April 2011

Featured In This Issue

Jerold S. Solovy: In Memoriam, Introduction By Jeffrey Cole
A Celebration of 35 Years of Judicial Service: Collins Fitzpatrick’s Interview of Judge John Grady, Introduction By Jeffrey Cole
Great Expectations Meet Painful Realities (Part I), by Steven J. Harper
The 2010 Amendments to Rule 26: Limitations on Discovery of Communications Between Lawyers and Experts, by Jeffrey Cole
The 2009 Amendments to Rule 15(a)- Fundamental Changes and Potential Pitfalls for Federal Practitioners, By Katherine A. Winchester and Jessica Benson Cox
Object Now or Forever Hold Your Peace or The Unhappy Consequences on Appeal of Not Objecting in the District Court to a Magistrate Judge’s Decision, By Jeffrey Cole
Some Advice on How Not to Argue a Case in the Seventh Circuit — Unless . . . You’re My Adversary, By Brian J. Paul
Certification and Its Discontents: Rule 23 and the Role of Daubert, By Catherine A. Bernard
Recent Changes to Rules Governing Amicus Curiae Disclosures, By Jeff Bowen
In This Issue

Letter from the President ................................................................. 1

Jerold S. Solovy: In Memoriam, Introduction By Jeffrey Cole ........................................ 2-5

A Celebration of 35 Years of Judicial Service: Collins Fitzpatrick’s Interview of Judge John Grady, Introduction By Jeffrey Cole ...................................................... 6-23

Great Expectations Meet Painful Realities (Part I), By Steven J. Harper ........................................ 24-29

The 2010 Amendments to Rule 26: Limitations on Discovery of Communications Between Lawyers and Experts, By Jeffrey Cole ...................................................... 30-33

The 2009 Amendments to Rule 15(a)- Fundamental Changes and Potential Pitfalls for Federal Practitioners, By Katherine A. Winchester and Jessica Benson Cox ........................................ 34-37

Object Now or Forever Hold Your Peace or The Unhappy Consequences on Appeal of Not Objecting in the District Court to a Magistrate Judge’s Decision, By Jeffrey Cole ...................................................... 38-41

Some Advice on How Not to Argue a Case in the Seventh Circuit — Unless . . . You’re My Adversary, By Brian J. Paul ...................................................... 42-44

Certification and Its Discontents: Rule 23 and the Role of Daubert, By Catherine A. Bernard ...................................................... 45-49

Recent Changes to Rules Governing Amicus Curiae Disclosures, By Jeff Bowen ...................................................... 50-52

Send Us Your E-Mail ........................................................................................................... 21

Upcoming Board of Governors’ Meeting ........................................................................ 37

Get Involved ..................................................................................................................... 44

Writers Wanted! ................................................................................................................. 52

New Appointments in the Seventh Circuit ........................................................................ 53

Announcement of Bankruptcy Judge Positions ..................................................................... 56

Seventh Circuit Bar Association Officers for 2010-2011 / Board of Governors / Editorial Board ...................................................... 57
Letter from the President

President William E. Duffin
Godfrey & Kahn, S.C.

In the last edition of the Circuit Rider I wrote about the high cost of civil litigation, which in my opinion is the single biggest challenge facing the legal system today. It’s the elephant in the room around which other issues – including e-discovery – revolve.

So for this year’s Annual Meeting of the Seventh Circuit Bar Association and Judicial Conference of the Seventh Circuit in Milwaukee, we’re going to address that issue, highlighted by our keynote speaker at our Annual Dinner on Monday, May 16, Ken Feinberg. Called, among other things, the Master of Disasters, Mr. Feinberg has been appointed the person responsible for doling out money to victims who have been harmed by everything from Agent Orange to the 9/11 disaster to the BP oil spill. For these people, Mr. Feinberg offers an alternative to the lengthy and costly litigation process.

At the Annual Dinner, we are also fortunate to be joined by the newest member of the United States Supreme Court, Justice Elena Kagan. After being blessed for so many years at our annual conference to the comments of Justice John Paul Stevens as our circuit justice, culminating in the special remarks last year about Justice Stevens by then Solicitor General Kagan, we are pleased that now Justice Kagan is taking the baton as our circuit justice.

At our annual lunch on May 15, we will be joined by the Honorable Rebecca Love-Kourlis, formerly of the Colorado Supreme Court and currently Executive Director of the Institute for the Advancement of the American Legal System, Emory Lee, a senior researcher from the Federal Judicial Center; Hilari Bass, current Chair of the Litigation Section of the American Bar Association and Global Operating Shareholder of Greenberg Traurig; and Rodd Schneider, Vice President and Litigation Counsel for Northwestern Mutual Life Insurance Company. The second civil program focuses on patent litigation and efforts to address the significant costs associated with such lawsuits.

But the conference will tackle other issues as well. We will hear from Dr. Scott Turner of Georgetown University on Cognitive Deterioration in Judges (and Lawyers). Seventh Circuit Judge Terrance Evans will moderate a panel discussion on the Use of the Internet by Judges for Independent Research, which panel will include Circuit Judge Richard Posner, among others. And there will be a discussion on the Impact of Social Media on the Administration of Justice.

On the criminal side, one program will begin with an update on the new pattern criminal jury instructions, followed by a discussion of the Honest Services Statute following Skilling. A second program will discuss habeas corpus petitions filed by Guantanamo Bay detainees and will be moderated by the United States Attorney for the Eastern District of Wisconsin, James Santelle.

The bankruptcy judges and lawyers will be presented with programs addressing both business and consumer bankruptcy issues, including, among others from the business side, Why Chapter 11 Doesn’t Work, Credit Bidding after Philadelphia Newspapers and Structured Dismissal as an alternative to Plan Confirmation, and from the consumer side, Pleading in Bankruptcy after Trombley and Iqbal, How Individual Chapter 11 cases differ from Chapter 13 cases, and Hot Issues in Consumer Cases after the Great Recession.

But the conference is not all about work. It presents a rare opportunity for members of the bench and bar to mingle outside of the courtroom and, for many lawyers, it helps humanize the legal process and provides invaluable insight into what judges think matters. This year’s conference will include an opening reception on Sunday, May 15, at the new Milwaukee Harley-Davidson Museum. Attendees will be provided the opportunity to tour the museum, which provides a unique look back into one facet of American history that even non-motorcycle aficionados will find interesting. And as always there will be an opportunity for judges and lawyers from each district in the circuit to get together to discuss issues of concern to them as they try to administer justice in their own part of the world.

If you can make it, it’s always worthwhile. We hope to see you there.
In 1955, fresh out of Harvard Law School, Jerry Solovy joined Johnston, Thompson, Raymond & Mayer – the firm we now know as Jenner & Block. Of course, he graduated cum laude and was a member of the Harvard Law Review. Over the course of the next 55 years he established himself as a major figure in American law. He was a teacher and author, and there was scarcely a piece of important litigation in which he was not involved. From 1990 to 2007, he was the Firm’s Chairman, and its Chairman Emeritus from 2007 until his death early this year. He was the recipient of numerous civic and professional awards. Commissions, appropriately named after him and which he actively headed, proposed far reaching changes in the Illinois court system in the wake of scandal that brought courts in Chicago into disrepute. Through his efforts and those who served on his Commissions, public faith in the Illinois court system was renewed. The concept of pro bono representation, as we know it today, is in no small measure the product of Jerry’s tireless efforts. His professional accomplishments alone are enough to secure him a respected place in the history of American law.

*Jeffrey Cole is a United States Magistrate Judge in Chicago and is the Editor-in-Chief of the Circuit Rider.
But it is one thing to be a great lawyer, quite another to be a great man. It is the verdict of all who knew him that he had a genius for friendship and a deep and abiding concern for the plight of those on whom good fortune had not smiled. A basic theme in Jerry’s life may be found in his answer to the question he was often asked, why he and his Firm did so much pro bono work and why he worked to encourage young lawyers to give so freely of themselves: “You are not put on earth just to make money. You are put on earth to do good for your fellow persons.” Jerry was faithful to this creed – he called it Jewish tradition. And because he was, there are thousands whose lives are better for his efforts, even though they never knew their benefactor – and that is how he wanted it.

Below is the lovely eulogy given by Tony Valukas, Jenner and Block’s Chairman, at Jerry’s funeral on January 24, 2011. It is something to be read and savored – and inspired by.¹

**Eulogy of Jerry Solovy**

by Anton R. Valukas

As I look around, I am reminded:

We know Jerry loved playing in the big arena. No one was better at the “bet the company” engagements than Jerry. The most brilliant and accomplished leaders in Corporate America routinely turned to Jerry for his thoughts, guidance and insight. Jerry, rightly so, took great pride in this. He loved his life and lived it with an exuberance that was literally infectious. That is the Jerry we all knew, larger than life, generating headlines in the Wall Street Journal, The Ny Times, The American Lawyer, The Chicago Daily Law Bulletin and The Tribune.

But, what you cannot know is that today, there is a mother and a child who had lived in Cabrini-Green, who had little hope that they could escape a life of abuse and deprivation but were given hope by a person they would never know—Jerry Solovy, through whose efforts the Cabrini Legal Aid Center received the largest donation in its history, which allowed for the continuation of programs that protected abused mothers and their children – among the neediest and most vulnerable members of our society. There were dozens and dozens of other instances the impact of which is almost incalculable in which Jerry was involved and by design went unadvertised.

I want to share with you today some stories about Jerry many of you may not have known, but which reveal so much about who Jerry was and why we are all feeling such loss. Jerry felt strongly that everyone should do a Mitzvah every day. And I can say with confidence that Jerry did just that.

For those of us at Jenner, it started in 1955, when a wet-behind-the-ears Jerry Solovy joined the Firm when it was known as Johnston, Thompson, Raymond & Mayer. Jerry was a litigator from the outset. And he loved being known as a trial lawyer. But, no one could have known that Jerry would become one of the most important lawyers of his time. He was recognized everywhere as one of the country’s 100 most influential attorneys; he was the author of leading legal treatises, books, and articles on the law; the recipient of numerous awards from prestigious bar associations, business groups, charitable organizations across the country. Illinois Supreme Court Chief Justice Thomas Kilbride, upon learning of Jerry death, said it best: “We have lost one of the finest lawyers in the history of Illinois.”

And I would add – of this country.

But more importantly, he became a person who came to change and define the practice of law in Chicago and across the country. At the time Jerry and others at our Firm started the Pro Bono program at Jenner, virtually no other large firm in the country dedicated the resources and level of commitment as our firm. Jerry helped establish pro bono work as a core value of the legal profession across the country and, as he grew in stature and reputation, he used his position to promote this effort. His impact on pro bono work – incalculable.

Jerry had an extraordinary sense of fairness and he – in his way – spent his life trying to make this world a fairer place. When he defended his clients, the captains of industry if you will, they knew in hiring Jerry that they had found an advocate who, they expected, would – and did – make the system work for them. And he did.

But Jerry was also instrumental in making the system work for people who had no reason or hope that the system would work for them. Jerry committed and devoted a large part of his life to making the hope of equal justice a reality for people who had no reason to so hope. That simply defines what pro bono work meant to Jerry.

¹ The Eulogy has been slightly abridged for reasons of space.
Our esteemed partner, Tom Sullivan, recalls he and John Tucker and Prentice Marshall combining efforts in the representation of death row inmate, William Witherspoon – one of Jerry’s most famous pro bono cases. When the U.S. Supreme Court finally granted cert, Bert Jenner, at the time, already a giant in the legal community, told these young lawyers that they had to get him, Bert, ready for the argument. They sat in stunned silence…Bert had done virtually no work on the case and was now swooping in as the case was about to go before the highest court in the land. They jointly decided on a course of action with Bert, who, according to Tom, seemed to be anticipating a fight with his young associates over who was going to argue the case in the Supreme Court. But, much to Bert’s surprise, they told him they thought Bert should argue the case as he had never appeared before the High Court, and they all had done so in their young careers. And that case, as we now know, forever changed the law related to jury selection in capital cases and resulted in 350 people being removed from death row.

This idea of putting the needs of justice before the needs of ego would go on to become a hallmark of Jerry throughout his amazing career. And let me draw this out a bit more….The untold story of Witherspoon, the one you won’t read in the hornbooks or in all the legal and academic prose written about the impact of this case, is quite remarkable. Jerry remained profoundly dedicated to Mr. Witherspoon well after the Court issued its historic decision. Yes, Jerry saved him from death row, and for most lawyers, that would be enough. Time to move on to other matters. But Mr. Witherspoon was, to Jerry, more than a client; he was a human being and needed to be treated with respect. Jerry, as we all know never, ever gave up. Jerry felt Mr. Witherspoon needed a chance to rebuild his life. So, Jerry, personally, persisted in petitioning for Mr. Witherspoon’s parole every year for over a decade. After Mr. Witherspoon was paroled in 1979, Jerry helped him get a job. As always, he did so without expectation of reward or notoriety.

Jerry was a very special man. He cared about people – they mattered. No matter how busy, the most important part about Jerry was to remember people. If you knew Jerry, he was your friend. And if he was your friend, you would invariably find yourself at table #7 at Gene and Georgetti’s for lunch. The ideal meal for him was a Coke, and a ten-ounce steak sandwich prepared “medium” and served to him by Juan Munoz. And he would, as Gene and Georgetti’s General Manager Rich Ciota told me, “light up the room” every time he walked in. And this happened wherever he went.

When you went to Jerry’s office, he welcomed you with candy and open arms. He never failed to remind our first year associates to call their mothers (he always did.) And this was because, for Jerry, it was all about family and if you knew him, he would make you part of his family. Friendship with Jerry was more than a lunch or a handshake at a bar event. To Jerry -- more than anything – people mattered.

As we started to canvass those lucky enough to know Jerry during his life, we heard amazing, touching stories of the quiet efforts of this giant of our profession to help others and how he used his group of friends to help others. One example that comes vividly to mind involved one of our partners who contracted cancer. On his own, Jerry called the finest physicians and experts in the country to come to his aid. But his involvement and concern did not end there. Jerry kept in constant contact with our ailing partner, as well as with the doctors so that he could be kept informed on the progress of his friend. He also continually urged other friends and partners to maintain the same kind of contact. This was one of many such involvements.

Last week, we received a call from a prominent trial attorney in Chicago who told us how Jerry helped him seek in-patient treatment for his life-long battle with alcohol addiction and how Jerry remained in contact with him as he struggled to beat back that demon, and the ongoing professional and personal support Jerry provided to him throughout his recovery and well beyond. And this, like everything else he did for others, was done without fanfare. Jerry never talked about his countless acts of kindness. That’s just the kind of man he was.

Two years ago Jerry received the Lifetime Achievement Award from The American Lawyer, along with Tom Sullivan and three other legendary members of the bar. When it came time for Jerry to talk, I was amazed, but then touched by what Jerry did. He began his speech by saying: “I’m honored to be here tonight with my beautiful wife, Kathleen, who reminds me to stand tall. So Kathleen, I hope I’m standing tall enough. And she lets me work endless hours because she knows the demands of my profession.”
JEROLD S. SOLOVY: in Memorium

Continued from page 4

Jerry never said another thing about himself. Instead, he spoke about the members of his firm and what they had done to assist the poor in the Firm’s pro bono efforts and he made an eloquent plea for the legal community to do something about those who were in prison in Guantanamo. He ended the speech by telling us what an honor it was to practice law with Tom Sullivan. That was vintage Jerry.

* * *

To Jerry, commitment to fairness and equality was not just an abstract concept, it was something you lived. In a clear and public sign of his sincere commitment to the advancement of female lawyers in our profession, Jerry Solovy was among the first men to join the Women’s Bar Association. And over the past few years, in an effort to help our female attorneys grow and develop networks on their own, Jerry created “The Woman’s Club” to which he would invite a rotating group of the Firm’s female associates to a lunch at which he would include a leading female executive from a local company or other firm. He never missed the monthly luncheons. Of course it was required that the lunch would always be held at a steakhouse.

* * *

Jerry was the personification of the civilized lawyer. He never spoke ill of others, even unpleasant opponents. He did not leave enemies or bruised egos behind. To the contrary, one of his most famous statements was that he wanted to be in a position where his referrals would come from clients who were on the other side of the litigation or their lawyers. And indeed, that’s where most of his business came from. Not only because they respected him as a lawyer and as an advocate, but probably equally as much because they respected him as a human being. Jerry connected with people and the community in an uncommonly deep and pervasive manner. His impact across this community is such that it is difficult to begin to measure its magnitude. It is fair to say that he redefined in some respects, the entire court system of Cook County and in the State of Illinois. The Solovy Commissions, as they came to be known, identified the problems and abuses in the Cook County Court system and pointed in a very specific and dramatic way to the solutions. There isn’t a citizen in Illinois who does not owe a debt of gratitude to Jerry for the work of the Commissions.

There is a saying that I would like to share with you:

Through the fabric of life, few of us are weavers; all of us are threads, and the thread can never see the design. As the weaver unfolds the fabric, he chooses what threads to use. If all of us could rise above the fabric, we would know that there are no loose threads. And no friends to lose; we would see that all is woven together; we would embrace the fabric of our relationships.

Jerry saw the design; Jerry embraced the fabric of our relationships. Jerry was a weaver.

So at the end, what do we say for his graciousness, for his generosity, for his endless contributions, for his inherent goodness? Not just for those who are here and for those who knew him, but for all those whose lives were enriched by the deeds of a man whom they never knew was responsible. While for Jerry the question would never be asked, for us it must be. And the answer is clear. We say thank you very much Jerry Solovy. We shall never forget you.
Oral history projects seek to preserve the lives of great men and women in a way that the cold pages of a biography cannot do. Perhaps the most famous of the legal oral histories are those by Dr. Harlan B. Phillips of Columbia’s oral history research office. And of these, the most well known are those of Justices Frankfurter and Jackson. The recordings of Justice Jackson’s interview span 74 hours recorded on 16.8 miles of reel-to-reel audio tape. See Noah Feldman, “Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices,” 415 (2010). A similar endeavor has been admirably undertaken by Collins Fitzpatrick, the Circuit Executive for the Seventh Circuit. See Collins Fitzpatrick, The Judges of the Seventh Circuit: Oral Histories, Circuit Rider 21 (November 2006). One of those interviewed is John Grady, who was appointed as a District Judge to the Northern District of Illinois in 1975 by President Ford and took his seat in January 1976.

But these are impersonal statistics that do not begin to tell the story of his contributions to the nation, and of the influences that shaped him. Even in the abridged version that follows, the story of Judge Grady’s life is fascinating and shows that excellence and achievement are, in the end, the result of sustained effort, not of advantaged circumstances in the beginning. As Judge Grady explained to Collins, he has long been driven by a desire for public service. That was what motivated him initially to become a lawyer and then to accept Senator Percy’s offer to be a federal judge. And it is that which has motivated him to continue to sit as a Senior Judge. In January 2011, Judge Grady began his 36th year of active service – a milestone exceeded by only one other District Judge in the 210-year history of the federal courts in Illinois, and by only seven others in the almost equally long history of all the districts in Wisconsin and Indiana.

Continued on page 7

*Jeffrey Cole is a United States Magistrate Judge in Chicago and is the Editor-in-Chief of the Circuit Rider.*
Q. Judge Grady, tell us a little about how the Gradys got to the Chicago area?

A. My father’s side of the family is descended from Irish immigrants who came to this country shortly after the potato famine. My great-grandfather, Patrick Grady, was born in 1835 in County Limerick, Ireland and came to Illinois in the mid-1800s after marrying Jane Sullivan in Drumcolliher, a town in Limerick. They had five children. My grandfather, John, was born in 1865 and married Mary Ward in 1890. Her parents had been born in Ireland and had arrived in Illinois at about the same time as the Gradys. They were also blue-collar people. John Grady I and his wife Mary had three children, one of whom was my father, John F. Grady II, born in 1892 in Rock Falls, Whiteside County, Illinois. He died before I was two years old. His mother had also died when he was a young boy, and he had to work to help support the family. At some point he came to Chicago and went to work for Charles Walgreen, who came from Dixon, near Rock Falls, and who by that time had opened one or more drug stores in Chicago. My father attended the University of Illinois to become a pharmacist. He served in World War I and then went to work full-time for the Walgreen Company. He worked his way up and had an executive position by the time he met my mother, Lucille Schroder, whom he began courting through the mail. She had not yet graduated from high school in Springfield, Illinois. My mother was the first of her family ever to have attended high school, let alone graduated from high school. When she graduated, she came to Chicago and they were married shortly thereafter, in 1927. The marriage was a very happy one.

In 1928, my father fell ill with kidney disease. He died in 1931, leaving my mother a 22-year-old widow, with a two-year-old baby. In 1931, which was the depths of the Depression, my mother had to sell the house for a pittance. She worked as a cashier at Walgreen. We lived in an apartment on the South side and she walked to work to save car fare. She earned $12 a week. I remember her telling me that, and I think we had some Walgreen stock dividends which, together with her salary, is what we lived on. We lived in Chicago until I was about 8 or 9 years old and I attended a variety of parochial schools; St. Clara’s, St. Philip Neri, and then at one point Our Lady of Lourdes on North Ashland. When I was about 6 or 7, my mother remarried. I have a half brother by that marriage who lives near Phoenix. He is eight years younger than I and is a retired school teacher. After the remarriage, which took place in about 1938, we lived in Chicago for a while and then in various places, including Arizona for a short time, when my stepfather was transferred there by his employer. We finally ended up down in Springfield, where both my mother and stepfather had been born and raised. By this time there was a little more money because the Depression was over.

CTF: Did you see the effects of the Depression?

JFG: I can’t really say that I did. I know that my mother experienced it, but I can’t say that I have any recollection of ever wanting for anything.

CTF: What about World War II?

JFG: I remember that quite well; but that again was nothing compared to what people in Europe and other places in the world went through. I remember the rationing, the shortages of various things, but there was no real hardship. I was too young to be in the war, which ended when I was 15, and in high school. I went to parochial grade school and high school in Springfield. I recall with affection my sixth grade teacher, Sister Catherine – a wonderful woman who lived to an incredibly old age. That school is still there. I attended my 50th graduation reunion in 1993. When it came time for high school, I thought I wanted to be a Jesuit. My mother was not Catholic, but she had reared me a Catholic out of respect for my father’s memory, and had sent me to parochial schools.

CTF: What religion was she?

