Federal Bar Council News

June 1999 Vol. VI, No. 3

From The President

Witness Preparation: The Black Art

By Steven M. Edwards

I have always prided myself on my witness preparation skills, but several recent articles have given me pause.

I prepare witnesses in three segments: First, I tell the witness the general rules of testifying. Then I describe the issues in the case. Finally, I engage in role playing with the witness.

The sequence is critical. Although the witness may not remember all of the rules, the first segment places me in a position of authority and, if done properly, establishes a teacher-student relationship between us. The second segment is my opportunity to persuade the witness of my theory of the case. It also gives the

(continued on p. 17)

Developments

The Federal Bar Council Presents The Honorable Ruth Bader Ginsburg With The Learned Hand Award At Law Day Dinner

By Wendy Mirsky

The Federal Bar Council's Annual Law Day Dinner, chaired by the Honorable Naomi Reice Buchwald, was held at the Waldorf-Astoria on May 4, 1999. Council President Steven M. Edwards presented the Council's Learned Hand Medal for Excellence in Federal Jurisprudence to the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States and "the Second Circuit Justice."

Judge Buchwald began the evening by extending a warm welcome home to Justice Ginsburg, whose service as the Council's Vice President from 1978-1980, she said, permits the Council "some limited standing to claim her as one of our own." Judge Buchwald then introduced Second Circuit Judge Alvin K. Hellerstein, who read President Clinton's Law Day Proclamation.

Justice Ginsburg

Council President Steven Edwards introduced Justice Ginsburg. He noted that he had tried to suggest to Justice

(continued on p. 2)

In Memoriam

Milton Gould

Milton Gould passed away on March 21, 1999, marking the end of a truly extraordinary career in federal practice. At a memorial service held on April 20, 1999, many distinguished judges, friends, and family remembered him. The following speech by Judge I. Leo Glasser is just one of the excellent tributes given at that service:

How Can I Praise Thee And Not Overpraise
And Yet Not Mar Thy Grace
By Stint Thereof

Milton would surely have recognized those as being the words of Euripides and they leaped to mind as I thought about what I could say in this remembrance of

(continued p. 15)

Inside:

Women In The Judiciary 3

Focus On: U.S. Attorney Robinson 4

Ethical Rules For Prosecutors 7

Ethics And E-Mail 9

Attorney-Client Privilege 10

Cameras In The Courtroom 11

New Judges' Reception 14

Letter From Moscow 20

Developments

(continued from p. 1)

Ginsburg that there is a cause and effect relationship between being a Vice President of the Council and her subsequent career, but she told him "there is no foundation for that argument."

Justice Ginsburg was born in Brooklyn and grew up in Flatbush. She graduated first in her class from Cornell University. She and her husband Martin then spent two years at Fort Sill in Oklahoma, where she was relegated to a position of typist when the government learned that she was pregnant.

Edwards noted that Justice Ginsburg attended Harvard Law School, where she was one of only nine women in her class and was on the Law Review. She transferred to Columbia in her third year, graduating first in her class. Despite these phenomenal credentials, Edwards said, New York law firms refused to hire her. She is quoted as saying that she "struck out on three grounds. I was Jewish, a woman, and a mother. The first raised one eyebrow, the second two. The third made me indubitably inadmissible."

Justice Ginsburg clerked for Judge Palmieri after graduating from law school. She then went to Sweden to study and write about Swedish civil procedure. From there, she taught civil procedure at Rutgers Law School. While at Rutgers, she became involved in a number of cases raising issues of gender bias. When she argued *Reed v. Reed* before the Supreme Court in 1971, she won the first case in which the Supreme Court struck down a law because it discriminated against women. This led to the creation of the A.C.L.U.'s Women's Rights Project, of which Justice Ginsburg was a founder and director. In that capacity, she argued five more cases before the Supreme Court involving gender bias, representing both men and women.

In 1972, she became the first female tenured professor at Columbia Law School, and in 1980 she was appointed to the Court of Appeals for the District of Columbia Circuit by President Carter. She was particularly known for her dissents on that court that emphasized the rights of the individual. In *Morrison v. Olson*, she dissented from the majority opinion striking down the Independent Counsel Law, noting that it is unreasonable to expect an individual to investigate or prosecute his or her superiors. Her dissent became the law of the land.

When President Clinton appointed Justice Ginsburg to the Supreme Court in 1993, he said that Justice Ginsburg "is to women's rights what the late Thurgood Marshall was to minorities' rights." But, as Edwards noted, Justice Ginsburg believes stereotypes can be dangerous: "While many would describe her as a crusader for women's rights, she has described herself as concerned about gender bias and discrimination of all types; she counts Justice Scalia and Robert Bork among her closest friends; and while she was an activist as a lawyer, as a judge she is known for her commitment to judicial constraint."

Majority Decisions

Edwards noted that Justice Ginsburg has written majority opinions in a number of cases during her tenure on the Court. Her most famous opinion is *United States v. Virginia*, in which the Court struck down V.M.I.'s policy denying admission to women. In "typical Ginsburgian fashion," Edwards said, she did not equate gender-based discrimination to racial discrimination by requiring strict scrutiny of gender-based classifications. Rather, she ruled that parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action. Justice Ginsburg revealed her concern for the rights of individuals when she wrote that "generalizations about the way women are, estimates of what is appropriate for most women, no longer justify denying opportunities for women whose talent and capacity place them outside the average description."

Edwards said that Justice Ginsburg's concern for the rights of the individual is strongly connected to her commitment to judicial moderation. She views judicial opinions as an "opportunity to resolve individual cases, with individual stories, in individual situations, consistent with the law." Quoting Learned Hand, Edwards described moderation as "the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens . . . , which recognizes their common faith and their common aspirations, in a word, which has faith in the sacredness of the individual." He concluded that no person fits this description better than Justice Ginsburg.

Finding Inspiration

In accepting the award, Justice Ginsburg said that Learned Hand helped her see "what a good judge should be." When Justice Ginsburg clerked at the Southern District for Judge Palmieri, she sometimes rode in the backseat of Judge Palmieri's car when he drove Judge Hand home at the end of the day. On those occasions, she said, she was treated to "the most extraordinary entertainment." Judge Hand would recite poetry, ask provocative questions, and sing either Gilbert & Sullivan numbers or

Calvinist hymns, depending on his mood. She added that Judge Hand's "zestful" vocabulary "introduced me to words my mother never taught me!"

Judge Ginsburg noted that Professor Jerry Gunther spoke at Judge Ginsburg's welcoming ceremony when she was appointed to the D.C. Circuit in 1980. She said that in delivering advice for her as a new judge, Professor Gunther used the words of Learned Hand, who said of Justice Cardozo:

He never disguised the difficulty, as lazy judges do, who win the game by sweeping all the chess pieces off the table. He would often begin by stating the other side better than his advocate had stated it himself. To those who knew him, the anguish that preceded the hard decisions was apparent. He wrote his decisions with his very blood. But he knew that it was a judge's duty ultimately to decide, not to debate.

As an advocate in her early career and then as a judge for the past 19 years, Justice Ginsburg said that she knows "the importance of Hand's message. Victory gained by sweeping the chess pieces off the table is not enduring."

Justice Ginsburg declared that Judge Hand, in his thousands of opinions, teaches the "ideal way of judging." She has learned from Judge Hand, she said, that "the good judge should be modest but creative, genuinely open-minded and detached, heedful of limitations stemming from the judge's own competence, and above all, from the presuppositions of our constitutional scheme." The good judge also recognizes, she said, that she need not be relegated to a trivial or mechanical role, but rather must make "creative, important judicial contributions."

In conclusion, Justice Ginsburg said that "this is my inspiration; it defines the good judge I strive to be."

A Judge's View

Women In The Judiciary

By Magistrate Judge Lisa Margaret Smith

On Friday, April 30, 1999, amidst the beautiful surroundings of the Tarrytown House in Tarrytown, New York, Second Circuit Judge Sonia Sotomayor gave the keynote address to the annual convention of the Women's Bar Association of the State of New York. Before a receptive crowd of several hundred lawyers, judges, and guests, Judge Sotomayor expressed her concern that despite the great strides that women have achieved in the legal profession, a great deal has to be accomplished before parity is realized. In addition, Judge Sotomayor challenged her audience with the question about what it means to the practice of law and judging to have diversity among the participants in the process, including diversity among judges.

