated 1998's season of togetherness by bringing together over 1500 stalwarts of Second Circuit practice at the Waldorf on November 25th.

The 55th annual Thanksgiving Luncheon honored Professor Jack Greenberg with the Emory Buckner Medal recognizing outstanding public service. As Director and Counsel of the NAACP Legal Defense and Educational Fund from 1961 until he came to Columbia in 1984, Mr. Greenberg led the Fund through one of its most notable periods.

The turnout may have been the largest ever; it was certainly one of the largest turnouts ever for a law-related event in New York. Several major milestones were noted.

Betsy Plevan became President Emeritus in the course of the proceedings; following a distinguished term as President, it was in an emeritus capacity that she presented the medal to Professor Greenberg.

She was introduced by her successor, Steve Edwards, whose rise to the Presidency included several years as the founding editor of the *Federal Bar Council News*.

Dean Joan Wexler, Chair of the Nominating Committee, accomplished the installation of the new officers, trustees,

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New Appointments

Chester J. Straub Sworn In As Judge For The Second Circuit

By Charles C. Platt

Chester J. Straub was sworn in as a judge for the U.S. Court of Appeals for the Second Circuit on July 27, 1998.

Before his appointment to the federal judiciary, Judge Straub had a distinguished professional career that included over 30 years in private practice and public service. Most recently, he was a partner

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at the firm of Wilkie Farr & Gallagher from 1971 to 1998, where he concentrated in complex civil litigation, practiced before regulatory agencies, and represented clients in government affairs matters.

Public Service

While he was in private practice, Judge Straub was very active in the public sector. From 1977 to 1985, he was a special master appointed by the Appellate Division to assist in the disposition of certain motions. Earlier in his career, he served as a New York State Senator from 1973 to 1975, where he was the ranking Democrat on the Committee on Corporations, Authorities, and Public Utilities, as well as a member of the Committees on Judiciary, Health, Civil Service and Pensions, Housing and Urban Development, Transportation, and the Select Joint Committee on Petroleum Distribution.

Prior to his service as a state senator, Judge Straub was a member of the New York State Assembly from 1967 to 1972, where he was the Chair of the Democratic Policy Committee and a member of the Committees on Judiciary, Ways & Means, Ethics & Guidance, and the Joint Legislative Committee to Study the Taylor Law.

Judge Straub is very engaging and thoughtful. When asked for his reflections on his new position, Judge Straub commented that he now has more time to consider legal issues at length, and to assess various arguments and counter-arguments over time. That time for extended study often was not available to him in the more hectic world of private practice, where lawyers are called upon to offer judgments at a different pace.

Nevertheless, Judge Straub finds the work at the court of appeals to be far more demanding than he ever anticipated. The sheer number of appeals and motions to be decided is daunting, and there is a huge amount of factual information and legal authority to review and absorb each month.

To handle the substantial work load, Judge Straub already has developed an efficient process for handling his cases. He carefully reads all the briefs that are submitted, and has his clerks research the questions well ahead of oral argument. He also takes a great amount of time, and spends a great deal of effort, writing his decisions.

Oral Argument

Judge Straub devotes considerable attention to oral argument, which he finds to be very helpful in reaching the right result. His only advice for lawyers handling oral arguments is to be well prepared.

Even though Judge Straub comes from both private practice and the public sector, he would like to see more experienced private practitioners seek positions in the federal courts. He believes practicing members of the bar bring a unique perspective to the judiciary that well serves the public.

Judge Straub has four young and energetic clerks trying to keep up with his heavy work load. They are: Edmund Polubinski III, W.S. Wilson Leung, Jonathan S. Kolodner, and Amanda Quester.

Calendar of Events

New Judges' Reception — *April 7, 6 - 7:30 p.m.*
Union League Club
38 E. 37th Street

New Appointments

Four New Judges Take The Bench In The Southern District Of New York

Judge Alvin K. Hellerstein

By Brian M. Cogan

This profile of Judge Alvin K. Hellerstein, who was sworn in November 30, was not written after an interview with the new judge in his chambers. Indeed, it would have made little sense for me to have interviewed Judge Hellerstein because for the last twenty years, my office has been literally three doors down from his. It was a period filled with discussion between the two of us about the best way to present a case, and of comparative judicial and case management techniques, in which then-attorney Hellerstein would talk about the approaches he liked, those he did not like, and how he would do things similarly or differently if he were a judge.

This profile is therefore based on my experience, rather than the usual interview process. It has the distinct advantage over the typical approach of decades — rather than minutes — of conversation about the topic and allows the introduction of personal as well as professional experiences. It has the disadvantage of being entirely subjective: everything in this profile reflects my views, rather than quoting recent statements that Judge Hellerstein intended for public consumption. It only will be as helpful as my ability to project my practice with attorney Hellerstein into appearances before Judge Hellerstein, and I alone am responsible for any failure to appreciate or communicate that distinction.



Judge Alvin K. Hellerstein

Practice Pointers

A short article like this cannot capture the sum and substance of twenty years' of potentially relevant experience. But the following sets forth a number of practice pointers for appearances before Judge Hellerstein.

Judge Hellerstein is not a jurist who will "pick sides." Many judges seem to choose early on in a case or a trial the side that has more merit, leaving the adversary with a constant uphill battle. Judge Hellerstein is the opposite; he will constantly re-evaluate every issue up to the moment of decision. Attorneys who predict the results of motion arguments based on the tenor of questions from him will be surprised to find decisions going the opposite way of their predictions once he has had a chance to reflect on the arguments in chambers. By way of example, although motions to reargue are difficult before any judge, it is probably the case that if an attorney genuinely believes that Judge Hellerstein has committed a manifest error of law or fact, a motion to reargue before him will probably be more favorably received than before many other judges. At least, there will not be a reflexive denial of the motion simply because it is a motion to reargue.