JFG: She had belonged to the Church of the Brethren. I always think with great affection about how my mother went out of her way to do this, because she’d go to one church and I’d go to another. She’d take me to church and then go to her own and come back and pick me up. I can remember my first communion; it was at St. Clara’s in Chicago. I told my mom I needed a white suit. She said I must be wrong, and she went out and got me a black suit. So we arrived at the church about an hour in advance and there were 50 kids and only one in a dark suit. So she rushed me down to 63rd Street, found a store that was open and got me a white suit in time to come back and receive first communion in a white suit.

Continued on page 8
Interview of: Judge John Grady
Continued from page 7

Getting back to high school, my mother sent me for my freshman year to Campion, a Jesuit school in Prairie du Chien, Wisconsin. I didn’t enjoy it. I found it rather rough going because I was a kid who liked to talk, liked to goof around, and that was not tolerated there. I was constantly in trouble, mostly for talking in study hall. I remember there were these priests and brothers there just waiting for me to do it – they knew I’d do it – it was just a question of when. It cured me of any desire to be a Jesuit, or anything else in a religious vocation. So I came back to Springfield after my first year at Campion and I said, “Mom, I don’t want to go back there,” and it was okay with her. So I then went to a Catholic boy’s school in Springfield called Cathedral Boys High School – it’s now called Sacred Heart – Griffin – and goofed around there for a couple of years playing basketball and neglecting my studies. At the end of three years of high school, I had about two years’ worth of credits. So a priest there, who later became a dear friend of mine, said to my mother, “you’ve got to get this kid out of here. He’s not doing anything and he’s not going to get into college.” So my mother investigated. I don’t know how she found out about Lake Forest Academy. At about this time she and my stepfather got divorced and there was no reason to remain in Springfield if I was going to attend Lake Forest Academy. So my mother, my brother and I came up here to the Chicago area and I went to Lake Forest Academy and lived at home in Evanston. We lived in Evanston and I graduated from the Academy. By that time I had become a student – some sort of transformation had taken place. I’d gone from a happy-go-lucky kid who never did any homework to a good student.

CTF: Did you play sports in high school?
JFG: Yes. Basketball. Basketball was the only thing I was ever any good at. I was a substitute center on a team that went to the Sweet Sixteen from Cathedral in 1946 and we got soundly beaten in our first game by a team that I think went on to take second place.

CTF: What about activities?
JFG: Yes, the school newspaper, student council, debating. I was on the debate team at Northwestern.

CTF: Were you active politically?
JFG: No, I was not. I majored in political science at Northwestern. I was interested and thought that some day I would go into politics, but I never did.

CTF: Now, you went to a six-year combined law school/college?
JFG: Right, what I did was I took extra credit hours, and at the end of three years of college I was only one quarter short of graduating. So, by that time I knew I wanted to go to law school. I had read *Clarence Darrow for the Defense*, by Irving Stone, who also wrote *The Agony and the Ecstasy*. I was so enthralled by the story of Clarence Darrow that I decided that’s what I wanted to do and, specifically, I wanted to become a criminal defense lawyer. I had never known any lawyers. There were none in my family. It was this one book and after I read it at about age 15 or 16, I knew that’s what I wanted to do. I never had any ideas of doing anything else so when I went to college it was strictly to prepare myself to go to law school. The reason I went to Northwestern Law School is that it had a program where I could go in right after three years of college. Toward the end of my second year of law school, I went out and talked to the then Public Defender of Cook County, Francis McCurrie, and told him I would like to be a Cook County assistant public defender. He said that I should check back with him when I was nearing graduation. He was very friendly and I left his office thinking that I had, if not a promise of a job, at least a good chance of getting a job. A year later, as I was about to graduate, I went out again and saw Mr. McCurrie and it was pretty clear that he had no recollection of our meeting a year earlier. When I told him I was hoping to sign on as an assistant public defender he said, “John, I don’t know where you got the idea that there is a place for you here.” He said, “I have five assistants.” That shows you how long ago that was, I think there are hundreds now. “Two of them are sons of judges and the other three are sons of county commissioners.” Of course, there were no daughters in those days. He said, “This is a place where you need very strong political influence to get a job,” and asked if I had any. I said, “No” and no truer word was ever spoken. So that was the end of my public defender career. He said there could be an opening in the future, but if there were, I would need some political backing to get the job.

Continued on page 9
So I thanked him and went on my way – utterly crushed – devastated would not be an exaggeration. Here was the one thing in the world that I wanted to do and I had thought I had a good chance of doing it, and suddenly it disappeared. I didn’t know any criminal defense lawyers I could work for; that was my next thought. I sent out some letters to firms and had a few interviews and had a few offers, but the kind of work they were offering was not the work I wanted. I remember one firm offered me a job where for the first couple of years I would be doing nothing but working on one railroad rate case. I had an offer from a very fine plaintiffs’ personal injury lawyer, but I didn’t think I wanted to limit myself to personal injury work. I ran into a fellow who had graduated a couple of years ahead of me on the street one day as I was literally pounding the pavement. He was an associate at the Sonnenschein firm and he said, “Why don’t you come on over and talk to the people at my firm?” I did that and was impressed with them and accepted their offer of a job. And I became an associate at the firm that was then known as Sonnenschein, Berkson, Lautmann, Levinson and Morse. This was in 1954. I took the bar exam in August and was admitted to the Illinois bar in January 1955.

CTF: What about the Korean War? Did that affect you?

JFG: At that time I was the right age for the Korean War. I had asthma but I assumed I would be drafted. However, I flunked the physical and they sent me home, 4F because of asthma. I worked for about 15 months at the Sonnenschein firm, doing mostly legal research and writing memoranda in civil cases. They were very good to me. During the 15 months I was there I think I tried three civil bench trials. Also, I joined the Defense of Prisoners Committee at the Chicago Bar Association and tried two armed robbery jury cases as a court-appointed lawyer. Prentice Marshall was also a member of that committee. So after a relatively short period in practice, I had tried five cases and that was many more than anyone in the firm had tried during the same period. I think the three cases they gave me to try were because I made it very clear that it was what I wanted to do. My mother was, by that time, the personal secretary to the United States Attorney, Robert Tieken. She had worked for Tieken when he was a partner at Winston & Strawn. He got word that he was being nominated as U.S. Attorney by Senator Dirksen, and he asked her whether she would be interested in going with him as his secretary. We were living in Evanston at the time, and I was attending law school. She took the job, and I thought that applying to the U.S. Attorneys office would allow me to gain the kind of trial experience I so wanted. At that time, Frank McGarr was Tieken’s first assistant. I knew Frank from having worked one summer as a clerk in the U.S. Attorney’s office doing research. My recollection is that Paul Plunkett also worked there that same summer. Both, of course, became judges on our court. Jim Parsons and Bill Hart were also hired by Tieken and they later became judges on this Court. Ultimately, I got an offer to become an Assistant U.S. Attorney at a starting salary of $6,000.00 a year, which was a substantial raise from what I was making at Sonnenschein. I started in February of 1956, and stayed until February of 1961.

CTF: In those days was it generally helpful to have a sponsor?”

JFG: I can’t say that it wasn’t helpful, but I can say it wasn’t necessary. I didn’t have any political sponsorship. On the other hand, I had worked there before and my mother was very well regarded as a secretary. There were people working there who probably had political ties. A number of assistants who were there were Democratic holdovers from previous administrations.

CTF: Tell me about your five years in the U.S. Attorneys office.

JFG: It was what made my career. I became a seasoned trial lawyer. I was up against top-notch competition. I had many trials before every judge on the federal bench in Chicago. Many were jury trials and during the five years I was an AUSA I got more trial experience than I could have gotten in a lifetime anywhere else. And I really owe whatever success I had in my career following those days to that experience and the opportunity it gave me. I think the quality of the experience was enhanced somewhat by the fact that, in those days, we tried our cases alone, with rare exceptions. I made all of the decisions myself, for better or worse, without having to consult with anybody. The current practice of having two prosecutors for every trial was unknown in those days. We only had twelve Assistants in the Criminal Division, so that one lawyer per trial was a necessity if we were to keep up with the work.

During my tenure there, I became a member of the Illinois Pattern Jury Instructions Committee (Civil) which had been appointed by the Illinois Supreme Court. We worked from scratch and came up with a set of pattern jury instructions which are still used to this day in the state with very few material revisions from our original set. That was a very invigorating experience for me because it brought me into contact with leaders of the State Bar.
Interview of: Judge John Grady
Continued from page 9

The committee consisted of about twenty judges, law professors and lawyers from plaintiffs’ and defendants’ bars, and they were from all over the state. The chairman of the committee was a fellow named Gerald Snyder from Waukegan. He was president of the Illinois State Bar Association in or around 1959. He had a law firm up in Waukegan that was the leading firm in Lake County. They had a broad litigation practice with a lot of insurance defense work. His principal trial lawyer had a heart attack at about the time I was starting to wonder how long I would stay in the U.S. Attorney’s Office. I didn’t think I wanted to stay there the rest of my life. And if I didn’t, then what would I do? Well, that decision was accelerated by an offer from Jerry Snyder to come up and take the place of his trial man who had the heart attack. So I decided I would take the job and that’s what I did. I moved lock, stock and barrel to Waukegan in February of 1961 and became a civil trial lawyer. I began trying cases there at the same rate as in the U.S. Attorney’s Office.

CTF: Did you try many cases in federal court after your move?
JFG: No, none. I had the hope that somebody might hire me to do federal work but it never happened. With one exception, my work was exclusively state civil trial work. Largely insurance defense, although a broad variety of stuff. I tried eminent domain cases, breach of contract; you name it. Practically everything. I stayed with Jerry Snyder for two years. When I went with him I told him, “I don’t think I’ll stay for long. My ultimate ambition is to have my own firm. I want to be my own boss.” And he said, “Well, you’ll change your mind about that” but I didn’t. After two years I said, “I’m going to take off.” This was 1963. We parted on good terms and I opened my own tiny office. I was a subtenant of a subtenant. I’m not even sure the law recognizes that status but that’s what I was. I had low rent. I shared a secretary and I’m happy to say that because I’d become well known in Lake County as a trial lawyer, I immediately started getting business by referral from other lawyers, and I even got a few insurance company clients. I didn’t solicit any business. It just came. I continued to practice as a sole practitioner until I was appointed to the bench and took office in 1976, so I spent fifteen years in Waukegan; thirteen of them as a sole practitioner. In addition to maintaining a law practice there, I became very active in Illinois State Bar Association lawyer grievance committee work. I got involved in that in about 1962 and eventually became General Chairman of the State Lawyer Disciplinary Committee, which acted as Commissioners of the Illinois Supreme Court and handled all grievance matters in the state arising outside of Cook County. When the Court decided to establish a full-time commission with a paid staff to replace the Bar Association volunteers, I participated in drafting the rules for the new organization, known as the Attorney Registration and Disciplinary Commission (ARDC). I was appointed as one of the five charter members of the Commission and served from its inception until I came to the district court in 1976.

CTF: Where did you meet your wife, Pat?
JFG: I met her on a blind date arranged by a client. I’d been hired by the client’s Chicago lawyer to represent her in her Lake County divorce. It was a very hotly contested divorce. In fact, we tried it. I tried a number of divorce cases, including a couple of jury trials. These were the days when you had to have grounds for divorce and grounds could be contested. Divorce wasn’t my speciality by any means, and I always said, “This is the last one,” but somehow there was always a friend or somebody who needed a lawyer in a divorce case. But anyway, my client asked me one time whether I would like to meet a very nice young lady she worked with. My client was a psychiatric social worker at one of the state hospitals and Pat was a speech pathologist working with disturbed children there. So we had a double date. It didn’t take with Pat and me immediately. I’d call every six weeks or so and we always had a good time. A big problem was that she lived in River Grove and I lived in Waukegan; a long way. Eventually, though, I realized that she was the one for me. We met in 1967, and got married in 1968. I continued my trial practice in Lake and McHenry Counties. Frankly I was starting to wonder, “Is this all there is?” Because I had done about everything there was to do in court, civil and criminal, there was a certain “sameness” that was starting to settle in. One personal injury case is not that much different from another, although sometimes the legal issues can be surprisingly fascinating. All of a sudden, one day I was sitting in my office in Waukegan and the telephone rang. The person on the other end of the phone introduced herself as Sheli Rosenberg, the then President of the Chicago Council of Lawyers. She said “Mr. Grady, my name is Sheli Rosenberg. I’m President of the Chicago Council of Lawyers. You may know that we are an organization that is very interested in improving the federal district court and in finding qualified candidates for the court.” And I thought “Well, my friend ‘blank’ has aroused some interest.” I assumed that she was calling me about a friend of mine who was a judge on the Circuit Court of Lake County and who longed to be federal district judge.

Continued on page 11
But her next sentence was, “We have heard from many sources that you would make an excellent candidate for the federal district court.” And I can remember my exact response. I said, “You have to be kidding me. I don’t have any political connection for that job.” And she said, “Believe it or not, that’s not necessary.” Now this was in 1974 in the wake of the Watergate scandal. There was a sort of “new” feeling in the land. Senator [Charles] Percy was the person who was selecting the candidates and she said, “You don’t need sponsorship. Senator Percy is interested in appointing qualified people regardless of their politics.” She asked, “Would you be willing to prepare for us a list of – I forget how many cases she said – I think she said a list of the last fifteen cases you have tried, in which you have been lead counsel. Give us the name of the case, what it was about, the name of the judge and opposing counsel and then give us some names of some additional lawyers we might talk to?” I said really didn’t think it would be worth the time to prepare such a list; that I appreciated her interest and was flattered by this call, but I just couldn’t see this going anywhere. She said, “Well, won’t you please just do it? Will you please trust me that I know what I’m talking about? We really believe that the lack of political sponsorship will make no difference.” So, more because I just kind of liked the sound of her voice than anything else, I said, “Okay, I’ll do it.” So I agreed to prepare the list, and added, “By the way, I’m lead counsel in everything I do – I don’t have any partners or associates.” I sent her the list, and then tried to make myself forget about it, although to be honest I was kind of excited about just being considered, let alone the possibility that this could come to anything.

All of a sudden, I started getting phone calls from lawyers in Lake County asking, “John, what’s going on here? I got a call from some guy who kept me on the phone for an hour about you!” I learned that the Chicago Council of Lawyers really does a job. They don’t just take a quick look at a candidate. They were really cross-examining people about me. What happened was that they prepared a lengthy, detailed report for Senator Percy. I never saw it of course, and I didn’t receive any further calls from anybody at the Chicago Council of Lawyers. One day the phone rang again and a fellow by the name of Jerry McMann introduced himself to me as Senator Percy’s Administrative Assistant. He asked, “Mr. Grady, would you be willing to come down to Chicago to talk with Senator Percy about the possibility of an appointment to the federal district court?” I said, “I sure would.” He said, “Can you come down, let’s say Thursday at two o’clock.” I said, “Yes, I can.” So at two o’clock on Wednesday, the phone rings: “Mr. Grady, this is Jerry McMann, how come you’re not down here?” I said, “The appointment is tomorrow.” He said, “Oh no, the appointment is today.” Well, I wasn’t going to argue with him, but I knew just as sure as I was sitting there that I was right and he was wrong. I said, “I’m terribly sorry, there’s no way I can get down there at a reasonable time today.” I was an hour plus away. He said, “Well, let me get back to you.” He called back in a few minutes and asked me to come down on Friday and that’s what I did.

But I said to my secretary, “Well, I blew that one. It wasn’t my fault, but there’s no way they’ll ever think it wasn’t and why in the world would they appoint somebody who can’t even keep the days straight? I’ll go, but it’s all over, any prospect of it; forget it.” She said, “No, I’m going to pray on this.” She was a born-again Christian. She said, “God wants it” and I’m sure she prayed on it. So I went down on Friday, and had the nicest chat with Senator Percy. He could not have been more gracious. I started out by saying I was awfully sorry about the mix-up and he said it was no problem at all. We chatted for perhaps an hour. He asked me all sorts of questions that I never expected, like what books I was reading, what I thought about preventive detention, and it was really fun. He said, “Well, I’ll be in touch.” The interview had seemed to me to have gone so well that when I left his office I was actually optimistic. Some time passed and I was in my kitchen in Waukegan at about 5:30 one morning, getting ready to drive down to Springfield to argue a case before the Illinois Supreme Court. I was just ready to walk out the door and the phone rang and a familiar voice said, “John, this is Senator Percy.” I said, “Good morning, Senator.” He said, “John, I do not have good news for you. I’m selecting two other lawyers for the two openings – Al Kirkland and Joel Flaum.” I said, “Those are two fine candidates, Senator.” I didn’t know Joel, but I knew Al. He said, “Well, that’s nice of you to say.” Then he said, “Let me ask you this. Would you be interested if another opening comes up?” I said that I would but at that point I resolved not to give it too much thought.

Then, in December of 1974, Judge [Edwin] Robson announced he was going to take senior status. The newspapers carried articles about all of the prominent lawyers who were being considered for the vacancy. My name was not among them. Then one day the phone rang again. It was McMann again. Could I come down? Same thing. I go down again and it was as though we hadn’t had the first conversation.
The Senator did not ask me the same things he had asked the first time, but I had the feeling I hadn’t made too much of an impression the first time because he didn’t seem to remember me. He said, “Well, I’ll be in touch.” About three days later I got a call from him. He said, “John, I’m sending your name to the President of the United States to fill the vacancy on the United States District Court.” and that’s how it was.

The reason I wanted to go into some detail about this story and how it happened is that it is an unusual story – not unusual for Senator Percy – but unusual for the appointment process because he was at that time the only one who did it this way. He relied on people who were, in his opinion, knowledgeable about the qualifications of people and he also relied on his own gut feeling gained from the interview...Senator Percy really took a chance in reaching out for a political nonentity from Waukegan, Illinois.

CTF: You were not the only political nonentity that made it here.
JFG: I’m sure that’s true.
JFG: Senator Percy told me in one of the interviews that the most important thing he did as a United States Senator was to nominate federal judges. So anyway, I closed up my law office as soon as I could which required an enormous flurry of activity in closing cases or finding other lawyers to carry on for my clients. Jim Parsons was the Chief Judge at that time and I let him persuade me that there was a great need for me to come down here as soon as possible, that they were in dire straits and, of course, that was nonsense. I practically killed myself getting down here in a few months which was not sensible. I should have taken six months. In any case, I came on board in January 1976.

CTF: Can you tell us about some of the significant cases you prosecuted?
JFG: The most important one involved Nathan Shavin, a personal injury lawyer who was a notorious ambulance chaser and had a habit of sending phony medical bills through the mail to insurance companies to increase the settlement value of the case. He would make what purported to be a copy of the doctor’s bill on his own paper and he would inflate the bill. If it was $100, he’d make it $300. His way of negotiating was three times specials. Since the mails had been used to send the phony bills, Shavin was indicted for mail fraud. I tried the case before Julius Hoffman. I was unwise enough to accept a Chicago policeman’s wife on the jury. It was eleven - one for guilty. We later learned that throughout the deliberations the policeman’s wife was making arguments for the defendant that could only have come from outside sources. Shavin had a lot of police connections and I always believed the juror had been bribed.

CTF: Was it retried?
JFG: Yes. I tried it a second time and got a conviction on some but not all counts. The jury deliberations were lengthy. In interviewing the jurors, I found out that the reason for that was that one juror, who had a sickly son, told the others “I made a pact with God that, if my son recovered, I was never going to be unkind to anybody again. I’ll find the defendant guilty on some things, but not on everything. You can pick three counts and I’ll go along with it, but I’m not going to find him guilty on everything.” The case was reversed on appeal on the basis that Judge Hoffman kept out of evidence, at my request, the fact that Shavin had not submitted phony bills on some occasions. [United States v. Shavin, 287 F.2d 647 (7th Cir. 1961)]. Shavin’s case was the talk of LaSalle Street at the time. I tried a number of drug, bank robbery and interstate commerce crime cases and criminal civil rights prosecutions. What made an enormous impression on me during these trials was that there’s a lot more to jury trials than simply presenting the facts and waiting for an appropriate verdict.

CTF: What about cases as a private lawyer? Anything stand out?
JFG: Yes. The one that stands out the most is one that I tried by court appointment in about 1973, three years before I came on the bench. This one more than counterbalances the few bad experiences I had with juries as an AUSA. A gang of young men known as the De Mau Mau, had cut a swath from southern Illinois up to Lake County and murdered a number of people, including a truck driver. Five members of the gang were arrested for the murder. There had been a lot of publicity linking the De Mau Mau with the murder of a family in Barrington Hills.

While awaiting trial in the Lake County Jail, the defendants requested that they be put in the same cell so that they could prepare their defense. The judge granted the request. One morning, two of the five were found strangled to death. The other three were indicted for the murder of the two. I was appointed by the court to represent one of the three.
He happened to be the biggest, strongest, the most likely-looking ring leader. I had never tried a murder case before. During jury selection the first panel of four tendered to us by the prosecution had on it the President of the R.R. Donnelley Company who lived in Barrington Hills and was a neighbor of the family that had been murdered. There was also a college professor. Counsel representing the other defendants wanted to excuse Mr. Donnelley and the professor. I was able to persuade them not to. We had a defense that was not going to appeal to the average juror. We needed people who would be able to distinguish between hunch and evidence and would be willing to hold the State to proof beyond a reasonable doubt. So after consulting with our clients, we accepted the panel, to the surprise of the prosecutors, who then began selecting only blue-collar workers. They also excused all black jurors. Our clients were all black and we objected, but this was before Batson v. Kentucky, 476 U.S. 79 (1986), and the judge simply overruled us. But we had our key jurors and Mr. Donnelley became foreman of the jury. The verdict was not guilty for all three defendants after a trial of many weeks. We took almost two weeks on jury selection.

Afterwards, we talked to one of the jurors about the defendants not having testified. He said that that was the one of the first comments in the jury room, but the foreman said, “Just a minute, the judge said we are not to consider that and we are not going to consider that.” So that’s the other kind of experience I’ve had with the jury system. Not to mention all the favorable experiences I’ve had as a trial judge but that unquestionably was the most important and satisfying case I ever tried. Interestingly, I never discussed with my client whether he was guilty or not and I’m sure the same was true of the other two lawyers.