Judge Sotomayor noted that since her graduation from Yale Law School in 1979, there have been many important firsts for women in the law. Janet Reno was appointed the first female U. S. Attorney General. Justice Sandra Day O'Connor was the first woman to be appointed to the United States Supreme Court. Here in New York, Chief Judge Judith Smith Kaye was the first woman appointed to the New York State Court of Appeals. As of 1998, women sat on the highest courts of almost all of the states and territories, including Puerto Rico, where Judge Sotomayor claims her roots.

In the federal judiciary, including circuit, district, bankruptcy, and magistrate judges, Judge Sotomayor pointed out that the numbers of women have increased steadily over the last 35 years. In 1965, there were only three women in the entire federal judiciary; in 1992, when Judge Sotomayor was appointed a United States District Judge for the Southern District of New York, women made up 13.4% of the federal bench; as of September 30, 1998, the percentage had increased to 17.88%.

Despite these laudable gains for women in the judiciary, Judge Sotomayor said that there are many goals yet to be achieved. After the historic appointment of Justice O'Connor to the Supreme Court in 1981, it took eleven years before Justice Ruth Bader Ginsburg was appointed. Similarly, between Chief Judge Kaye's appointment as an Associate Judge of the New York State Court of Appeals in 1983, and Judge Carmen Beauchamp Ciparick's appointment, ten years passed. Six years later, there have been no additional women appointed to either Court.

Judge Sotomayor stated that in 1992, two of the 13 circuit courts had no women judges; some 53 of the 92 district courts had the same lack of diversity. At the end of 1998, there is at least one woman sitting on each of the circuit courts, although the First, Eighth, and Federal Circuits each have only one female judge; of the forty-nine district courts with five or more judges, seven had no women judges. For women of color, the statistics are even more sobering. As of September 20, 1998, of the 195 circuit court judges, only two were African-American women, and two were Hispanic women. Of the 641 district court judges, only 12 were African-American women, and 11 were Hispanic women. No African-Americans, either male or female, sit on the First, Ninth, or Tenth Circuits, and no

(continued on p. 4)

(continued from p. 3)

Hispanics, either male or female, sit on the Third, Sixth, Eighth, or District of Columbia Circuits.

These statistics are amplified by recent events in the judicial confirmation process. Of the 11 judges whose nominations were delayed more than a year before confirmation in 1998 (including Judge Sotomayor's), eight were women or minorities. Eight of the 12 nominees whose nominations remained pending at the end of the 1998 Congressional session, and which had been pending for more than six months, were women or minorities; of those pending more than a year, seven of eight were women or minorities. When the Senate adjourned in 1998, three of the four nominees who had been voted out of the Judiciary Committee, but were not confirmed, were minorities, Judge Sotomayor declared.

Judge Sotomayor's recitation of these statistics provided a backdrop to her query, "What will it mean to the development of the law to have more women judges?" She said that in a 1992 speech entitled "Women on the Federal Bench," the Honorable Miriam Goldman Cedarbaum expressed the belief that the numbers of women on the bench were too statistically insignificant at that time to permit valid scientific conclusions to be drawn about the impact of gender diversity on the justice system, and she questioned whether any such conclusion could ever be drawn. Judge Cedarbaum found it "difficult to accept the notion that as judges or lawyers, men and women have fundamentally different approaches." She expressed her belief that judges of either gender must transcend their personal sympathies and prejudices, and must aspire to a greater degree of fairness and integrity based on the reason of law. Judge Sotomayor, by contrast, wondered whether this laudatory aspiration is possible, and whether ignoring differences that may exist between women, men, and people of color does a disservice both to the law and to society.

In her address, Judge Sotomayor affirmed her belief that in any group of human beings there is a diversity of opinion because there is both a diversity of experience and of thought. She also accepted the notion that women's experiences will, in some way, affect their decisions, including their decisions as lawyers and judges. Judge Sotomayor concluded that not all women, in all or even some circumstances, or that even she in any particular case, would make a difference in the process of judging, but that enough women, in enough cases, will make a difference in the development of the law and judging. She argued that gender makes and will make a difference in judging, whether the differences are born from differences in experience or result from inherent physiological differences. She summed up her thesis by saying:

I accept the proposition that there will be a difference by the presence of women on the bench and that my experiences will affect the facts I choose to see as a judge. I hope that I will take the good and extrapolate it further into other areas than those with which I am familiar. I simply do not know exactly what that difference will be in my judging, but I accept there will be some based on my gender and the experiences it has imposed on me.

Judge Sotomayor ended her remarks with additional questions, and noted that her quest for answers to these questions is likely to continue indefinitely:

Each day on the bench, I learn something new about the judicial process and its meaning, about being a professional woman in a world that sometimes looks at us with suspicion. . . . I can and do . . . aspire to be greater than the sum total of my experiences but I accept my limitations. I willingly accept that we who judge must not deny the differences resulting from experience and gender but attempt . . . continuously to judge when those opinions, sympathies, and prejudices are appropriate.

Judge Sotomayor concluded with an invitation to the members of the Women's Bar Association to think about these issues, and to work to create more opportunities for women to be on the bench. With increasing numbers, she opined, women judges may become statistically significant enough that the differences made by them will be discernible as well as measurable.

Focus On:

U.S. Attorney Stephen C. Robinson

By Michael G. Considine and Peter G. Eikenberry

As a youngster in Bedford-Stuyvesant, Stephen C. Robinson began penning a "Book of Rules" to guide him through life. The principles contained in the book served him well as he embarked upon a journey through a diverse range of jobs, culminating in his appointment as U.S. Attorney for the District of Connecticut on April 3, 1998.

The Early Years

Mr. Robinson credits his parents, especially his mother, Yvonne Robinson,

with having a profound impact on his life. His mother emphasized the importance of education and sought to expand his world view "beyond our housing project." She regularly took Mr. Robinson and his two brothers to events such as "Expo 67" in Montreal, the ballet, and various museums in New York City. He vividly recalls listening to first rate speakers at the 92nd Street Y.M.C.A., where he was one of the few children in attendance. Mrs. Robinson's simple message was that life was full of opportunities, all of which were available to him if he "had the desire and was willing to pay the price."

His childhood was a disciplined one. Mr. Robinson and his brothers did the food shopping and the cooking; they ironed their clothes and handled most household chores. His "Book of Rules" was a journal — packed with maxims he tried to follow. Cary Grant was cited as the authority for wearing blue suits to important meetings. Former New York Yankee outfielder Mickey Rivers warranted a few lines also. Mr. Robinson was impressed with Rivers' response to an interviewer who wondered how Rivers stayed calm under pressure. Rivers observed: "I don't worry about what I can't control; I can't control it. I don't worry about what I can control; I can control it."

While in high school, Mr. Robinson focused on music. He played the trumpet and belonged to a soul band that once opened for James Brown. Although his trumpet was far from a "hit" with the neighbors, it provided him with a sense of peace in a world that was otherwise tumultuous. He recalled that his musical ability was evaluated solely on the merits; his race was irrelevant. But music was not his true calling. Mr. Robinson recalled that, when his high school music teacher predicted that he would never be a great musician, Mr. Robinson contemplated alternatives.

College, Law School, And Beyond

After high school, he briefly worked on Wall Street as a trading clerk to save money for college. He then attended Cornell University, where he majored in Government and minored in Philosophy. As a junior, he was accepted into Cornell Law School, from which he graduated in 1984.

He then returned to New York, where he held several jobs that provided him with vastly different legal experiences. Initially, Mr. Robinson was a litigation associate at two New York City law firms, Alexander & Green and Christy & Viener. He gives credit to these firms for teaching him the basics of practicing law. These firms also taught him to cope with failure. "I was allowed to dust myself off, to recover and to continue to learn."

In 1987, U.S. Attorney Rudolph Giuliani appointed him an Assistant U.S. Attorney in the Southern District of New York. During his four years as an Assistant in the Criminal Division, he tried more than ten cases, including a four-month securities fraud trial (with Assistant U.S. Attorney Vincent Bricetti) for which he received the Department of Justice Director's Award for Superior Performance.

(continued on p. 6)

Editors

Editor-in-Chief
Charles C. Platt

Managing Editor
Steven A. Meyerowitz

Editor Emeritus
Steven M. Edwards

Board of Editors

Brian M. Cogan
Hon. Mark D. Fox
Wendy L. Mirsky
Nancy L. Savitt
Peter G. Eikenberry
Bruce A. Green
Kevin O'Brien
Steven Flanders
Bennette Kramer
Stephen L. Ratner
C. Evan Stewart

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.