Technical arguments will be accepted only if they are inexorably required by law or comport with Judge Hellerstein's notions of fairness. The most prominent piece of artwork displayed in his office for decades was a Biblical quotation, the translation of which is "Justice, Justice, Justice Shalt Thou Pursue." He always was able to reconcile that mandate with his obligation to represent clients zealously. He would reject without hesitation any client's attempt to urge him to sharp practice, and his passion for justice can be expected to be even stronger as a judge. As a judge, he will not have concern about being reversed other than to avoid making a ruling that will prove futile. His greatest attribute is intellectual creativity, and he usually will find a sustainable way around technical barriers if he thinks it necessary to achieve justice.

A Fondness For Lawyers

Remember that Judge Hellerstein is genuinely fond of people generally and lawyers particularly. This has several consequences for practicing before him.

First, avoid pejorative attacks on opposing parties and, particularly, their

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attorneys. He never engaged in such attacks as a practitioner and he is highly likely to discard such efforts as a judge. If an adversary or opposing party has engaged in inappropriate conduct, simply put the facts before him, without characterization, and let him draw his own conclusions.

Second, Judge Hellerstein can be expected to be slow to sanction, and if he imposes sanctions, he will favor non-monetary sanctions if practical. As Chairman of the ABA's Litigation Section Subcommittee on Rule 11 in the early 1980s, he frequently expressed the concern that the then-new amendments to Rule 11 would discourage creativity in the law and zealous representation of clients. Throughout my practice with him, I can recall only one incident in which he sought sanctions, for repeated failure to comply with discovery orders, and the court granted his motion, dismissing the case.

Drafting Briefs

There are three points to keep in mind in drafting briefs for Judge Hellerstein. First, conciseness is king. He probably will be liberal in granting page-limit extensions, but practitioners should not need them. He spent his career in private practice cutting down 25-page briefs to 10-page briefs. He will carefully read the key cases himself, or at least review detailed summaries from his law clerks, so there is no need for extended discussion of authorities.

Second, focus heavily on the crucial facts. Judge Hellerstein will be the kind of judge who does not consider himself bound to choose between two competing views of a case. He may decide in one party's favor based on facts that were not emphasized or distinguished by either party if he believes those facts are the key to the case. The primary task of a lawyer appearing before him will be to get him to accept the context in which that lawyer has placed the facts.

Third, consistent with the need to avoid pejorative attacks on opposing parties and adversaries, avoid the use of hyperbole, exaggeration, and even adjectives in briefs. They have little or no impact on him. If the facts and law do not speak for themselves, he is unlikely to be moved by dressing them up in passionate language.

Because of his years in private practice, Judge Hellerstein is sensitive to the costs of litigation and the deleterious effect that excessive costs can have on the attorney-client relationship. Practitioners should not hesitate to propose case management techniques that will reduce costs, nor to point out to Judge Hellerstein that his own procedures, as applied in a particular case, are creating cost difficulties. He is not the kind of judge who will say "take your complaint to Congress or the Advisory Committee on the federal rules." He will react favorably to any reasonable proposal that can save litigation expense.

Finally, this short article would not be complete without some mention of Judge Hellerstein's judicial temperament. Although it sounds like the kind of exaggeration that he would promptly reject, it is the fact that in twenty years of practice, I never saw a single incident in which attorney Hellerstein raised his voice in anger, or lost his composure or his temper. The most agitated state of mind that we observed at Stroock was one that I would describe as "mildly annoyed," and that infrequently. For the practitioner, this means that so long as you genuinely believe that your arguments and conduct are proper, you need have little fear of angering Judge Hellerstein. You may tell him directly if you think he has erred; you may call chambers if your motion has not been decided for a prolonged period to inquire as to its status without fear of retribution; you may persist in your argument until the point that you are certain the judge has ruled against you without the risk of alienating Judge Hellerstein in future arguments. For if his primary maxim is Justice, Justice, Justice, then his secondary maxim is Patience, Patience, Patience.

Judge Richard M. Berman

By Charles C. Platt

Richard M. Berman was sworn in as a judge for the United States District Court for the Southern District of New York on November 23, 1998.

Judge Berman came to the federal court after a diverse career that included public positions in the state judiciary and with Congress, and serving as a lawyer in private practice with two law firms and at a large corporation.

Most recently, Judge Berman sat on the Family Court for the County of Queens from 1995 to 1998. There, he handled a number of important child abuse and child neglect cases, including the well-publicized *Matter of Kennasia S.*, in which he established procedures and guidelines before children could be returned to a mother who was a chronic drug addict. While on the Family Court bench, Judge Berman also served on the Mayor's Task Force on Child Welfare, and was a member of the Permanent Judicial Commission on Justice for Children, which is chaired by New York Court of Appeals Chief Judge Judith S. Kaye.

Before his appointment to the Family Court, Judge Berman was a partner at the firm of LeBoeuf, Lamb, Greene & MacRae, where he represented major communications clients such as Time Warner, Warner-AMAX, the Discovery Channel, and TCI. He also served for two years as the managing partner of the firm's Los Angeles office.

Cable Industry

Judge Berman's career in private practice also included eight years as Executive Vice President and General Counsel at Warner Cable Corporation. His duties in that in-house position included serving as general counsel of the MTV network, at a time when the cable industry was rapidly expanding and music videos were first appearing on television.

Earlier in his career, Judge Berman served from 1974 to 1978 as Executive Assistant to U.S. Senator Jacob K. Javits. He was responsible in that position for issues relating to New York City, and served as Executive Director for the New York State Alliance to Save Energy. He began his career in private practice as a litigation associate at Davis, Polk & Wardwell.

Commenting on his new position as a federal district judge, Judge Berman pointed out that there was far less drama and emotion than he encountered daily in Family Court. He finds that makes it easier to reach decisions and to resolve disputes. He also noted that cases are presented much more in writing and comprehensively in federal court.

On Time

Judge Berman is in the process of holding conferences with the litigants in all his new cases, trying to master the essential issues and develop plans for resolution. He expects practitioners to be on time and prepared to present a concise description of the case. He also expects them to acknowledge and respond to the weaknesses of their case in a way that will help both sides narrow their differences.