CTF: Any other cases that you can think of?
JFG: I tried a case on behalf of a theater owner in North Chicago against Abbott Laboratories. Abbott manufactured a drug through a fermentation process that caused a terrible odor which made the town of North Chicago very unpleasant as a place to live and do business, but it’s a company town and most of the residents wouldn’t think of complaining. But my client was an independent sort and he believed that the patronage at his theater was adversely affected by the smell from the factory which was only a couple of blocks away, so he hired me to sue Abbott. This was in about 1965 or 1966, before any of the environmental statutes had been enacted. Believe it or not, there was a time when there was no EPA and there was no OSHA, none of this bureaucracy and statutory regulatory regime that we are so familiar with now. All we had back in those days was the common law of nuisance. So I sued Abbott Laboratories for creating a nuisance. (We tried the case before the judge who had aspirations for the federal district court and who was later to be disappointed by my appointment.) The case was hotly contested and the question of damages was an interesting one. How do we prove that more people would come to the movie if it didn’t smell so bad, how many more people would come, and how much revenue did we lose and so on. I won the case and got a relatively modest damage award. The injunction I was seeking was denied, which of course would have shut down Abbott Labs, something that judge was not about to do. Abbott appealed and I wound up in the Illinois Appellate Court for the Second District. See Schatz v. Abbott Labs., Inc., 269 N.E.2d 308 (Ill. App. Ct. 1971). One of the panel members was a visiting judge from the Springfield area. He wrote an opinion reversing the judgment on a ground that had not been argued on the appeal and had not been raised in the trial court. I petitioned for rehearing, arguing that (a) they were wrong, and (b) I had been denied due process. They had taken my judgment away without giving me an opportunity to be heard. Motion denied without comment. I sought leave to appeal to the Illinois Supreme Court on the due process ground, and to my surprise, they granted leave. So I went down to Springfield and argued that case and won. In Schatz v. Abbott Laboratories, 281 N.E.2d 323 (1972), the Illinois Supreme Court reversed the appellate court on the due process ground. That gave me such a shot in the arm. Here again, justice prevailed. Just hang in there and things will come out right.

Another case that was very important was a case that I didn’t try but I argued on appeal. It was a case tried in Lake County involving a dispute between the Serbian Orthodox Church headquartered in Belgrade, Yugoslavia, and the local Serbian Orthodox Church. The dispute was over the ownership of the monastery up in Libertyville, and the local people had won in the Circuit Court of Lake County. A friend of mine who had been the trial lawyer asked me to help on the appeal. Bert Jenner was on the other side.
I argued that case in the Illinois Supreme Court against Bert and won. When Jenner found out that I was being considered by Senator Percy for nomination to this court, he tried his best to talk the Senator out of it on the basis that I was just a country lawyer, unsophisticated, and didn’t know anything about Chicago, etc. I learned about his effort, by the way, from a member of Senator Percy’s staff long after my appointment. I ran into Bert at a Seventh Circuit Judicial Conference later on. He congratulated me and said he was delighted by my appointment.

The losing side in the Serbian case petitioned the United States Supreme Court for certiorari and we thought there was about as much chance of that being granted as the sun not coming up. Petition granted, and unfortunately for me, I had let Jim Parsons talk me into coming aboard here at the earliest possible time and the Supreme Court argument wasn’t held until after I took office. So I could not take advantage of the one and only chance I ever had to argue a case in the U.S. Supreme Court. The guy who brought me into the case argued it and lost.

**CTF:** John, I don’t know another judge that came here as a solo practitioner. Do you know anyone else?

**JFG:** I have never encountered one. Maybe we’ll get into this as we go along here this afternoon. But my having been a sole practitioner has a lot to do with my judicial philosophy and especially with my attitude toward attorney’s fees and the obligation that lawyers have to do a day’s work for a day’s pay.

**CTF:** Does it also have a lot to do with the ease with which you can make the transition from being a sole trial lawyer to in effect being a sole judge?

**JFG:** I think so. I was wondering whether it was going to be difficult from a temperamental point of view first of all. Could I cease being an advocate and become an impartial arbiter? That turned out to be a piece of cake. I had absolutely no trouble disrobing myself as a gladiator. Perhaps I was ready to do it long before I did. The other question in my mind was whether my lack of any federal civil experience would handicap me in handling my caseload. I erroneously thought I would be dealing with a lot of tax questions. The first law clerk I hired was a lawyer/CPA because I thought I could use the help. Well, I’ve never had a tax question of any complexity in my thirty years on the bench.

**CTF:** But when you came on board, I think you came on board at a time when there wasn’t a random assignment of new cases to a judge?

**JFG:** There was sort of a hybrid system at that time, Collins. It wasn’t the old system that Judge Miner was so aggrieved about that he wrote a letter to Senator Dirksen complaining about how they loaded him up with all the bad cases, the antitrust cases and so on. I don’t know what Senator Dirksen said. He probably said there was nothing he could do for him. I didn’t have that experience but I did have my share of old, complicated cases, and the way that could come about even under the random reassignment system until we made some adjustments to it, was that the people who wanted to play games could still play games. For instance, there was a practice of withholding from the random reassignment pool any case that was “about to be settled.” Well, guess what cases were about to be settled? The simple ones, thus increasing the odds that the old dogs would be reassigned and there was a member of the court who specialized in that. When I became chief judge years later, one of the first things I did was to bring about the elimination of that wrinkle in the reassignment system.

**CTF:** What about the patent cases you got — that must have been a new area of law for you?

**JFG:** Ironically, I thought I would dislike them and was prepared to, but to my surprise, I was fascinated with the subject matter and really enlivened by the competence of the typical patent trial lawyer – extremely intelligent, witty, innovative, masters of demonstrative evidence. They can draw a picture of anything and I found that patent cases were very interesting and very challenging. Most of them were bench trials initially and I would simply ask questions and have them repeat their answers if I didn’t understand. And I’d warn them in advance that my wife does all our home repairs, so they better come prepared to make it clear, and they did. So I decided some very complicated patent cases, expecting there to be appeals and there weren’t. Oh, I can recall one of them being reversed by the Federal Circuit on the question of obviousness.
Then there came the time when everybody was demanding jury trials in patent cases. That was a lot more work than a bench trial, because I was no longer free to say “could you repeat that answer,” etc. and I used to worry about the jury. It was about that time that I initiated my practice of allowing the jurors to ask questions and I have had that practice for more than twenty years now.

**CTF:** Do you screen the questions?

**JFG:** No. What I tell the lawyers is to relax. If there is an objectionable question, I will explain to the juror that he or she can’t ask that. But rather than me screening them and then rescreening them for the follow-up question, I let them simply ask.

**CTF:** How many objectionable questions do you encounter on trial?

**JFG:** Year by year, I’d say maybe one and not because it’s an outrageous, inadmissible thing but just because perhaps it was irrelevant. It wouldn’t help them to know the answer. The lawyers don’t have to object in the event there should be an objectionable question. I tell them in advance to just sit there poker-faced and I’ll take care of it. What I find is that allowing jurors to ask questions has several very beneficial effects. First and foremost, you learn whether the jury is understanding what is going on. Very often the question would be, “You are using the word ‘so and so,’ what did you say that meant?” Well, in the typical courtroom, the juror can’t ask that question. So the juror has to sit there while this expert witness is using this term over and over again and the testimony is going over the head of the juror. Sometimes the question is, “What page did you say that was on?” Again, it’s a simple matter of bringing the jury up to speed on what’s being said. With the exception of one case where I had a pugnacious juror, and had to cut off the questions, I have never had the cross-examination type question, you know, the adversary type question. Jurors know that it’s improper without being told.

Secondly, it gives the jurors a sense of participation in the trial. They are not just bumps on a log sitting there, and they tell me after trial, “We sure loved being able to ask questions, Judge, it made us feel like a part of the process.” And I think that having that ability, whether or not they use it — and sometimes I have gone through whole trials without a single question even though I’ve let them know they can ask — makes them more interested in what’s going on and more satisfied with the judicial system when they leave here.

Another benefit of allowing jurors to ask questions is that it gives the lawyers an indication of how they are doing. Those questions indicate at the very least what the jury is interested in and maybe even, if the lawyer is sophisticated enough, lets the lawyers know in what way they are being deficient in bringing out the facts. I don’t encourage questions in every single civil trial — but most of them — and I don’t do it in criminal cases. I’ve suggested to counsel in criminal cases to consider allowing the jurors to ask questions and I get stony silence. No one is going to get accused of ineffective assistance because they refused to allow the jurors to ask questions. Both sides would object. So I don’t do it with criminal cases even though I think it could really be vitally important, sometimes especially for the benefit of the defendant. Sometimes jurors might have doubts they’d like to pursue in the form of a question and they’re not given an opportunity, so they go along with a guilty verdict. That’s just my hunch.

Almost every time I allow questions in a civil case, I’ll forget to ask the jurors whether they have any questions at the end of the examination of a particular witness and the lawyers will invariably remind me. They like it. They want those jurors to ask questions. There is never an objection and there’s never an issue raised on appeal.

**CTF:** Do you allow jurors to take notes?

**JFG:** Oh, absolutely. I was the first one on this court to do that. I started doing that my first year on the bench despite the unanimous disapproval of those of my colleagues who commented to me about it.

**CTF:** It would be interesting to know if the first district judge got that reaction when he made the decision to give the jurors copies of the jury instructions. That was not well received. Now we think, “Why wouldn’t we?”

**JFG:** Instructions in writing, of course, were second nature to me because of the state system and my being on the IPI Committee and I was astounded that many of my colleagues, if not most of them, were not doing that. At the present time, and for some years now, I send in twelve copies of the instructions to the jury. First I sent in one set, then I sent in three sets and finally one time a juror raised his hand and said, “Hey Judge, how come we don’t each get a set?” So, from then on, I’ve been sending in twelve sets, and with the xerox machine you know, it’s not that tough.

I’m a big fan of juries. I’m a believer in their competence to handle anything that comes their way. I’m a believer in their sincerity, their diligence and their dedication to getting it right and I just don’t buy these criticisms of the jury system from the ivory tower.
Now I will say this, however, it’s a lot more work than a bench trial. A bench trial is a walk in the park compared to a jury trial, especially when the case is complex, and one of the reasons for that is that I always have to do the instructions myself. The lawyers don’t give me much help. In the criminal cases it’s not too bad because they tend to be repetitive. But you take your average diversity case, they’re often *sui generis*. We don’t get many rear-enders here. The diversity cases are mostly breach of contract, some kind of state law tort or something like that and you don’t get those instructions out of a form book. You’ve got to do some thinking and some drafting and generally speaking the lawyers are just not very good at that. While I used to say, “I want you guys to have your jury instructions ready on day one or day three,” I don’t say that anymore. I just assume I’m going to do them. If they volunteer, I say, “Fine, I’m happy to look at what you submit. I encourage you to do so.” But I have no expectations, and that’s a shame. I always did my own jury instructions when I tried cases but that’s the way I tried cases. I was ready to go and I suppose that was one of the reasons I was a good pick for the I.P.I. Committee.

**CTF:** Since you were a trial lawyer, there have been big changes in the use of technology in the courtroom. There are notebooks of exhibits and use of technology so that everybody is fully on the same page. Can you talk a little bit of the technology in use and the way lawyers try cases and the way judges decide cases?

**JFG:** I think there have been some very great improvements in visual presentations. Back in the days when I tried cases in the state court and even during my first years on this bench, if there were important exhibits, there would be one and it would be in the hands of the witness as he was testifying about it. The jury wouldn’t see it, and even the opposing lawyer would have to look over the shoulder of the witness to see it and it was really an unsatisfactory way of handling it. Then came the exhibit books. I’d ask the counsel just to limit those to the important exhibits, not everything, and that was a great improvement. Each juror would have the exhibit to look at. Then the first case I can remember with this overhead projection technique was the Sanitary District bribery case back in about 1978.

And then, starting maybe three or four years ago, this ELMO procedure came in which is essentially the same as the overhead. I don’t know why it’s considered so technologically advanced but that’s fine too. There is no doubt that the trial is expedited and juror comprehension is improved by these visuals. Now, there are things that are being done that I think are useless and distracting and also very expensive, and that’s this playing back of testimony or watching a screen where the judge and the lawyers can follow the testimony as it goes along – utterly useless. I’ve seen the equipment in my courtroom but I have yet to see any lawyer make any productive use of it. So, I’m not impressed with that technology. I’m trying to think of what else there is ....

**CTF:** What do you see as the difference between six-person and twelve-person juries?

**JFG:** Zero. That’s my experience. I was shocked when I got down here and found there were six-person juries. I didn’t even know that. We’d pick twelve people to try an intersection accident up there in Waukegan – take two days out of their lives to see who had the red light. When I first got down here I thought, “God, this has got to be some kind of a constitutional issue,” but it didn’t take me long, maybe the second or third case, to decide, “Hey, there’s no difference and this is good. This is saving the time of the jurors; saving the time of selecting the jurors. It’s efficient.” And it’s altogether consistent with the rights of the parties. It’s the old story we were referring to earlier, “Oh, no, you can’t let jurors take notes. Oh no, you can’t let jurors ask questions. Oh no, you can’t have six-person juries.” These challenges are made by people who haven’t done it. They are made by people who come from jurisdictions where they take twelve jurors and decide what color the light was and think they can’t do it any other way. I think that once you try it, most people will be sold on it unless they’ve just got a blind spot. So I’m all for six-person juries. I don’t think I would want to go with less than six persons. I’ve heard it said that the reason for twelve is that if you have twelve you’re going to have all idiosyncracies included. If you have six, you’re going to have less of a spectrum. I should say that I always pick eight, now that the rules allow all jurors who sit through the trial to deliberate. You don’t have to let them go. So it’s not just six, it’s eight. It seems to me that eight comes about as close to being a representative cross-section as twelve, because that twelve is as likely to include two plumbers from Cicero as it will twelve people with completely different backgrounds.

*Continued on page 17*
Interview of: Judge John Grady
Continued from page 16

CTF: Somehow I get the feeling that you, as a trial lawyer, did not make use of jury consultants. Did you even know of them?
JFG: I never heard of the term. In fact, it did not exist to my knowledge. It’s another cottage industry that has grown up. It appeals to neophytes in the trial of cases. These people tout themselves as having some kind of insight that they don’t have, but woe be to the lawyer in the big case who doesn’t hire one and loses the case and the other guy hires one and wins the case. That’s why this guy would be fired by his corporate client and wouldn’t be hired again. These various specialities manage to insinuate themselves into the trial process and charge huge fees as trial consultants. Back in my day, accident reconstruction experts were the big specialty. I never used them. I have no confidence in the consultants’ ability to size up a juror any better than a good trial lawyer’s.

CTF: Do you allow the attorneys to talk to the jurors after a trial?
JFG: I do when I’m not concerned about lawyers who have no judgment about what to do and what not to do. If I sense a lawyer really wants to try to find out something to impeach the verdict I won’t permit interviews. Even though it’s unlikely they could impeach the verdict, they will nonetheless try. Also, I won’t allow interviews of jurors who might be selected in another case. Only when this is their last case in the building will I allow it. The way I handle it is that when I go in to talk to the jurors after the verdict I will ask if any of them want to talk to the lawyers. Any who do can remain in the jury room and I’ll send the lawyers back in. I tell the jurors not to disclose anything about their deliberations, but to give the lawyers hints about what they did right or wrong that might help next time. Almost invariably all or most of the jurors will stay behind.

CTF: I think you have made some cuts in attorney’s fees that people have taken up on appeal.
JFG: First, my feeling about fees. It was generated during my practice. I saw lawyers who did little or nothing in personal injury cases taking a third of the settlement; never a verdict, always settling the cases. Sometimes that could be justified but usually not. In my own practice, I handled a lot of personal injury cases and tried to charge a fair fee based on the result and how much work I did. Rarely was it a straight one-third of the recovery except for cases where I had a referring lawyer who had already entered into that kind of contract with the client. If I settled it, sometimes it was ten percent. Whatever seemed to me to be reasonable compensation for the work I did, the result and the risk I took in the particular case that I wouldn’t be paid at all.

When I was under consideration for this job, I got a call from John Schmidt, President of the Chicago Council of Lawyers, asking me to be the speaker at their annual luncheon. I asked him what he would like me to speak about and he said I could talk about anything. I said, “I think I might like to talk about contingent fee cases.” He said fine, that should be interesting. So I gave a talk in which I said essentially what I just told you. The typical one-third fee in a case that may be total liability with insurance and little work just can’t be justified because there really is no contingency, either about winning or collecting. Well, that speech marked me in some parts of the Chicago Bar as somebody who was against lawyers and against reasonable fees. I later wrote an article expanding on the theme of the speech at the suggestion of Alex Polikoff which was published in Litigation Magazine (“Some Ethical Questions About Percentage Fees.” 2 Litigation 20 (Summer 1976)). I made a point to call them “percentage fees” rather than “contingent fees,” because most of them are not contingent. That article generated a lot of talk in the legal community and Phil Corboy’s daughter wrote a counter-article, Contingency Fees: The Individual’s Key to the Courthouse, 2 Litigation, Summer 1976 at 27.

When I came on the bench, I didn’t have any particular yen to start cutting fees. I wasn’t even sure in what kinds of cases I would have occasion to rule on fees. But it wasn’t long before I had a criminal case where a lawyer had done nothing more than talk to the young defendant for a little while before pleading him guilty and charging him $8,000, a lot of money for those days. I either figured it out or he told me that he spent just a few hours on the case and this young man was not a wealthy person. I told the lawyer to give all but “x” dollars of the money back. I explained that as the presiding judge, I had the authority to prevent him from using the process of this court to charge his client an unconscionable fee. He refused to return any of the money and I held him in contempt. I wrote an opinion, United States v. Vague, 521 F. Supp. 147 (N.D. Ill. 1981), explaining the basis of what I believed was my authority, and he appealed. My order was reversed, see United States v. Vague, 697 F.2d 805 (7th Cir. 1983) and that was my first encounter with the Seventh Circuit’s view of the free market in attorney’s fees as being totally divorced from any question of professional ethics. The question is simply what the traffic will bear. It was a shock to me to learn my view of right and wrong could be so different from another judge’s view of the same issue. Well, that ended my intervention in fee questions where the exploited litigant had not made an objection.

Continued on page 18
Interview of: Judge John Grady

Continued from page 17

The main basis of the Seventh Circuit opinion was the fact that the client had not objected. The reason he hadn’t objected, of course, was that he had no idea he had a basis for objecting. Because no client ever objects to a fee in a criminal case no matter how exorbitant, I have never had a fee issue in another criminal case. I do, of course, rule on Criminal Justice Act fee vouchers and I think I do about the same thing everyone does. I reduce them when they’re excessive.

In civil cases I think my reputed bark is a lot louder than my bite. I think I grant the amount requested at least as often as I reduce fees. My decisions are seldom appealed; and, offhand, I can think of only one case where I was reversed. In the Matter of Continental Illinois Securities Litigation, 962 F.2d 566 (7th Cir. 1992). Again, there was a fundamental philosophical difference. Do fees involve an ethical question or not? The Canons of Professional Ethics make it quite clear that they do.

I mentioned before that my experience as a solo practitioner had a lot to do with my attitude toward fees. The connection is this. I didn’t have anybody to make telephone calls to in house. You look at one of these fee petitions in the average civil case and it often consists largely of time entries for lawyers conferring with each other and writing memos to each other. No indication of what they conferred about or whether it did any good, just the fact that they spent the time. The petitioner then gives the court his response. The procedure has almost entirely eliminated this awful experience that we were all required to go through, wading through these voluminous items. The attorney really spent ten hours researching something because, presumably, he researched the same issue and he knows how long it took him. The items that are ultimately submitted to the judge for decision are relatively few and are usually fairly easy to handle.

The procedure has almost entirely eliminated this awful experience that we were all required to go through, wading through these voluminous fee petitions and trying to figure out what was what. The lawyer on the other side is in a much better position to know whether it is likely that he has of enormous assistance in recent years. We have a local rule that requires the lawyers to get together and work out their fee disputes and come up with agreement as to all items for which they can’t articulate a specific objection, not just conclusory statements like “excessive,” and then give the reasons for the remaining disputed items. The petitioner then gives the court his response.

The procedure has almost entirely eliminated this awful experience that we were all required to go through, wading through these voluminous fee petitions and trying to figure out what was what. The lawyer on the other side is in a much better position to know whether it is likely the attorney really spent ten hours researching something because, presumably, he researched the same issue and he knows how long it took him. The items that are ultimately submitted to the judge for decision are relatively few and are usually fairly easy to handle.

He or she would have said that there was no time and no need to hold conferences about my cases. So I reacted with a great deal of skepticism to these “conferences” that can run fifty-percent of the average fee petition. What did the conferences actually do? What did they accomplish? The same with research. Research on what? I pin them down and very often they can’t remember what the research was about. Legal research – that was another thing that was problematic for me. I wrote an opinion about these things early in my tenure on the bench. In re Continental Bank Securities Litigation, 572 F.Supp.
We make our own decisions and the things that we have in common, as to which some leadership is necessary, are relatively few. That’s the first point. The second point is that almost all of the judges realize that if this place is going to run right, you’ve got to have cooperation, so that, even when the chief judge does not have the authority to act on his own, a suggestion will almost always work. A request will usually be honored and then there’s the executive committee which works with the chief judge and enhances his ability to get things done. When the rest of the judges are told that the executive committee has decided something, they usually won’t argue. If you look at the local rule, it says that the administrative power of the court is vested in the executive committee. Who says that? Is that in a statute somewhere? Of course not, but it’s accepted.

CTF: What were the most important issues that you dealt with as chief?

JFG: The thing that made that job doable was that Olga Claesson was my administrative assistant. She had worked for Frank McGarr and Jim Parsons and she knew everyone at all the agencies. She was a wonderful liaison person to have. In the summer of 1986, GSA had a plan to move the courts out of this building and they were going to build us another building apparently in this vicinity. I knew the kinds of new courthouses that were being built because I had visited them in conjunction with committee work, and they were tiny courtrooms, cramped halls, the kind of facilities that would not hold a candle to this one. I knew that the prospect of replicating this building for a new courthouse was nonexistent. Well, GSA held a conference up in Lake Geneva to which I was invited and I took Olga with me. I didn’t know who was going to be there but it was to discuss the problems with the various tenants of which we, of course, were one. The then-head of the GSA, who was in his last week before retiring, approached me at the meeting to discuss our court moving out of the Dirksen building. He found out that I was from Springfield, Illinois, and so was he. We immediately hit it off. He told me in private that if we wanted to stay in the Dirksen building, he could arrange it, but we had to decide that day, otherwise he said, “the horse is out of the barn and you are going to have to move to another building when it is built.” So I said, “Let me talk to Olga.” We went to another room and I asked her what she thought. She said she didn’t think we should move, which is what I thought. So I made the deal that day and upon my return to Chicago, I called a special meeting of the court and the decision was ratified. Bill Bauer, who was then chief judge of the Seventh Circuit, also confirmed that decision. That is the most significant thing I did as chief judge, and nobody here knows about it except you, me and Olga and, of course, the judges on the court at the time.