(continued from p. 5)

After leaving that position in 1991, Mr. Robinson assumed an investigative role, as an Associate General Counsel and later Managing Director of Kroll Associates, the international private investigation firm. For Kroll, he traveled throughout the world on behalf of numerous clients, including the governments of Kuwait and Brazil. Kroll provided an opportunity to "see the world and to improve my investigative skills."

In 1993, Mr. Robinson was tapped by F.B.I. Director Louis Freeh to become Principal Deputy General Counsel of the F.B.I., a "position without portfolio." In the Bureau, he was exposed to various cutting-edge issues and events, including the tragedy of Ruby Ridge. He helped revamp the Bureau's hiring and promotion process, reviewed undercover investigative proposals, and worked on significant terrorism and espionage matters. He particularly enjoyed his role on a committee that focused on multi-agency investigations abroad.

The long distance commute between his Connecticut home and the District of Columbia eventually took its toll. With his wife, Kathleen A. Sullivan, settled as a law professor at Yale, and his daughter turning five, Mr. Robinson opted to return to the private sector. He accepted a corporate legal position, joining Aetna, Inc. in late 1995. He ran the Compliance Program and Fraud Investigative Units at Aetna-U.S. Healthcare.

One afternoon in late 1996, while knee-deep in compliance issues, he read that then-U.S. Attorney for Connecticut, Christopher Droney, was headed for the federal bench. Mr. Robinson immediately decided to "throw his hat into the ring" for U.S. Attorney, a daunting prospect, given his limited contacts within the Connecticut legal and political communities. Although he was handicapped by the loss of his Book of Rules, which had been destroyed in a flood, Mr. Robinson successfully navigated through the nomination process, which led to his appointment as the first African-American U.S. Attorney for the District of Connecticut.



Photo courtesy Drev er

Connecticut U.S. Attorney Stephen C. Robinson

Office Profile

One of his first tasks on becoming U.S. Attorney was to fill a number of open slots. He formed a Hiring Committee to review about 400 resumes. The committee's mission was to fill nine open positions with people who "do not have egos, can get along with their co-workers and are prepared to fulfill their sacred oaths as prosecutors." He has sought to attract the best available talent and to further diversify the office, in terms of race and gender. He is well-aware that the mere initiation of an investigation severely affects people's lives and wants to ensure that responsible people are conducting such inquiries.

Although his priority is combating public corruption and white collar crime, the prosecutors in the U.S. Attorney's Office handle a wide variety of cases. With the exception of Organized Crime and Appeals, there are no individual units in the Connecticut office, as are typically found in larger offices.

Mr. Robinson prefers to "supervise from a distance and not to micro-manage." He is supportive of his assistants and learns about their cases

through the indictment-review process. He relies heavily on the front-line supervisors to keep him apprised of all significant developments. This occurs, for example, through weekly meetings attended by all of the supervisors in both the Civil and Criminal Divisions and the Office Administrator.

Priorities

Mr. Robinson has a keen appreciation of his predecessors' abilities to make substantial inroads in combating organized crime and gang violence. Their work has enabled him to focus the office's efforts on white collar crime and public corruption, two areas that he views as warranting significant attention. He is concerned that the public has lost confidence in law enforcement's ability in these areas: the public "assumes that nothing will happen" to correct abuses by police officers and other public officials. He is determined to investigate allegations of corruption, as he views the federal government as having the necessary resources to pursue sensitive and complicated investigations. As he puts it, "If we don't investigate, no one will." Mr. Robinson indicated that he has joined forces with local law enforcement agencies and will continue to do so, where appropriate.

Convening Power

He views the "convening power" of the office as a potent weapon in combating crime in non-traditional ways. For example, his office is participating in the Strategic Approaches Project, designed to convene numerous entities in crime-ridden areas (including churches, boards of education, community groups, and other federal and state agencies such as H.U.D.) in eliminating opportunities for crime. In New Haven, for example, comprehensive mapping systems are employed to identify high crime areas and to identify ways to make these sites less attractive to criminals. Through the installation of lighting systems, the removal or conversion of abandoned buildings, and the expansion of recreational opportunities at schools, crime rates are falling, and the public is slowly gaining confidence that their communities can become safer, when groups rally together to effectuate change.

On a personal note, Mr. Robinson is looking for an appropriate case to try. Ideally, it will be a challenging and important two or three week criminal case. He predicts that a severed defendant in a public corruption trial could be an ideal case.

Accessibility

Mr. Robinson is available "to any outside attorney who would like to review any matter relating to the office." He cautions that he is fully supportive of his staff and, although his mind was changed on one occasion, that "is not the norm."

He is striving to be accessible to the larger community as well, by speaking before local bar associations, schools, and community groups. He is spending most of his time in Connecticut as he wants to understand fully its needs. At least for the moment, he has avoided joining any of the Attorney General Sub-Committees, which require frequent travel to Washington.

For now, Mr. Robinson chooses to look no further than to fulfilling the duties of his office and to making life better for the citizens of Connecticut. As he stated, "If I leave this office having made no difference in the lives of ordinary citizens, what's the point?"

Federal Prosecutors

Which Ethical Rules Should Apply?

By Bennette Kramer

In connection with the continuing tension over whether federal prosecutors should be subjected to state ethical standards, last October Congress enacted the Citizens Protection Act of 1998. Also known as the McDade Amendment, the law became effective on April 21, 1999. Since the McDade Amendment was passed, the Justice Department and Senators Orrin Hatch and Patrick Leahy have sought to have it repealed and replaced with more lenient rules for federal prosecutors. Specifically, they seek to exempt federal government lawyers from state ethical standards prohibiting contacts with persons who are represented by counsel.

Same Standards

The McDade Amendment subjects United States government attorneys to the same ethical standards to which other attorneys practicing in the same state must adhere. The McDade Amendment states:

An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

The McDade Amendment additionally requires the Attorney General to make rules to assure compliance with the statute.

(continued on p. 8)

(continued from p. 7)

Senator Joseph McDade introduced the bill in response to efforts by the Justice Department to exempt government prosecutors from the state ethics rules prohibiting unauthorized contact with represented persons. The issue first arose in 1989 when Attorney General Richard Thornburgh issued a memorandum asserting that Department of Justice lawyers could question a suspect represented by counsel without notifying that counsel and, thus, did not have to abide by state ethics rules. Then, in 1994, the Department of Justice issued regulations exempting federal prosecutors from ethics rules prohibiting *ex parte* contact with persons represented by lawyers. The reasoning was that these state disciplinary rules placed a burden on Department of Justice prosecutors and investigators.

The McDade Amendment, as originally drafted, contained provisions defining punishable conduct, penalties, and procedures for complaints about violations. These provisions were eliminated during the enactment process as the result of intensive lobbying by the Department of Justice. The six months between passage of the McDade Amendment and its effective date were intended to provide the Justice Department with time to promulgate the necessary regulations to effectuate the law. Instead, the Justice Department lobbied for its repeal. In response to Justice Department efforts, Senators Hatch and Leahy introduced bills specifically intended to repeal it and to enact provisions aimed primarily at reinstating the right of federal prosecutors to communicate *ex parte* with persons represented by counsel.

On January 19, 1999, Senator Hatch, along with Senators Michael DeWine and Don Nickles, introduced a bill (S. 250) called the "Federal Prosecutor Ethics Act" to repeal the McDade Amendment and establish separate ethical standards for federal prosecutors. The bill would exempt federal prosecutors from the ethical rules of each state "to the extent that the State law or rule is inconsistent with Federal law or interferes with the effectuation of Federal law or policy, including the investigation of violations of Federal law." The bill would require the Attorney General to promulgate regulations and to establish rules to carry out the bill. It also would establish a commission of federal judges "appointed by the Chief Justice, to review and report on the interrelationship between the duties of federal prosecutors and regulation of their conduct by state bars and the disciplinary procedures utilized by the Attorney General." Essentially, the bill would give ethical oversight of the conduct of federal prosecutors to the Attorney General and eliminate oversight by the states in which such prosecutors are admitted to practice law.