Judge Berman believes that these conferences will advance cases significantly by permitting both sides in a case to analyze it in a less adversarial mode, and give both sides a better understanding of their positions. Judge Berman also expects lawyers who appear before him to have consulted with their client about what it would take to resolve their cases.

Judge Berman is assisted by two law clerks: Christopher Denig and Christine Murray.

Judge Colleen McMahon

By Magistrate Judge Mark D. Fox

On Tuesday, November 24, Colleen McMahon was formally installed as a United States District Judge for the Southern District of New York. Judge McMahon had been sworn into office on October 26 by Judge Lewis A. Kaplan, her friend, mentor, and former partner from Paul, Weiss, Rifkind, Wharton & Garrison.

In keeping with the philosophy that the focus is and should be on the continuity of the court, rather than on any individual,

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Federal Bar Council News (ISSN 1075-8534) is published February, April, June, October, and December for $7.50 per year by the Federal Bar Council, 370 Lexington Avenue, Suite 1012, New York, N.Y. 10017-6503, (212) 883-1777. Periodicals postage paid at New York, N.Y. POSTMASTER: Send address changes to Federal Bar Council News, 370 Lexington Avenue, Suite 1012, New York, NY 10017-6503. Copyright 1999 by Federal Bar Council. All rights reserved. This publication is designed to provide accurate and authoritative information but neither the publisher nor the editors are engaged in rendering advice in this publication. If such expert assistance is required, the services of a competent professional should be sought.

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the traditionally brief induction ceremony gave very little insight into the personality of one of the district's newest judges. However, those present were handed a written welcome from Judge McMahon that explained why the ceremony was so brief and offered thanks and acknowledgments to her friends, colleagues, and especially family members for their good wishes and support.

That Judge McMahon would take the time to write the greeting, while she was busy dealing with the considerable effort involved in organizing the ceremony, arranging for the care and feeding of her family and guests (including Thanksgiving dinner for 29!), organizing chambers, and assuming responsibility for more than 300 cases, is evidence of her energy and personal priorities. Immediately after the formal induction, some sixteen children, including nieces, nephews and her daughter Katie and sons Patrick and Brian, crowded onto the bench for photographs that captured the high spirited good humor and closeness of her large, extended family.

Energy And Direction

On first meeting Judge McMahon, one gets an impression of energy and direction. She comes to the federal bench with a well deserved reputation for getting things done and getting them done quickly. In September 1993, Chief Judge Kaye, another friend and mentor, asked Judge McMahon to chair a commission on jury reform. After just six months, the commission sent Judge Kaye a report, written largely by Judge McMahon, that served as a blueprint for the extensive changes that recently have been implemented in New York State jury service.

Judge McMahon is a graduate of Ohio State University and Harvard Law School. She joined Paul Weiss immediately after law school and spent almost 19 years there as a civil litigator. Her practice was varied and included tender offer and securities work, as well as a good deal of employment discrimination litigation and advisory work. She has spoken at numerous continuing education seminars and is particularly proud of being on the original faculty of the popular "Woman Advocate" series. She also has numerous publications to her credit, including the introduction to Dr. Cynthia Fuchs Epstein's study of glass ceilings in large Manhattan law firms (published in the *Fordham Law Review*), which was carried out in accordance with a study design written by Judge McMahon.

Although she misses New York City, where she spent 22 happy years and has many "lunch buddies," Judge McMahon plans to remain in White Plains so she can spend more time with her husband and children while moving her calendar at her customary pace. She also objects most strenuously to characterizations of the White Plains courthouse as "Siberia" and, as "a pledge of good faith to the Bar," she already has begun decorating her chambers. So far, she finds the case mix no different from that of her Foley Square colleagues, and she has seen very fine lawyers from throughout the district in her busy courtroom.

Deadlines

When Judge McMahon imposes a discovery deadline or a trial-ready date, it rarely changes. She encourages attorneys to be courteous with each other and straight with the court, and to handle each case from the beginning as though it were going to be tried. That approach, she finds, insures that discovery and trial preparation are properly completed and that the attorneys think seriously about the issues in the case. She wishes that lawyers were more realistic about making dispositive motions, particularly motions for summary judgment in civil rights and employment discrimination cases, where issues of fact tend to be present. "If they make them, I'll decide them," she says, but in a departure from the practice of many of her colleagues, she notes that the pendency of such motions does not suspend the parties' obligation to file their pre-trial order and in limine motions.

Judge McMahon's vigorous approach to moving the cases assigned to her and her extensive experience as a state and federal litigator already has resulted in over 65 dispositions, including several of the oldest matters in the White Plains courthouse. This has contributed to the warm welcome she has received from the local Bar, as well as from the judges and court personnel in White Plains.

Judge William H. Pauley, III

By Bennette D. Kramer

Southern District Judge William H. Pauley, III, was sworn in informally on October 28, 1998, with a formal swearing in held on December 2, 1998 at the 500 Pearl Street Courthouse.

Judge Pauley is enthusiastic about his new role as a judge. He hopes to focus on creating an efficient and cost effective process for resolving disputes. He believes that the courts are the best place to resolve disputes because of the need to develop a consistent rule of law. However, he understands how businesses

and individuals have become frustrated with the delays in the judicial process. Right now, Judge Pauley is becoming familiar with the 300 cases he has been assigned.

Private Practice

Judge Pauley was born in Nassau County, but has always worked in New York City. Prior to assuming the bench, Judge Pauley was with Snitow & Pauley. For twenty years his practice involved public sector matters and he represented governmental entities in Nassau and Suffolk County and government employees in their individual capacities. Judge Pauley represented the Nassau County Correctional Center in jail overcrowding litigation, which has gone to the Second Circuit four times.