CTF: Why did you leave as chief judge when there were three years left of your term?

JFG: The main reason – certainly a significant factor – was the job involved a significant time commitment for matters that I found extremely boring. Under our local procedure, the chief judge is in charge of the grand jury and that involves a great deal of time, and there were many other administrative duties that were time consuming. I was a judge; not an administrator. While I did the work and I think I did it competently, I found it very boring. Having taken the job — I could, after all, have turned it down — I thought I had to stay with it a reasonable time, but I doubted that I could stand it for seven years.

CTF: What do you think are the most important cases that you tried as a judge?

JFG: I would like to say the Lake Michigan pollution case, which had originally been filed in the Supreme Court, but which the Court remanded to the district court for trial on the theory of common law nuisance. [Illinois v. City of Milwaukee, 406 U.S. 91 (1972)]. The plaintiffs were the State of Illinois, and the State of Michigan intervened. The defendant was the City of Milwaukee. The claim was that the citizens of Illinois and Michigan were being injured as a result of the discharge of raw and insufficiently treated sewage into Lake Michigan. The scientific questions in the case were complex and interesting. It was a bench trial and it took six months. I held in favor of the plaintiffs and ordered Milwaukee to adopt what is known as tertiary treatment of its sewage before discharge into the lake. This was an expensive remedy, but one I thought was necessary to protect the lake. Milwaukee appealed. The Seventh Circuit reversed in part, saying that I had gone too far and reduced the treatment requirement. [People of the State of Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979)].
Meanwhile, the Supreme Court came along in a similar case and held that there is no federal common law of nuisance. The Federal Clean Water Act providing for much lower treatment standards, had according to the Court, preempted the field. [City of Milwaukee v. Illinois, 451 U.S. 304 (1981)]. I had to vacate my order and my six months of work went down the drain (so to speak) and Milwaukee to this day is discharging raw sewage into Lake Michigan, and according to a recent TV program, the EPA is about to let Milwaukee increase its discharge. Had my decision been ultimately affirmed in that case even in part, I would regard it as my most important case. As it turned out, it was a waste of time.

The case of MCI v. AT&T was an antitrust jury trial resulting in a $600 million verdict. I trebled this to $1.8 billion, which they told me was the nation’s largest civil judgment up to that time. It was reversed and sent back for a new trial on damages only. The Court of Appeals held that some of MCI’s antitrust theories were not viable but others were, so the case was remanded for a new trial on the ones that were viable. [MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983)]. The parties ultimately settled the case after the second trial.

I’m trying to think of other civil cases I’ve tried that might have some lasting effect and none occur to me offhand. I tried an interesting case brought by a transsexual alleging sex discrimination. The case was Ulane v. Eastern Airlines, Inc., [581 F. Supp. 821 (N.D. Ill. 1983)]. I held that firing the plaintiff pilot because she had a sex change operation from male to female was sex discrimination. The Seventh Circuit reversed in a remarkably terse opinion. They just said, “This isn’t sex discrimination.” [Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984)]. My point was that Congress had not defined “sex” in the statute and I thought the term literally applied. It had been inserted as a last-minute effort by southern senators to scuttle the Civil Rights Law of 1964, which was primarily concerned with race. At any rate, I gave it the interpretation I thought was right but that decision didn’t survive either.

Another case I decided, I can’t remember the name, was on a claim brought by some Mexican aliens who contended that immigration quotas designed for Mexicans were diverted by the Immigration Service to South American immigrants, contrary to the intent of Congress. [Silva v. Bell, 605 F.2d 978 (7th Cir. 1979)]. I agreed with plaintiffs and as a result 50,000 Mexicans were given visas. It was an important decision for those particular people, and it was apparently also important for a lot of anonymous Texans who showered me with threatening letters. Nothing ever happened, but I sure did make a lot of people furious down there in Texas.

CTF: You mentioned that you did some important work in criminal cases.

JFG: Let me start with what I think was perhaps the most important thing I did in the criminal area. That was a substantial upping of the ante in political corruption cases. When I came on the court, people convicted of political corruption were traditionally treated as white-collar criminals and were not generally speaking given substantial sentences. Probation or a short period of incarceration was the rule. The first such case I had was in 1977. It involved the payment of $1 million in bribes to officials of the Metropolitan Sanitary District as an inducement to award the defendants a contract to haul sludge by barge from Cook County to downstate Illinois. After a long trial, the defendants were convicted. The appeal was complicated enough that the opinion was written by three judges who divided up the issues. [United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979)].

I was pleased that I had been able to handle a case of that complexity even though I was relatively new on the bench. I gave lengthy sentences which included ten years for the president of the Sanitary District. This was something new. I gave an extended explanation of the sentence which was quoted in the editorial pages of the newspapers. I’m pleased to say that since that time the ante has stayed up. Interestingly, it’s the sentencing guidelines that came in 1987 that pushed them down again. The guidelines are money-driven, so maybe a $1 million bribe would still be up there. Anyway, I think that would be my major contribution to the community as far as criminal cases are concerned – fair adjudication followed by meaningful sentencing designed to deter public corruption.

You mentioned the “Marquette 10” case [(United States v. Ambrose, 740 F.2d 505 (7th Cir. 1984)]. That came along about ten years later and involved ten Chicago police officers who were taking bribes from dope dealers. After a long jury trial they were found guilty. I gave them very substantial sentences starting at twenty years and going down to eight years. I thought at the time, and even said, that the case was going to be a significant deterrent to police corruption. Never again could policemen bank on the proposition that no jury would believe a dope dealer when he says that he bribed a policeman.
These witnesses, by the way, were the worst of the worst. They were professional drug peddlers and had lengthy criminal records. Many of them were drug users, but they were also very bright, articulate and credible witnesses.

Events have proven me overly optimistic. There have been several virtually identical cases in this very building subsequent to Marquette 10. There’s an investigation going on right now, or maybe an indictment has been returned, against several Chicago policemen alleging the same kind of bribe taking from dope dealers. That raises the question whether we are kidding ourselves when we think that criminal sentencing deters. That really is a fundamental premise of our system which I think there is reason to wonder about. Maybe the answer is that long sentences do deter those who are not risk-takers. If people knew they could break the law without risking substantial incarceration, undoubtedly many more of them would commit crimes, especially property crimes. So in that sense, punishment does deter. I know of no way to demonstrate that empirically. But in any event, the real risk-takers especially those with no moral compunctions, aren’t going to be deterred by sentences imposed on someone else.

CTF: What was the toughest thing about trying that case? Was it ten defendants, ten lawyers at least on one side and you’ve got the government...

JFG: The toughest single thing was one lawyer who was ungovernable. She was the only female lawyer on the defense team, and I think there was some sort of macho thing going on, but she insisted upon disobeying my rulings. I forget whether it was on one subject or on a variety of subjects. So I called her over to the sidebar and said, “Please don’t do this in my court. I don’t want to hold you in contempt but if it’s necessary to maintain order, I will do it.” She did it anyway and I held her in contempt – not once – but twice during that trial and, as you know, if you hold somebody in contempt you have to write an order reciting what they did. So I had to dictate two separate orders explaining why I was holding that lawyer in contempt so that it would stand up on appeal. I fined her I think $500 the first time and a little more the second time. I stayed execution, three days or something like that, so she could appeal. Well, it did the job – she didn’t do it anymore. I have held a lawyer in direct contempt only twice in all my years on the bench. Those were the two times – the same lawyer, the same trial. That took a toll on me. Maybe it shouldn’t have, but the thing that irritated me so much was that it was so unnecessary, and it added so gratuitously to the task I already had trying to manage this very complicated trial. By and large, the other lawyers conducted themselves quite properly.

The prosecution was extremely well done. Dan Webb was the prosecutor and he is undoubtedly one of the best trial lawyers who has ever appeared before me. He was assisted by Jim Schweitzer, now a partner in a Milwaukee law firm, and he was also an outstanding lawyer.

CTF: You’ve made reference to the sentencing guidelines and we’ve now come full circle from when there were sentencing councils.

JFG: I am one of the few district judges left who predates the guidelines which came into effect in 1987. I came on in January of 1976 so I had a good ten years of experience with discretionary sentencing. Let me tell you my view of that system. The disparities in the sentences imposed by the judges of this court were a disgrace to the administration of justice. There is absolutely no doubt that different defendants with similar backgrounds who committed essentially similar offenses could receive probation in one courtroom and, in a courtroom down the hall, five or ten years. I think that Congress was quite correct in concluding that something had to be done to create some kind of equity in sentencing. The sentencing councils which I attended on various levels were totally ineffective.
Our local sentencing council met in Judge [Hubert] Will’s chambers once a month. To prepare for it, we would read each other’s pre-sentence investigation reports on cases set for sentencing. We had eight or ten members of the council and it took a lot of time to read all those reports. We would come to the meeting prepared to state what sentence we would impose in each case. The results were fairly predictable. Some judges would give probation in almost every case, while other judges would incarcerate for lengthy periods. One judge’s rationale for everything was well, if you send this fellow to jail he’ll lose his job, or, if he wasn’t employed, there would be some other reason for probation. Other judges would emphasize the need for punishment and they would differ as to how much punishment would do the job. I never had the sense that I convinced anyone of anything. I stopped attending after a couple of years.

Once we went as a court down to Texas for a Sentencing Institute with the Fifth Circuit. That was an experience I’ll never forget. The idea was to see how we compared with them as a circuit. Those Texas judges would give ten years to a first-time mail thief. I can remember one judge who later became chief judge of the Fifth Circuit. I think his very words were, “This is the United States mail. You mean you’re gonna not incarcerate somebody who steals from the United States mail?” and he didn’t mean just a short incarceration. He meant a long incarceration. It was clear that the disparities highlighted at that conference were just a microcosm of what existed nationally. And invariably in answer to the question, “What if I don’t think the guideline sentence is appropriate?,” he would say, “Depart.– just depart.” Well, if there was ever an overly sanguine outlook, that was it. Prior to Booker, the judges on our court believed a departure, especially a downward one, was almost certain to be reversed on appeal. It remains to be seen how “deviations” from the now advisory guidelines will fare on appeal.

I can remember Judge (now Justice) Breyer when the guidelines were being formulated, going around giving these talks telling judges that the guidelines would be a great thing. And invariably in answer to the question, “What if I don’t think the guideline sentence is appropriate?,” he would say, “Depart.– just depart.” Well, if there was ever an overly sanguine outlook, that was it. Prior to Booker, the judges on our court believed a departure, especially a downward one, was almost certain to be reversed on appeal. It remains to be seen how “deviations” from the now advisory guidelines will fare on appeal.

CTF: Tell me about your family.
JFG: I married my wife, Patsy, in 1968 and we have a son, John Francis Grady IV, who was born August 29, 1970. He’s our only child. He was a delight throughout his boyhood. We were and remain very close – the three of us. We started out in Waukegan and he went to parochial school there. We moved to Wilmette when he was in fourth grade. He went to public school there and graduated from New Trier High School, the University of Iowa, where he graduated cum laude and Phi Beta Kappa. He graduated from Northwestern Law School in 1996. He was a partner at Arnstein & Lehr in the litigation department and then in 2009 became a founding partner of his own firm, Grady, Pilgrim, Christakis and Bell in Chicago. I could not be more proud of him. He is so bright and knowledgeable about so many aspects of the law that I don’t know anything about. He’s learning every day. His major regret professionally is that there are so few cases to try. Cases that go to trial are few and far between – largely, in my opinion, because of high legal fees. People are forced to settle. In fact, he sometimes has to tell his clients, “You can’t afford to try this case. My fee will be ‘x’ dollars and you can settle for less than that.”
The days when I would try a jury case in Waukegan for three days and charge $1,000 are long gone. They want $1,000 just to talk to you the first day. But he’s enjoying the practice of law and the real challenge of having his own firm. He shares my ethical views and regards the practice as a profession, not simply a business. He’s independent – you couldn’t make him do something he doesn’t think is right. He’s married to Jenny, who has an MBA from Indiana University and worked for the Whirlpool Corporation for a couple of years before quitting when she became pregnant with Patrick Grady, who was born in September 2003. He might have been John Francis the V, but, as John explained, “Dad, we just have to quit this at some point.” I was delighted that they chose his name “Patrick,” which was the name of the first Grady who came to the United States. Patrick lives with John, Jenny and his younger sister Lily, age four, eight blocks from our house. We see them often.

CTF: Someday Patrick and Lily Grady are going to be reading this and why don’t you tell them and the rest of us what motivates you? You already revealed that you liked being a trial lawyer, you like being a trial judge, you appreciate that you’ve been given the gift of being in a profession. Why don’t you elaborate?

JFG: I am motivated, Collins, by a desire to perform what I regard as the best kind of public service that I’m suited to perform. I have literally no skills other than lawyering skills, judging skills. I can’t fix a broken pipe. I can’t understand most complicated scientific matters. I’m strictly a liberal arts graduate who is interested in ideas. I love to read. I love the arts and I am firmly of the view that my significance as a person is to be measured by the service that I am able to perform for other people. I’ve believed that for as long as I can remember. That’s what motivated me to enter the practice of law and that is what accounts for the fact that I spent a substantial part of my time while in private practice engaged in disciplinary work for the bar association. I was directed toward improvement of the profession. It accounts for my pleasure in accepting the offer of this job. I knew it would provide me an opportunity to render public service on a scale that was not possible in my one-person law office. There, I represented individuals and corporations. The results of my efforts rarely had significance beyond the fortunes of the litigants. I did have the feeling that to the extent I was practicing my profession honorably and competently, I was contributing toward its betterment. I was, in a general way, adding to the common good. One of the things that differentiates this country from most others in the world is a relatively just legal system and, to the extent any lawyer or judge contributes to the maintenance or improvement of that system, he or she renders a vital service to the nation. I was pleased when I came on the bench and found the cases I decided, most of which I can’t even remember now, did sometimes have an impact beyond the spheres of the particular people involved in the dispute. Especially now, with this Westlaw system where everything gets published, I find myself cited with some frequency, including to myself. So, lawyers read everything you do and if it has any merit it’s like dropping a pebble in the lake and seeing the concentric circles expand. My desire is to deal with litigants, both civil and criminal, in a way that is fair and just. I know that I won’t always be right but there is no excuse for not always being fair and I believe that I am always fair. I am unaware of any axes that I have to grind. I don’t dislike any group of people except perhaps lawyers who abuse their clients. Therefore, I have remained on as a senior judge to continue performing what I believe is a worthwhile public service. I’d be very disappointed if it is not. The question that crosses my mind from time to time is, how long should I go on? I’ve been a senior judge now for 10 years, and the answer I always give myself is, as long as I can continue making what I regard as a significant contribution to the public good and as long as my health, mental and physical, is good, I’ll continue as long as I’m permitted. I have no plans to retire at any particular time. My plans will be dictated mostly by my health. When I compare what I’m doing now on a daily basis to what I’d be doing if I retire altogether, there simply is no comparison. At least when I practiced law in Waukegan, I was helping people – accomplishing good in that respect. If I were to retire now, I couldn’t return to a law practice. I suppose I could do various kinds of volunteer work. But I believe that I’m rendering a greater public service in my position as a senior district judge. That’s my motivation.
Great Expectations meet Painful Realities
(PART I)

by Steven J. Harper*

In this two-part article, Steven J. Harper, former Kirkland & Ellis LLP partner, author, regular contributor to The American Lawyer – Am Law Daily, and adjunct professor at Northwestern University, challenges law schools to rethink their roles and responsibilities as the profession’s gatekeepers. Part I outlines the problem. In the next issue of The Circuit Rider, Part II proposes solutions.

"Your problems are our problems and our problems are your problems.” – Dean David E. Van Zandt, Northwestern University School of Law, speaking to big law leaders at the PLI Law Firm Leadership and Management Institute on February 1, 2010

“We have met the enemy and he is us.” – Pogo, 1971

The second half of Dean Van Zandt’s statement was a triumph of hope over reality. As a 30-year veteran of a large firm, I’m confident that such institutions have never regarded any law school’s problems as theirs. With respect to the first half, he did consider big law’s problems to be his, but that resulted from Van Zandt’s unique view of legal education for which he was an outspoken advocate. I use the past tense because he has none of those problems anymore. On January 1, 2011, he became president of The New School in Greenwich Village.

Continued on page 25

*Steven J. Harper was a litigator at Kirkland & Ellis LLP for 30 years. He is a Fellow of the American College of Trial Lawyers, an Adjunct Professor at Northwestern University’s Law School and Weinberg College of Arts & Sciences, a regular contributor to The American Lawyer (Am Law Daily), and the author of The Partnership (a legal thriller set in a large firm) and two other books, including Crossing Hoffa: A Teamster’s Story (a Chicago Tribune “Best Book of the Year”). His award-winning blog is “The Belly of the Beast” (www.thebellyofthebeast.wordpress.com – ABA honoree as one of the Best Blogs of 2010). A graduate of Harvard Law School (magna cum laude) and Northwestern University (B.A./M.A. combined program in economics with honors and Phi Beta Kappa), his website is www.stevenjharper.com.
This article is not a retrospective assessment of Van Zandt’s long and distinguished tenure at the top of a great law school. He led Northwestern to national prominence in many areas – enhancing a distinguished faculty, recruiting talented students, developing the Bluhm Legal Clinic’s Centers for Wrongful Convictions, Trial Strategy, Children and Family Justice, International Human Rights, and more. Faculty, administration, and alumni should share in the pride of his accomplishments. Nevertheless, his departure from the legal academy and the installation of his replacement provides an opportunity to revisit his special vision of legal education. He described it in “Client-Ready Law Graduates,” which appeared in the fall 2009 issue of the ABA’s Litigation quarterly, and again in his PLI presentation a month later. While toasting him in many respects for a job well-done, I offer this query: In pursuit of a laudable goal – revising curriculum to meet 21st century challenges – should a law school regard its principal academic mission as training young attorneys to meet large firms’ needs for a business school-type education?

Van Zandt answered with a resounding yes. Other schools probably pursue similar approaches, albeit with a lower and less controversial profile. Wearing the maverick label to the end, Van Zandt first donned it when he penned the lone dissent to all other deans’ condemnation of U.S. News’ law school rankings. At least publicly, he was still alone on that issue when he left Northwestern more than a decade later. His article in Litigation [Vol. 36, No. 1, Fall 2009] combines with his PLI presentation to make a fitting bookend. My critique is not directed at Van Zandt personally. Rather, it questions an approach to legal education that he pioneered; it challenges the MBA mentality of misguided metrics.

“Client-Ready Law Graduates,” he wrote in “Client-Ready Law Graduates,” and laws schools “have not kept up.” (Van Zandt, p. 11) Then came the metrics. Citing revenue growth at the nation’s top 200 grossing law firms, he extolled their vanishing $160,000 starting salaries before describing Northwestern’s new long-range strategic document. With much fanfare only weeks before the collapse of Lehman Brothers, Van Zandt announced his first major initiative resulting from Plan 2008: Preparing Great Leaders for the Changing World – the accelerated JD. (http://www.law.northwestern.edu/difference/documents/NorthwesternLawPlan2008.pdf) He hailed the program as a key innovation resulting from his unprecedented approach: Conducting focus groups to ascertain prospective employers’ desires – with a special emphasis on large law firms.

It is certainly appropriate for any dean to solicit input from all relevant quarters, including those who offer some graduates the best-paying jobs. But Van Zandt’s speech to the PLI revealed that big law loomed particularly large in his thinking. In that presentation, he analyzed law school as a business catering to large firms. He started with the fees that clients pay as the principal determinants of new associates’ starting compensation. Accepting as given the million dollar average incomes of Am Law 100 equity partners, his goal was to put graduates into high-paying entry level jobs because, he said, those wages set the maximum tuition that law schools can charge. Beyond this breakeven value, pursuing a legal degree became economically irrational. The next Atticus Finch should seek another line of work.

This “law school as a business” approach ignores critical facts.

First, most prospective law students don’t analyze the decision to pursue a degree according to economic models of rational behavior and, even more importantly for reasons described later, many shouldn’t. Choosing to become a lawyer – or anything else – involves more than calculating whether an initial job will yield a reasonable return on the educational investment for the degree it requires. Financial payback can be a relevant factor. In fact, to those considering a legal career solely for its potential monetary rewards, I offer this advice: Heed the implicit warning in Van Zandt’s economic analysis – namely, that the secure, six-figure job you seek might not be there – and reconsider your own ambitions.

Continued on page 26
Great Expectations meet Painful Realities

Continued from page 25

But for those who truly want to be attorneys and understand what the job entails, such a sterile calculation should not decide the issue. What their parents told them was true: There’s more to life than money. Similarly, law schools should never become mere producers of widgets for large firm customers willing to pay the most for their outputs. They stand for more than that. Or at least, they should. Second, big firms employing fewer than 15% of the nation’s one million attorneys are important, but they’re not the only game in town. In fact, employment in those firms probably shouldn’t even be a goal for most students – which leads to a third point.

Associates who begin their careers in large firms don’t stay there. Even Plan 2008 acknowledged, “While the overwhelming majority of [Northwestern] graduates, as well as the graduates of other top law schools, still begin their careers in big law firms, very few will remain to become partners…” (Plan 2008, p. 5) This casual observation cried out for elucidation that never came. In “Client-Ready Law Graduates,” Van Zandt alluded to graduates who “embark on a journey through a multi-job career.” (Van Zandt, p. 12) Such gentle language masked a troubling truth: The predominant big law model requires high levels of associate attrition – not solely for the purpose of assuring quality, but also to maintain economic leverage ratios that produce staggering equity partner wealth. As eminently qualified attorneys consistently get their walking papers instead of hard-earned and well-deserved promotions to partnership, why should any law school view its most important job as stocking the front end of that assembly line?