Regulating Conduct

In his statement to the United States Senate introducing S. 250, Senator Hatch defined his goal as seeking to ensure that rules regulating prosecutorial conduct are "measured and well-tailored to that purpose." Senator Hatch contends that the McDade Amendment would "cripple the ability of the Department of Justice to enforce federal law and cede authority to regulate the conduct of federal criminal investigations and prosecutions to more than fifty state bar associations." In addition, according to Senator Hatch, it would have a negative effect on the complex cases investigated and prosecuted by the federal government by subjecting federal prosecutors to differing rules and the "whim" of defense counsel who could file complaints about their prosecutorial decisions. Stating that the McDade Amendment would be "an open invitation to clever defense attorneys to stymie federal criminal or civil investigations by raising bogus defenses or bringing frivolous state bar claims," Senator Hatch pointed out two specific situations where federal prosecutors would be hampered. First, they would not be permitted to speak with represented witnesses which would let corporate misconduct go uninvestigated and hinder undercover investigations. Second, in some states federal prosecutors might be required to present exculpatory evidence to the grand jury. (This, however, appears to be an area of conduct typically regulated by procedural rules incident to state criminal investigations, rather than ethical rules applicable to all attorneys.) Senator Hatch contended that the result of the McDade Amendment would be that "violations of federal laws will not be punished, and justice will not be done." Moreover, the control of prosecutorial conduct in federal courts will have been surrendered to state bar associations.

Professional Standards

On April 21, 1999, the day the McDade Amendment became effective, Senator Leahy introduced "Professional Standards for Government Attorneys Act of 1999" (S. 855) to repeal the McDade Amendment and replace it with a statute providing more general criteria than the Hatch bill, including a requirement that national rules be developed for government attorneys.

Specifically, S. 855 provides that the applicable standards of professional conduct for government attorneys would be the standards of the court in which a

proceeding is pending or by which a grand jury is impaneled. For other conduct the standards established by the state in which the attorney is licensed to practice would apply. In addition, Senator Leahy's bill would require the Judicial Conference of the United States to prepare a report to the Chief Justice of the United States recommending a uniform national rule covering government attorneys concerning "communications with represented persons and parties."

In his statement in support of the Professional Standards for Government Attorneys Act of 1999, Senator Leahy stated that the bill "would clarify the professional standards that apply to federal prosecutors and identify who has the authority to set those standards." Senator Leahy pointed out that the current stage of the debate over professional standards arises from heightened public concern over the investigations and prosecutions conducted by independent counsels, which are perceived as being unaccountable. Senator Leahy indicated that investigatory excesses committed by the special prosecutor in connection with Monica Lewinsky was the springboard for developing a uniform set of rules.

Uniform Rule

Senator Leahy criticized the McDade Amendment as lacking clarity because it subjects federal prosecutors to the laws and rules of the state, as well as local federal court rules, without any indication as to what a federal prosecutor is supposed to do in the event the state rules and local federal court rules conflict. Senator Leahy also pointed out that the McDade Amendment did not consider the possibility of a uniform federal rule or set of rules governing attorney conduct in federal courts. He was concerned that this oversight might interfere with the Supreme Court's existing authority to prescribe rules under the Rules Enabling Act.

Both the Hatch and Leahy bills have been read twice in the Senate and referred to the Judiciary Committee, but neither has progressed any further at this writing.

The Computer Lawyer

Ethics And E-Mail

By Nancy Savitt

There has been much concern in the bar about the use of e-mail, and whether security measures such as encryption are required to preserve client confidences. The use of e-mail involves two overlapping sets of issues: (1) as a legal matter, does use of unencrypted e-mail render the communication unprivileged and open the attorney to an ethical violation; and (2) as a practical matter, should e-mail be used to convey sensitive communications because of the risk of interception.

In New York, the legislature has answered the privilege question, preserving the privilege for electronic communications in C.P.L.R. 4547, enacted last year. But that still leaves room for discussion of the ethical and practical issues.

Ethical Opinion

Formal Opinion 99-413 of the American Bar Association Standing Committee on Ethics and Professional Responsibility, entitled "Protecting the Confidentiality of Unencrypted E-Mail" (headnotes for this are available at www.abanet.org), was issued in March 1999. It discusses the confidentiality of several communication devices in coming to its conclusion that a "lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint."

The ethical issue arises under Model Rule 1.6 and its state analogues, that, absent client consent, an attorney has a duty to take reasonable steps in the circumstances to protect confidential client information from unauthorized use or disclosure. Is e-mail as it exists today such a reasonable step? The A.B.A. committee thinks so, and so does the New York State Bar Association.

The A.B.A. committee compared e-mail with alternative communication methods, including mail, phone, and fax communication. It noted that the "reasonableness of a lawyer's use of any medium to communicate with or about clients depends on both the objective level of security it affords and the existence of laws intended to protect the privacy of the information communicated."

U.S. and commercial mail is sent sealed, unlike unencrypted e-mail, but it also can be subject to illegal interception and dissemination, the committee noted. Land-line telephones are not secure because they can be tapped, and extension phones provide eavesdropping opportunities—yet their use is consistent with ethical duties to protect client confidences. The A.B.A. committee distinguished e-mail from the use of cordless and cellular phones, which some authorities have held do not carry with them an expectation of privacy, in part on

(continued on p. 10)

(continued from p. 9)

the ground that e-mail communications "are not 'broadcast' over public airwaves." Faxes can be misdirected or intercepted, but their use does not generally violate any ethical prohibitions (although the A.B.A. committee noted that "prudent lawyers faxing highly sensitive information should take heightened measures to preserve the communication's confidentiality.")

The A.B.A. discussed the four different types of e-mail systems, from "direct" e-mail where the lawyers' modem communicates directly with the client's modem and does not pass through any intermediaries (making it akin to fax communication), through less direct methods ending with Internet e-mail. All pass muster under the A.B.A.'s analysis, which concluded that "[l]awyers have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure."

New York's Rule

Similarly, the New York State Bar Association Committee on Professional Ethics, in its Opinion 709 (Sept. 16, 1998) (available at www.nysba.org), opined that "the criminalization of unauthorized interception of e-mail . . . , together with the developing experience from the increasingly widespread use of Internet e-mail, persuades us the concerns over lack of privacy in the use of Internet e-mail are not currently well founded. . . . We therefore conclude that lawyers may in ordinary circumstances utilize unencrypted Internet e-mail to transmit confidential information without breaching their duties of confidentiality under Canon 4 to the clients, as the technology is in use today."

Even with the current ethical wisdom in these recent opinions, the committees emphasize that special precautions may be needed for particularly sensitive information. As the New York committee said, "in circumstances in which a lawyer is on notice for a specific reason that a particular e-mail transmission is at heightened risk of interception, or where the confidential information at issue is of such extraordinarily sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyer's control, the lawyer must select a more secure means of communication than unencrypted e-mail."

The A.B.A. committee offered another alternative, client consent: "when the lawyer reasonably believes that confidential client information being transmitted is so highly sensitive that extraordinary measures to protect the transmission are warranted, the lawyer should consult the client as to whether another mode of transmission, such as special messenger delivery, is warranted" and then follow the client's instructions.

Consulting with clients is always the best approach, especially with regard to the practicalities rather than the legalities of e-mail communication. The best practice is to obtain the clients' informed consent to communicate via unencrypted e-mail, and to memorialize that consent in writing.

These recent opinions are expressly limited to the technology as it currently exists. Lawyers would be well advised to heed the advice of the New York committee that they keep abreast of e-mail technology "to assess any changes in the likelihood of interception as well as the availability of improved technologies that may reduce such risks at reasonable cost."

Second Circuit Decisions

The Attorney-Client Privilege

By C. Evan Stewart

Assertions of the attorney-client privilege are more likely today to be challenged by the government and private litigants than in the past. It also is true that the privilege is scrutinized more carefully by judges today, with less judicial deference. Into the midst of this state of affairs has come a recent decision by the Second Circuit that is clear and well-reasoned, and that hopefully will help lawyers and their clients to ensure that their future communications will be protected from subsequent disclosure.

In *United States v. Ackert*, a Second Circuit panel led by Judge Leval ruled that an attorney's communications with a non-client third party were not covered by the attorney-client privilege. Although this ruling has been viewed by some as spurning an "extension of the privilege," in fact Judge Leval's decision is so clearly correct that it is somewhat unclear what all the fuss has been about.