Judge Pauley also was involved in *United States v. Nassau County*, and subsequent actions, which originally was a pattern and practice challenge by the Department of Justice to testing for police officers. The original action was settled in 1982. Following that settlement, Judge Pauley was involved in litigation involving three generations of police examinations and their redesign. First, the Guardians Association of Nassau County sued, charging racial discrimination. Most recently, the Department of Justice and the Guardians defended against charges by the Atlantic Legal Foundation, a conservative think tank, of reverse discrimination.

Judge Pauley also was involved in litigation following the Crown Heights riots, representing the Orthodox community in its suit against New York City for civil rights violations.

In the public sector, Judge Pauley served as part-time Assistant Counsel to the State Assembly for Human Resources, Employment, Title VII, and ethics issues. His bar activities include membership in the Theodore Roosevelt American Inns of Court in Uniondale. There are inns of court across the country, each one consisting of 75 people, including judges, lawyers, and law students. Each month a group presents a program in the courthouse, starting with a special meal. Judge Pauley will participate in presenting a program entitled "Trial Nightmares, Part 2" in the early Spring.

Judge Pauley has been a member of the Federal Bar Council since 1978. He graduated from Duke University in 1974 and Duke Law School in 1977.

Focus On:

Judge David G. Trager

By Peter Eikenberry and Robert Beigleiter

Judge David G. Trager has been an appeals' court judge's law clerk, a lawyer, a law professor, a chief federal prosecutor, President of the Federal Bar Council, and a law school dean. As an Eastern District Judge he savors the interchange of ideas with lawyers the same way that he loved the exchanges he had with well-prepared law students when he was a law professor.

Five years ago in January 1994 on his very first day as a judge, Judge Trager was found in his courtroom, not on the bench, but in his business suit seated at a conference table with the lawyers conducting a pretrial conference. To this day he hears motions in the same manner. He believes that positions are advocated with more candor and that he can better focus the argument on the issues raised in the papers under less formal conditions. As one lawyer seated at the table makes a good point, he is interrupted — the judge asks his adversary what he thinks of that point — and so the dialog proceeds to satisfy the judge's understanding of the parties' positions to reach his decision.

Large Caseload

As a federal judge he hopes to have the time to reach the right decision in every case regardless of the respective advocacy skill of the lawyers, but he concedes it is more difficult with a caseload of over five hundred cases (about 420 civil and 100 criminal). Although he may deem it, perhaps, silly to go to trial when the parties are close to settlement, he will not coerce a result and the lawyers will be free to try their cases. His first year he tried twenty-one cases — eight criminal and thirteen civil — but finds it difficult to try nearly so many cases in recent years; now it is difficult to find a civil case ready for trial.

Judge Trager finds the quality of advocacy to be almost universally high among criminal practitioners, particularly among prosecutors, legal aid attorneys, and Criminal Justice Act assigned attorneys. He is disappointed over the somewhat inconsistent quality of civil representation, where, across the board, inadequate representation can be found from lawyers from big firms as well as from small firms.

The sentencing guidelines do not come under significant criticism from Judge Trager with the exception of drug cases, where he believes it nonsensical to sentence by quantity of drugs found on the person. He finds the Eastern District magistrate judge system works well to clear away discovery disputes.

Judge Trager's practice of requiring a three page letter from both parties before making a dispositive motion results in incalculable savings to the court and

the litigants; most motions are resolved. For example, a motion to remand usually can be settled. Where cases are in more than one court, the judge usually can convince the attorneys to place everything either before the federal court or before the state court. Coverage issues in insurance cases often can be resolved quickly, or at least simplified by a pre-motion conference.

Rule 26

He is outspoken on his criticism of proposed new Rule 26. He feels the proposed amendments relating to discovery are not workable and that the changes are inconsistent with the notice theory of federal pleading.

Judge Trager's only major complaint is the lack of courthouse space. Because construction is stalled for the new courthouse, fifteen Eastern District judges have but ten courtrooms to share among them. One day when Judge Johnson found Judge Trager trying a case in his courtroom, Judge Johnson took his case to trial in the park outside the courthouse.

Judge Trager's favorite trial since being on the bench was a patent case. Before that trial he knew nothing about patent law. Because the advocacy was carried on at a very high level, the lawyers educated him thoroughly in the issues about which he was unfamiliar. He found it to have been advantageous to have been a U.S. attorney, and to have known the court before he took the bench. Having been a professor was to no particular advantage.

He finds the civil cases more intellectually challenging in the variety of issues and yet seems to love his job of being a judge no matter what the issue.

Judge Trager recently fell into a debating point with one of his law clerks over a legal point in a decision that was being hammered out between them. "Professor" Trager was in his element, analyzing the law with another well prepared "student."

FBC News

Technology Committee

The Federal Bar Council has created a new committee, known as the Committee on Technology in the Second Circuit. The committee will examine issues such as the use of technology in the courtroom, electronic filing, service by e-mail, and other technological issues of interest to members, and will include communicating with federal judges on these issues. Members of the Council who are interested in serving should contact Brian M. Cogan at bcogan@stroock.com or 212-806-5654.

Second Circuit Decisions

Certification To The New York Court of Appeals

By Wendy Mirsky

The last year witnessed a sharp increase in the number of questions of state law certified by the United States Court of Appeals for the Second Circuit to the New York Court of Appeals. The federal appeals court certified questions in ten cases to New York's highest court in 1998, up from questions certified in four cases in 1997 and only one question certified in all of 1996. Although there are several possible reasons for this rise in the Second Circuit's use of the certification procedure, it is possible, of course, that the unusual number of questions certified in 1998 was simply an anomaly. Moreover, the New York Court of Appeals has exercised a significant degree of discretion in deciding whether to accept or decline certification from the Second Circuit.

Statutory Authority

Local Rule 0.27 of the Second Circuit Court Rules provides the statutory authority for certification of a question by the Second Circuit. This rule permits the Second Circuit to certify to the highest court of a state "an unsettled and significant question of state law that will control the outcome of a case" pending before the Second Circuit. Such certification must be made in accordance with procedures provided by a state's legislature or highest state court rules.