Consider metrics that get too little attention. According to the NALP Foundation, the average associate attrition rate in 2002 for firms of 500 or more attorneys was 15% – the same as the average of all NALP categories (under 100 lawyers, 101-250, 251-500, and over 500). (Toward Effective Management of Associate Mobility (NALP Foundation, 2005) p. 16). Over the next five years, the rate for the largest firms cruised past all others to 20% – that’s for just a single year. By 2007, the average associate attrition rate in firms of 500 or more lawyers equaled 70% of hiring. For every 10 people added to the payroll that year, seven departed. And that was before the crash of 2008. (Update on Associate Attrition (NALP Foundation, 2008) p. 12)

Surely, the refugees landed great jobs elsewhere, right? You decide. Typically, an associate’s first move preceded many more that followed. Forty percent went to other firms where the vast majority of these lateral hires found their personal attrition cycles accelerating. Another 20% took in-house jobs for corporate clients. About the same number went to unknown or undecided destinations. (Update, p. 33)

Job insecurity doesn’t end with promotion to partner, either. Increasingly, firms have moved from single-tier partnerships to multiple classifications in which only equity partners share profits. In May 2009, The American Lawyer reported that the number of non-equity partners in the largest 100 firms had grown threefold over the prior decade while the number of equity partners increased by only one-third. (The American Lawyer, May 2009, p. 186). Ask firm leaders pulling up these ladders to predict the number of new hires who will capture the brass ring of equity partnership 10 or more years later. Then, if you get an honest response, ask yourself how anyone could reasonably harbor such an ambition. The prospects are less daunting than playing the lottery, but at least those tickets come with a smaller investment and quicker disappointment.

What has made the road to equity partnership so difficult? The proliferation of more misguided metrics. Van Zandt’s Litigation article observed that the large firms dominating the profession have evolved from a traditional guild into a competitive business. A more direct and less flattering articulation is that the most prestigious institutions in a noble profession have devolved into a collection of unforgiving bottom-line enterprises focused on short-term results.
The ubiquitous metric – average equity profits-per-partner rankings for the Am Law 100 (and 200) – has become a scorecard by which most large firms now measure their success each year.

After it first appeared in 1985, the new Am Law list tapped into attorneys’ competitive instincts and began to influence decisions. Most firms wanted to climb up the roster (which initially included only the top 50); that meant increasing average equity partner profits each year. By the dawn of the new millennium, a generation of joint-degree JD/MBAs with ready access to business school techniques had teamed with a new cottage industry of self-proclaimed expert consultants in law firm management to formalize the model: Bring ever-increasing numbers of new bodies into the base of the pyramid while limiting entry at the top. For most associates, equity partnership became a distant dream.

Apart from and complementary to the Am Law rankings, more misguided metrics began to rule as billings, billable hours, and associate/equity partner leverage ratios – let’s call them deceptively objective performance evaluators (“DOPE”) – made decisions about people easy; a firm’s culture soon followed. Economic incentives determined behavior:

– Seeking a partner to mentor young lawyers, just as others had once mentored him or her? They see the attrition data, too. Why waste non-billable time training those who are likely to be gone after a year or two?

– Hoping that partners will share client billings with talented contemporaries and protégés, thereby assuring the institutional continuity of those client relationships? That’s asking them to commit economic suicide. Senior lawyers retain client control to justify their current year compensation and/or to persuade other firms that their independent books of business make them desirable lateral hires. Certainly, some attorneys still do the right thing in true partner-like fashion. But most big law incentive structures – based on DOPE – render such behavior institutionally challenging and financially unrewarding.

Meanwhile, the rich have become richer. In 1985, average partner profits for that year’s inaugural list of the Am Law 50 were $300,000 ($623,000 in today’s dollars); in 2009, the top 50 earned more than $1.5 million. (Andrew R. Dunlap and Katherine L. McDaniel, American Lawyer.com, “Catching Up With the Class of 1985” http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202457909833) Although exceptions survive, big law in general has succumbed to an overriding MBA mentality focused on short-term profits. The lucrative rewards for those at the top made its central tenets immune from serious consideration, analysis, criticism, and debate. Adhering to misguided metrics cloaked greed in respectability while creating the comfortable illusion that results were fair.

“Just look at the numbers,” said the decision-makers.

It’s still true. Too many big firm managers want to tout annual earnings increases. So even in tough times, they work feverishly to keep their financial trees growing to the sky, as the bloodbaths of 2008 and 2009 proved with agonizing clarity. The first casualties were outside the equity ranks: Income partners, associates, and salaried staff lost their jobs or otherwise bore disproportionate burdens of the economic downturn. That’s how what became known as “Bloody Thursday” occurred in mid-February 2009; calling it a second St. Valentine’s Day massacre was too obvious. Attorney unemployment reached record heights while average annual equity partner earnings for the Am Law 100 remained comfortably above $1 million and leverage ratios kept climbing.

Of course, every law school dean wants his graduates to find good jobs. Indeed, what’s the short-run alternative? Unemployment as student loans come due? But that goal doesn’t require equating good with well-paying and then converting it to a school’s long-term strategy. No law school should elevate big firms to a lofty status that accepts their business models as a given, puts their resulting cultures beyond scrutiny, and reworks curriculum to satisfy their desires. That leads to my fourth and most important point.

After describing the growing legal services demand that fueled competition for top law school graduates and increased big law starting salaries, Van Zandt suggested, “Obviously, this has been wonderful for the lawyers, at least those who have graduated from the top law schools...” (Van Zandt, p. 11).
Great Expectations meet Painful Realities

Continued from page 27

Not really. Attorney misery in many large firms goes far beyond John Grisham’s fictional portrayals in The Associate (and mine in The Partnership). Serious concerns about the profession’s psychological condition began emerging 20 years ago when Johns Hopkins researchers reported that attorneys led all occupations in the prevalence of clinical depression. The contest wasn’t close: Lawyers were almost four times more likely to suffer from this affliction than the average rate for all 104 job groups surveyed. Retail apparel salespersons ranked a distant second. (William W. Eaton, James C. Anthony, Wallace Mandel, and Roberta Garrison, “Occupations and the Prevalence of Major Depressive Disorder,” Journal of Occupational Medicine, November 1990, p. 1079-1087).

The Johns Hopkins study didn’t categorize lawyers according to their practice settings, so there was no reason to isolate big firms as posing special challenges to emotional health. But subsequent reports made distinctions. In a 2007 ABA survey, only 42% of all attorneys practicing 10 years or more said they would advise a young person to pursue a legal career. More than half of big firm attorneys reported dissatisfaction with theirs. (Stephanie F. Ward, “The Pulse of the Profession,” ABA Journal, October 2007).

Could such angst simply reflect a universal discontentment that transcends attorneys? It’s a comforting thought. After all, the same MBA mentality of misguided metrics prevalent in the legal world has overtaken other professions as well. Everyone has anecdotes: Doctors complain about the loss of professionalism in medicine; journalists, college professors, and many others laboring in fields once regarded as special callings voice similar sentiments—and they’re all correct. A recent book, Urban Lawyers, argued that lawyers weren’t that unhappy, but the interviewers in that 1995 study of Chicago attorneys met face-to-face with their subjects, almost always in the respondents’ offices. In a remarkable understatement of most lawyers’ reluctance to admit error, the authors acknowledge the impact of that methodological flaw: “It is...possible...that answers to both satisfaction and the career choice questions are biased toward the positive side of the scale by respondents’ desire to present themselves as successful persons. They may be reluctant to admit, to others or themselves, that they made poor choices.” (John P. Heinz, Robert L. Nelson, Rebecca L. Sandefur, and Edward O. Laumann, Urban Lawyers: The New Social Structure of the Bar (University of Chicago Press, 2005), p. 266).

In the end, a dissatisfied lawyer’s search for comfort in the misery of others is ultimately unrewarding. A 2007 study from the University of Chicago’s National Opinion Research Center reported a 50% job satisfaction rate for attorneys, far behind clergy (87%), firefighters (80%), physical therapists (78%), authors (74%), special education teachers (70%), and many others. At least we’re happier than roofers and bartenders. (Tom W. Smith, “Job Satisfaction in the United States,” NORC/University of Chicago, April 17, 2007, pp. 3, 5).

More pointedly, the ABA’s 2007 survey found far less dissatisfaction (only one-third of respondents) among public sector lawyers. When asked if they thought their clients or organizations valued their contributions, 70% of them said yes. In contrast, fewer than half of big firm attorneys responded affirmatively to that question. Sadly, the negative results may further the problem because the ABA survey canvassed only practicing lawyers. Of the one million plus people with law degrees, 750,000 have legal jobs. How many of the 250,000 others fled the profession because of dissatisfaction with their legal careers? No one knows.

The prevalence of dissatisfied attorneys is the critical issue confronting the profession, but it remains the unacknowledged elephant in rooms where it should be tackled most directly: law schools. As a group, large firm attorneys are the unhappiest of a very dissatisfied lot.

That takes us back to the illusory comfort of metrics and the implications for legal education. With an advanced degree in economics, I’m not an anarchist who opposes the collection and use of data. That would be silly. But when decision-makers focus myopically on numbers to the exclusion of everything else, bad things can happen. Today, the difficulties start with student reliance on U.S. News & World Report rankings.

Many educators have exposed that publication’s methodological flaws. Early on, virtually every law school dean, except Van Zandt, signed a letter condemning the U.S. News law school evaluations as counterproductive to thoughtful individual choice.

Continued on page 29
Great Expectations meet Painful Realities

Continued from page 28

Northwestern’s dean dissented, arguing that even bad information was better than none—a proposition at odds with the very existence of fraud and misrepresentation causes of action.

The next problem became institutional behavior that catered to the *U.S. News* criteria. Northwestern’s aggressive recruitment of transfer students was one high-profile example. (Leslie A. Gordon, “Transfers Bolster Elite Schools,” *ABA Journal*, December 2008). Such students’ LSAT scores don’t count in that particular *U.S. News* ranking criterion. So during the 2006-2007 academic year, the school reportedly sent conditional acceptances to a number of previously rejected students who'd gone elsewhere. Eventually, 43 transfers signed on, the original class grew, and the dean defended the policy in straightforward business school jargon: “Chrysler and General Motors don’t agree not to poach each other’s customers.”

Emphasizing the advantages to the transferees who upgraded to a Northwestern degree and thereby improved their big law job prospects, he never explained how the additional students enhanced the educational experiences or employment opportunities of the original class; it’s difficult to imagine how they did. But the added tuition payments improved another business-type metric—the bottom-line. While feigning disgust over the *U.S. News* rankings and complaining about Van Zandt’s “poaching,” other schools play the game, too. According to the *ABA Journal* article that first disclosed Northwestern’s conditional acceptance letters, Georgetown, UCLA, and NYU also had significant numbers of transfer students. Likewise, an important ranking criterion—employment status nine months after graduation—makes no distinction between working at Cravath or as a greeter at Wal-mart. As *The New York Times* reported in early 2011, that “Enron-type accounting” allowed the most recent average of all law schools to reach 93%. (David Segal, “Is Law School a Losing Game?” *The New York Times*, January 9, 2011, Business p.1) That’s right; the reported average employment rate for all law schools in 2010 was 93%. Just don’t ask those recent graduates whether they needed a JD to do their jobs.

Law school deans possess relevant information that their students lack. What should they do with it? Ay, there’s the rub. Revealing the truth about employment prospects and the winners’ typical large firm experiences—including rates of attrition, dissatisfaction, promotion, and leverage—risks lowering two key metrics: Maximizing applications and placing students in the best-paying jobs.

To be fair, many Northwestern graduates accept judicial clerkships (9% according to the 2009 class statistics posted on its website). (http://www.law.northwestern.edu/career/statistics/) Likewise, Northwestern’s public service fellowship program forgives loans to students pursuing that path (5% of its 2009 graduates took public interest/government jobs). But Van Zandt often urged that he wanted Northwestern to be big law’s “go-to school.” The problem is that, even in rosier financial times, large law firms were a dissatisfying long-term destination for most new associates who started their careers in one. Today, it’s become worse.

In the end, those who live by the sword of misguided metrics remain oblivious at their peril when the blade swings wildly toward them. If nothing else, ongoing turmoil in the wake of the Great Recession—and the concomitant reduction in high-paying big firm starting positions—slowed everything. The death of some big firms—Heller Ehrman, Thelen, and Howrey among them—should have given all large firms and the law schools catering to them pause.

Of course, big law is relevant to law schools. After all, not all such institutions are the same—2007 associate attrition rates for firms of 500 or more attorneys ranged from 14 to 32 percent and current non-equity/equity attorney leverage ratios likewise vary from one to almost seven. (*Update*, p. 12; *The American Lawyer*, May 2010). Even in the harshest big firm environments, some graduates—perhaps as many as half—find a fit that fulfills them. The problem for the profession is the growing majority consisting of everyone else.

In Part II of this two-part article, Mr. Harper will describe how students and, eventually, the entire profession become the ultimate victims when law schools focus myopically on rankings criteria and strive blindly to maximize graduate placement in large law firms.
The common law’s “sporting theory of justice” permitted “the concealment of one’s evidential resources and the preservation of the opponent’s defenseless ignorance as a fair and irreproachable accompaniment of the game of litigation.” 6 J. Wigmore, Discovery § 1845 at 490 (3rd Ed.1940). Indeed, requiring disclosure of evidence was “repugnant to all sportsmanlike instincts.” *Id.* Today’s attitude toward discovery is vastly different. Contemporary thought has concluded that secrecy is not congenial to truth-seeking, and that trial by ambush is incompatible with the just determination of cases on their merits. Consistent with that view, and with the long-standing perception that experts are too often “the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit,” and that “there is hardly anything, not palpably absurd on its face that cannot now be proved by some so-called experts,” *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 382 (7th Cir. 1986) (Posner, J.), the 1993 Amendments to Rule 26 of the Federal Rules of Civil Procedure established a regime of expansive discovery of experts.

Central to the 1993 Amendments was Rule 26(a)(2)(B)(ii)’s requirement that the testifying experts on each side submit a written report, signed by the witness, containing, in addition to the opinions to be expressed at trial and the bases for those opinions, “the data or other information considered by the witness in forming them.” In interpreting the Rule, the vast

*Jeffrey Cole is a United States Magistrate Judge in Chicago and is the Editor-in-Chief of The Circuit Rider.*
Communications Between Lawyers and Experts

Continued from page 30

The majority of courts concluded that the phrase “other information” included virtually anything communicated to the expert by counsel, regardless of whether the expert ultimately relied on or used the information. Since no privilege attached to the information, the communications between lawyer and expert were freely discoverable.

Even though broad-based expert discovery was compatible with the underlying goals of Rule 26 and the repeated concerns from all quarters about experts’ partiality, *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*, 372 F.Supp.2d 1104, 1106 (N.D.Ill. 2005)(collecting authorities), there was constant carping from lawyers about the costs associated with such discovery and the intrusions into what was argued should be regarded as core work-product of counsel. The objectors insisted that a cost-benefit analysis did not support the expansive discovery allowed by the 1993 Amendments. Interestingly, academics took a very different position and vigorously opposed changes that would narrow the scope of expert disclosure and the discoverability of communications between the expert and the lawyer who hired him.

The upshot of this conflict is to be found in the 2010 Amendments to Rule 26 that became effective December 1, 2010. The intent of the Amendments is, as the Advisory Committee Note states, to “alter the outcome in cases” decided under the 1993 Amendments to Rule 26. To that end, amended Rule 26(a)(2)(B), while maintaining the requirement that the report contain a complete statement of all opinions and their bases, eliminated the phrase, “or other information.” Thus, the expert’s written report need only disclose “the facts or data considered by the witness in forming” the opinions expressed in the report. Rule 26(a)(2)(B)(ii). Under this amended subsection, there need only be a disclosure of “material of a factual nature.” Advisory Committee Note to 2010 Amendments. Discussions about the significance of the data or its relationship to the theory of the case, etc. need not be disclosed and are not discoverable through deposition or interrogatory. Since the Amendment relates to the content of the required report, it will apply only to those communications between counsel and an expert who is obligated to produce a report, namely the witness who is retained or specially employed to provide expert testimony in the case or whose duties as the parties’ employee regularly involve giving expert testimony. Rule 26(a)(2)(B).

Rule 26(a)(2)(C) is also new. It deals with witnesses who are not required to provide a written report, although they will be giving testimony under Rule 702, 703 or 705 of the Federal Rules of Evidence. The new Rule requires a written disclosure (by counsel) of the subject matter on which the witness is expected to present evidence and a summary of the facts and opinions to which the witness is expected to testify. Rule 26(a)(2)(C)(i) and (ii). Treating physicians fall within this rule. Whether the witness will be excused from preparing a report will depend not merely on whether he or she was a treating doctor but on the content of the testimony. See *Bannister v. Burton*, _F.3d_, 2011 WL 547487 (7th Cir. 2011); *Meyers v. Nat’l RR Passenger Corp.*, 619 F.3d 729 (7th Cir. 2010); *Fielden v. CSX Transport, Inc.*, 482 F.3d 866 (6th Cir. 2007).

Another significant amendment is Rule 26(b)(4)(B), which is captioned “Trial-Preparation Protection for Draft Reports or Disclosures.” Under the 1993 Amendments to Rule 26, drafts of an expert’s report were freely discoverable.

Continued on page 32
Communications Between Lawyers and Experts

Continued from page 31

This was one of the chief objections voiced to the Committee considering amendments to Rule 26. Those objections proved persuasive and resulted in Rule 26(b)(4)(B), which protects from discovery “drafts of any report or disclosure” “required under Rule 26(a)(2).” By its terms, the new Rule includes reports of witnesses retained or specially employed to provide expert testimony in the case or one whose duties as a party’s employee involve giving expert testimony, Rule 26(a)(2)(B), and drafts of disclosures of those witnesses who are not required to provide a report but who are expected to give expert testimony at trial. 26(a)(2)(C). The form of the draft is irrelevant to protectability.

Rule 26(b)(4)(C) is also new. With three exceptions, it provides work-product protection to communications between a party’s attorney and expert witness that Rule 26(b)(3) affords to documents and tangible things prepared in anticipation of litigation or trial. The Rule however applies only to communications between a party’s attorney and a witness who is required to produce a report under Rule 26(a)(2)(B). The three exceptions to the prohibition on discovery are communications that: 1) relate to the compensation to be paid to the expert; 2) identify the facts or data that the attorney provided the expert and that the expert considered in forming the opinion; and 3) identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed. Rule 26(b)(4)(C)(i)-(iii). The protective aspects of the Rule do not apply to those witnesses who are not obligated to furnish a written report pursuant to Rule 26(a)(2)(B).

The exclusion from work-product protection of communications relating to “compensation for the expert’s study or testimony,” Rule 26(b)(4)(C)(i), was based on the recognition – supported by more than two centuries of common law development and the Federal Rules of Evidence – that such information is relevant to the question of potential bias. Bias, of course, is always relevant and never collateral, United States v. Abel, 469 U.S. 45 (1994); United States v. Vasquez, __ F.3d __, 2011 WL 855850, 7 (7th Cir.2011), and will seldom, if ever, be subject to Rule 403, Federal Rules of Evidence, because it is not “unfairly” prejudicial. The Advisory Committee Note stressed that since “the objective” of the compensation exclusion was “to permit full inquiry into such potential sources of bias,” the exclusion should be read expansively to include communications “about additional benefits to the expert, such as further work in the event of a successful result in the present case” and compensation for work done by a person or organization associated with the expert. Cf., United States v. Brown, 938 F.2d 1482, 1488 (1st Cir. 1991) (Expectation or hope of future benefits, of any kind, can evidence bias). Compare Sun Refining & Marketing Co. v. Statheros Shipping Corp., 761 F.Supp. 293, 299 (S.D.N.Y.), affirmed, 948 F.2d 1277 (2d Cir. 1991) (“[A] judge cannot have a prospective financial relationship with one side yet persuade the other that he can judge fairly in the case.”); Midwest Generation EME, LLC v. Continuum Chemical Corp., 2010 WL 2517047 (N.D.Ill. 2010)(“Under a realistic appraisal of psychological tendencies and human weakness,’ Withrow v. Larkin, 421 U.S. 35, 47 (1975), where [there exists a] relationship [that] involves a system of referrals, bias is inherent and inescapable, for '[g]etting and keeping customers, is, of course, the life blood of any business.’ Kennedy v. C.I. R., 673 F.2d 167, 176 (6th Cir.1982).”).

Rule 26(b)(4)(C)(i)’s allowance of discovery of communications relating to compensation arrangements was not (and could not have been) intended to disallow or limit discovery of other areas of potential bias, for the range of circumstances from which the jury may properly infer bias is not limited to those involving financial incentives.

Continued on page 33
Rather it is as broad as human nature is diverse. Richman v. Sheahan, 415 F.Supp.2d 929, 943 (N.D.Ill. 2006). Indeed, Wigmore has said it is “infinite.” IIIA Wigmore on Evidence, §949 at 984; §950 at 793 (Chadbourn rev. 1970). And so, the cases are uniform in holding that the jury is entitled to assess evidence of any circumstance that might lead the witness to slant, unconsciously or otherwise, his testimony. United States v. Jamison, _F.3d_, 2011 WL 923506, 2 (7th Cir. 2011); United States v. Martin, 618 F.3d 705, 727 (7th Cir. 2010). Concern about experts’ partiality is not new. In his famous speech in 1921 to the Bar Association of the City of New York – “The Deficiencies of Trials to Reach the Heart of the Matter” – Learned Hand said that the expert “inevitably or nearly, must take on the attitude of a partisan, for partisan they surely become.” A year earlier, the Illinois Supreme Court was even more emphatic: Expert testimony is “regarded as the most unsatisfactory part of judicial administration. This is with good reason, because the expert is often the hired partisan, and his opinion is a response to a pecuniary stimulus.” Opp v. Pryor, 294 Ill. 538, 128 N.E. 580, 583 (1920).