In 1989, Eugene Meyers, Paramount Communications' senior vice president and tax counsel, had several discussions and meetings with David Ackert, an investment banker at Goldman, Sachs & Co. The purpose of those discussions and meetings was for Meyers to learn more about a transaction Ackert had proposed to Paramount to help it deal with a capital gains problem; Meyers used the information from those communications to advise his client as to the wisdom of pursuing the transaction.

Ultimately, Paramount decided to go forward, but did so using the services of

a different investment banking firm. Paramount nonetheless paid Goldman, Sachs a $1.5 million fee, basically for bringing the concept of the transaction to it.

In 1996, the Internal Revenue Service was conducting an audit of Paramount and focused on, among other things, the transaction impacting on Paramount's capital gains. The I.R.S. directed a summons to Ackert to find out what he knew. Paramount interposed an objection to any questions of Ackert relating to his conversations with Meyers, citing the attorney-client privilege. The government then filed suit in federal court in Connecticut to compel Ackert's testimony, and the matter was referred to Magistrate Judge Garfinkel. After argument by both sides and after Ackert was interviewed in camera, Magistrate Judge Garfinkel ruled in favor of Paramount.

In reversing that ruling, Judge Leval followed the path he had laid down previously in 1995 and 1998 decisions in *U.S. v. Adlman*. [For a further discussion of these decisions, see C. Evan Stewart, "Attorney Work-Product," *Federal Bar Council News*, June 1998.] In *Ackert*, Judge Leval gently pointed out that the privilege covers communications between an attorney and his or her client, period; because the underlying policy of the privilege is "to encourage clients to make full disclosure to their attorneys," it does not extend to discussions lawyers have with third parties, for whatever reason (even if it is in the furtherance of their clients' best interests).

It was Paramount's contention, however (and one which had been persuasive to Magistrate Judge Garfinkel), that it fit into a narrow exception to the requirement of an attorney-client communication. In *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), Judge Friendly had held that the privilege would extend to communications by an attorney's client to an accountant hired by the attorney to assist the attorney in understanding the client's financial information (a role analogized to that of being a translator of a foreign language); Paramount argued that Ackert was just such a translator for Meyers and thus *Kovel* should be applicable.

Judge Leval, having just rejected the application of *Kovel* in *Adlman* in 1995, found that it also had "no application" to the Ackert-Meyers communications. In *Adlman*, the court found that an in-house tax attorney had consulted an accounting firm for "tax advice," rather than consulting the firm "to help him reach the understanding he needed to furnish legal advice." Judge Leval applied the same analysis with respect to Meyers, finding that he "sought out Ackert for information Paramount did not have about the proposed transaction and its tax consequences," and thus rejected the "translator or interpreter of client communications" role.

Beside Judge Leval having correctly applied the attorney-client privilege and delineated the applicable principles thereunder, there are at least two other lessons from the *Ackert* decision:

- The *Kovel* "translator role" exception is a very narrow concept because it basically is at odds with the principle that all that is to be protected is the attorney-client communication. In general, communications between accountants and lawyers — even on behalf of the same client — are not privileged. Other, more distant third parties have no greater claims of confidentiality as to their discussions with lawyers.
- The failure to protect the confidentiality of the Meyers-Ackert discussions and meetings points up the importance of always considering meshing the protections of the attorney-client privilege and the attorney work-product doctrine (as embodied in Federal Rule 26(b)(3)). Judge Leval's prior decisions and *Ackert* demonstrate how careful lawyering can effectuate both. When an attorney similarly situated to Meyers seeks information, advice, or services from an outside person or entity, the attorney should make it clear: (a) that that person or entity is working for and communicating to him or her at his or her direction and in his or her capacity as the company's legal officer; and (b) that, if litigation is present or on the horizon, such retention has been effected "in anticipation of litigation."

The lesson learned by Paramount may be an expensive one. Judge Leval's decision, however, is clearly consistent with his prior rulings in *Adlman*, and is firmly grounded in well-established Supreme Court jurisprudence (e.g., *Upjohn Co. v. United States*). At bottom, the trilogy of Judge Leval's decisions provides an excellent road map for corporate litigators who want to ensure that they and their clients do it the right way.

Federal Trials

Cameras In The Courtroom

By Brian Cogan and Bennette Kramer

New York Eastern District Judge David G. Trager recently moderated a panel whose participants debated whether cameras should be in federal courts in the new millennium, focusing on

(continued on p. 12)

(continued from p. 11)

the practical and policy aspects (as opposed to the legal and constitutional aspects) of cameras in the courtroom.

Rikki Kleiman, the first speaker and currently an anchor at Court T.V., spoke of her experiences as a prosecutor in Massachusetts during the 1980s when cameras were first introduced to the courtroom. She expressed her opinion that the cameras were not intrusive and that the presence of cameras had the practical benefits of causing judges to be more judicious (mitigating some judges' tendencies to want to push their dockets) and attorneys to be better prepared (for fear of being taped unprepared) without affecting witnesses or jurors. She also noted the educational aspects of viewing a trial and the entertainment of watching lawyering at its best. Lastly, she rejected the argument that the presence of the camera somehow reduces the "majesty of the courtroom," pointing out that the print press and court artists long have been a tradition in our judicial system; television, she said, is a natural evolution of an open court system and "it is sad to feel that the public will have less respect for the courtroom if they see its inner workings."

Next, Stuart Summit of Phillips, Nizer, Benjamin, Krim & Ballon expressed his opinion that the only appropriate criterion for evaluating whether there should be cameras in the courtroom is its effect on the intended product of the courtroom: the administration of justice. In his view, it should not be evaluated as an educational tool for the public. He noted that a trial and cross-examination is intended to effect the impeachment or ridicule of a witness, and that even good and honest people can be made to look silly if only for a moment. This factor, combined with the nature of the T.V. media to play only the "highlights" or dramatic snippets of a trial, inevitably will lead to the public embarrassment of witnesses. The dynamic effects of repetitious public embarrassment of witnesses is likely to chill witness participation because the prospect of publicity (either good or bad) affects people. Thus, Summit argued, T.V. cannot possibly contribute to the product of justice.

Second Circuit Judge Robert Sack, who had represented the *Wall Street Journal* for 30 years, opened by noting that although the Second Circuit long has allowed cameras in its courtroom, few cameras, if any, ever show up. Judge Sack then gave three examples of taped trials and his impression of their effect.

First, he remarked that after the O.J. Simpson trial, which he described as the "worst example" of cameras in the courtroom, he had spoken to jury



Panelists at a program discussing whether cameras should be allowed in federal courts

Photo courtesy Beth Bianculli

consultants who had observed dramatic increases in prospective jurors' interest in serving as jurors (both mock and real), and that the increased interest extended to mock jurors wanting to hear "all the evidence," and not just attorneys' arguments, before making their decision. Thus, even the "worst example" had the positive effect of increasing public interest and participation in the judicial system.

Second, he recalled watching the sentencing hearing of Joel Steinberg while walking through an airport one day and being moved by the visual and physical impact of viewing the defendant in a different light than that of the monster described by the print news media.

Lastly, having recently watched taped portions of a trial of a Nazi war criminal, he said "how awful it would have been if cameras had not been there to tape such an important case."

In summary, he believed that increased public involvement, as well as the importance of creating a historical record in important cases, was a sufficient reason to have cameras in the courtroom.

High Ratings

Gerald Lefcourt, a defense attorney, rejected the contention of the proponents of cameras in the courtroom that the purpose of televising trials is educational; instead, he said, it is about earning money from high ratings. He pointed out that all memorable examples of televised trials were salacious cases intended to titillate the public, citing the cases of Marla Maples' shoe-fetish stalker, Joey Buttafucco, and John Wayne Bobbitt. In fact, he argued, New York State's experiment with cameras in the courtroom found that 94% of all taped cases were criminal cases, and usually high-profile criminal cases at that. In stark contrast to such trials, the average defendant is poor and often innocent (sometimes scientifically proven innocent after being convicted). He expressed his opinion that there was too much at stake to risk the negative effect cameras have on witnesses, jurors, judges, and lawyers. He suggested that criminal defendants should have to consent to the presence of a camera in the courtroom; such self-selective use of the camera would benefit those defendants who felt the camera made judges fairer, without the prejudice of an over-inclusive policy. Lefcourt rejected requiring defendants who want to exclude cameras to demonstrate prejudice, asking how they could ever possibly demonstrate prejudice. He concluded as he opened, pointing out that the most vocal proponents of having cameras in the courtroom are those who are likely to profit monetarily from the cameras' presence.