Both New York and Connecticut have adopted a procedure for accepting certification. New York Court of Appeals Rule 500.17 allows the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state to certify to the New York Court of Appeals that determinative questions of New York law are involved in a cause pending before it for which there is no controlling precedent of the New York Court of Appeals. Similarly, Connecticut Public Act No. 85-111 enables that state's highest court to accept certification.

The Vermont Rule

Unlike New York and Connecticut, however, the Vermont Supreme Court lacks the statutory authority to accept certification from the Second Circuit. Vermont probably has not adopted a procedure to take certification because it

sends far fewer cases to the Second Circuit than do New York and Connecticut, and fewer cases arise that require decisions under Vermont state law. Therefore the Vermont Supreme Court has not found it necessary to adopt a certification procedure.

Nevertheless, the Vermont Advisory Committee on Civil Rules recently voted to make a recommendation to the Vermont Supreme Court that it adopt a procedure to take certification. The committee felt that, in part because Vermont was one of the few remaining states that had not adopted a procedure to take certification, it would be appropriate for the Vermont Supreme Court to have the first say in questions of state law. The committee expects to take its recommendation to the Vermont Supreme Court in early 1999.

Sparingly Used

Since the adoption of Rule 500.17 in 1986, the certification procedure has been used only rarely, typically in about two or three cases per year on average. Indeed, from 1990 to 1997, the Second Circuit used the certification procedure in only eighteen cases in total. The Second Circuit noted in 1987 that "issues of state law are not to be routinely certified to the highest courts of New York or Connecticut simply because a certification procedure is available. The procedure must not be a device for shifting the burdens of this Court to those whose burdens are at least as great." *Kidney by Kidney v. Kolmar Laboratories, Inc.*, 808 F.2d 955, 956 (2d Cir. 1987). The Second Circuit continues to certify questions to the New York Court of Appeals quite selectively, as certification can be a time-consuming and expensive procedure that delays the ultimate resolution of a matter. Concerns of comity and judicial federalism are also important.

One explanation that has been suggested for last year's increase in the number of questions certified by the Second Circuit to the New York Court of Appeals was the large number of cases that reached the Second Circuit in 1998 on the basis of diversity jurisdiction. In such cases, all questions of substantive law must be decided according to the governing state law. When that law is unclear or nonexistent on a dispositive issue in the case, certification may be appropriate.

Issues Certified

In 1998, the Second Circuit certified questions to the New York Court of Appeals on a wide variety of issues of state law. For example, on November 18, 1998, in *Argentina v. Emery World Wide Delivery Corp.*, Docket No. 98-7183, the Second Circuit certified two open questions under New York's Vehicle and Traffic Law, finding that it was "unable to decide th[e] case without reaching these two issues" and that, "[b]ecause these are important issues of New York law that may be dispositive of many future cases, we believe that they are appropriately decided in the first instance by the New York Court of Appeals."

Additionally, in *Great Northern Ins. Co. v. Mt. Vernon Fire Ins. Co.*, 143 F.3d 659, (2d Cir. 1998), an insurance coverage dispute, the Second Circuit certified an issue concerning the proper interpretation, under New York law, of a provision in the "other insurance" clause of a standard commercial liability insurance policy. In certifying the issue, the Second Circuit stated that the insurance contract involved was a standard commercial liability policy sold by numerous insurers throughout New York, and that the interpretation of the contract language would affect the interests of a wide category of groups in New York, including New York property owners, management companies, and injured third parties. For that reason, the Second Circuit believed that resolution by the New York Court of Appeals would "aid in the administration of justice."

In another case, *Engel v. CBS, Inc.*, 145 F.3d 499 (2d Cir. 1998), the Second Circuit certified the issue of whether, under New York law, purposeful interference with an attorney's representation of a client by an adversary could satisfy the special injury requirement for malicious prosecution; it stated that a determination of this issue by the New York Court of Appeals would provide other courts with a "clear standard to apply in actions for malicious prosecution under New York law."

Similarly, in *Messner Vetere v. Aegis Group*, 150 F.3d 194 (2d Cir. 1998), the Second Circuit certified a question of the proper interpretation and application of New York's part performance exception to the Statute of Frauds. The Second Circuit expressly stated that it certified the question because New York has a "strong interest in deciding the issue certified rather than having the only precedent on point be that of the federal court, which may be mistaken."

New York's Discretion

Although Rule 500.17 enables the New York Court of Appeals to accept certification from the Second Circuit, it also gives the New York court wide discretion in deciding whether to accept certification from the federal court. The rule does not set forth specific factors

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that the state court should consider in determining whether to accept certification, but requires the state court to examine the merits presented by the certified question first to determine whether to accept the certification.

Of the ten cases in which the Second Circuit certified questions to the New York court in 1998, New York's highest court wholly declined to accept certification in two cases stemming from consolidated appeals, *Mojica v. Reno*, Docket No. 97-2599, and *Yesil v. Reno*, Docket No. 97-2629, and declined certification of the second part of the certified question in one other case, *Liriano v. Hobart Corp.*, Docket No. 96-9641; the questions certified in *Argentina v. Emery World Wide Delivery Corp.*, Docket No. 98-7183, are still pending before the New York court.

In light of the suggestion that the rise in the number of questions certified in 1998 stems from the large number of cases in the federal court on the basis of diversity jurisdiction, it is noteworthy that the only instances in which the New York Court of Appeals wholly declined to accept certification from the Second Circuit in 1998 were cases originally in federal court on the basis of federal question jurisdiction.

In *Yesil* and *Mojica*, two habeas corpus proceedings, several factors led the New York court to decline to accept certification. First, the court found that the question posed in the certification, whether jurisdiction was established under a specific prong of New York's long-arm provisions, was unlikely to be dispositive of the matter. Additionally, the court found that the fact pattern would be unlikely to arise in any state court proceeding, and therefore the issues would be more appropriately resolved by the federal court. Finally, the court found that because the certified question was somewhat theoretical, it could not be a "determinative question" of New York law and therefore was not appropriate for certification.