The passage of time has not improved the situation. Judge Weinstein has lamented that: “[a]n expert can be found to testify to the truth of almost any factual theory, no matter how frivolous.” Weinstein, Improving Expert Testimony, 20 U.Rich.L.Rev. 473, 482 (1986). And this from Judge Easterbrook: “[The expert’s] affidavit exemplifies everything that is bad about expert witnesses in litigation. It is full of vigorous assertion..., carefully tailored to support plaintiffs’ position but devoid of analysis.” Minasian v. Standard Chartered Bank, PLC, 109 F.3d 1212, 1216 (7th Cir. 1997). Eminent scholars are equally critical. See e.g., Peter W. Huber, Galileo’s Revenge, Junk Science in the Courtroom, 206-09 (Basic Books 1991)(“A Ph.D. can be found to swear to almost any ‘expert’ proposition no matter how false or foolish.”); Michael H. Graham, Expert Witness Testimony and the Federal Rules of Evidence: Insuring Assurance of Trustworthiness, 1986 Ill.L.Rev. 43, 45 (“Today practicing lawyers can locate quickly and easily an expert witness to advocate nearly anything the lawyers desire.”); 29 Wright and Gold, Federal Practice and Procedure, § 6262 at 183 (1997).

The ability to discover evidence relating to an expert’s possible bias is indispensable to “[v]igorous cross-examination,” which the Supreme Court has stressed is crucial to “attacking shaky but admissible [expert] evidence.” Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993). It is arguable that the 2010 Amendments’ limitations on expert discovery will reduce counsel’s ability to bring to the jury’s attention the expert’s susceptibility to give an opinion that conforms with the ultimate goals of the lawyer who retained him. The Advisory Committee Note to the 2010 Amendments reflects the Committee’s awareness of the problem, but concludes that the benefits to be derived from the new rules outweigh any detriments, and that the Amendments will not deprive the jury of relevant information to aid in its determination of an expert’s credibility. Only time will tell.
THE 2009 AMENDMENTS TO RULE 15(A) –
Fundamental Changes and Potential Pitfalls
FOR FEDERAL PRACTITIONERS

By Katherine A. Winchester and Jessica Benson Cox∗

The 2009 Amendments to Rule 15(a)

Federal Rule of Civil Procedure 15(a) was amended effective December 1, 2009. The amendment alters among other things when a party may amend its pleading as a matter of right. In particular, the new Rule provides that the right to amend as a matter of course is not cut off by an opponent’s filing of a responsive pleading. In addition, the new Rule now addresses the filing deadlines for amended pleadings when a Rule 12 motion is filed in lieu of a responsive pleading. Finally, deadlines relative to amended pleadings have been altered to multiples of 7. Following a year of implementation of the revised Rule, some questions have surfaced as to whether the revised provisions regarding amendments as a matter of course create a gap in some cases. That issue, as well as the more benign changes, are discussed below.

The pre-2009 Rule 15 provided:

(a) Amendments Before Trial.

1. Amending as a Matter of Course. A party may amend its pleading once as a matter of course:
   (A) before being served with a responsive pleading; or
   (B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

2. Other Amendments. In all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.

3. Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.

Continued on page 35

∗Katherine and Jessica are attorneys in the Drug, Device and Chemical Litigation practice group at Ice Miller LLP in Indianapolis.
35

The Circuit Rider

Fundamental Changes and Potential Pitfalls

Continued from page 34

Purpose Behind the Amendments As Reflected in the Committee Notes

The purpose behind the substantive changes to Rule 15(a) was to limit "judicial involvement in the pleading process when there is little reason for doing so." 4 Wright & Miller, Federal Practice and Procedure: Civil 3d §1480 (2010). Because a responsive pleading "may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise," the revised Rule 15 allows for amendment of a pleading after a responsive pleading has been filed. See Committee Note to the 2009 Amendments to Rule 15(a). This fundamental change is intended to streamline the amendment process and limit the need for the court to be involved in the early stages of litigation. In addition, the Rule explicitly addresses what had become a common situation in federal litigation, i.e., where a motion to dismiss was filed before a responsive pleading and the opposing party filed an amended complaint after the motion was fully briefed or even after a decision on the motion. See id. Accordingly, by requiring the pleader to amend within 21 days after service of a motion, "[t]his provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided and will expedite determination of issues that otherwise might be raised seriatim." Id.

In addition, the changes to Rule 15 align the deadlines in Rule 15(a)(1) and (a)(3) with other federal rules to reflect multiples of 7. Subsection (a)(1) was extended from 20 days to 21 days, and subsection (a)(3) was extended from 10 days to 14 days. Id. In addition, the provision in (a)(1) that cut off the time to amend if the matter was placed on the trial calendar was deleted as "Rule 40 no longer refers to a trial calendar, and many courts have abandoned formal trial calendars." Id.

Potential Confusion Under Revised Rule 15(a)

Although the changes to Rule 15 were intended to limit the necessity of court intervention in the early stages of litigation, some confusion about the application of the new rule may actually create the need for more judicial intervention. In particular, the question has arisen whether a gap exists in a pleader's right to amend as a matter of course between 21 days after filing and 21 days after service of a responsive pleading or Rule 12 motion.

Consider the following hypothetical situation:

(1) Plaintiff files and serves a complaint against defendants A, B, and C on January 3. Accordingly, defendants' answer or other responsive pleading would be due on January 24.

(2) Defendants A, B, and C file a notice of extension of time to file responsive pleading rendering defendants' responses due by February 23.

(3) Plaintiff amends its complaint and names only Defendants A and B as parties on February 1. Given that more than 21 days have elapsed since service of the complaint and no defendant has responded, does the plaintiff have the right to amend its complaint on February 1 as a matter of course? Under the new Rule 15(a), the answer is unclear. Under the old version of Rule 15(a), plaintiff undoubtedly had the right to amend its complaint on February 1, as no defendant had yet filed a responsive pleading and the complaint was one for which a responsive pleading was allowed. The new version of Rule 15(a), however, is ambiguous.

Continued on page 36
In our hypothetical, the plaintiff filed an amended complaint 29 days after serving his complaint, and thus he could not amend as a matter of right according to 15(a)(1)(A). Plaintiff’s complaint requires a response, so the first part of 15(a)(1)(B) is satisfied. It is not clear, however, if (B) allows an amendment before, as well as after, any defendant files a response or motion under Rule 12.

In this situation, whether or not counsel for defendant C would be obligated to file an answer on February 23 is also unclear. Counsel for defendant C would be faced with deciding whether to consider the original complaint still operative (and file an answer in an action where he, in all likelihood, is no longer a party), or to consider the amended complaint as properly filed (and risk default for failing to answer the original complaint).

The Committee Notes to the Rule do not explicitly address this potential gap, but they seem to contemplate that a pleader, like our hypothetical plaintiff, can amend as a matter of right anytime up to and including 21 days after a responsive pleading or Rule 12 motion. First, in discussing amendments in cases where a responsive pleading or motion is allowed, the Notes only discuss the application of (a)(1)(B), not the 21-day-after-service-of-pleading provision of (a)(1)(A). Second, although the revised Rule (a)(1)(A) does not limit its application to pleadings where no response is allowed by the Rules, the Notes seem to read in such a limitation: “Finally, amended Rule 15(a)(1) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision [in the prior (a)(1)(B)] that cuts off the right if the action is on the trial calendar.” Accordingly, if the Notes are followed, the amended complaint in our hypothetical would be operative and defendant C need not respond.

Case Law Interpreting the Application of New Rule 15(a)

Not surprisingly, with the new Rule in its infancy, case law on this issue is sparse. Some courts have interpreted the new Rule 15(a) in the disjunctive and in seeming disaccord with the Notes. Under these decisions, a plaintiff may amend its complaint as a matter of right either: (1) within 21 days of filing, or (2) within 21 days of the filing of a motion to dismiss or answer. This interpretation creates a gap – an otherwise appropriate amendment may not be proper if more than 21 days have passed since the filing of an original complaint but before a defendant answers or files a motion to dismiss. See Soler v. United States, No. 10 Civ. 04342, 2010 WL 5173858, at *3 (S.D.N.Y. Dec. 20, 2010) (explaining that a party may amend once as a matter of course “either twenty-one days after serving it or within twenty-one days after service of a responsive pleading or motion under 12(b), (e), or (f)” (emphasis added)); Adams v. Kraft, No. 10-CV-00602, 2010 WL 4939440, at *3 (N.D.Cal. Nov. 30, 2010) (same); Bigler v. Amegy Bank Nat’l Assoc., Adv. No. 10-03029, 2010 WL 1993807, at *3-*4 (Bkrtcy S.D. Tex. May 18, 2010) (explaining plaintiffs’ amendment was not properly as of right under a two-step analysis because it was filed: (1) more than 21 days after they filed original complaint, and (2) more than 21 days after defendant filed a motion to dismiss).

The Northern District of Florida, however, has suggested in dicta that a plaintiff may amend its complaint as of right at any time before 21 days following the filing of a responsive pleading or motion to dismiss. Martinelli v. Morrow, No. 3:09cv256, 2010 WL 2278152, at *1 n.2 (N.D.Fla. June 3, 2010) (stating the amended Rule 15(a) “permits a plaintiff to amend the complaint once as a matter of course within 21 days of either a responsive pleading or a rule 12(b) motion”).

Continued on page 37
Fundamental Changes and Potential Pitfalls

Continued from page 36

The Rationale Behind the Amendments to Rule 15(a) Favor Howard’s Interpretation of its Application

From the Notes to the new Rule 15(a), it is clear that the core aim of the 2009 amendments to Rule 15(a) was to limit needless court intervention. The revised Rule explicitly allows a pleader to amend its pleading as a matter of right in response to arguments raised by the other side – as long as it does so within 21 days after the arguments have been brought to its attention through the pleading or filing. It therefore would make little sense to require a pleader to request permission from the court to amend its complaint of its own volition (rather than in response to a motion to dismiss or answer), as a consequence of waiting more than 21 days to amend. This interpretation of the Rule would be in accord with the Notes, which seem to contemplate no “gap” in the availability or termination of this right until 21 days after a responsive pleading or motion is filed.

In conclusion, federal practitioners, when faced with a potential amendment to a pleading should take into consideration the changes to Rule 15(a), including the timing changes. If your party is the one seeking to amend, it may be prudent to follow a strict interpretation of the Rule and either file within 21 days after the initial pleading was filed or wait until a responsive pleading or motion is filed by the opposing party. In addition, amending parties should recall that an answer filed by the opposing party no longer requires the amending party to seek leave before filing a (first) amended complaint, as long as the amendment is made within 21 days. Finally, the amending party needs to be cognizant that if a motion to dismiss is filed, the party can no longer delay more than 21 days in filing an amended complaint.

The Middle District of Georgia, however, in addressing a “gap” case under the revised Rule 15(a), applied the Rule in accord with the Committee Notes. *Howard v. Hutto*, No. 1:09-CV-120 (WLS), 2011 WL 843910 at *1 (M.D. Ga. Feb. 15, 2011). “While the Motion to Amend was filed more than twenty-one (21) days after the Complaint and waivers of service were mailed to the Defendants, Plaintiff filed his Motion to Amend prior to the filing of Defendants’ Rule 12(b) Motion to Dismiss.” *Id.* Thus, the Howard court found plaintiff’s amendment made as a matter of right to be timely.

Upcoming Board of Governors’ Meeting

Meetings of the Board of Governors of the Seventh Circuit Bar Association are held at the East Bank Club in Chicago, with the exception of the meeting held during the Annual Conference, which will be in the location of that particular year’s conference. Upcoming meetings will be held on:

**Tuesday, May 17, 2011 (at the annual conference)**

**Saturday, September 10, 2011**

*All meetings will be held at the East Bank Club, 500 North Kingsbury Street, Chicago at 10:00 AM*
If conspiracy is the darling of the prosecutor’s nursery, (to borrow Learned Hand’s famous phrase), it is not amiss to say that the waiver doctrine, serving as it does important institutional interests, cf., *Thomas v. Arn*, 474 U.S. 140, 147 (1985), has a special place in the affections of judges. A waiver is a deliberate decision not to present a ground for relief that might otherwise be legally available, precluding even plain error review. *United States v. Hamilton*, 499 F.3d 734, 735 (7th Cir. 2007); *United States v. Babul*, 476 F.3d 498, 500 (7th Cir. 2007). It is to be distinguished from a forfeiture, which is basically an oversight – a failure to make the timely assertion of a right, that limits the scope of appellate review to correction of a “plain error.” *United States v. Diaz-Jimenez*, 622 F.3d 692, 694 (7th Cir. 2010). See also *United States v. Olano*, 507 U.S. 725, 733 (1993); *United States v. Knox*, 624 F.3d 865, 875 (7th Cir. 2010).

Everyone knows how the waiver doctrine works when applied to some claimed blunder by the district judge to which no objection was made. What is not so well known is how it operates where the gripe is with a decision by a magistrate judge to which no objection was filed with the district court. One might think that the ruling – at least as to a non-dispositive pretrial matter, which is self-effectuating when entered, *United States v. Brown*, 79 F.3d 1499 (7th Cir.), *cert. denied*, 519 U.S. 875 (1996), simply gets bundled together at the end of the case with those errors of the district judge and is properly included as an issue on appeal. That’s not how the system works.

*Continued on page 39*

*Jeffrey Cole is a United States Magistrate Judge in Chicago and is the Editor-in-Chief of The Circuit Rider.*
28 U.S.C. §636 and Rule 72, Federal Rules of Civil Procedure, delineate the jurisdiction of magistrate judges and the mechanism for review of their decisions by the district judge who made the referral. As applied in civil cases, §636(b)(1)(A) provides, in pertinent part, that a judge may designate a magistrate judge to “hear and determine” any pretrial matter except a motion for injunctive relief and various, enumerated, dispositive motions, such as motions for judgment on the pleadings, for summary judgment, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action or permit maintenance of a class actions. The list of prohibited motions is illustrative, not exhaustive. The question is whether the motion can fairly be deemed dispositive. See e.g., Williams v. Bee Miller, Inc., 527 F.3d. 259 (2nd Cir. 2008)(motion to remand to the state court, although not mentioned in §636(b)(1)(A), is case dispositive and thus within its scope). Cf. MacNeil Automotive Products, Ltd. v. Cannon Automotive Ltd., 2011 W.L. 812140, 2-3(N.D.Ill.2011)(“Whether the district judge treats a matter as dispositive or non-dispositive depends not on the relief sought, but on the relief entered.”).

Where a non-dispositive, pre-trial matter has been decided by the magistrate judge, Rule 72(a), allows the losing party to object to the order by filing with the referring judge specific, written objections within 14 days after service of the order to which an objection is made. The Rule explicitly prohibits the assignment as error of a defect in the order to which timely objection was not made. It does not prescribe what happens on appeal where there has been no challenge to such a ruling in the district court. In Brown, supra, the Seventh Circuit for the first time squarely addressed the question whether appellate review is waived by the failure to challenge before the district judge a magistrate's pretrial ruling made pursuant to §636(b)(1)(A). The court ultimately concluded that failure to challenge such an order waives the right to attack the ruling on appeal. 79 F.3d at 1504. That continues to be the rule here and in many Circuits. See The Glidden Co. v. Kinsella, 386 Fed.Appx. 535, 544, 2010 WL 2803944, 8 (6th Cir. 2010)(collecting cases); Schur v. L.A. Weight Loss Centers, Inc., 577 F.3d 752, 760 (7th Cir. 2009); Brown, 79 F.3d at 1504, n.4; Caidor v. Onondaga County, 517 F.3d 601 (2nd Cir. 2008); Wingerter v. Chester Quarry Co., 185 F.3d 657, 661 (7th Cir. 1999). However, the waiver “rule is not a jurisdictional waiver provision,” and a default may be excused in the “interests of justice.” Thomas, 474 U.S. at 155. Cf., Douglass v. United Services Auto. Ass’n, 79 F.3d 1415 (5th Cir. 1996)(En Banc) (waiver applies except in cases involving “plain error”). Equitable considerations come into play when determining whether an unchallenged pretrial ruling may yet be contested on appeal, and under certain circumstances the failure to file objections may be excused. Brown, 79 F.3d at 1505; Lorentzen, 64 F.3d at 330

A frequently seen variant of the situation where the losing party fails to appeal the magistrate judge’s decision to the district judge occurs where there is an appeal but it advances arguments never presented to the magistrate judge. Rule 72 effectively allows the district judge to ignore the newly minted claims. The cases are collected in The Glidden Co., 386 Fed.Appx. 535, 544, 2010 WL 2803944, 8. And, while a district judge is not precluded from reviewing sua sponte a magistrate judge’s decision from which no appeal was filed, Schur; 577 F.3d at 760, don’t count on it or on the judge to consider new arguments where objections have been filed with him. Still less should you count on the Court of Appeals to reverse such a discretionary call.

A refusal by the district court to overrule the magistrate judge based on a previously unadvanced argument or issue will be measured by the Court of Appeals under the highly deferential standard of abuse of discretion, which occurs when no reasonable person could agree with the district court's decision. United States v. Harris, 531 F.3d 507, 514 (7th Cir. 2008); Roadway Exp., Inc. v. U.S. Dept. of Labor, 495 F.3d 477, 484-485 (7th Cir. 2007); United States v. Re, 401 F.3d 828, 832 (7th Cir. 2005). See generally, Henry Friendly, Indiscretion About Discretion, 31 Emory L.J. 747 (1982).
Object Now or Forever Hold Your Peace

Continued from page 39

Since discretion denotes the absence of a hard and fast rule, *Langnes v. Green*, 282 U.S. 531, 541 (1931); *Rogers v. Loether*, 467 F.2d 1110, 1111-12 (7th Cir. 1972) (Stevens, J.), on virtually identical facts, two decision makers can arrive at opposite conclusions, both of which constitute appropriate exercises of discretion. *United States v. Banks*, 546 F.3d 507, 508 (7th Cir. 2008). Thus, saving the best for last can be a fatal strategy, since your chances of getting the Court of Appeals to overturn a discretionary determination by the district court not to consider new arguments aren’t particularly good. In fact they are particularly bad. Cf., *Worley v. City of Lilburn*, 2011 WL 43543, 1 (11th Cir.2011).

Perhaps even riskier than waiting to advance an argument until the objections to the magistrate judge’s decision are filed with the district judge is the all-too-frequently-seen approach to brief writing that contents itself with the *ipse dixit* that the magistrate judge’s conclusion was wrong and makes little or no effort to support the conclusion with principle or precedent. A district judge’s almost certain rejection of what the Seventh Circuit has called “shoddy briefing,” *Gross v. Town of Cicero, Ill.* 619 F.3d 697, 704 (7th Cir.2010), will invariably be sustained on appeal. Time and again the Seventh Circuit has said that it is not the obligation of the court to research and construct the legal arguments available to parties, *Gross*, 619 F.3d at 704; *United States v. McLee*, 436 F.3d 751, 760 (7th Cir. 2006), and with unwavering consistency has warned that skeletal, perfunctory, conclusory, undeveloped, or unsupported arguments will be deemed waived. See e.g., *Gross*, supra; *United States v. Collins*, 604 F.3d 481, 488, n. 2 (7th Cir. 2010); *White Eagle Co-opinion Ass’n v. Conner*, 553 F.3d 467, 476 n. 6 (7th Cir. 2009)(collecting cases); *Fabriko Acquisition Corporation v. Prokos*, 536 F.3d 605, 609 (7th Cir. 2008); *de la Rama v. Illinois Dept. of Human Services*, 541 F.3d 681, 688 (7th Cir. 2008); *United States v. Hook*, 471 F.3d 766, 775 (7th Cir. 2006). And the rule applies even where constitutional issues may be involved. *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991).

The waiver rule can also apply to dispositive motions referred under §636(b)(1)(B) to a magistrate judge for recommended findings and/or a recommended disposition of the motion. *S.E.C. v. Benger* 2010 WL 724416 (N.D.Ill.2010). Rule 72(b)(2) and §636(b)(1)(C) require that any objections to the proposed findings and recommendation be specific, be in writing, and be filed with the district judge within 14 days. A ruling on a dispositive matter is not self-effectuating and thus not valid until the district judge acts on the report and recommendation and enters an order. *Brown, supra*. In the absence of an objection, the district judge may simply accept the recommended disposition. *Schur*, 577 F.3d at 760. Unlike review of non-dispositive orders, which are governed by the “clearly erroneous or contrary to law” standard, review of a recommended disposition is *de novo* “of those portions of the report or specified proposed findings or recommendations to which objection is made.” §636(b)(1)(C) (Emphasis supplied).

Rule 72 and § 636(b)(1) are silent with respect to the consequences on appeal of a party’s failure to object. But, citing *United States v. Walters*, 638 F.2d 947 (6th Cir.1981), the Advisory Committee's note to Rule 72(b) states that “[f]ailure to make timely objection to the magistrate’s report prior to its adoption by the district judge may constitute a waiver of appellate review of the district judge's order.” *Thomas v. Arn* made clear that the Courts of Appeals can prescribe a rule that failure to file objections with the district court to a magistrate’s report and recommendation waives the right to appeal all issues addressed in the recommendation, both factual and legal so long as there is a notification of the consequences of that failure by the court to the parties. That is the rule in the Seventh Circuit and in a number of other courts. See *Goyal v. Gas Technology Institute*, 389 Fed.Appx. 539, 543, 2010 WL 3069717, 3 (7th Cir. 2010); *Schur*, 577 F.3d at 760, n.7; *Wingerter*, 185 F.3d at 661; *Lorentzen v. Anderson Pest Control*, 64 F.3d 327, 330 (7th Cir. 1995). See also *Douglass v. United Services Auto. Ass’n*, 79 F.3d 1415 (5th Cir. 1996)(En Banc)(requiring notice)(and collecting and discussing the Circuits’ overall positions on waiver).

Continued on page 41
The policy considerations underlying the waiver rule in this setting were explained by the Supreme Court in *Thomas v. Arn*:

The filing of objections to a magistrate's report enables the district judge to focus attention on those issues-factual and legal—that are at the heart of the parties’ dispute. The Sixth Circuit's rule, by precluding appellate review of any issue not contained in objections, prevents a litigant from “sandbagging” the district judge by failing to object and then appealing. Absent such a rule, any issue before the magistrate would be a proper subject for appellate review. This would either force the court of appeals to consider claims that were never reviewed by the district court, or force the district court to review every issue in every case, no matter how thorough the magistrate's analysis and even if both parties were satisfied with the magistrate's report. Either result would be an inefficient use of judicial resources. In short, the same rationale that prevents a party from raising an issue before a circuit court of appeals that was not raised before the district court applies here.