James Goodale of Debevoise & Plimpton disagreed with Lefcourt's criticism, stating that it was print media, and not broadcast media, that had "pushed for cameras in the courtroom." Most jurisdictions, he noted, allow cameras. With such broad exposure, he argued that there was meaningful evidence that the camera served as a good educational tool, without any proof that cameras negatively affected witnesses or trials. Thus, on balance, Goodale opined that the educational benefits of cameras in the courtroom outweigh other considerations.

The last panelist, Second Circuit Judge Dennis Jacobs, commented that the demand for cameras in the courtroom was almost always in the trial courts where the cameras were most likely to have their dangerous effects. He rejected the notion that the opposite of a secret trial is to have the trial televised. It was his opinion that cameras were likely to affect witness' demeanor (e.g., increased nervousness, vulnerability, or panic as witnesses realize they are the subject of gaze by millions of people) and deter witness availability and cooperation, ultimately impairing the search for truth. Exacerbating these problems, he said, the only cases that attract cameras seem to be the highly publicized cases, where the presence of the camera is most likely to negatively affect witnesses' demeanor, availability, and cooperation. Judge Jacobs expressed concern over society's tendency to reduce things to entertainment. To the extent that good arguments could be made for cameras in the courtroom (e.g., educational purposes, increasing the participation of the public in the judicial system), such benefits did not go to the purpose of the judiciary, although all the arguments against having cameras in the courtroom negatively affected the purpose of the judiciary. In closing, Judge Jacobs questioned whether trials, already charged with the difficult task of administering justice, should now be burdened with the additional responsibility of being a good civics lesson or entertainment show.

After all panelists had presented their viewpoints, the panel opened the floor to questions and comments by the panelists and audience. Kleiman discounted the concerns raised by the cameras' opponents, noting that jurors are never taped (and thus not likely to be affected in any way by the cameras' presence) and that most jurisdictions did not tape defendants who objected to being taped. She also suggested that cameras help criminal defendants, citing as an example a poor capital defendant in Mississippi.

Public Interest

Lefcourt was quick to point out that Court T.V. doesn't carry such cases

(continued on p. 14)

(continued from p. 13)

because there is no public interest in them. Summit commented that the proponents of cameras in the courtroom have no scientific evidence to support their position that cameras do not impair trials and that obtaining scientific evidence is practically impossible because no control group will ever exist; Kleiman agreed but added that anecdotal evidence was favorable. Summit suggested that taping important trials, but not televising them until after a verdict, could fulfill the role of archiving history while reducing the harmful effects of the cameras' presence.

In response to a question asking whether cameras undermined the Federal Rules of Evidence (either directly because nonsequestered juries would be influenced or indirectly because excluded evidence may undermine confidence in the judicial system), Goodale stated his belief that public review of our exclusionary rules is not necessarily harmful. Judge Jacobs expressed his fear that televised trials can undermine respect for the courts and deference to jury verdicts because home audiences will have more "evidence" than actual jurors.

FBC Program

New Judges' Reception

By Wendy Mirsky

The Federal Bar Council hosted a reception at the Union League Club on April 7, 1999, in honor of recently appointed judges within the Second Circuit. Council President Steven Edwards introduced Chief Judge Winter. Advising that he would never appear before the Chief Judge without doing his research, Edwards noted that he had conducted a Lexis search of Chief Judge Winter to prepare his introduction and found over three hundred hits, "mostly favorable." He made special mention of a January 10, 1982 article from *The New York Times* concerning the "appointment of a new judge to the Second Circuit," a highly-respected judge who proves "that there is bantering on the bench." That judge, of course, was Chief Judge Winter.

Edwards also extended a special welcome to Sir Brian Kerr, Justice of the High Court of Northern Ireland, visiting the United States on an Eisenhower Fellowship.

13 Judges

Chief Judge Winter welcomed 13 recently appointed judges within the Second Circuit. He began by stating that he would depart from the judiciary tradition of introducing by seniority, noting that he would instead begin with the Court of Appeals and would then introduce the district judges, alphabetically.

Chief Judge Winter first introduced newly-appointed Second Circuit Judge Robert D. Sack. Judge Sack, who was sworn in as a judge of the Court of Appeals in August 1998, spent 30 years in media litigation practice and was a partner at Gibson, Dunn & Crutcher before coming to the bench. Chief Judge Winter noted that Judge Sack served as principle outside counsel for Dow Jones Company and wrote a well-regarded treatise on the law of libel. Judge Sack also has been an active participant in the public sector and has sat on the Board of Directors of the New York Lawyers for the Public Interest.

Chief Judge Winter then welcomed Second Circuit Judge Chester J. Straub. Judge Straub was sworn in as a judge of the Court of Appeals in July 1998. Prior to his appointment to the bench, Judge Straub spent 30 years working in both private practice and public service. He was a partner at Wilkie, Farr & Gallagher. He also served in the New York State Assembly and as a New York state senator.

District Judge Richard M. Berman was the next newly-appointed judge to be welcomed. Judge Berman was sworn in as a district judge in the Southern District of New York in November 1998. Before his appointment to the Southern District, Judge Berman served on the Family Court in Queens. Judge Berman has worked in both private practice and in the government. He was the Executive Assistant to Senator Jacob Javits. He was also a partner at LeBoeuf, Lamb, Greene & MacRae, L.L.P.

Chief Judge Winter then introduced District Judge Richard C. Casey, who also recently was sworn in as a district judge in the Southern District of New York. The Chief Judge noted that in 1964, Judge Casey served on a special commission to investigate public corruption in New York, adding "of which there's not been a single instance since." Judge Casey was an Assistant United States Attorney for the Southern District from 1959-1963 and was a partner at Brown & Wood prior to joining the bench.

District Court Judge Christopher F. Droney was sworn in as a judge of the District Court for the District of Connecticut in September 1997. Chief Judge Winter noted Judge Droney's many years of dedication to public service, serving as the mayor of West Hartford in the 1980s. Prior to joining the bench, Judge Droney was in private practice in Hartford.

District Court Judge Janet Hall, also appointed to the District Court for the District of Connecticut, joined the court

in 1998. Chief Judge Winter noted Judge Hall's varied career, serving in the Antitrust Division of the Department of Justice from 1975-1980, as United States Attorney in the Eastern District of Virginia, joining Hale & Dorr in Boston, and finally working as a partner at Robinson & Cole in Hartford. Chief Judge Winter remarked with good humor that in 1992, Judge Hall successfully argued *Germain v. Connecticut National Bank* to the Supreme Court, which quite decidedly overturned Chief Judge Winter's earlier decision, 9-0.

Chief Judge Winter next welcomed District Judge Lawrence E. Kahn of the Northern District of New York. Prior to his appointment to the district court, Judge Kahn served as a New York State Supreme Court Justice, elected in 1979 and again in 1993. Judge Kahn was also a partner at Kahn & Kahn in Albany, and an adjunct professor at Albany Law School.

District Court Judge Colleen McMahon also recently was sworn in as a judge of the District Court for the Southern District of New York. Chief Judge Winter noted that Judge McMahon was formerly a partner at Paul, Weiss, Rifkind, Wharton & Garrison and recalled her achievements chairing the Commission on Jury Reform in New York, which completed its work quickly (in six months) and effectively. In welcoming Judge McMahon, Chief Judge Winter humorously quoted Judge McMahon herself, who is reported to have said that she "does not regard the White Plains court house as Siberia."

District Judge William H. Pauley, III, was sworn in as a judge of the District Court for the Southern District of New York in 1998. Chief Judge Winter remarked on Judge Pauley's strong commitment to litigation involving public sector matters. He noted in particular Judge Pauley's representation of the Orthodox community in civil rights litigation following the racial and religious unrest in Crown Heights in the early 1990s.

Four newly-appointed judges were unable to attend the night's reception in their honor. Those judges were Judge Rosemary Pooler, who joined the Second Circuit Court of Appeals in the summer of 1998; Judge Sonia Sotomayor, who was sworn into the Court of Appeals in the summer of 1998 and who, as Chief Judge Winter noted, was his first former student to serve on the Second Circuit Court of Appeals; District Judge Alvin K. Hellerstein, who was sworn into the district court for the Southern District of New York in November 1998; and District Judge Charles J. Siragusa, who was recently sworn in as a district court judge in the Western District of New York.