In *Liriano*, the New York court, having answered the first, substantive part of the question certified to it, then found that, with respect to the second part of the certified question, the "Second Circuit's opinion does not indicate that there is an unsettled or open question of New York substantive law." On the basis of that determination, the New York court concluded that the federal, not state, court should address any remaining question.

Finally, it is interesting to note that the New York Court of Appeals declined to accept certification of the only question certified to it by the Second Circuit Court of Appeals in 1996.

In *Grabois v. Jones*, 88 N.Y.2d 254 (1996), the New York Court of Appeals, in the exercise of its discretion under Rule 500.17, declined to accept the question certified to it in an action brought under the Employee Retirement Income Security Act. The court stated that although it generally accepts questions certified to it by the Second Circuit, various factors warranted the refusal of certification in that matter. First, the court noted the "likely rarity of any recurrence of this issue, a distinctive certiorari factor." The motivation for generally accepting certification of questions with important precedential impact was therefore absent. Additionally, the court found it important that "the interplay between Federal and State law in interpreting issues of statutory construction under ERISA is as yet not fully settled." The court thus found that the federal courts could more appropriately resolve the issue.

Legal Practice

The Possibly Impaired Client

By James A. Cohen

When representing a possibly impaired client, defense attorneys face a host of ethical, evidentiary, and practical issues. Under the rules of professional responsibility (both the Code and the Rules), lawyers owe their clients loyalty, zealousness, and confidentiality. The attorney-client privilege requires that client confidences be kept inviolate; however, there are circumstances under which all of these duties can be breached.

Suppose a defense attorney, prosecutor, or judge has a "bona fide doubt" that a defendant may not be competent to stand trial. In that event, he or she must raise the possibility that the defendant is incompetent. See *Pate v. Robinson*, 385 U.S. 375, 385 (1966). Given the amount of time judges and prosecutors usually spend with defendants, it is typically a defense attorney who first becomes aware of problems in communication and cooperation. For the same reason, a defense attorney often possesses the most information about a client's capacity.

Competency Evaluation

Typically, the court then will order a competency evaluation by a mental health professional. That evaluation involves an interview with the defendant that usually lasts from ten to thirty minutes. During the interview the defendant is asked about his or her background and whether he or she is aware of the charges, the possible consequences of conviction,

and the role of the judge, prosecutor, jury, and defense lawyer. The defendant also is asked some questions designed to test cognition and general awareness, e.g., to name presidents or to count backwards by seven. Occasionally, psychological tests are used to aid in reaching a decision, but normally the mental health professional's decision is based on that person's training, experience, and the interview. The mental health professional prepares a report for the court containing a description of information learned during the evaluation, possible diagnosis, and a conclusion about the defendant's competence to stand trial.

As with almost everything else in this area of the law, there are hard cases and easier ones. This manifests itself here not so much in a case where the defendant is passive, unresponsive, and otherwise presents himself or herself as catatonic. To the extent that there is virtually no communication between defendant and defense lawyer, or between defendant and the examining mental health professional, the defendant normally will be found incompetent, given medication and, depending on the precise nature of the individual's deficit, may be returned to court as competent at some later point in time.

Articulate Defendant

The problem is more difficult when the defendant is intelligent, articulate, completely aware of his or her surroundings, and has objectives or goals for the case. The case of *United States v. Blohm*, 579 F. Supp. 495 (S.D.N.Y. 1984) (J. Sweet), provides such an example.

That case arose from a *pro se* copyright infringement action brought in a federal district court by an individual named Blohm against a company based in Ohio. The company was making a film, which Blohm alleged was based on "screen notes" that he had sent to it. After summary judgment was granted in favor of the company, Blohm sent a communication to the court, accompanied by an empty shot gun shell box and ear plugs. The F.B.I., obviously concerned about the exhibits attached to the note, arrested Blohm, and he was charged with mailing threatening communications to a United States District Court Judge.

The Golf Conspiracy

During the course of the civil litigation, Blohm had come to believe in the possible existence of a conspiracy against him. He came to believe in what Judge Sweet characterized as the "golf conspiracy." It turned out that the defendant in the civil case rented space in a building owned by a company in which Arnold Palmer, the golfer, had an interest. Richard Nixon had appointed the judge assigned to the civil case, and because Richard Nixon and Arnold Palmer played golf, they were possible co-conspirators, in Blohm's view.

The belief in the possible existence of this conspiracy became quite important for the criminal case. It was Blohm's intention to attempt to use the criminal case to determine whether he was the target of a conspiracy and, if so, to seek impeachment of the trial judge who had presided over the civil case.

Judge Sweet ordered a competency hearing. Blohm was examined by two experienced forensic psychiatrists, both of whom found that he suffered from a paranoid delusion but that he was competent to stand trial because he understood the charges; the role of the judge, prosecutor, defense attorney, and jury; his rights; and the possibility that a conviction would result in a jail sentence.

In finding Blohm incompetent to stand trial, Judge Sweet agreed that he had a factual understanding of the proceeding, the applicable statutes, and the court's procedure, including the role of all the actors in the system. Judge Sweet, however, found that Blohm's understanding was not rational.

Blohm had communicated his beliefs about the golf conspiracy widely, but it is easy to imagine a client who communicates his delusional ideas only to his lawyer and does not share those ideas with others. Can the ethical duties of zealousness, loyalty, and confidentiality combined with the attorney-client privilege be reconciled with the constitutional prohibition of proceeding against a possibly incompetent defendant and the lawyer's role as officer of the court? Traditional notions of the ethical rules, attorney-client privilege, and the role of the criminal defense attorney would say no.