474 U.S. at 147.

Many Circuit Courts of Appeals have also held that arguments first raised in objections to a magistrate judge’s recommended disposition are waived. Others, however, have held that the district court must address all arguments regardless of whether they were raised before the magistrate judge. Still others hold that a district judge may not consider new arguments absent compelling reasons, while still others hold that a district judge has discretion not to consider arguments raised for the first time in objections to a magistrate judge’s recommended disposition. See *The Glidden Co.*, 386 Fed.Appx. at 544, n.2 (collecting the authorities); *Smith v. School Bd. of Orange County*, 487 F.3d 1361, 1365 (11th Cir. 2007); *Wingerter*, 185 F.3d at 661; *Douglass*, supra.

The Eleventh Circuit, in holding that a district judge has discretion not to consider newly advanced arguments, explained the salutary reasons animating the appellate forfeiture doctrine:

Circuit courts differ on the meaning of *de novo* review by the district court as stated in the Magistrates Act and Federal Rule of Civil Procedure 72(b). For example, in *United States v. George*, the Fourth Circuit held that as part of its obligation to determine *de novo* any issue considered by the magistrate judge to which a proper objection is made, a district court must consider all arguments, regardless of whether they were raised before the magistrate judge. The First, Fifth, Ninth, and Tenth Circuits, however, have rejected this idea, finding that requiring the district court to consider new arguments raised in the objections effectively would eliminate efficiencies gained through the Magistrates Act and would unfairly benefit litigants who could change their tactics after issuance of the magistrate judge's report and recommendation.

In *Paterson-Leitch Co. v. Massachusetts Municipal Wholesale Electric Co.*, the First Circuit held "categorically that an unsuccessful party is not entitled as of right to de novo review by the judge of an argument never seasonably raised before the magistrate." Because the magistrate judge system was created to help alleviate the workload of the district judges, “it would be fundamentally unfair to permit a litigant to set its case in motion before the magistrate, wait to see which way the wind was blowing, and having received an unfavorable recommendation-shift gears before the district judge.” In the [*Tenth Circuit* ... "[i]ssues raised for the first time in objections to the magistrate judge's recommendation are deemed waived.” In addition to finding that both the Magistrates Act and Supreme Court precedent provide discretion to the district court in this instance, the court noted that “[t]o require a district court to consider evidence not previously presented to the magistrate judge would effectively nullify the magistrate judge's consideration of the matter and would not help to relieve the workload of the district court.” “Systemic efficiencies would be frustrated and the magistrate judge's role reduced to that of a mere dress rehearser if a party were allowed to feint and weave at the initial hearing, and save its knockout punch for the second round.”


While cases can be found allowing arguments to be raised for the first time in the Court of Appeals, it is a risky tactic. Why face an uphill battle when any risk can be eliminated simply by filing timely and specific written objections with the district judge as Rule 72 and 28 U.S.C. §636 require. In this, as in most contexts, you cannot go wrong by following Shakespeare’s timeless insight: “Defer no time, delays have dangerous ends.” Henry VI, Part I, Act III, sc. ii 1.33 (1592). The Seventh Circuit is partial to Twelfth Night. *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 775 (7th Cir.1995) (“In delays there lies no plenty.”). No matter. The point is the same. While compliance with §636 and Rule 72 and with the basic principles of brief writing will not insure victory, at least you will be spared having to read an opinion that mentions you in the same breath with that most dreaded of words – WAIVER!
Two years ago in these pages I offered some advice to you, my adversaries, on brief writing in the Seventh Circuit, and that advice was so well received that I thought it would be appropriate to round things out with some advice on oral argument. Love your enemies and do good to them that oppose you—that’s what I was taught. Just because you may be on the wrong side of things, while I fight for all that is good and just, doesn’t mean we can’t learn from each other. So I offer the following words of wisdom to you, my esteemed opposing counsel, sincerely and in good faith. No, really, I do.

The first thing to remember is that while you should obviously prepare for an oral argument in the Seventh Circuit, you shouldn’t over prepare. Rereading the record and the cases cited in the briefs is a waste of time; indeed, it’s counterproductive. You need to leave yourself a certain amount of (how shall I put it?) “flexibility” in answering questions at oral argument. The facts and the law will only weigh you down. If you can’t answer a question off the top of your head about something that happened in the trial court, it probably wasn’t important anyway. Just confidently answer the question the best you can, preferably with something you think the judges want to hear, and move on. Better to do this than to tell the court you don’t know the answer. You’ll look like a dunce if you admit your ignorance, and, besides, if the court catches you in a half-truth, you can just turn the situation to your advantage by admitting you must be “mistaken.” This gives you the appearance of forthrightness. As Mark Twain said, “A man is never more truthful than when he acknowledges himself a liar.”

One thing in particular that you shouldn’t worry about as you prepare is subject matter jurisdiction. If the case has gotten as far as oral argument in the Seventh Circuit, you can assume the appellate court has jurisdiction. The court could care less about this procedural nuance.

Continued on page 43

*Mr. Paul is a partner in the appellate practice group at Ice Miller LLP in Indianapolis and an associate editor of The Circuit Rider.*
Nor should you attempt to anticipate the questions you’ll get at oral argument, or (if you do engage in this fruitless thought experiment) concern yourself with the answers you might give in response to those questions. Rarely will you get a hot bench at the Seventh Circuit. This is for two reasons. The first is that oral arguments are often so short (10 or 15 minutes per side is common) that judges want to give you plenty of time to talk about what you want to talk about. Oral argument is not about giving the court the opportunity to engage you in dialogue about the case. Oral argument is about giving you, the lawyer, the opportunity to recap what you wrote in your briefs.

Which brings me to the second reason the court is typically so reserved at oral arguments: the judges do not read the briefs beforehand. This makes them naturally more inclined to give you ample, uninterrupted time to explain your case. An extended recitation of the facts is thus always advisable. Do not just jump in and get to the point. Start with the complaint or indictment and retrace chronologically the background of the case, both factual and procedural. I have never seen anyone on the court get impatient when a lawyer has tried to do this in the past.

But before getting into the facts, you’ve got to start with a big introduction. The introduction is your opportunity to shine, to show off your oratorical skills. So begin with something sensational. The more over the top it is, the better. I once heard an oral argument in a sexual harassment case where the plaintiff’s counsel started off by quoting what purported to be the alleged harasser’s own words:

“What color is your bra? Does it match your panties?” At which point Judge Rovner asked counsel, “Are you speaking to Judge Posner?” As you might imagine, the courtroom erupted into laughter, which is probably not the reaction plaintiff’s counsel had hoped to elicit, but so be it. The gimmick got the court’s attention, and that’s really all that matters.

Once you get past your opening, slow down, let the court catch its breath, and then read your argument—deliberately, ploddingly, word for word. Do not engage the court in a discussion. Regard questions as interruptions. This is your show, your time. So there is no need to make eye contact with the judges. Avoiding eye contact has the happy advantage of not only discouraging questions from the bench, it is a sign of proper deference. Judges respect lawyers who are obsequious. So reinforce your visible obsequiousness with verbal obsequiousness. Tell the court, for example, how wonderful it is to appear in the Seventh Circuit. Or, if you are lucky enough to have the author of a key decision on your panel, remind the judge of that fact and mention what an incisive, groundbreaking case it is.

If the court does ask questions (which, again, is unlikely) inform the court that you will be deferring your answers until the end of your presentation. It is far more important that you finish your prepared remarks than it is to satisfy the court’s idle curiosity.

If you get a hypothetical question, preface your answer with the following words, “Those aren’t my facts.” Hypotheticals are often a sign of confusion borne out of a lack of knowledge. So take hypotheticals as an opportunity to clarify the court’s obvious misperceptions about your case.

“Continued on page 44
Then, transition into a ponderous dissection of case law, discussing the facts and holdings of each key opinion. Quote liberally from precedent. And don’t forget to give the court a citation for each case that you discuss. Watch as the panel studiously records everything you say. You want their notepads to look like a table of authorities by the time argument is over.

I have seen some lawyers make the mistake of answering questions directly. One technique, odd though it may be, is to respond to a yes or no question with “yes” or “no,” and then, if necessary, to elaborate on the answer. That technique is for suckers. There’s no need to hurry. Let the answer unfold like a good novel. Keep the judges in suspense. The court will patiently listen as it wonders whether you are answering the question that was asked.

Sometimes questions are designed to illicit concessions. Never, ever concede anything. If you’ve come to the argument minimally prepared, as I have suggested you should, you likely won’t know enough about your case to discern whether something can be conceded or not, so it’s just better not to concede anything at all. I recently observed an oral argument where the court had a question about some testimony in the trial court record. Counsel couldn’t remember the testimony, and so after some fumbling on his part, one of the judges flipped to where it was in the appendix and read it to the lawyer. “Isn’t that what your own client said?” the judge asked. The lawyer wisely refused to straightforwardly acknowledge the judge was quoting from the actual language of the transcript. “Well, if that’s what you say my client said, then I guess I’ll have to take your word for it,” the lawyer responded with not a little skepticism. Attaboy! For all the lawyer knew, the judge could have been trying to pull a fast one on him. Concede nothing.

Finally, a word about rebuttal argument. The key here is to be exhaustive. Don’t limit yourself two or three critical points. Rebut each and every one of your opponent’s arguments seriatim. And do so even if it’s clear the court is in your corner. If this takes more time than you have left, don’t sweat it: ignore the red light and take all the time you need. The allotted time for argument is merely a suggestion. The court will appreciate your thoroughness.

I could go on, but you can learn only so much about oral argument by reading about it; you must actually put these principles into practice. That is why I offer private, one-on-one tutoring sessions. Mention this article, and the next time we are on opposite sides of an appeal, I will provide one complimentary lesson tailored to our case. What do you have to lose?

---

**Get Involved!**

Interested in becoming more involved in the Association? Get involved with a committee! Log on to our web site at www.7thcircuitbar.org, and click on the “committees” link. Choose a committee that looks interesting, and contact the chair for more information.
The certification motion is the make-or-break event of a Rule 23 class action lawsuit. For defendants in particular, a successful motion for class certification can transform a garden-variety lawsuit into a bet-the-company case, dramatically expanding the risks and expenses of continued litigation and creating considerable pressure to settle. As the Seventh Circuit has observed, a class certification ruling “usually is the district judge’s last word on the subject” and ordinarily “there is no later test of the decision’s factual premises.” Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001). Although the district court has authority to alter or amend a class certification order at any time before final judgment, see Fed. R. Civ. P. 23(c)(1)(C), that possibility often is insufficient to counterbalance the actual costs and potentially ruinous effects of defending a certified class action.

As a result, both parties increasingly bring to bear all the ammunition possible to the class certification hearing, including expert testimony. Over time, a consensus has emerged among the federal circuit courts of appeals that a district court not only may, but must undertake a rigorous factual analysis where necessary to determine whether the class certification elements have been satisfied, including resolution of conflicting expert proof. Where experts appear, however, Daubert issues inevitably surface. What role the Daubert standard for admission of expert opinion should play in class certification remains very much an open question. The Seventh Circuit and the Eleventh Circuit have held that where reliability challenges are raised, the court must conduct a full Daubert analysis of expert testimony presented for or against class treatment. The Ninth Circuit, however, has diverged from this trend, and a decision expected from the United States Supreme Court this term could decide the issue once and for all.

Continued on page 46
Rule 23
In pertinent part, Rule 23(a) provides:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

1. the class is so numerous that joinder of all members is impracticable,
2. there are questions of law or fact common to the class,
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In practice, these are referred to as the “numerosity,” “commonality,” “typicality,” and “adequacy” requirements. Most federal class actions also must meet two additional requirements set out in Rule 23(b): the court must “find[] that the questions of fact or law common to class members predominate over any questions affecting only class members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy” – the “predominance” and “superiority” requirements. Fed. R. Civ. P. 23(b)

Eisen and Its Aftermath
Unfortunately, the first toe the Supreme Court dipped into the waters of Rule 23 created significant and lasting confusion about the trial court’s role in class certification. In 1974, the Court decided Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). At stake was a then-recent amendment to Rule 23 requiring individual notice to class members (currently codified at Rule 23(c)(2)(B)). After holding a preliminary evidentiary hearing and finding that the plaintiff showed a strong likelihood of success on the merits, the trial court shifted 90% of notice costs to the defendants.

The Supreme Court reversed, holding that Rule 23 placed the procedural and financial burdens of providing notice to absent class members squarely and exclusively on the plaintiff. The Court criticized the district court’s assumption that Rule 23 authorized an examination of the plaintiff’s likelihood of success, announcing that “[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” Id. at 177. Although the Court hardly could have foreseen it, the federal courts proceeded to interpret this single sentence to mean that no analysis of issues going to the merits of the case was permitted at the class certification stage, even if those issues bore directly on whether the Rule 23 requirements had been satisfied. The result was that plaintiffs often had to present little more than facially adequate allegations that class treatment was warranted in order to obtain certification.

The Supreme Court swiftly moved to clarify its holding. Four years after Eisen, the Court ruled in Coopers & Librand v. Livesay, 437 U.S. 463 (1978), that a denial of class certification was not immediately appealable because, among other reasons, “[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims.” Id. at 469 n. 12 (quoting 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3911 (1976)). The Court identified “[t]he typicality of the representative’s claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact” as “obvious examples.” Id. A few years later, in General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982), the Court confronted the issue head-on, holding that “a rigorous analysis” is required to determine whether the elements of Rule 23 have been satisfied. Id. at 161. The Court instructed that it may be necessary to “probe behind the pleadings” at the class certification stage because “actual, not presumed, conformance” with Rule 23 is required. Id. at 160.

Continued on page 47
Certification and Its Discontents
Continued from page 46

Despite the seemingly clear directives of Coopers & Lybrand and General Telephone, the federal courts labored for years in confusion over the scope of a court’s evidentiary inquiry on a class certification motion. A wide spectrum of opinions emerged, with some courts interpreting Eisen as effectively imposing a requirement that the judge take the substantive allegations in the complaint as true (see, e.g., Edwards v. City of Long Beach, 467 F. Supp. 2d 986, 991 (C.D. Cal. 2006)), other courts concluding that class certification was appropriate as long as the plaintiff made “some showing” beyond the face of the complaint (see, e.g., In re Natural Gas Commodities Litig., 231 F.R.D. 171, 181 (S.D.N.Y. 2005)), and still other courts holding that the Supreme Court’s holdings in Coopers & Lybrand and General Telephone meant that the court must make whatever factual determinations were necessary to find whether the Rule 23 requirements had been met Wright v. Circuit City Stores, Inc. 201 F.R.D. 526, 534 (N.D. Ala. 2001).

The Use of Experts in Class Certification Proceedings
Since General Telephone instructed courts to “probe behind the pleadings” to ensure conformance with Rule 23, parties have made increasing use of experts at the class certification stage to demonstrate that class claims are susceptible to resolution by common proof (according to plaintiffs) or, to the contrary, that individualized factors trump any commonalities among class members (according to defendants). Not surprisingly, the federal courts’ struggle as to the general boundaries of class certification review extended to consideration of expert opinions, and in particular to the treatment of conflicting expert testimony.

Initially, the prevailing view was that that “a district court may not weigh conflicting expert evidence or engage in ‘statistical dueling’ of experts.” In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 135 (2d Cir. 2001). But over the past decade, this stance has been repudiated in favor of a consensus that any factual disputes concerning the Rule 23 factors, including disputes created by dueling certification experts, must be resolved before a class can be certified.

The Seventh Circuit was in the vanguard of this trend, issuing an influential pair of opinions in 2001 and 2002. Szabo v. Bridgeport Machines, Inc., vacated an order certifying a nationwide class, ruling that the district court erroneously had concluded that it had no authority to investigate the merits of the class certification allegations. The Seventh Circuit admonished that “[t]he proposition that a district judge must accept all of the complaint’s allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it” and that “[p]laintiffs cannot tie the judge’s hands by making allegations relevant to both the merits and class certification.” Id., 249 F. 3d at 675, 677. The following year, in West v. Prudential Securities, Inc., 282 F.3d 935, 938 (7th Cir. 2002), the Seventh Circuit applied this holding to the question of expert testimony, reversing the district court’s conclusion that a clash of experts was “enough by itself to support class certification.” In no uncertain terms, West rejected this approach as “amount[ing] to a delegation of judicial power to the plaintiffs” and made clear that “[a] district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits.” Id. at 938.

The jurisprudential turning point was the Second Circuit’s decision in In re Initial Public Offering Securities Litigation (“In re IPO”), 471 F.3d 24 (2d Cir. 2006), which expressly repudiated an influential line of prior decisions that had established a lenient standard for class certification and held instead that a district court must resolve conflicting evidence, including conflicting expert testimony, in order to certify a class action. Id. at 41-42. The Second Circuit placed particular significance on the 2003 amendments to Rule 23, which appeared to endorse this standard by removing a provision for conditional class certification and changing the time frame for a certification decision from “as soon as practicable” to “an early practicable time” to allow “discovery into the ‘merits’ * * * relevant to making the certification decision on an informed basis.” Fed. R. Civ. P. 23(c)(1)(A) & 23(c)(1)(C) Adv. Comm. Notes; see also In re IPO, 471 F.3d at 39. Following In re IPO, other federal circuits have fallen in line.

Continued on page 48
Most recently, the Ninth Circuit adopted *In re IPO’s* reasoning in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 582 (9th Cir. 2010) (*en banc*), observing that courts had “myopically invoked *Eisen* to avoid considering facts properly relevant to the Rule 23 determination because the facts happen to be relevant to the later merits inquiry as well.”

**Daubert’s Role in Class Certification: American Honda and Dukes**

Less well-established is how a district court should handle a Daubert challenge to expert opinion offered at the class certification stage. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court set a new standard for admission of expert testimony in federal proceedings, overruling the then-prevailing “general acceptance” admissibility standard advanced by *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Daubert* concluded that a district court faced with a proffer of expert testimony must exercise a gatekeeping role, scrutinizing the testimony carefully, and, if the opinions are not grounded on a reliable foundation or do not help the factfinder to understand the actual issues in the case, excluding the testimony. *Id.* at 592-93. In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court made clear that the *Daubert* analysis is not limited to scientific testimony, but must be undertaken when any kind of “technical” or “specialized” expert testimony is offered. *Id.* at 147.

The federal circuits are only beginning to grapple with whether the *Daubert* standard applies to expert opinions submitted in connection with class certification. Initial post-*Daubert* jurisprudence concluded that “a motion to strike expert evidence pursuant to [Daubert] involves an inquiry distinct from that for evaluating expert evidence in support of a motion for class certification,” and the district court’s only task was to ensure that “the basis of the expert opinion [wa]s not so flawed that it would be inadmissible as a matter of law.” *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d at 132 n.4, 135. Recently, however, two of the federal circuit courts have undertaken to reexamine that view.

In *American Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010) (*per curiam*), the Seventh Circuit ruled that “when an expert's report or testimony is critical to class certification,” courts must “perform a full *Daubert* analysis before certifying [a] class.” *Id.* at 815-16. *American Honda* states in no uncertain terms that a district court is obligated to “resolve any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements for class certification.” *Id.* at 816. Recently, the Eleventh Circuit adopted the standard set forth in *American Honda*, vacating a certification order and instructing the district court to conduct a *Daubert* review of the admissibility of conflicting expert testimony. *Sher v. Raytheon Co.*, No. 09-15798, 2011 WL 814379, at *3 (11th Cir. Mar. 9, 2011).

Just three weeks after *American Honda*, however, the Ninth Circuit came to a contrary conclusion in *Dukes*, creating a circuit split. In *Dukes*, the Ninth Circuit affirmed the certification of a nationwide class of as many as 1.5 million female Wal-Mart employees alleging gender discrimination based on pay.
The plaintiffs sought to prove the Rule 23 “commonality” requirement through the opinions of a sociologist who opined that Wal-Mart’s decision-makers are “likely influenced by” gender stereotyping, although he “conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.” *Dukes v. Wal-Mart Corp.*, 222 F.R.D. 189, 192 (N.D. Cal. 2004). Wal-Mart moved to strike the expert’s opinions as unreliable and inadmissible under *Daubert*, but the district court declined to conduct a *Daubert* hearing. In a sharply divided (6 to 5) opinion, the Ninth Circuit affirmed [*en banc*]. As discussed, the Ninth Circuit expressly repudiated any use of *Eisen* to limit a district court’s inquiry at the class certification stage. But *Dukes* also concluded that the district court had not erred in refusing to test the reliability of plaintiffs’ expert’s methodology, finding that because “*Daubert* does not require a court to admit or exclude evidence based on its persuasiveness,” a *Daubert* hearing “would not have addressed Wal-Mart’s objections.” *Id.* at 602.

In a footnote, the majority further remarked that it was “not convinced” that “*Daubert* has exactly the same application at the class certification stage as it does to expert testimony at trial.” *Id.* at 602 n.22. The dissent took the majority to task for failing to “explain why the district court can rely on an expert's testimony that is not reliable, at the class certification stage or any other,” and argued that the purposes of the *Daubert* inquiry – “to ensure that proffered expert testimony is relevant and reliable” – were “equally applicable in the class certification context.” *Id.* at 639.

On December 6, 2010, the Supreme Court granted Wal-Mart’s petition for certiorari, directing the parties to address whether the certification order “was consistent with Rule 23(a).” *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 795 (2010). Argument was conducted on March 29, 2011, with a ruling expected by June.

Approximately twenty-nine *amicus curiae* briefs have been filed, including briefs that specifically urge the Court to find that the “rigorous analysis” required by *General Telephone* demands nothing less than a full *Daubert* analysis when expert testimony is offered in support of or against class certification. Those *amicus* have argued that the Ninth Circuit’s opinion prejudices defendants who expend the resources necessary to reach the merits phase only to have the court de-certify the class upon *Daubert* review, and can have significant adverse consequences for absent class members who may lose their rights if a class is certified on the basis of ultimately excluded expert testimony. *See, e.g.*, *Briefs of Amici Curiae* Washington Legal Foundation, Atlantic Legal Foundation, and New England Legal Foundation.

**Conclusion**

In *American Honda*, the Seventh Circuit presented a simple and pragmatic solution to the problem of how expert proof presented in connection with certification proceedings should be reviewed: the *Daubert* standard. Despite the *Dukes* majority’s suggestion to the contrary, there is no evident reason why expert testimony presented at the class certification stage should be reviewed with lesser scrutiny than the same testimony would be at trial. Indeed, a more lenient standard presents the serious risk that classes will be certified on the basis of opinions that prove to be inadmissible at trial, wasting time, money, and judicial resources. *Dukes* presents an opportunity for the Supreme Court to establish a clear and comprehensive rule; hopefully, the Court will take advantage of that opportunity to cement the position of *American Honda*. 
Effective December 1, 2010, Rule 29 of the Federal Rules of Appellate Procedure was amended to require additional disclosure by counsel submitting an appellate brief amicus curiae. The previous rule required an amicus to submit a concise statement of its identity, a description of its interest in the case, the source of its authority to file, and, if necessary, a corporate disclosure statement similar to that found in Rule 26.1. The new Rule 29(c)(5) imposes three additional disclosure requirements, focusing on the relationship between amicus and parties or other outside entities, though only with respect to the brief itself.