The reception for new judges hosted by the Council
Photo courtesy Rick Kopstein

In Memoriam

(continued from p. 1)

him. Many memories vie with one another for recognition — the first being the occasion on which my wife and I had the good fortune of meeting Milton and Eleanor many years ago. It was in a modest, dimly lit little movie house in Torrington, Connecticut, that we were sitting directly across the aisle from another couple. We were the only persons there. When I heard the man speak in what could hardly be called a whisper, I bellowed, totally out of character, "The voice I hear is the voice of Milton Gould." The immediate response was "and who the hell are you?" The lights went out at that moment and the movie started. We were still the only four in the theater when it ended and meeting was inevitable. We exchanged introductions, chatted briefly but long enough for us to fall instantly in love with Eleanor (falling in love with Milton took just a little longer) and we agreed to meet soon again. We did, and continued to meet frequently for years thereafter.

The thought occurs that Milton's response to me in that theater long ago might give rise to the impression in some ways that he was gruff and bold and self-assured. I would be remiss if I didn't dispel that impression, for in truth, as I came to know him more intimately, I also

(continued on p. 16)

(continued from p. 15)

came to know that he was essentially shy and introspective and self-effacing. It was those self-effacing and introspective qualities which, I believe, prompted his articles on "hubris," a trait which he disdained and wrote about so eloquently. He identified "hubris" as an occupational disorder of some successful lawyers. Except when he was with Eleanor, I suspect that Milton was happiest sitting alone in his library, his pipe clenched between his teeth, with a pad or a book on his lap and the strains of La Boheme playing softly in the background.

Looking back at our first meeting together, I am struck by the ease with which we quickly navigated through the shoals of conventionality and found ourselves in stimulating conversation. Milton was an engaging teller of tales and an attentive and discriminating listener. Our conversations were mostly about the law — about the art of advocacy, about the judiciary, about his recollections of encounters with the legendary lawyers of the New York bar, and perhaps most frequently about the law as a profession, a profession about which he felt so very deeply. Those conversations were unfailingly challenging and enriched my life.

I am honored to speak on this occasion not as a former partner nor as a former adversary nor as a judge who presided over a case he tried, for I was none of those. I speak of Milton as a friend who was privileged to spend countless hours with him and from the vantage point of that friendship believe I came to know him. Holmes once said that the law is the calling of thinkers and that a man may live greatly in the law as well as elsewhere. It was as a thinker that Milton found his calling. He brought to the law more than simply a knowledge of its hornbook rules. He brought to it the wisdom of the great poets and philosophers and playwrights and novelists which he absorbed during his undergraduate years at Cornell and continued to read faithfully thereafter. William Casey once described him as a modern Sophocles in a lawyer's robe.



Milton Gould

Who can deny that he lived greatly in the law? He did not wear the emblems of rank — the badge of significant influence on his lapel. Upon meeting him one would hardly suspect that there was a man who walked with Princes, counseled leaders of government and giants of industry. That there was a man who was also familiar, I would add, with rogues and charlatans, saints and sinners, a man sensitively attuned to the vicissitudes of life and to the temptations to which humankind was prone to succumb.

Living greatly in the law is not, I suggest, measured solely by the influence wielded in the halls of power or in the boardrooms of major corporations. It is also measured, and perhaps more importantly, by one's performance on the battleground of the law — the courtroom. His prowess and skill as a warrior on that battleground, as an advocate, was widely acknowledged. He was a star in the courtroom — a venue in which he was thoroughly at home.

His reputation as a great trial lawyer would not have been earned if his zeal as an advocate was not tempered with discretion and self-respect. If it were not

taken as a given that he understood himself to be not merely a mouth piece for his client but understood that his office was a higher one — that he was an officer of the law who could be relied upon never to willfully misstate the law or knowingly misstate the facts. He was congenitally incapable of doing evil that good may come of it. Those attributes embedded in every fiber and sinew of his body defined his life as one lived greatly in the law.

I wish that time permitted me to speak of Milton the Classicist, at home in Latin and Greek and equally at home with the great literature and with music and art. He had an enviable command of language and words flowed from his pen in sculptured phrases. His two books, "A Cast Of Hawks" and "The Witness Who Spoke With God," together with innumerable essays, testify eloquently to both. I wish, too, that time permitted me to speak of the impact he had upon the lives of young lawyers for many of whom he was a mentor and who looked upon him as the embodiment of a lawyer. I can't dispel a nagging allusion to Milton prompted by Benet's "The Devil and Daniel Webster," and it reverberates in my head like this:

Yes, Milton Gould is dead . . . or at least he no longer walks among us — but every time there's a thunderstorm around Foley Square they say you can hear his rolling voice in the hollows of the sky. And they say that if you go to the Square and speak loud and clear "Milton Gould, Milton Gould," the ground'll begin to shiver and the trees begin to shake. And after a while you'll hear a deep voice saying, "Friend, how stands the profession." And tho' you'd be tempted to say "palpably diminished since you've gone," you'd better answer "The profession stands as it stood — still the noblest of them all," or he's liable to come right down out of the heavens.

From The President

(continued from p. 1)

witness a framework within which to understand the questions.

I usually begin the third segment by asking the witness whether he or she agrees with my theory of the case. If I have done an effective job in the second segment, the witness will generally agree that my position is just and fair. Once I have that agreement, the witness will be reluctant to change his or her story at a deposition or trial, especially if I have done a good job of reinforcing that story through role playing.

Am I stepping over the line, or am I doing what all good lawyers do? I always begin my rendition of the rules by stating that Rule Number One is to tell the truth, but the whole purpose of witness preparation is to try to get the witness to tell the truth in a way that is helpful to my client. I never suggest that the witness should give false testimony, but I also make it clear that the witness is not under any obligation to help the other side.

Three Grades

According to an article by Janeen Kerper of California Western Law School, published in last summer's *Litigation Magazine*, I may be skirting on the edge of propriety. Relying on an article by Richard Wydick entitled "The Ethics of Witness Coaching," 17 Cardozo L. Rev. 1 (1995), Professor Kerper describes three levels of witness coaching. In Grade One the lawyer overtly induces a witness to testify to something the lawyer knows is false. In Grade Two the lawyer, through implication, improves on the evidence by suggesting what the witness should say, even if another version of the facts would be closer to the truth. In Grade Three, the lawyer does not try to induce the witness to testify to something that the lawyer knows is false, but the lawyer's preparation nevertheless alters the witness' story.

According to Professor Wydick, Grade One witness coaching is clearly impermissible; Grade Three is appropriate; and Grade Two is impermissible but difficult to detect. This is interesting because the line between Grade Two and Grade Three is difficult to define, and most lawyers probably venture into Grade Two territory from time to time in preparing their witnesses to testify. Lawyers frequently script testimony, rehearse with their witnesses and use role playing to educate a witness on how to avoid a "bad" answer on cross-examination.

The acceptance of these techniques in this country stands in marked contrast to the practice in Great Britain where, according to Professor Kerper, under Code of Conduct of the Bar of England and Wales 6079(b), barristers may not "rehearse, practice, or coach a witness in relation to his evidence or the way in which he should give it."

In the same issue of *Litigation Magazine* mentioned above, Professor Bruce Green of Fordham Law School (and a member of the editorial board of the *Federal Bar Council News*) cites an article by John Applegate entitled "Witness Preparation," 68 Tex. L. Rev. 277 (1989), that suggests that "polishing, scripting, and rehearsing" a witness' testimony is improper. Authorities in this field are fond of quoting the New York Court of Appeals in *In re Eldridge*, 37 N.Y. 161, 171 (1880):

While a discreet and prudent attorney may very properly ascertain

from witnesses in advance of the trial what they in fact do know, and the extent and limitations of their memory, as a guide for his own examinations, he has no right, legal or moral, to go further. His duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.

So where does this leave us? Have we lost our moral compasses and stepped over the line separating witness preparation from suborning perjury? Would the system operate more effectively if lawyers took great pains not to influence the testimony of witnesses, or if we adopted the British approach and abandoned the concept of "preparation" altogether?