A Different Result

However, the United States Supreme Court in *Medina v. California*, 505 U.S. 437 (1992), suggested the possibility of a different result. *Medina* involved a challenge to a California statute that placed the burden of proving incompetence on the party raising incompetence. Medina claimed such a rule violated his due process rights. In concluding that placement of the burden of proving incompetence to stand trial on the defendant did not violate due process, Justice Kennedy, speaking for the Court, said:

"Although an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, the defendant's inability to assist counsel can, in and

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of itself, constitute probative evidence of incompetence, and defense counsel would often have the best-informed view of the defendant's ability to participate in his defense."

The dissent in *Medina* identified potential obstacles to defense counsel's participation in a competency hearing. Referencing the ethical rules and the attorney client privilege, the dissent suggested that defense counsel would hesitate to participate because of concerns about confidentiality, and becoming a witness adverse to the client, thus implicating the duties of loyalty and zealousness.

In fundamental ways, the relationship between attorney and client is that of agent and principal. If the principal is known by the agent to be incompetent, the agent is without authority to act. Thus, the lawyer must not only notify the court when he or she has a good faith reason to doubt a client's competence, but should participate in the competency process.

One might frame the issue as whether the due process clause should trump the ethical rules and attorney-client privilege, or whether there should be an exception to the ethical rules and the attorney-client privilege that would permit a defense attorney to disclose client confidences for the purpose of the competency determination.

An examination of DR 4-101 and EC 7-12 of the Model Code and Rule 1.14 of the Model Rules reveals that neither the Model Code nor Model Rules provide adequate guidance to attorneys representing possibly incompetent clients. In 1997, the Committee on Professional Responsibility of the Association of the Bar of the City of New York issued a report entitled "A Delicate Balance: Ethical Rules for Those Who Represent Incompetent Clients," which recommended the addition of a new subdivision to DR 4-101. The addition would have permitted attorneys to reveal confidences and secrets to obtain judicial or professional assistance for clients "whom the attorney reasonably believes cannot act in [their own] best interests." This recommendation has not yet, however, been adopted.

It is not lightly that I propose an exception to the confidentiality rules and the ethical rules' duties of loyalty and zealousness. Lawyers in general, and criminal defense lawyers in particular, are an adversarial group, and the confidentiality rules are deeply ingrained and symbolic.

Moreover, there are obvious dangers, including the supposed chilling effect on clients' willingness to be completely candid, the possible risk that a lawyer's statements of a client's confidences will be used by prosecutors for an improper purpose, and the additional burden on a class of clients that is already handicapped. There are detailed answers to each of these complaints, but, and briefly, I believe an exception is required for a number of reasons.

First, the Constitution prohibits proceeding against an incompetent criminal defendant, *Cooper v. Oklahoma*, 517 U.S. 348 (1996), and the conviction of an incompetent defendant will be overturned. *Drope v. Missouri*, 402 U.S. 162 (1975).

Second, a lawyer's authority to act as agent requires a competent principal.

Third, in criminal cases only the defendant can make certain decisions. In general, ethical rules place "case dispositive" decisions in the hands of clients and the Constitution requires that defendants decide how to plead, whether to testify, and whether to waive a jury. If a client is incompetent, he or she is unable to make those decisions and under the Constitution those decisions cannot be delegated to the lawyer.

Finally, a defense lawyer is an "officer of the court," which, in part, requires that lawyers not perpetrate a fraud on the court. Silence when representing a client about whom a lawyer has doubts concerning competency could be considered the perpetration of a fraud on the court.

The author is an associate professor of law, and the Director of Clinical Education, at Fordham University School of Law.

Developments

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and directors, including President Edwards.

Following honored tradition and more, the organizers and participants outdid themselves and their predecessors. Not only was the ambitious and promised goal of a 2:00 p.m. departure accomplished, the proceedings ended about five minutes early, no mean feat in so complex and choreographed an event involving so many independent minds, feet, and appetites. Perhaps the only disappointment of the occasion was that the remarks of the honoree, clearly a favorite son of the multiple legal worlds of this region, were so brief. Mr. Greenberg contented himself with gracious comments about Emory Buckner, his partner Grenville Clark, and law and the public service. Those present learned that Buckner died in 1941, which Professor Greenberg claimed was the year he went to college — unbelievable to all present who did not have benefit of a copy of his CV. One whose career in the public service literally speaks for itself, Professor Greenberg recounted the history from Buckner to the Clark



Photo courtesy Rick Kopstein.

Betsy Plevan presenting medal to Prof. Greenberg

plan that placed the Legal Defense Fund on a sound financial basis "that allowed it to do its work, including representing demonstrators for the civil rights movement and to bring the many cases that implemented *Brown v. Board of Education* and the Civil Rights Acts of the mid-sixties." Also noted was the fact that among the young lawyers Buckner hired when he was U.S. Attorney was Nathan Margold, who around 1930 drafted the blueprint for developing the line of cases that led to *Brown* a quarter of a century later.

Luncheon Chair Audrey Strauss kept the proceedings moving smartly, with a deft touch that illuminated the events of the year since the last Thanksgiving Luncheon. "Much has happened since then. We have learned that it all depends on what the meaning of 'is' is. That was illuminating. We have also learned that no matter how alone we may be, we are never truly 'alone.' That was comforting. In the great tradition of this organization, we hope to part company at exactly 2:00 o'clock but, remember, even then, you will never be alone."

From The President

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political issues? (2) Is it possible to separate the political from the legal? (3) Are the issues surrounding the Clinton matter political or legal?

Expressing Views

When we started the Federal Bar Council newsletter five years ago, we wanted to create something that was more than just another bar association newsletter. As then president George Yankwitt wrote in our inaugural issue, we hoped the newsletter would "include items of actual interest to our members and perhaps even be a bit provocative." We had the sense that there are many frustrated would-be journalists out there whose work has not quite made it to the Op Ed page of the *New York Times*, and we hoped that those putative pundits would find our publication a suitable alternative for expressing their views.