First, amicus curiae must now disclose whether “a party’s counsel authored the brief in whole or in part.” This requirement stresses actual authorship, and “mere coordination—in the sense of sharing drafts of briefs—need not be disclosed under subdivision (c)(5).” Rule 29 cmt. Second, amicus must state whether a party or party’s counsel “contributed money that was intended to fund preparing or submitting the brief.” The rule appears to cover only financial contributions specifically intended to assist with the preparation or filing of the brief itself. Payment of general membership dues to an amicus by a party or party’s counsel need not be disclosed. Rule 29 cmt. Third, an amicus brief must disclose whether “a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.” The Advisory Committee notes that this requirement applies to “artificial as well as natural persons.” Rule 29 cmt. Rule 29 specifically exempts the United States, its officers or agencies, and any state from these disclosure requirements when they act as amicus curiae.

Rule 29(c)(5).

Continued on page 51

* Jeff Bowen is the Wisconsin Chair of the Circuit Rider and an Associate at Perkins Coie LLP. He is a graduate of Boston University, summa cum laude, and a Ph.D candidate in political science from Stanford. He is a 2002 graduate of Yale Law School, where he was an Editor of the Yale Law Journal. He clerked on the Eleventh Circuit for Judge Rosemary Barkett and on the Ninth Circuit for Judge Sidney Thomas.
The Seventh Circuit has voiced similar suspicions on several occasions. In denying several motions for leave to file an amicus brief, the court explained that judges suspected, though without concrete proof, that amicus briefs were often “sponsored or encouraged by one or more of the parties” and thus “may be intended to circumvent the page limitations on the parties’ briefs, to the prejudice of any party who does not have an amicus ally.” National Organization for Women, Inc. v. Scheidler, 223 F.3d 615, 617 (7th Cir. 2000). In fact, counsel for one of the amici admitted “that he was paid by one of the appellants for his preparation of the amicus curiae brief,” while the appellant suggested that “its support for the requests to file amicus briefs essentially responded to our having denied the appellant's motion to file an oversized brief.” Id. On another occasion, Judge Posner noted that “the vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant's brief.” Voices for Choices v. Illinois Bell Telephone Co., 339 F.3d 542, 7th Cir. 2003 (Posner, J., chambers op.). The new disclosure rules attempt to discourage this activity and to assist judges to identify when it has happened.

In discussing the motivation for the new appellate disclosure rules, the Advisory Committee stressed that the information would both deter counsel from circumventing pleading rules and assist the Court to evaluate the potential value of the amicus brief submitted. The Committee noted the suspicion expressed by several appellate courts that amicus briefs could be used to circumvent limitations imposed upon party briefs. In Glassroth v. Moore, 347 F.3d 916 (11th Cir. 2003), the Eleventh Circuit reviewed attorneys’ fees submitted by a successful § 1983 plaintiff and rejected fees connected with the preparation and filing of an amicus brief. The court noted that, as a non-party, an amicus was not entitled to attorneys’ fees or expenses as a prevailing party. Permitting party counsel to recover fees for time spent on an amicus brief would circumvent this rule. In addition, the court remarked that “amicus briefs are often used as a means of evading the page limitations on a party’s briefs.” Id. at 919.
Funbus Systems, Inc. v. State of Cal. Public Utilities Com’n, 801 F.2d 1120 (9th Cir. 1986). Rather, the role of amicus curiae is to assist in a case of general public interest by supplementing the efforts of counsel and drawing the court's attention to law or issues that might otherwise escape consideration. Id. The Glasworth court, cited by the Advisory Committee, notes that it “comes as no surprise to us that attorneys for parties solicit amicus briefs in support of their position.” Furthermore, courts accept and encourage coordination between amicus and counsel, particularly to the extent that it helps to avoid duplicative arguments. Fed. R. App. P. 29 cmt.

Nonetheless, some courts, particularly the Seventh Circuit, apply more stringent criteria to the decision whether to grant the motion for leave to file an amicus brief. Under Rule 29(a), a potential amicus must obtain leave of the court to file a brief unless it is a governmental entity or officer, or unless it has obtained consent of all parties. Rule 29(b) in turn provides that a motion for leave to file an amicus brief must include a statement of the movant’s interest and “the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.” In considering these rules, Judge Posner noted that “the bane of lawyers is prolixity and duplication” and concluded that, in “an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, we judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties’ briefs do not give us all the help we need for deciding the appeal.” Ryan v. Commodity Futures Trading Com’n, 125 F.3d 1062, 1064 (7th Cir. 1997) (chambers op.). Thus, the Seventh Circuit has stated that permission to file an amicus brief will only be granted when (1) a party is not adequately represented or not represented at all; (2) when the potential amicus has a direct interest in another case that could be materially affected by the outcome of the present case through stare decisis or res judicata; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do. NOW, 223 F.3d at 617. Arguably, the amended disclosure requirements of Rule 29(c) could help the court apply these criteria, particular the third one.

Other courts have rejected the Seventh Circuit approach, arguing for a broader interpretation of Rule 29(b) “desirability” criteria. For example in Neonatology Associates, P.A. v. C.I.R., 293 F.3d 128, 132 (3d Cir. 2002) then Judge Alito argued that an amicus may provide important assistance to the court even when a party is well represented by collecting “background or factual references that merit judicial notice” or arguing “points deemed too far-reaching for emphasis by a party intent on winning a particular case.” Judge Alito also suggested that a permissive policy toward granting leave to file an amicus brief would be prudent given that it is sometimes difficult to determine whether a proposed amicus filing would be helpful at an early stage of the appeal or without thoroughly studying the parties’ briefs and other case materials. Id. Regardless of whether information disclosed under the new rules may affect the success of a motion for leave to file an amicus brief, the amendments should remind parties and potential amici of the general expectation that their perspectives and submissions should be distinct, if coordinated.

Writers Wanted!

The Association publishes The Circuit Rider twice a year. We always are looking for articles on any substantive topic or regarding news from any district — judges being appointed or retiring, new courthouses being built, changes in local rules, upcoming seminars.

If you have information you think would be of interest, prepare a paragraph or two and send it via e-mail to: Jeffrey Cole, Editor-in-Chief, at Jeffrey_Cole@ilnd.uscourts.gov or call 312.435.5601.
We are pleased to congratulate the 12 new District and Magistrate Judges in the Circuit. They bring to the bench widely diverse backgrounds, a wealth of varied experience, and extraordinary intellect. Additionally, two Bankruptcy Judges, Pamela Pepper of the Bankruptcy Court for the Eastern District of Wisconsin and Bruce Black of the Bankruptcy Court for the Northern District of Illinois, have been named Chief Judge in their respective courts. Finally, there are two new appointments to the Circuit Rider, one in Illinois, David Saunders, and one in Wisconsin, Jeff Bowen.

Illinois

Judge Edmond Chang
In 2011, Edmond E. Chang joined the federal bench in the Northern District of Illinois, becoming the first Asian-American to serve as a federal judge in Illinois. At age 40, he is also the youngest judge currently serving as a federal judge. Judge Chang graduated from the University of Michigan with a degree in aerospace engineering in 1990, and received his J.D. from Northwestern Law School in 1994. He then clerked for Judge James Ryan of the Sixth Circuit Court of Appeals and Judge Marvin Aspen of the Northern District of Illinois. After finishing his clerkships, Judge Chang joined Sidley Austin. In 1999, Judge Chang joined the U.S. Attorney’s Office for the Northern District of Illinois, where he served in a number of positions, including Chief of Appeals for the Office’s Criminal Division. Judge Chang was nominated by President Obama and confirmed by the Senate in December 2010.

Judge Sharon Coleman
Last year, Sharon J. Coleman joined the federal bench in the Northern District of Illinois after serving as an Illinois State Court judge since 1996. Judge Coleman received her B.A. from Northern Illinois University, and her J.D. from Washington University School of Law in 1984. After law school, Judge Coleman joined the Cook County State’s Attorney’s Office, where she served as an Assistant State’s Attorney for five years. She then joined the U.S. Attorney’s Office for the Northern District of Illinois. In 1993, Judge Coleman became the Deputy State’s Attorney & Bureau Chief for the Public Interest Bureau in the Cook County State’s Attorney’s Office. Judge Coleman was elected in 1996 to the Circuit Court of Cook County. In 2008, she became a Justice of the Illinois Appellate Court, First District. President Obama nominated her to be a United States District Judge in 2010. She has served on the boards of numerous bar associations and public interest organizations and was the recipient of a Woman of Excellence award from the Chicago Defender. She has also served as a Leadership Greater Chicago fellow.

Judge Gary Feinerman
Judge Feinerman, who was nominated to the federal bench in Chicago by President Obama in 2010, received his undergraduate degree from Yale University and his J.D. from Stanford Law School in 1991. He went on to clerk for Judge Joel Flaum of the Seventh Circuit, and then for Justice Kennedy on the United States Supreme Court. He also served in the U.S. Justice Department’s Office of Policy Development. He was named to Crain’s prestigious “40 Under 40” in 2001. He was a partner at Mayer Brown and later at Sidley Austin LLP. Judge Feinerman served as Illinois’ Solicitor General from 2003 to 2007. He was President of the Appellate Lawyers Association of Illinois and a Leadership Greater Chicago fellow.

Judge Sue Ellen Myerscough
Judge Myerscough was recently confirmed by the Senate after being nominated to be a District Judge in the Central District of Illinois by President Obama. Judge Myerscough received her undergraduate and law degrees from Southern Illinois University. After law school she clerked for Judge Harold Baker in the Central District of Illinois and then went into private practice until 1987 when she became an Associate Judge on the Circuit Court of Illinois, Seventh Judicial District. In 1990, Judge Myerscough became a Circuit Judge, and then in 1988, became a Justice on the Illinois Appellate Court for the Fourth District, where she sat at the time of her appointment to the federal bench.

Continued on page 54
New Appointments

Continued from page 53

Judge James Shadid
Soon to be joining the bench in the Central District of Illinois is Judge James E. Shadid, who was recently confirmed by the Senate after being nominated by President Obama. Judge Shadid received his B.S. from Bradley University, and his J.D. from John Marshall Law School in 1983. For the next eight years, Judge Shadid worked in private practice and as an assistant public defender. Starting in 1996, and through 2001, Judge Shadid also served as a Commissioner in Illinois’ Court of Claims. Judge Shadid became a Circuit Judge for the Tenth Judicial Circuit in Illinois in 2001.

Magistrate Judge Sheila Finnegan
In early 2010, Sheila Finnegan was selected to serve as a Magistrate Judge in the Northern District of Illinois. In 1982, she received her Bachelor of Science in Foreign Service from Georgetown University, School of Foreign Service. She received her J.D. from the University of Chicago in 1986, and was a member of the Order of the Coif and an Associate Editor of the University of Chicago Law Review. She then clerked for Judge Milton Shadur in the Northern District of Illinois. After her clerkship, she joined the U.S. Attorney’s Office for the Northern District of Illinois, where she served in various roles, including Chief of the Criminal Division. In 2000, Sheila joined Mayer Brown as a partner. She served as Co-chair of the White Collar and Criminal Defense Practice Group from 2004 to 2006, and became co-leader of the Chicago Litigation Department. She is a member of The American College Of Trial Lawyers (having tried some 40 criminal and civil cases, most of them jury trials), and in 2008, 2009, and 2010 was recognized as one of the top 50 women lawyers in Illinois by Super Lawyers. Among her many extra-judicial activities, she has long been and continues to be a Mentor in the University of Chicago Women’s Mentoring Program.

Magistrate Judge Jeffrey Gilbert
In early 2010, Jeffrey T. Gilbert became a Magistrate Judge in the Northern District of Illinois. He received his undergraduate degree from Washington University in St. Louis where he was elected to Phi Beta Kappa. He graduated from Northwestern University Law School in 1980 and was the Articles editor of the Northwestern Law Review, and thereafter clerked for Judge Marvin Aspen in the Northern District of Illinois. He then joined Sachnoff & Weaver, which merged with Reed Smith in 2007, where he practiced until being named a Magistrate Judge. While in private practice, Magistrate Judge Gilbert was recognized as an “Illinois Super Lawyer” by Law and Politics and the publishers of Chicago Magazine from 2005-2010. Magistrate Judge Gilbert served on the Board of Access Living of Metropolitan Chicago and on its lawyers advisory committee for many years.

Magistrate Judge Young Kim
Young Kim was selected to serve as a Magistrate Judge in the Northern District of Illinois in early 2010. Born in South Korea, Young moved to America with his family in 1977. He received his B.A. in economics and business from the University of Illinois and his J.D. from Loyola University School of Law in 1991. After two years in the Cook County Public Defender’s Office, he clerked for Judge Charles Norgle of the Northern District of Illinois. Following that clerkship, he joined the U.S. Attorney’s Office for the Northern District of Illinois. In 2001, Young became an Administrative Law Judge of the U.S. Equal Employment Opportunity Commission. He was a recipient of National Asian Pacific American Bar Association’s Best Lawyers Under 40 Award in 2004.

Magistrate Judge Stephen Williams
Stephen C. Williams became a Magistrate Judge for the Southern District of Illinois in 2010 after working as a federal public defender in the Southern District of Illinois for the previous six years. He received his law degree from Southern Illinois University, summa cum laude, in 1997. Before serving as a public defender in the Southern District of Illinois, he served as a public defender in St. Louis, Missouri, and before that was in private practice.

Chief Judge Bruce Black
On February 23, 2011, Bruce Black was selected by the unanimous vote of the District Judges for the Northern District of Illinois to serve as the Chief Judge of the U.S. Bankruptcy Court for that court at the expiration of Chief Judge Carol Doyle’s term on June 30, 2011. Judge Black graduated from Bradley University in 1966 with a Bachelor of Arts degree. He received his J.D. from the University of Illinois in 1971, where he was a lead article editor of the law review. After a one-year clerkship for U.S. District Judge Robert D. Morgan, in Peoria, Illinois, he spent 1973 as a teaching assistant at the University of Melbourne College of Law in Australia. Following a year in private practice and two years as an assistant State’s Attorney in Tazewell County, Illinois, he was elected Tazewell County State’s Attorney in 1980. He was re-elected in 1980 and 1984. He was appointed Circuit Judge for the Tenth Judicial Circuit of Illinois in 1985. He was appointed Circuit Judge for the Tenth Judicial Circuit of Illinois in 1985. He was elected to that office in 1986 and retained in 1992 and 1998. He served as Chief Judge for the Tenth Judicial Circuit of Illinois from 1999 to 2001. He resigned in 2001 to accept appointment as a U.S. Bankruptcy Judge for the Northern District of Illinois.
New Appointments

Continued from page 54

David Saunders

David Saunders, an Associate with Jenner & Block, was recently named as the new Illinois Co-Chair for the Circuit Rider. He received his B.A. in English from the University of Chicago in 2004, where he was a recipient of the Howell Murray Alumni Association Award and a member of the Maroon Key Society. He received his J.D. from the University of Virginia School of Law in 2007, where he served as an Articles Editor for the Virginia Journal of Social Policy and the Law. In addition to representation of clients in a variety of complex commercial and securities disputes, David maintains, in the long tradition of the Jenner & Block firm, an active pro bono practice and serves on the Young Professionals Board of the Cabrini Green Legal Aid Clinic. He is the co-author of several articles.

INdIANA

Magistrate Judge Mark Dinsmore

Mark J. Dinsmore was appointed United States Magistrate Judge on December 17, 2010. He fills the vacancy created by the elevation of Judge Magnus-Stinson to the District Court for the Southern District of Indiana. He received his degree in economics from Wabash College in 1983 and is a magna cum laude graduate of the University of Toledo College of Law, where he graduated first in his class, served as Lead Articles Editor of the University of Toledo Law Review, and was named the Outstanding Law Graduate. Prior to his appointment, Mark was with the law firm of Barnes and Thornburg LLP, where he chaired the firm’s Litigation Department Technology Committee. He has also represented clients in international and domestic arbitrations, including representing the Federation of Bosnia and Herzegovina in an international arbitration arising out of the Dayton Accords that ended the Balkan war. Mark clerked for Judge Tinder when he was a District Judge in the Southern District of Indiana. He serves on the board of directors of Indiana Legal Services, Inc. and the Heartland Pro Bono Council.

WISCONSIN

Judge William Conley

In March 2010, William M. Conley was appointed to the United States District Court for the Western District of Wisconsin and became its acting Chief Judge. Judge Conley grew up in Rice Lake, Wisconsin, and earned his undergraduate and law degrees from the University of Wisconsin – Madison. After graduation he clerked for Judge Thomas Fairchild on the Seventh Circuit and then joined the commercial litigation practice at Foley & Lardner in Madison, where he became a partner. Judge Conley earned national recognition as an appellate and antitrust advocate, representing clients before the U.S. Supreme Court as well as state and federal trial and appellate courts. Judge Conley’s appointment followed the decisions by Judge John Shabaz and, later, Judge Barbara Crabb to take Senior Status.

Magistrate Judge Nancy Joseph

In November 2010, Nancy Joseph became a Magistrate Judge for the Eastern District of Wisconsin. Born in Haiti, she moved to New Jersey as a child. She received her undergraduate degree from Howard University and her J.D. from Rutgers School of Law. After moving to Milwaukee, Nancy served for many years in the federal defenders office. She was appointed a Magistrate Judge following the decision of Magistrate Judge Aaron E. Goodstein to retire in June 2010. (Judge Goodstein, not surprisingly, continues to maintain a full calendar). She was instrumental in the organization of the Eastern District of Wisconsin Bar Association’s Kids, Courts, and Citizenship program, which brings Milwaukee schoolchildren to the federal courthouse to learn about the work of the court, and to expose students to the different careers available in the courthouse. Until recently, Magistrate Judge Joseph served on the Board of Directors for Meta House, a Residential Treatment Program, which was Wisconsin’s first substance abuse treatment facility that allowed children to reside with their mothers during treatment.

Chief Judge Pamela Pepper

Judge Pamela Pepper became Chief Judge of the U.S. Bankruptcy Court for the Eastern District of Wisconsin in July 2010. She has served as a Bankruptcy Judge in the Eastern District since 2005. Chief Judge Pepper received her undergraduate degree from Northwestern University and her law degree from Cornell Law School. Prior to her appointment to the Bankruptcy Court, Chief Judge Pepper was an Assistant United States Attorney in both Illinois and Wisconsin and later was in private practice in Milwaukee. She also served as the Wisconsin Chair of The Circuit Rider until 2011. Chief Judge Pepper succeeds Chief Judge Margaret Dee McGarity.

Jeff Bowen

Chief Judge Pepper’s successor on The Circuit Rider as the Wisconsin Chair is Jeff Bowen, an Associate at Perkins Coie LLP. Before joining the firm in 2009, he was an Associate at Munger, Tolles & Olson in Los Angeles. He is a graduate of Boston University, summa cum laude, and a Ph.D candidate in political science from Stanford. Jeff graduated in 2002 from Yale Law School, where he was an Editor of the Yale Law Journal. He clerked on the 11th Circuit for Judge Rosemary Barkett and on the 9th Circuit for Judge Sidney Thomas, and is a recipient of the coveted ACLU of Southern California Pro Bono Award (2008).
The Judicial Council of the Seventh Circuit is seeking applicants for two bankruptcy judge positions for the United States District Court for the Northern District of Illinois. An applicant must also be willing to travel to other courts in the circuit to handle cases as need arises. Interested applicants may obtain an application from the United States Court of Appeals for the Seventh Circuit website at http://www.ca7.uscourts.gov. Persons interested in applying for this position should send their applications to:

Collins T. Fitzpatrick
Circuit Executive
Judicial Council of the Seventh Circuit
2780 U.S. Courthouse
219 South Dearborn Street
Chicago, Illinois 60604

In making the appointment, applicants will be reviewed without discrimination as to race, color, sex, religion, or national origin. Applicants should be admitted to practice in at least one state court and be members in good standing of every bar of which they are members. Applicants should possess and have a reputation for integrity and good character and be of sound physical and mental health. Applicants must possess and have demonstrated a commitment to equal justice under law. Applicants must also possess and have demonstrated outstanding legal ability and competence as evidenced by substantial legal experience, ability to deal with complex legal problems, aptitude for legal scholarship and writing, and familiarity with courts and court processes. Applicants must also possess demeanor, character, and personality to indicate that they would exhibit judicial temperament if appointed to the position of United States Bankruptcy Judge. The term of office is 14 years and the current salary is $160,080.

Pursuant to Section 120 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, the Judicial Council of the Seventh Circuit will make recommendations to the United States Court of Appeals which will make the appointment. Applications are to be received by May 24, 2011.
2010-2011
Seventh Circuit Bar Association Officers

**President**
William E. Duffin
Milwaukee, Wisconsin

**First Vice President**
Steven F. Molo
Chicago, Illinois

**Second Vice President**
Christopher Scanlon
Indianapolis, Indiana

**Secretary**
Julie A. Bauer
Chicago, Illinois

**Treasurer**
Howard L. Adelman
Chicago, Illinois

**Treasurer Emeritus**
Honorable Dale E. Ihlenfeldt
Milwaukee, Wisconsin

**Immediate Past President**
Michael D. Monico
Chicago, Illinois

Board of Governors

**Illinois Governors**

Stephen R. Kaufman
Springfield

C. Graham Gerst
Washington D.C.

Marie A. Halpin
Chicago

John J. Hamill
Chicago

Thomas J. Wiegand
Chicago

Michael T. Brody
Chicago

**Indiana Governors**

Linda L. Pence
Indianapolis

Brian W. Welch
Indianapolis

Thomas E. Wheeler II
Indianapolis

**Wisconsin Governors**

Elizabeth C. Perkins
Milwaukee

G. Michael Halfenger
Milwaukee

Susan M. Knepel
Milwaukee

The woodcut illustrations used in this issue were obtained from the Newberry Library with the assistance of John Powell.