It seems to me that preparation is very necessary because, more often than not, it takes time for the lawyer and the witness to get on the same wavelength. If courts and juries had to sit and listen while the lawyer searched for a question that the witness could understand and then endure the litany of possible answers — some of which would include information that is irrelevant, confusing, or simply wrong — trials would be even less efficient than they already are. Nevertheless, there is something to be said for adopting an approach that minimizes the impact of a lawyer on the substance and recognizes that a lawyer has not failed simply because the lawyer's witness has testified to "bad facts" that are true.

Practical Approach

I, for one, have adopted a practical approach. I have found, after years of hard experience, that aggressive witness preparation often backfires. The witness cannot remember everything, is often uncomfortable, and frequently does a poor job if he or she is overprepared. I have found that witnesses who try very hard to do what they think their lawyer has told them to do often are not credible on the witness stand.

For that reason, I have adopted what I call the "naturalist approach." Like Kurt Vonnegut's character Bokonon in *Cat's Cradle*, after I go through the three phases of preparation, I tell the witness to feel free to ignore everything I have said. I stress that the most important thing is for the witness to be comfortable and to give testimony that is accurate and precise. I usually say, "It is your testimony, not mine, and you have to live with it for the rest of your life."

It works like a charm.

The Back Page

(continued from p. 20)

and respect for the veterans that everyone experienced that day manifested almost no anti-American component. There were demonstrations of every conceivable sort, directed to anyone and anything, but no one I spoke to experienced or saw any considerable focus on Kosovo.

But the clouds were there all the same. I had been told just before I left that judicial seminars in Nizhny Novgorod and Ulianovsk might be delayed, though assertedly not for reasons related to international events. Since addressing these regional meetings — each involving two of the twelve judicial regions into which the new Judicial Department has divided the Federation for administrative purposes — was the central and immediate focus of my work, the news was obviously disquieting in the extreme. But it was also a bit of a relief. The R.A.J.P. had questioned, at my request, whether it was practical for three foreign consultants to begin a national series of addresses after only a one-week opportunity to learn about our audience and its needs. It did not look hard to make a virtue of necessity here.

Foreign Advisors

These are exciting times in the Russian Federation, and in no other area is this more true than in judicial administration. Largely following the U.S. model, the Russians have enacted legislation to remove the courts and their supervision from the Ministry of Justice, establishing a new cabinet-level Judicial Department. This bold venture is an expression of determination to make the courts non-political, separating them from the successors to the political commissars. (The old joke was that the Soviet Union suffered under a system of "telephone justice": toward the end of any judicial proceeding, the telephone on the bench would ring, and the judge learned from the political commissar the outcome of the matter at hand.)

But it has always seemed anomalous that General Director Chernyavsky has cabinet status — his Washington counterpart, Ralph Meacham, does not loom large in the deliberations of the present or any previous Administration. Foreign observers have contented themselves, however, with the recognition that a need for clout at the top of the fragile government of the day may be essential at the outset of the new system, to effectuate and establish a truly independent judiciary.

Possibly more anomalous is the foundation of an R.A.J.P. at all. The Russian legal system has always been based on civil law, with traditions and practices far closer to those of France, Germany, and Spain than to the United States. Indeed, I am told that French

visitors to Russia and other C.I.S. countries have sometimes been quite dismissive of any sources of foreign advice other than their own. Some of them have conveyed to their hosts the impression that they feel that there is only one useful or appropriate model, that of the highly centralized, almost Mandarin, civil service-based judicial establishment of their country.

Experience in Russia and elsewhere suggests that it is just possible that offering non-directive yet useful advice in such a setting is something that Americans can be particularly good at. Obviously we must begin by recognizing that our experience may be applicable only in part, if at all. Yet our collective experience is far more heterogeneous and diverse than other countries can offer: ours is a congeries of more than 50 legal and judicial systems, not just one. We can bring to bear some form of experience with almost any initiative that might be under consideration. And the range of issues, both substantive and administrative, on which American assistance has been invited is wide, and includes many issues that seem little affected by the degree that we bring an alien legal tradition. In substantive matters, everyone agrees that Russia desperately needs an effective bankruptcy system; this area has been a particular success of the R.A.J.P. and other U.S.A.I.D.-supported programs. A.D.R. is a strong interest; notwithstanding that the most effective judicial component of the Federation has the word "arbitration" in its title, the notion of an informal resolution of a dispute that is actually before a public tribunal has been completely unknown in Russia.

The R.A.J.P. had been asked to address computer issues and systems development, and myriad issues of administrative support to the courts. I was to address such matters as the roles and qualifications of professional administrators in courts, statistics and performance measures, and records management, among other matters. (Southern District of New York Clerk Jim Parkinson remarked, before my departure, that he would have thought that maintaining effective and accessible records of court actions would have been a particular strength of the predecessor systems I would see. He was right.)

A Program Derailed

Not long after my arrival, a formal letter from General Director Chernyavsky arrived concerning the nationwide sequence of seminars we had planned. It was terse and to the point. The May seminars had indeed been canceled for reasons related to the international situation. Nothing was said about the further programs scheduled for July and September that would bring together judges and administrators from the remaining regions. Moreover, we were entirely unable to obtain further elucidation or explanation. Mr. Chernyavsky proved unreachable for several days, until after I had left, though I take it that the meeting was cordial enough when it finally took place. Although we were invited to undertake a study of matters relevant to our presentations, and make corresponding recommendations, there was no indication either that we could do anything practical or effective in the brief time available to study an enormous and diverse system, or that anyone would listen to our recommendations. In light of pressing matters at home, I decided to leave and await a better day for my work on behalf of the R.A.J.P.

Since my departure, it seems that the urgent interest previously expressed in applying U.S. administrative experience has evaporated. One can guess that this results, at least in part, from the still-politicized nature of the new judicial department. It may well be that the General Director simply feels that he cannot run the risk, in the present climate, of highlighting Americans and their experience in the sensitive settings we had planned.

Ironically, the continuing interest of the Judicial Department seems to be in the area in which they appear most advanced: computer applications. The several systems we saw are quite well-conceived, seemingly cost-effective, and useful. Although I am sure that improvements can be suggested and refinements adopted, this does not appear to be an area of urgent need in Russia, except as to equipment.

On departing, I found myself suggesting to the R.A.J.P. Chief of Mission, retired Indiana Supreme Court Justice Betty Barteau, that a similar sequence of events might well have been possible had there been a similar problem in the early years of our own Republic. The three Chief Justices before John Marshall certainly each had his own vulnerabilities to the political winds, especially as to foreign affairs. The judicial system they presided over was tiny and fragile, and vulnerable to forms of political intervention that today are unthinkable. Especially in light of the cabinet status of Russia's new judicial establishment, perhaps it is not surprising that it bends to political winds. What cannot be clear today, but may become clear in coming months, is whether R.A.J.P. programs are affected by Kosovo-related concerns because the judicial establishment is weak, or because the Russian government's concern with the bombing is so compelling that it would overwhelm any institutional obstacle.

The Back Page

Letter From Moscow

By Steven Flanders



The central railway booking office in Moscow

Has the NATO bombing in Kosovo undermined U.S. relations with Russia and others of the former Soviet states — known as the Commonwealth of Independent States, or C.I.S. — in a lasting fashion? The ups and downs of the Russian-American Judicial Partnership (R.A.J.P.), whose work I joined for a brief and abortive mission, may provide a preliminary answer.

I arrived in Moscow May 9 under circumstances that seemed a bit cloudy and unpromising, yet I felt doubly energized. I had delayed my departure by a day, to allow participation in a Harriman Institute/Columbia University conference entitled "How Can Russia Recover?" The importance of what came to be called "rule of law" issues became a sort of mantra throughout the proceedings; all speakers, whether pessimistic or (the rare breed) optimistic about Russia's prospects, seemed to agree that the country's principal need, and the one to which American advisors could make the most clear contribution, was to improve the legal system. Although I wondered if this incantation merely was an expression of the obvious notion that things in Russia would be so much better if Russians would better obey the law, it was hard to avoid undertaking my work with a renewed sense of self importance.

On arrival I found that all of my hosts, Americans and Russians alike, had been much moved by the events of the day, which seemed promising for us all. May 9 is celebrated as one of the most important Russian holidays, commemorating victory in the "Great Patriotic War"; our equivalent is V-E Day. Notwithstanding reports here to the contrary, the vast outpouring of gratitude

(continued on p. 18)

Federal Bar Council
370 Lexington Avenue
New York, NY 10017

Periodicals
Postage Paid
New York, NY