Although we always assumed the thrust of any contribution would be legal, we recognize that it is sometimes difficult to separate the legal from the political. Indeed, there are some schools of thought that hold that everything is political, and legal analysis is just a way of rationalizing a politically motivated result. Without wading into the merits of that debate, it is fair to say that the political process has an impact on the law, and vice versa; therefore, it has not been the editorial policy of the newsletter to reject opinion editorials that touch on political issues for that reason alone.

In the situation involving President Clinton, a fundamental question is what constitutes an impeachable offense. Is that a political question or a legal question? I have seen the view expressed in numerous publications that it is a political question, but the House Judiciary Committee called numerous legal experts to testify on the subject. *Marbury v. Madison* teaches us that the Supreme Court is the ultimate arbiter of what the Constitution means. Could President Clinton seek a ruling from the Supreme Court on this issue? Everybody tells me no, but why not?

Another question is the extent to which the judicial system should tolerate disingenuous testimony.

President Clinton seems to concede that his testimony was disingenuous, but he contends that Supreme Court precedent permits it. Has he interpreted that precedent correctly? Did the Supreme Court misinterpret the perjury statute?

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No matter what their politics are, most people would agree that President Clinton has a significant legal problem. Have his lawyers handled the case properly? What would your strategy have been?

Presumably, President Clinton was prepared by his lawyers to testify in the *Jones* case. Many view witness "preparation" as the highest example of the lawyer's art, but what does that mean? If, as a result of preparation, a witness gives testimony that is materially different from the testimony that he or she would have given in the absence of that preparation, is that good?

Another issue is what does the public think of all of this? Opinion polls suggest that most Americans do not think that President Clinton should be removed from office. Is that because they do not think he lied under oath? Is that because they do not think that lying under oath is an impeachable offense? Or is that because they do not care if President Clinton lied under oath?

If the latter is correct, then what does that tell us about the public's perception of the legal system? Does it suggest that the general public does not view a trial as a search for the truth? Or is this a special case, with no far-reaching implications, because it involves a politically motivated investigation into the President's personal life?

Alas, notwithstanding all of these interesting questions, we have received nothing from our readership addressing them. My opinion editorial, while it has engendered some controversy as to its propriety, has not generated anything in the way of debate. Where are the people who disagree with my views?

We urge our readers to speak up and to send us their insights — on this or any other subject of interest to our members. Of course, we reserve the right to reject any contribution that does not meet our standards for quality and taste.

Beyond that, it is the editorial policy of this newsletter to avoid the cardinal sins of journalism: to be dull, uninteresting, and not at least a bit provocative.

The Back Page

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time to time will come across a letter of credit issue. It is not an area that lends itself to off-the-top-of-the-head answers. Harvey I. Saferstein and Thomas J. Hall have done a fine job of answering many of the questions that are likely to arise.

Mark Alcott, in his treatment of "Theft or Loss of Business Opportunities," does a great job of presenting the elements of, and defenses to, a claim for tortious interference, along with citations to key cases. In particular, he addresses the often overlooked subject of remedies. The chapter has a useful checklist of essential allegations, illustrations of the wordings of such allegations and sample jury instructions. Both the "allegations" and the "jury instructions" are found on the accompanying diskettes. There are cross-references to the relevant key numbers and to Wright & Miller.

The RICO chapter authored by Jerold S. Solovy and R. Douglas Rees spans 123 pages of text addressing the relevant case law, including issues of application of RICO to foreign acts, availability of contribution, and indemnification. Delving into specific RICO issues requires a firm grasp of the big picture. The chapter does a great job of orienting the reader in this area.

The publication also approaches federal business litigation from the standpoint of practice and procedure. There are chapters on areas that the experienced federal practitioner is not likely to encounter with great frequency. Thus, there are separate treatments on, for example, multidistrict litigation, by John L. Strauch and Robert C. Weber, and international disputes in federal court, by Warren Christopher and Louis B. Kimmelman. The less frequent visitor to federal court will find the chapters on venue, forum selection, and transfer, co-authored by Gary Naftalis and Mike Oberman, and removal to federal court, by Chief Judge Roger Vinson of the Northern District of Florida, to be of great value. The seasoned lawyer will find the same chapters to be a quick entree into the case law.

Ready access to a crisp thoughtful treatment of an area of the law can give lawyers a leg up on efficiently directing research inquiries to other lawyers or to doing it oneself on-line. Having a work like this on a credenza where a lawyer can reach for it while on the phone will give the lawyer a great advantage. The editor, Bob Haig, has assembled an impressive team of practitioners.

I readily admit my bias. I know and admire many of the co-authors. To me, this adds to the confidence level in the publication. It is a very fine work that I will be putting to frequent good use.

The 6,690 page publication plus 2 diskettes of forms/jury charges is available from the West Group for $480 with a 15% discount to ABA members. The diskettes contain useful forms and model jury instructions. I had no difficulty running the diskettes which are written in WordPerfect with my MS Word program. For further details, call (800) 328-9352.

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The Back Page

Twenty-Six FBC Members Are Among Co-Authors Of New Treatise

By P. Kevin Castel

Any time twenty-six members of the Federal Bar Council join in a common professional enterprise, it is likely to be a matter of considerable significance. Recently, a joint effort resulted in a six-volume treatise entitled *Business and Commercial Litigation in Federal Courts* (Robert L. Haig, Editor), published by the West Group under the sponsorship of the Litigation Section of the American Bar Association. Each of the 80 chapters is authored by a prominent practitioner in the field. The twenty-six FBC co-authors are from twenty-two different law firms.

Just how useful is the publication? It is not uncommon to receive a call from a client requiring quick informed answers on a substantive area of law that is not part of one's core practice. It is of tremendous value to be able to slip into a briefcase a savvy treatment of a substantive law area for review the night before a morning meeting. A card carrying intellectual property lawyer may know the nuances of trademark law. But for a commercial litigator whose practice only occasionally touches the area it is extremely valuable to be able to brush up before a client meeting with a chapter on trademarks co-authored by Bob Jossen and Louis M. Solomon. Or, for example, commercial litigators from

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